UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EMILY'S LIST,	)	
	)	
Plaintiff,	)	Civ. No. 05-0049 (CKK)
	)	
v.	)	
	)	
FEDERAL ELECTION COMMISSION,	)	EXHIBITS
	)	
Defendant.	)	

FEDERAL ELECTION COMMISSION'S EXHIBITS IN SUPPORT OF ITS OPPOSITION TO PLAINTIFF'S APPLICATION FOR A PRELIMINARY INJUNCTION

TABLE OF CONTENTS

14. Comments of Republican National Committee (April 5, 2004) (excerpts).

15. Comments of Democracy 21, Campaign Legal Center, and Center for Responsive Politics (April 5, 2004) (excerpts).

16. Comments of the Media Fund (April 5, 2004) (excerpts).

17. EMILY's List Website, Where We Come From, available at http://www.emilyslist.org/about/where-from.html.

18. EMILY's List Website, Welcome from Ellen R. Malcolm, available at http://www.emilyslist.org/about/welcome.html.

19. Wisconsin Right to Life, Inc. v. FEC, Civ. No. 04-1260 (DBS, RWR, RLJ) (D.D.C. Aug. 17, 2004), slip op.

20. Disclosure Report, filed by EMILY's List (July, 24 2002) (excerpts).

21. ACT Website, About ACT, available at http://www.actforvictory.org/act.php/home/content/about

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EMILY'S LIST,	)	
	)	
Plaintiff,	)	Civ. No. 05-0049 (CKK)
	)	
v.	)	
	)	
FEDERAL ELECTION COMMISSION,	)	EXHIBIT
	)	
Defendant.	)	

EXHIBIT 1

Political Committee Status; Proposed Rule, 69 Fed. Reg. 11 (March 11, 2004).

Federal Register

Thursday,
March 11, 2004

Part III

Federal Election Commission

11 CFR Parts 100, 102, 104, 106, and 114
Political Committee Status; Proposed Rule

FEDERAL ELECTION COMMISSION

11 CFR Parts 100, 102, 104, 106, and 114

[Notice 2004–6]

Political Committee Status

AGENCY: Federal Election Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Federal Election Commission is seeking comment on whether to amend the definition of ''political committee'' applicable to nonconnected committees. The Commission is also considering amending its current regulations to address when disbursements for certain election activity should be treated as ''expenditures.'' Related amendments to the allocation regulations for nonconnected committees and separate segregated funds are also under consideration to determine whether those regulations need further refinement. While the Commission requests comments on proposed changes to its rules, it has made no final decisions on any of the proposed revisions in this notice. Further information is provided in the supplementary information that follows.

DATES: The Commission will hold a hearing on these proposed rules on April 14 and 15, 2004, at 10 a.m. Commenters wishing to testify at the hearing must submit their request to testify along with their written or electronic comments by April 5, 2004. Commenters who do not wish to testify must submit their written or electronic comments by April 9, 2004.

ADDRESSES: All comments should be addressed to Ms. Mai T. Dinh, Acting Assistant General Counsel, and must be submitted in either electronic or written form. Commenters are strongly encouraged to submit comments electronically to ensure timely receipt and consideration. Electronic mail comments should be sent to *politicalcommitteestatus@fec.gov* and must include the full name, electronic mail address and postal service address of the commenter. Electronic mail comments that do not contain the full name, electronic mail address and postal service address of the commenter will not be considered. If the electronic mail comments include an attachment, the attachment must be in the Adobe Acrobat (.pdf) or Microsoft Word (.doc) format. Faxed comments should be sent to (202) 219–3923, with printed copy follow-up to ensure legibility. Written comments and printed copies of faxed comments should be sent to the Federal Election Commission, 999 E Street, NW., Washington, DC 20463. The Commission will post public comments on its Web site. The hearing will be held in the Commission's ninth floor meeting room, 999 E Street, NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Ms. Mai T. Dinh, Acting Assistant General Counsel, Mr. J. Duane Pugh Jr., Senior Attorney, or Mr. Daniel E. Pollner, Attorney, 999 E Street, NW., Washington, DC 20463, (202) 694–1650 or (800) 424–9530.

SUPPLEMENTARY INFORMATION:

I. Introduction

The Bipartisan Campaign Reform Act of 2002 (''BCRA''), which amended the Federal Election Campaign Act (''FECA'' or ''the Act''), was signed into law on March 27, 2002. The Supreme Court upheld most of BCRA in *McConnell* v. *FEC,* 540 U.S. —, 124 S. Ct. 619 (2003).

McConnell recognized that regulation of certain activities that affect Federal elections is a valid measure to prevent circumvention of FECA's contribution limitations and prohibitions. Consequently, the Commission is undertaking this rulemaking to revisit the issue of whether the current definition of ''political committee'' adequately encompasses all organizations that should be considered political committees subject to the limitations, prohibitions and reporting requirements of FECA.

FECA, and the Commission's regulations, with certain exceptions, define a political committee as ''any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 in a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year.'' 2 U.S.C. 431(4)(A); 11 CFR 100.5(a). FECA subjects political committees to certain registration and reporting requirements, as well as limitations and prohibitions on the contributions they receive and make, that do not apply to organizations that are not political committees. *See, e.g.*, 2 U.S.C. 432, 433, 441a, 441b; 11 CFR part 102.

While the statutory and regulatory definitions of ''political committee'' set forth above depend solely on the dollar amount of annual contributions received and expenditures made, the Supreme Court, in *Buckley* v. *Valeo,* explained that to fulfill the purposes of FECA, the definition of political committee ''need only encompass organizations that are under the control of a candidate or *the major purpose of which is the nomination or election of a candidate,*'' and does not ''reach groups engaged purely in issue discussion.'' *Buckley* v. *Valeo,* 424 U.S. 1, 79 (1976) (emphasis added). The Supreme Court has reaffirmed the applicability of the ''major purpose'' test in subsequent opinions. *See FEC* v. *Massachusetts Citizens for Life, Inc.,* 479 U.S. 238 (1986)(''*MCFL*''). Therefore, the definition of ''political committee'' arguably should have two elements: First, the $1,000 contribution or expenditure threshold;[1] and second, the major purpose test for organizations not controlled by Federal candidates.

The FECA generally defines ''expenditures'' as ''(i) any purchase, payment, distribution, loan advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office; and (ii) a written contract, promise, or agreement to make an expenditure.'' 2 U.S.C. 431(9)(A). The definition also includes a lengthy list of exceptions. 2 U.S.C. 431(9)(B). Commission regulations at 11 CFR part 100, subparts D and E implement this statutory definition. Since the enactment of the FECA, there have been debates about whether certain activities, not specifically mentioned in the statutory or regulatory definitions, were expenditures. BCRA did not amend the definition of expenditure, but instead categorized certain election-related activities into new statutory definitions. *McConnell* shed light on what the Supreme Court considered to be activities that could affect Federal elections. *See McConnell,* 124 S. Ct. at 673–675 and 696–697 (upholding BCRA's provisions concerning Federal election activity and electioneering communications).

This notice of proposed rulemaking (''NPRM'') explores whether and how the Commission should amend its regulations defining whether an entity is a nonconnected political committee [2] and what constitutes an ''expenditure'' under 11 CFR 100.5(a) or 11 CFR part 100, subparts D and E. With respect to the second element of the definition of ''political committee,'' the Commission's regulations do not expressly incorporate the ''major purpose'' test into 11 CFR 100.5(a). However, the Commission does apply the ''major purpose'' test when assessing

[1] This threshold, however, does not apply to separate segregated funds and state or local party committees. *See* 2 U.S.C. 431(4)(B) and (C) and 11 CFR 100.5(b) and (c).

[2] The Commission is not proposing to change the definition of ''political committee'' applicable to party committees, Federal candidates' authorized committees or separate segregated funds.

whether an organization is a political committee. See, *e.g.*, Advisory Opinions (''AOs'') 1994–25 and 1995–11. In this NPRM, the Commission is seeking comment on whether to amend its regulations to incorporate the major purpose test into the regulatory definition of ''political committee'' in 11 CFR 100.5(a). Furthermore, the Commission seeks comment on whether the effective date for any final rules that the Commission may adopt should be delayed until after the next general election and whether there is a legal basis for delaying the effective date. The Commission also seeks comment on whether changing the definition of basic terms such as ''political committee,'' ''expenditure,'' and ''contribution,'' in the middle of an election year would cause undue disruption to the regulated community.[3]

II. Expenditures

In *Buckley,* 424 U.S. at 62–63, the Supreme Court first examined FECA's definitions of ''expenditure'' and ''contribution'' and their operative phrase, which is ''for the purpose of influencing any election for Federal office.'' *See* 2 U.S.C. 431(8) and (9). The Supreme Court found that the ambiguity of this phrase posed constitutional problems as applied to expenditures made by individuals other than candidates and organizations other than political committees. *Buckley,* 424 U.S. at 77. To avoid the vagueness and potential overbreadth of the statutory definition, *Buckley* adopted a narrowing construction so that FECA's definition of ''expenditure'' reached ''only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate.'' *Buckley,* 424 U.S. at 79–80.[4]

A. McConnell v. FEC, 540 U.S. —, 124 S. Ct. 619 (2003).

The Supreme Court clarified in *McConnell* that *Buckley's* ''express advocacy'' test is not a constitutional barrier in determining whether an expenditure is ''for the purpose of influencing any Federal election.'' *McConnell,* 124 S.Ct. at 688–89. The Supreme Court explained: ''In narrowly reading the FECA provisions in *Buckley* to avoid problems of vagueness and overbreadth, we nowhere suggested that a statute that was neither vague nor overbroad would be required to toe the same express advocacy line.'' *McConnell,* 124 S.Ct. at 688.

With this understanding of express advocacy, the Supreme Court found constitutional Congress' regulation of two types of activities addressed in BCRA: ''Federal election activity,'' as defined in 2 U.S.C. 431(20), and ''electioneering communication,'' as defined in 2 U.S.C. 434(f)(3)(A)(i). *McConnell,* 124 S.Ct. at 670–77 and 685–99. In upholding BCRA's amendments to FECA, the Supreme Court discussed the effects that Federal election activities and electioneering communications have on Federal elections.

1. Federal Election Activities

As the Supreme Court observed in *McConnell,* ''[t]he core of [section 441i(b)] is a straightforward contribution regulation: It prevents donors from contributing nonfederal funds to state and local party committees to help finance ''Federal election activity.' '' 124 S.Ct. at 671.[5] The Supreme Court noted that this regulation arises out of Congressional recognition of ''the close ties between federal candidates and state party committees.'' *Id.,* at 670. ''Federal election activity'' encompasses four distinct categories of activities: (1) Voter registration activity during the 120 days preceding a regularly scheduled Federal election; (2) voter identification, get-out-the-vote (''GOTV''), and generic campaign activity that is conducted in connection with an election in which a candidate for Federal office appears on the ballot; (3) a public communication that refers to a clearly identified Federal candidate and that promotes, supports, attacks, or opposes a candidate for that office; and (4) the services provided by certain political party committee employees. *See* 2 U.S.C. 431(20) through (24); 11 CFR 100.24 through 100.28. *McConnell* referred to all four types of Federal election activities as ''electioneering,'' and found BCRA's definition of Federal election activities to be ''narrowly focused'' on ''those contributions to state and local parties that can be used to benefit federal candidates directly.'' *McConnell,* 124 S.Ct. at 671 and 674.

Considering the first two types of Federal election activities, which include certain voter registration, voter identification, GOTV and generic campaign activities, the Supreme Court determined that all of these activities ''confer substantial benefits on federal candidates.'' *McConnell,* 124 S.Ct. at 675. The Supreme Court also stated that ''federal candidates reap substantial rewards from any efforts that increase the number of like-minded registered voters who actually go to the polls.'' *Id.,* 124 S.Ct. at 674. *McConnell* described the factual record as ''show[ing] that many of the targeted tax-exempt organizations engage in sophisticated and effective electioneering activities for the purpose of influencing elections, including waging broadcast campaigns promoting or attacking particular candidates and conducting large scale voter registration and GOTV.'' *Id.,* 124 S.Ct. at 678 n.68. Like the first two types, public communications that promote, support, attack, or oppose a clearly identified Federal candidate, ''also undoubtedly have a dramatic effect on Federal elections. Such ads were a prime motivating force behind BCRA's passage * * *. [A]ny public communication that promotes or attacks a clearly identified federal candidate directly affects the election in which he is participating.'' *Id.,* 124 S.Ct. at 675. Because the fourth type of Federal election activities applies on its face only to certain political party committees, it is not considered further in this proposal. 2 U.S.C. 431(20)(A)(iv).

2. Electioneering Communications

An ''electioneering communication'' is any broadcast, cable, or satellite communication that refers to a clearly identified Federal candidate, is publicly distributed for a fee within 60 days before a general election or 30 days before a primary election or convention, and is targeted to the relevant electorate. *See* 2 U.S.C. 434(f)(3)(A)(i); 11 CFR 100.29. For communications that refer to congressional candidates, targeting means the communication can be received by 50,000 persons in the relevant State or congressional district. 2 U.S.C. 434(f)(3)(C); 11 CFR 100.29(b)(5). For communications that refer to presidential candidates in the nomination context, ''publicly distributed'' means the communication

[3] By way of historical background, on March 7, 2001, the Commission published an Advance Notice of Proposed Rulemaking (''ANPR'') seeking comment on the definitions of ''political committee,'' ''contribution'' and ''expenditure.'' *See* ''Definition of Political Committee; Advance Notice of Proposed Rulemaking,'' 66 FR 13681 (Mar. 7, 2001). After receiving comments on the ANPR, the Commission voted on September 27, 2001, to hold that rulemaking in abeyance pending changes in legislation, future judicial decisions, or other action. The ANPR and related comments are available on the FEC's Web site at: *http://www.fec.gov/register.htm* under ''Definition of Political Committee.'' This NPRM is a separate proceeding.

[4] A communication refers to a clearly identified candidate if it includes ''the candidate's name, nickname, photograph, or drawing'' or if ''the identity of the candidate is otherwise aparent through unambiguous reference [or] through unambiguous reference to his or her status a candidate.'' 11 CFR 100.17.

[5] The Supreme Court acknowledged that the Levin Amendment ''carves out an exception to this general rule.'' *McConnell,* 124 S.Ct. at 671.

can be received by 50,000 persons in the relevant State prior to its presidential primary election or anywhere in the United States prior to the presidential nominating convention. 11 CFR 100.29(b)(3)(ii). BCRA establishes disclosure requirements for persons who make electioneering communications. 2 U.S.C. 434(f); 11 CFR 104.20. *McConnell* upheld regulation of electioneering communications against a facial challenge, explaining that the definition of ''electioneering communication'' serves ''to replace the narrowing construction of FECA's disclosure provisions adopted by this Court in *Buckley,*'' which, for nonpolitical committee groups, was the express advocacy construction. *McConnell,* 124 S.Ct. at 686 and 695. In so holding, the Court observed that ''the definition of ''electioneering communication'' raises none of the vagueness concerns that drove our analysis in *Buckley.*'' *Id.,* at 689.

BCRA also amended the definition of ''contribution or expenditure'' in 2 U.S.C. 441b to include any payment for an electioneering communication, thereby expressly prohibiting corporations and labor organizations from using their general treasury funds to pay for electioneering communications. *McConnell* described electioneering communications subject to 2 U.S.C. 441b as ''communications that are intended to, or have the effect of, influencing the outcome of federal elections.'' *McConnell,* 124 S.Ct. at 654.

BCRA further provides that any disbursement for an electioneering communication that is coordinated with a candidate, candidate authorized committee, or a Federal, State, or local political party committee shall be treated as a contribution to the candidate or the candidate's party and as an expenditure by that candidate or party. 2 U.S.C. 441a(a)(7)(C).

In rejecting various challenges to BCRA's electioneering communication requirements, the Supreme Court addressed the purpose and effect of electioneering communications in several instances. *McConnell* concluded that while advertisers seeking to evade the express advocacy line create advertisements that ''do not urge the viewer to vote for or against a candidate in so many words, they are no less clearly intended to influence the election.'' *McConnell,* 124 S.Ct. at 689. The Supreme Court also referred a second time to the use of electioneering communications ''to influence federal elections'' and quoted approvingly from the decision below, which referred to electioneering communications as either ''designed to influence federal elections'' or, in fact, ''influencing elections.'' *Id.,* at 691 (*quoting McConnell* v. *FEC,* 251 F.Supp.2d 176, at 237 (D.D.C. 2003)). The Supreme Court also concluded that ''the vast majority'' of advertisements that qualify as electioneering communications had an ''electioneering purpose,'' which the Court equated with advertisements that are ''intended to influence the voters' decisions and [that] have that effect.'' *McConnell,* 124 S.Ct. at 696. The Court considered such advertisements to be ''the functional equivalent of express advocacy.'' *Id.*

The Commission seeks comment on whether the Supreme Court's treatment of Federal election activity or electioneering communications in *McConnell* requires or permits the Commission to change its regulations defining ''expenditure'' and ''contribution'' in 11 CFR part 100, subparts B, C, D and E to include those concepts. In the alternative, the Commission seeks comment on whether *McConnell* recognizes additional activities that may be constitutionally regulated by Congress, but in the absence of new legislation doing so, the Commission is prohibited from expanding the regulatory definitions of ''expenditure'' and ''contribution.''

The Commission further seeks comment on whether, even if it may so amend its regulations, the Commission should refrain from redefining such fundamental and statutorily defined terms, in the absence of further guidance from Congress. Is it consistent with BCRA to include all Federal election activity within the regulatory definition of ''expenditure'' when BCRA only added electioneering communications to the definition of ''contribution or expenditure'' in 2 U.S.C. 441b(b)(2)? Does BCRA's specification in 2 U.S.C. 441a(a)(7)(C) that coordinated ''disbursements'' for electioneering communications can be contributions provide any guidance regarding whether payments for electioneering communications should be considered expenditures? Is it consistent with Congressional intent for the Commission to categorize voter registration, voter identification, get-out-the-vote and generic campaign activities by a State or local candidate committee as ''for the purpose of influencing any election to Federal office?''

Does the definition of ''independent expenditure'' in 2 U.S.C. 431(17)(A), which requires express advocacy, limit Commission's ability to define an ''expenditure'' to communications that include express advocacy? If not, can communications be considered ''expenditures'' if they fail to meet both the definition of ''independent expenditure'' in 2 U.S.C. 431(17) and the definition of ''coordinated communication'' under 11 CFR 109.21? Is the function of the definition of ''independent expenditure'' in 2 U.S.C. 431(17)(A) limited to the 24-hour and 48-hour reporting requirements in 2 U.S.C. 434(g)?

B. Proposed Regulations

In this NPRM, the Commission considers whether, in light of *McConnell,* it should revise current regulations to reflect that certain communications and certain voter drive activities have the purpose of influencing Federal elections. This proposal includes several alternatives. The Commission has not made any final decisions on any of the proposed rules or alternatives, which are described below, and seeks comment on all of them.

1. Proposed 11 CFR 100.5—Definition of ''political committee''

Current 11 CFR 100.5(a) specifies that any committee, club, association, or other group of persons that receives contributions aggregating in excess of $1,000 or which makes expenditures aggregating in excess of $1,000 during a calendar year is a political committee. In addition to considering amending this regulation to include *Buckley's* major purpose test, the proposal for which is discussed separately below, the Commission is considering amending this definition so that the first three types of Federal election activity and electioneering communications would be counted toward the $1,000 expenditure thresholds.

Alternative 1–A would define those ''expenditures'' that count toward the $1,000 threshold, but this definition would not apply in any other context in which the term ''expenditure'' is used in FECA or in the Commission's regulations.

The Commission is considering a number of issues related to Alternative 1–A. Should persons other than political party committees be subject to a rule that treats the first three types of Federal election activities as ''expenditures'' for purposes of the $1,000 threshold in the definition of ''political committee?'' Should all of Federal election activity and all electioneering communications count toward political committee status, or should the Commission make distinctions to count only certain types of Federal election activity or only certain electioneering communications toward political committee status? For

example, should Federal election activity that does not refer to a clearly identified Federal candidate count toward political committee status? Would a definition of ''expenditure'' that includes voter drive activities by State or local candidate committees on behalf of their own candidacies be overly broad?

Should funds received for Federal election activities types 1 through 3 or electioneering communications count as contributions for purposes of the $1,000 threshold? If any disbursements for these activities should count as expenditures, should the corresponding funds received to make those disbursements count as contributions? Should the Commission treat funds raised by a State or local candidate committee through solicitations advocating their own election, as well as incidentally expressly advocating the election or defeat of a clearly identified Federal candidate, or promoting, supporting, attacking or opposing a clearly identified Federal candidate, as funds contributed ''for the purpose of influencing any election for Federal office?'' Please note that none of the regulatory text set forth below relates to this proposal regarding ''contributions'' as used in proposed 11 CFR 100.5(a)(1)(i).

Finally, should the Commission confine any reexamination of the definition of ''expenditure'' to apply only as that term is used as part of the definition of ''political committee?'' FECA already provides two definitions of ''expenditure,'' one in 2 U.S.C. 431(9) and a broader definition in 2 U.S.C. 441b. Currently, ''expenditure'' in 11 CFR 100.5(a) uses the definition in 2 U.S.C. 431(9) and 11 CFR part 100, subpart D. Should the Commission create by regulation a third definition of ''expenditure'' for determining political committee status?

2. 11 CFR Part 100, Subpart D—Definition of ''expenditure''

The Commission is also considering amendments to its general definition of ''expenditure'' to reflect *McConnell's* conclusion that certain communications and certain voter drives have the purpose or effect of influencing Federal elections.

One approach would be to add payments for the Federal election activities described in 2 U.S.C. 431(20)(A)(i) through (iii) and payments for electioneering communications to the definition of ''expenditure'' in 11 CFR part 100, subpart D. In evaluating this approach to amending its rules, the Commission will consider the same issues raised above concerning BCRA's application of the concepts of Federal election activities and electioneering communications in connection with Alternative 1–A.

BCRA imposes prohibitions and restrictions related to Federal election activities on national party committees (2 U.S.C. 441i(c)), State, district, and local political party committees (2 U.S.C. 441i(b)), Federal candidates (2 U.S.C. 441i(e)(1)(A), (e)(4)(A), and (e)(4)(B)), and State candidates (2 U.S.C. 441i(f)). Consequently, most of the Supreme Court's consideration of Federal election activities arose with respect to political party committees. In this context, the ''close relationship'' of Federal officeholders and candidates to their political parties was part of the justification of the Government's interest in regulating Federal election activities. *See McConnell,* 124 S.Ct. at 668 and n.51. In fact, in disposing of an equal protection claim that BCRA discriminates against political party committees in favor of ''interest groups,'' the Supreme Court acknowledged: ''Interest groups, however, remain free to raise soft money to fund voter registration, GOTV activities, mailings, and broadcast advertising (other than electioneering communications).'' *Id.,* 124 S.Ct. at 686.

The approach of including all funds disbursed for Federal election activities in the definition of ''expenditure,'' if adopted, would extend restrictions related to Federal election activities beyond political party committees and Federal candidates to all persons, including a State or local candidate committee.[6] Would such a regulation be consistent with FECA, as amended by BCRA? Would it be consistent with Congressional intent?

Similarly, BCRA amended the definition of ''contribution or expenditure'' in the corporate and labor organization prohibitions to include payments ''for any applicable electioneering communication.'' 2 U.S.C. 441b(b)(2). BCRA did not amend, however, the definition of ''expenditure'' with a broader application in 2 U.S.C. 431(9). Would the approach of including all payments for electioneering communications in the regulations implementing the 2 U.S.C. 431(9) definition of ''expenditure'' be consistent with FECA, as amended by BCRA? Would it be consistent with Congressional intent?

The proposed rules that follow as Alternative 1–B present a narrower approach. Although the Supreme Court's discussion of Federal election activities in *McConnell* was framed in the political party and candidate context, it recognized that these same activities by tax-exempt organizations do affect Federal elections. *McConnell,* 124 S.Ct. at 678 n.68. Given the Supreme Court's conclusions that types 1 through 3 of Federal election activities have a demonstrable effect on Federal elections, can the Commission conclude that the same communications and the same activities by actors other than political party committees and candidates are not expenditures, *i.e.*, payments for the purpose of influencing a Federal election? In an effort to take the Supreme Court's conclusions into consideration, Alternative 1–B would incorporate the concepts of Federal election activities types 1 through 3, but would also recognize that applying these concepts to actors other than political party committees and candidates requires some tailoring of Federal election activities.

A proposal to regulate Federal election activities by persons other than political party committees and candidates requires a reexamination of those activities in order to determine whether those activities carried out by such persons are the functional equivalent of the same activities when carried out by political party committees and candidates. Inherent in any activities conducted by political party committees or candidates is a partisan purpose, as the Supreme Court has recognized in other contexts. *See FEC* v. *Colorado Republican Federal Campaign Committee,* 533 U.S. 431, 450 (2001) (noting ''the seemingly unexceptionable premise that parties are organized for the purpose of electing candidates'' and agreeing that ''political parties are dominant players, second only to the candidates themselves, in federal elections''). When the proposed rules in Alternative 1–B consider Federal election activities conducted by other persons, they attempt to be consistent with *McConnell* by limiting the activities included in the ''expenditure'' definition to those with a partisan purpose.

Are the proposed rules consistent with *McConnell*? Do they limit the activities included in the ''expenditure'' definition to those activities that have a partisan purpose? Is Alternative 1–B's treatment of a State or local candidate committee's partisan activities consistent with BCRA? Is Alternative 1–B consistent with 2 U.S.C. 441i(e)(4), which permits Federal candidates to solicit up to $20,000 per individual for certain Federal election activities or for an entity whose principal purpose is to

[6] State and local candidate committees are subject to limitations with respect to their type 3 Federal election activities. 2 U.S.C. 441i(f).

conduct certain Federal election activities?

a. Proposed 11 CFR 100.115—Federal election activity: Partisan voter drives. Because the Supreme Court recognized that voter registration activity that takes place within 120 days before a Federal election, voter identification, and get-out-the-vote activities ''confer substantial benefits on federal candidates'' and because voter drives may be for the purpose of influencing Federal elections even when performed by tax-exempt organizations, Alternative 1–B would incorporate these aspects of Federal election activities in the definition of ''expenditure.'' *See McConnell,* 124 S.Ct. at 675, 678 n.68, and the discussion above in part II, A., 1. Proposed section 100.34 would define ''partisan voter drives,'' and proposed section 100.115 would include payments for voter registration, voter identification, and GOTV activities into the regulatory definition of ''expenditure,'' subject to the exceptions described below.

As reflected in FECA, the proposed rules in Alternative 1–B would distinguish partisan from nonpartisan Federal election activities. FECA exempts ''nonpartisan activity designed to encourage individuals to vote or register to vote'' from the definition of ''expenditure.'' 2 U.S.C. 431(9)(B)(ii). In order for voter drives to be ''nonpartisan,'' Commission regulations currently require that no effort is or has been made to determine the party or candidate preference of individuals before encouraging them to vote. 11 CFR 100.133.

Alternative 1–B includes proposed changes to section 100.133. First, the proposal would expressly state that if voter registration or get-out-the-vote activities included a communication that promotes, supports, attacks, or opposes a Federal or non-Federal candidate or if it promotes or opposes a political party, then the voter registration or get-out-the-vote activities is partisan. *See* proposed 11 CFR 100.133(a). Second, the proposal would add a provision that if information concerning likely party or candidate preference has been used to determine which voters to encourage to register to vote or to vote, the voter registration and get-out-the-vote activities would be partisan. *See* proposed 11 CFR 100.133(b).

These proposed changes would achieve more harmony between the Commission's approach to this issue and the Internal Revenue Service's (''the IRS's'') approach. The IRS regulations provide that ''to be nonpartisan, voter registration and 'get-out-the-vote' campaigns must not be specifically identified by the organization with any candidate or political party.'' 26 CFR 1.527–6(b)(5). In a private letter ruling, the IRS determined that a voter drive was partisan, even though the activities ''may not be specifically identified with a candidate or party in every case.'' It did so due to ''the intentional and deliberate targeting of individual voters or groups of voters on the basis of their expected preference for pro-issue candidates, as well as the timing of the dissemination and format of the materials used.'' Priv. Ltr. Rul. 99–25–051 (Mar. 29, 1999). Should the Commission otherwise clarify this rule or consider any other criteria?

Should voter identification be considered part of get-out-the-vote activities subject to section 100.133? If so, what changes to the proposed rules, if any, are necessary?

The proposed new rules for voter registration and get-out-the-vote activities at 11 CFR 100.34(a) and (c) would retain by reference the nonpartisan exception to the definition of ''expenditure'' in proposed 11 CFR 100.133. Similarly, proposed 11 CFR 100.34(b) would exclude disbursements for voter identification when no effort has been or will be made to determine or record the party or candidate preference of individuals on the voter list from the definition of ''partisan voter drive'' and therefore ''expenditure.'' *See* proposed 11 CFR 100.34(b) and 100.115.

The proposed rule at new 11 CFR 100.115 would also exclude Levin funds from the definition of ''expenditure.'' Levin funds are funds raised by State, district, or local political party committees and party organizations pursuant to 11 CFR 300.31 and disbursed by the same committee or organization pursuant to 11 CFR 300.32. BCRA specifically permits State, district, and local political party committees to raise and spend Levin funds for an allocable portion of voter registration, voter identification, and get-out-the-vote activities, rather than requiring these committees to use entirely Federal funds for these Federal election activities. 2 U.S.C. 441i(b)(2). This exception in BCRA would be preserved for State, district, and local political party committees and organizations by the exclusion of Levin funds from the proposed rules.

State and local political party committees may also conduct voter drives under the ''coattails'' exception to the definition of ''expenditure.'' 2 U.S.C. 431(9)(B)(ix); 11 CFR 100.149. Under certain conditions, voter registration and GOTV activities conducted by these party committees on behalf of the Presidential nominees are not treated as expenditures. In order to leave this exemption unaffected by the inclusion of the types 1 and 2 of Federal election activity in the definition of ''expenditure,'' the proposed rules would also amend 11 CFR 100.149 to provide expressly that the ''coattails'' exemption would apply notwithstanding proposed 11 CFR 100.115.

A proposal for the allocation of these expenditures is discussed below. Proposed section 100.155 would state that any non-Federal funds permissibly disbursed by a separate segregated fund or a nonconnected committee for partisan voter drives pursuant to the allocation rule in proposed 11 CFR 106.6 would not be ''expenditures.'' Consequently, the non-Federal funds would not count toward the $1,000 of expenditures required for political committee status under current 11 CFR 100.5(a) (or proposed 11 CFR 100.5(a)(1)(i)). The Commission seeks comment on whether this is an appropriate conclusion.

Additionally, the Commission seeks comment on the following questions. Are proposed sections 100.34 and 100.115 sufficiently tailored to reflect the application of Federal election activities to persons other than political party committees and candidates? The proposed regulations would treat many of the voter activities conducted by State and local candidate committees on behalf of their own candidacies as ''expenditures.'' Is there any evidence that Congress intended for the Commission to categorize such activities as ''for the purpose of influencing any election for Federal office?'' Should the Commission give any consideration in this context to the statutory exemptions from the definition of Federal election activity set forth in 2 U.S.C. 431(20)(B)? Should the proposed rules include an exception for the receipt of funds solicited by Federal candidates under 2 U.S.C. 441i(e)(4)(B)(ii), which under certain circumstances permits Federal candidates to solicit funds from individuals of up to $20,000—an amount that exceeds the contribution limit applicable to certain political committees in 2 U.S.C. 441a? Or, should the exception in 2 U.S.C. 441i(e)(4)(B)(ii) be limited to entities that are not political committees or that confine their voter registration, voter identification, and get-out-the-vote activities to nonpartisan activities? If the exception were confined to nonpartisan activities, what evidence, if any, is there that Congress intended for the exception

in 2 U.S.C. 441i(e)(4)(B)(ii) to be interpreted in such a way?

The definition of ''partisan voter drive'' in proposed section 100.34 would not include some voter registration and get-out-the-vote activities that would simultaneously fail to qualify for the exemption of ''nonpartisan voter registration and get-out-the-vote activities'' in section 100.133, in either its current form or as proposed to be amended. For example, some voter registration activity could take place more than 120 days before an election, which would mean that payments for it would not be expenditures. *See* proposed 11 CFR 100.34(a) (citing current 11 CFR 100.24(b)(1)) and 100.115. That same activity could also fail to qualify as nonpartisan under proposed 11 CFR 100.133 if it is subject to any of that section's exclusions, which include, for example, directing voter drives to supporters of a political party. Any voter registration or get-out-the-vote activities that fall in this ''gap'' would not be expenditures under proposed section 100.115, even though they would not qualify as ''nonpartisan'' under the exception in proposed section 100.133. This gap may be appropriate in that it reflects that such activity cannot be considered nonpartisan for purpose of the exemption, but it may not rise to the level of an ''expenditure'' under proposed sections 100.34 and 100.115 for the same reason that similar activity by a political party committee would be excluded from the definition of ''Federal election activity.'' 11 CFR 100.24(b)(1).

Alternatively, this gap could be eliminated by either adding an additional exemption from the definition of ''expenditure'' in 11 CFR part 100, subpart E, or dropping the time limitations of current 11 CFR 100.24(a)(1), (a)(3)(i), and (b)(1) from proposed section 100.34. Under the latter approach, the time limitations in current section 100.24 would be maintained with respect to the political party committees whose Federal election activities are subject to BCRA's time limits. 2 U.S.C. 431(20)(A)(i). The Commission seeks comment on these issues.

b. Proposed 11 CFR 100.116—Certain public communications. Alternative 1–B would also incorporate into the definition of ''expenditure'' payments for public communications that refer to a political party or a clearly identified Federal candidate and promote or support, or attack or oppose any political party or any Federal candidate. *See* proposed 11 CFR 100.116. This proposed rule is based on two types of Federal election activities: generic campaign activities, which are public communications that promote or oppose a political party, and public communications that promote, support, attack, or oppose a clearly identified candidate. *See* 2 U.S.C. 431(20)(A)(ii) and (iii); 11 CFR 100.24(a)(1); (b)(2)(ii); (b)(3); 100.25; and 100.26. Proposed section 100.155 would state that any non-Federal funds permissibly disbursed by a separate segregated fund or a nonconnected committee for public communications pursuant to the allocation rule in proposed 11 CFR 106.6 would not be ''expenditures.'' The Commission seeks comment on whether this is an appropriate conclusion.

The Supreme Court found that public communications that promote, support, attack or oppose a clearly identified Federal candidate ''have a dramatic effect on federal elections.'' *McConnell,* 124 S.Ct. at 675. The Supreme Court also found that generic campaign activity ''confer[s] substantial benefits on federal candidates.'' *Id.* If the Commission were to apply the voter drive activities of types 1 and 2 of Federal election activities outside of the political party committee context, these concepts may require modification to incorporate a partisan element. In contrast, generic campaign activity and type 3 of Federal election activities, by definition, include material that either promotes, supports, attacks or opposes a clearly identified Federal candidate or promotes or opposes a political party. This partisan content obviates the need to tailor these concepts for application outside the political party and candidate context.

Consistent with this approach, the Commission recently issued Advisory Opinion 2003–37 in which it stated that ''communications that promote, support, attack or oppose a clearly identified Federal candidate have no less a 'dramatic effect' on Federal elections when aired by other types of political committees, rather than party committees or candidate committees.'' AO 2003–37, at 3. In that advisory opinion, the Commission concluded that public communications that promote, support, attack or oppose a clearly identified Federal candidate when made by political committees are expenditures. Proposed section 100.116 would incorporate this conclusion in the Commission's regulations. It would also treat public communications that promote or oppose political parties in a similar fashion, and it would apply to communications made by all persons, not just political committees. If new rules apply the ''promote, support, attack or oppose'' standard to actors other than political party committees and candidates, should a temporal element be included in any such rule? Might an advertisement by a person other than a political party committee or candidate be properly understood as, for example, promoting a Federal candidate if publicly distributed close to an election, but the same advertisement by the same person publicly distributed far from an election might not promote the candidate? Should any of FECA's temporal limitations, which are discussed in connection with expenditures generally below, be adapted for this purpose?

Would the ''promote, support, attack or oppose'' standard be appropriate for those 527 organizations (tax exempt ''political organizations,'' discussed more *infra*) that by their very nature have influencing elections as a primary purpose? Would the ''promote, support, attack or oppose'' standard be appropriate for all 527 organizations? Should the Commission adopt a different standard for 501(c) organizations (other tax exempt organizations, discussed more *infra*) that would require not only ''promote, support, attack or oppose'' content, but also some basis for concluding the message is to influence a Federal election? Such additional bases could include: (1) Reference to the clearly identified candidate *as a candidate*; (2) reference to the election or to the voting process; (3) reference to the clearly identified candidate's opponent; or (4) reference to the character or fitness for office of the clearly identified candidate. Alternatively, should the Commission adopt the ''promote, support, attack or oppose'' standard for 501(c) organizations, but build in an exception for a message that is confined to expressly advocating seeking action by the clearly identified candidate on an upcoming legislative or executive decision without reference to any candidacy, election, voting, opponent, character, or fitness for office? In essence, the Commission seeks comment on whether it should define what is an expenditure in a way that follows the functional distinctions in the Internal Revenue Code and recognizes that some organizations engage in ''grassroots lobbying'' campaigns primarily designed to affect upcoming legislative or executive actions. If so, what regulatory language would be appropriate?

In different contexts, FECA now provides at least three content standards for communications—express advocacy; promote, support, attack or oppose; and reference to a clearly identified Federal candidate. *See, e.g.*, 2 U.S.C. 431(17)(A); (20)(A)(iii); 434(f)(3)(A)(i)(I) and

441d(a). What other content standards that are not vague or overbroad, if any, should be included in the definition of ''expenditure?''

c. Electioneering communications. Alternative 1–B does not include payments for electioneering communications in the definition of ''expenditures.'' Many electioneering communications either already are included in the definition of ''expenditure'' or would be included under the proposal. Under the current rules, political committees must report communications that satisfy the general definition of ''electioneering communications'' in 2 U.S.C. 434(f)(3)(A) as expenditures. 11 CFR 104.20(b). In addition, if an electioneering communication promotes, supports, attacks, or opposes a Federal candidate, it would also be a public communication that promotes, supports, attacks, or opposes a Federal candidate, which would make it an expenditure under proposed section 100.116. Consequently, the only electioneering communications that would not be treated as expenditures under Alternative 1–B would be those made by persons other than political committees that do not promote, support, attack, or oppose a clearly identified Federal candidate. Should the final rules include all electioneering communications in the definition of ''expenditure?''

d. Other potential approaches. The Commission also seeks comments on other potential approaches to amending the definition of ''expenditure'' in 11 CFR part 100, subpart D. Should a payment's status as an ''expenditure'' depend on the identity of the maker? For example, should payments for public communications that promote, support, attack or oppose a Federal candidate be expenditures only if made by a Federal political committee?

Are there other identifying characteristics that should be considered in determining whether a payment is an expenditure? For example, should payments by a tax-exempt, charitable organization operating under 26 U.S.C. 501(c)(3) be exempt from the definition of ''expenditure?'' In this regard, how should the Commission interpret the Internal Revenue Service's Technical Advice Memorandum 89–36–002 (Sept. 8, 1989), which permitted a 501(c)(3) organization to make advertisements that ''support or oppose a candidate in an election campaign,'' without losing its 501(c)(3) status for intervening in a political campaign?

Should the Commission consider an organization's status under section 501(c) or 527 of the Internal Revenue Code in determining whether a payment is an expenditure? Should some activities be expenditures if made by a section 527 organization, regardless of whether it is a Federal political committee? Should the same rules or different rules apply to organizations operating under section 501(c)(3), (4), or (6)?

Should the timing of a payment affect whether it is an ''expenditure?'' FECA and BCRA provide several temporal limitations on various provisions that recognize the significance of proximity to an election. FECA provides that certain independent expenditures must be reported within 24 hours if made during the twenty days before an election. 2 U.S.C. 434(g)(1) (formerly 2 U.S.C. 434(c)(2)(C)). BCRA limits electioneering communications to the thirty days before a primary election and the sixty days before a general election. 2 U.S.C. 434(f)(3)(A)(i)(II). BCRA also includes voter registration activity in Federal election activity only in the 120 days before a regularly scheduled Federal election. 2 U.S.C. 431(20)(A)(i). Do any of these time periods provide an appropriate temporal standard for any expenditures?

Should the rules address expenditures that might be in connection with more than one Federal election? The Commission recently concluded in an advisory opinion that an advertisement that was coordinated by a Congressional candidate with a presidential campaign committee could be a contribution to the presidential campaign committee in connection with the upcoming Presidential primary election in that State and an expenditure of the Congressional candidate in connection with her special election. AO 2004–1. Should this conclusion be incorporated into regulations or should it be reconsidered?

The Commission also seeks comment on whether any aspect of Alternative 1–B should be revised in order to harmonize the definition of ''expenditure'' in the Commission's regulations with the approach taken by the IRS. Section 527(e)(2) of the Internal Revenue Code of 1986, as amended, defines the term ''exempt function'' as ''the function of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization, or the election of Presidential or Vice Presidential electors, whether or not such individual or electors are selected, nominated, elected, or appointed.'' 26 U.S.C. 527(e)(2). IRS regulations implementing this statutory definition provide that ''the term 'exempt function' includes all activities that are directly related to and support the process of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to public office or office in a political organization.'' 26 CFR 1.527–2(c)(1). IRS regulations also specify that whether an expenditure is for an exempt function depends on all the facts and circumstances. *Id.*

A Revenue Ruling issued by the IRS on December 23, 2003, stated that ''[w]hen an advocacy communication explicitly advocates the election or defeat of an individual to public office, the expenditure clearly is for an exempt function under § 527(e)(2).'' Rev. Rul. 04–6, at 4. The Revenue Ruling also identified a non-exhaustive list of factors that ''tend to show'' whether an advocacy communication on a public policy issue is for an exempt function or not, in the absence of ''explicit advocacy.'' The six identified factors that tend to show a communication is for an exempt function are: (a) The communication identifies a candidate for public office; (b) the timing of the communication coincides with an electoral campaign; (c) the communication targets voters in a particular election; (d) the communication identifies that candidate's position on the public policy issue that is the subject of the communication; (e) the position of the candidate on the public policy issue has been raised as distinguishing the candidate from others in the campaign, either in the communication itself or in other public communications; and (f) the communication is not part of an ongoing series of substantially similar advocacy communications by the organization on the same issue. The five factors that tend to show a communication is not for an exempt function are: (a) The absence of one or more of the factors listed in (a) through (f) above; (b) the communication identifies specific legislation, or a specific event outside the control of the organization, that the organization hopes to influence; (c) the timing of the communication coincides with a specific event outside the control of the organization that the organization hopes to influence; (d) the communication identifies the candidate solely as a government official who is in a position to act on the public policy issue in connection with the specific event; and (e) the communication identifies the candidate solely in the list of key or principal sponsors of the legislation that is the subject of the communication.

To what extent should Alternative 1–B be modified for harmony with the IRS's approach?

3. 11 CFR Part 100, Subpart B—Definition of ''contribution''

The Commission is also considering amending the definition of ''contribution'' in 11 CFR part 100, subpart B to make changes that would correspond to those proposed for the definition of ''expenditure'' in Alternative 1–B. Additionally, the Commission is considering amending its definition of ''contribution'' to include any funds that are received in response to a communication containing express advocacy of a clearly identified candidate.

a. Amendments corresponding to amendments to ''expenditure'' definition. Current 11 CFR 102.5(b) imposes requirements on organizations that do not qualify as ''political committees'' under current 11 CFR 100.5 and that make contributions or expenditures. The organization must demonstrate through a reasonable accounting method that, whenever it makes expenditures, it has received sufficient funds subject to the limitations and prohibitions of FECA to make the expenditures. Such organizations must also keep records of receipts and disbursements and, upon request, must make such records available to the Commission. *See* current 11 CFR 102.5(b)(1). Consequently, if the definition of ''expenditure'' is amended in any way, then any entity making such expenditures would be required to do so using only contributions that comply with the amount limitations and source prohibitions of FECA. If the Commission adopts the amended definition of ''expenditure,'' as proposed in Alternative 1–B, is an amendment to Commission regulations needed to state that funds used for any expenditures are contributions to that entity? Please note that proposed rule text for this approach is not included below, but if the Commission were to decide to adopt Alternative 1–B and this approach, then the text in the final rules amending the definition of ''contribution'' would be similar to the text in proposed sections 100.115 and 100.116 regarding ''expenditure.'' Should entities that are not political committees be required to report their contributions received and expenditures made in this context?

b. Proposed 11 CFR 100.57—Funds solicited with express advocacy. The Commission is considering whether solicitations containing express advocacy of federal candidates establish that any funds received in response are necessarily ''for the purpose of influencing any election for Federal office,'' so that they are contributions. Proposed section 100.57 would state that any funds provided in response to a solicitation that contained express advocacy for or against a clearly identified Federal candidate are contributions. If a solicitation states that the solicitor intends to take actions to elect or defeat a particular candidate, is it then logical to treat funds that are provided in response as funds that are ''for the purpose of influencing a Federal election?'' Should the standard be that the solicitation must not just include express advocacy but state that the funds will be used for express advocacy? Should funds raised by a State or local candidate for his or her own candidacy be treated as contributions ''for the purpose of influencing a Federal election'' if the State or local candidate's solicitation includes express advocacy for or against a clearly identified Federal candidate? Should proposed section 100.57 also include solicitations that expressly advocate the election or defeat of Federal candidates of a particular party without clearly identifying the particular candidates? Should the new rule use a standard other than express advocacy, such as a solicitation that promotes, supports, attacks, or opposes a Federal candidate, or indicates that funds received in response thereto will be used to promote, support, attack, or oppose a clearly identified Federal candidate? Should the new rule specify which contributions result from which solicitations? Should the new rule incorporate the standards in current 11 CFR 102.5(a)(2)(i) through (iii) to clarify further the types of funds received that must be treated as contributions? A conforming amendment to current 11 CFR 102.5(a)(2)(ii) would be necessary if any rule based on proposed section 100.57 is adopted.

4. Proposed 11 CFR 114.4—Corporate and Labor Organization Communications

Current 11 CFR 114.4(c)(2) and (d) permit corporations and labor organizations to conduct voter registration and get-out-the-vote activities beyond their restricted class provided that any communication does not expressly advocate the election or defeat of any clearly identified candidate(s) or candidates of a clearly identified political party and subject to other restrictions. The Commission seeks comment on proposed rules that would amend paragraphs (c)(2) and (d) and add new paragraph (c)(3) to specify that such voter registration and get-out-the-vote activities would be subject to the conditions set forth in proposed 11 CFR 100.133, as discussed above. The purpose of such a revision would be to ensure that corporations and labor organizations would be subject to the same conditions as political committees, as well as other conditions specific to corporations and labor organizations, when spending non-Federal funds on these voter registration and get-out-the-vote activities. The Commission seeks comment on whether the same rules should apply not only to corporations and labor organizations, but also to any person or entity who uses corporate or labor organization general treasury funds for these purposes.

The Commission also seeks comment on whether current 11 CFR 100.133 should be amended to make clear that, when a corporation or labor organization conducts voter registration or get-out-the-vote activities, it would be subject to the requirements of 11 CFR 100.133 and 114.4(c) and (d). Additionally, the Commission seeks comment on whether the ''express advocacy'' standard set forth in 11 CFR 114.4(c)(2) and (d)(1) should be changed to the ''promote, support, attack or oppose'' standard. Would the latter standard be an appropriate standard for determining whether a communication has the ''purpose of influencing a Federal election?'' Would such an approach be consistent with *MCFL*?

Corporations and labor organizations may also conduct certain voter registration and GOTV activities aimed at their restricted classes. 11 CFR 114.3(c)(4). Because these activities are permitted by 11 CFR part 114, they are exempt from the definition of ''expenditure.'' 2 U.S.C. 431(9)(B)(v); 11 CFR 100.141. No changes to section 114.3(c)(4) are proposed because the Commission intends to retain this exception to the definition of ''expenditure.''

III. Major Purpose

A. Major Purpose Requirement

The Commission seeks comment as to whether the existing definition of ''political committee'' in 11 CFR 100.5(a) should be amended by incorporating the major purpose requirement, and if so, how that should be accomplished. Under the proposed section 100.5(a)(1), a committee, club, association or group of persons that receives in excess of $1,000 in total contributions or makes in excess of $1,000 in total expenditures would be a political committee only if ''the nomination or election of one or more

Federal candidates is *a* major purpose'' of the committee, club, association or group of persons (emphasis added).

1. Major Purpose or Primary Purpose?

The proposed rule would include the indefinite article ''a'' to modify ''major purpose,'' rather than the definite article ''the.'' The consequence would be that the major purpose element of the definition of ''political committee'' may be satisfied if the nomination or election of a candidate or candidates is one of two or more major purposes of an organization, even if it is not its primary purpose. The Commission seeks comment regarding whether, to satisfy the major purpose requirement, the nomination or election of candidates must be the predominant purpose of the organization, or whether the major purpose standard is satisfied when the nomination or election of candidates is a major purpose of the organization, even when the organization spends more funds for another purpose.

In first articulating the major purpose requirement in *Buckley,* the Supreme Court determined that the definition of political committee ''need only encompass organizations that are under the control of a candidate or *the major purpose* of which is the nomination or election of a candidate.'' *Buckley,* 424 U.S. at 79 (emphasis added). Likewise, in *MCFL,* the Supreme Court observed that:

> should MCFL's independent spending become so extensive that *the organization's major purpose* may be regarded as campaign activity, the corporation would be classified as a political committee. As such it would automatically be subject to the obligations and restrictions applicable to those groups whose *primary objective* is to influence political campaigns.

MCFL, 479 U.S. at 262 (emphasis added and citations omitted). These passages indicate that the nomination or election of candidates must be *the* major purpose or, put another way, the *primary objective* of the organization. In light of the Supreme Court's repeated use of the term ''the major purpose,'' can the Commission substitute the term ''a major purpose,'' which appears to have a different meaning?

Could the major purpose standard in *Buckley* nevertheless be interpreted to require that the nomination or election of candidates be ''a'' major purpose of the organization, even when the organization has other, perhaps more significant, purposes? The Commission notes that the ''major purpose'' requirement appears only in judicial opinions not in any statute, and that the Supreme Court has warned against ''dissect[ing] the sentences of the United States Reports as though they were the United States Code.'' *St. Mary's Honor Ctr.* v. *Hicks,* 509 U.S. 502, 515 (1993). *In Aka* v. *Washington Hosp. Ctr.,* 156 F.3d 1284 (D.C. Cir. 1998), the Circuit Court explained that ''the [Supreme] Court's every word and sentence cannot be read in a vacuum; its pronouncements must be read in light of the holding of the case and to the degree possible, so as to be consistent with the Court's apparent intentions.'' *Id.* at 1291.

As explained above, in *Buckley,* the Court imposed the ''major purpose'' requirement because it was concerned that the statutory definition of political committee ''could be interpreted to reach groups engaged purely in issue discussion.'' *Buckley,* 424 U.S. at 79. Consequently, the ''apparent intention'' of the Court appears to have been to limit the applicability of the definition of political committee so that it would not cover organizations involved ''purely in issue discussion'' but that nevertheless engage in some incidental activity that might otherwise satisfy the Act's $1,000 expenditure or contribution political committee thresholds. Would it be consistent with the Court's apparent intention for the Commission to amend its definition of ''political committee'' to only require that the nomination or election of candidates be a major purpose rather than the primary purpose of the organization? It seems that an organization that has the nomination or election of candidates as a major purpose is not ''engaged purely in issue discussion.'' Moreover, such a definition of political committee appears unlikely to cover organizations that engage in some incidental activity that causes them to exceed the $1,000 expenditure or contribution thresholds.

In *United States* v. *Harriss,* 347 U.S. 612, 621–22 (1954), the Supreme Court interpreted the meaning of the term ''principal purpose'' in the Federal Regulation of Lobbying Act. That statute provided that certain provisions applied only to those persons whose ''principal purpose'' is to aid in the passage or defeat of legislation. *Id.* at 619. The Court refused to interpret the statute to require that the influencing of legislation be the person's most important—or primary—purpose. Instead, the Court concluded that the phrase ''principal purpose'' was designed to exclude from the coverage of the act those persons ''having only an incidental purpose of influencing legislation.'' *Id.* at 622. According to the Supreme Court:

> [i]f it were otherwise,—if an organization, for example, were exempted because lobbying was only one of its main activities—the Act would in large measure be reduced to a mere exhortation against abuse of the legislative process. In construing the Act narrowly to avoid constitutional doubts, we must also avoid a construction that would seriously impair the effectiveness of the Act in coping with the problem it was designed to alleviate.

Id. at 622–23.

The Court's ruling in *Harriss* may be instructive because, in that case, the Court was interpreting the meaning of the word ''principal,'' which, when used as an adjective, is defined as ''most important.'' *See* Webster's II New Riverside Dictionary 556 (1st ed. 1984). The term ''major,'' on the other hand, is defined as ''greater in importance rank or stature'' or ''demanding great attention.'' Webster's II New Riverside Dictionary 421 (1st ed. 1984). Thus, ''major,'' unlike ''principal,'' does not signify ''most important'' or ''primary'' or ''first in rank.'' Given that the Supreme Court has interpreted the phrase ''principal purpose'' in a statute to include an organization for which lobbying is merely ''one of its main activities,'' would the Commission be justified in interpreting the phrase ''major purpose'' in *Buckley* to also mean ''one of its main activities?'' Is it significant that the Court in *Buckley* chose to use the phrase ''major purpose'' instead of ''primary purpose'' or ''principal purpose?''

2. Particular Federal Candidates

The proposed rule would require that the organization have as a major purpose the nomination or election of candidates for Federal office, as opposed to non-Federal office. The Commission seeks comment regarding whether the proposed rule should be limited to the nomination or election of Federal candidates or, instead, whether the nomination or election of all candidates, including candidates for non-Federal office will suffice. Likewise, the Commission asks whether the major purpose requirement mandates that the organization be involved in the nomination or election of one or more particular candidates or, instead, whether it is sufficient for the organization to have a major purpose of nominating or electing certain categories of candidates, such as Democrats or Republicans, or women, or candidates who take a position on a particular issue. In *FEC* v. *GOPAC, Inc.,* 917 F. Supp. 851 (D.D.C. 1996), the District Court interpreted *Buckley* and *MCFL* to require that the major purpose of the organization be ''the nomination or election of a *particular* candidate or

candidates for *federal* office.'' *GOPAC,* 917 F. Supp. at 859 (emphasis added). The Commission seeks comment as to whether this is a proper reading of *Buckley* and *MCFL.* Should the Commission issue regulations that conflict with the GOPAC decision?

3. Existing 11 CFR 100.5(b) through (e)

Please note that current 11 CFR 100.5(b) through (e), which identify certain organizations that are considered to be political committees (separate segregated funds, local party committees, principal campaign committees, and multi-candidate committees), do not incorporate the ''major purpose'' standard. This is because the Commission has determined that these organizations, by their nature or by definition, have as their major—if not primary—purpose, the nomination or election of candidates.

For example, current 11 CFR 100.5(b) provides that a separate segregated fund established under 2 U.S.C. 441b(b)(2)(C) is a political committee because, pursuant to 2 U.S.C. 441b(b)(2)(C), a separate segregated fund is ''to be utilized for political purposes.'' 2 U.S.C. 441b(b)(2)(C). Current 11 CFR 100.5(c) provides that, under certain circumstances, the local committee of a political party is a political committee because, like national parties, these organizations exist for the purpose of nominating and electing candidates. *See* 2 U.S.C. 431(4)(C). Moreover, such organizations are organized under section 527 of the Internal Revenue Code, which requires that these organizations be organized and operated primarily for the purpose of influencing or attempting to influence the nomination, election or appointment of individuals to public office. *See* 26 U.S.C. 527(e); *see also* discussion of 527 organizations below. Current 11 CFR 100.5(d) and (e)(1) provide that an individual's principal or authorized campaign committees are political committees because these organizations are established for the purpose of nominating or electing an individual to public office. *See* 2 U.S.C. 431(5) and (6). Moreover, such organizations are ''under the control of a candidate,'' and therefore are not subject to the major purpose requirement. *See Buckley,* 424 U.S. at 79. Finally, current 11 CFR 100.5(e)(3) provides that multi-candidate committees are political committees because these organizations make and receive contributions for Federal elections. Consequently, these organizations satisfy the major purpose test.

The Commission proposes no changes to existing 11 CFR 100.5(b) through (e). Nevertheless, the Commission seeks comments regarding whether any amendments to these paragraphs are necessary.

B. Major Purpose Tests

The Commission seeks comment on proposed 11 CFR 100.5(a)(2)(i) through (iv), which provides four tests for determining when an entity would satisfy the major purpose requirement. Please note that the Commission has not made any decisions on whether to adopt any of the proposals for the major test(s). If the Commission were to decide to adopt one or more of the proposed major purpose tests, an organization that meets any of the major purpose tests would be considered to have as a major purpose the nomination or election of Federal candidates. Consequently, if that organization exceeds the $1,000 contribution or expenditure threshold in 11 CFR 100.5(a)(1)(i), it would be a political committee and would have to comply with the registration, reporting and other requirements for political committees. Are the criteria appropriate? Would other criteria be more appropriate?

1. Proposed 11 CFR 100.5(a)(2)(i)—Avowed Purpose and Spending

The first of the four proposed major purpose tests, which is set forth in proposed section 100.5(a)(2)(i), would use the organization's public pronouncements and spending to determine if its major purpose is to nominate or elect candidates. An organization would satisfy the major purpose element in proposed section 100.5(a)(2)(i) if: (1) Its organizational documents, solicitations, advertising, other similar written materials, public pronouncements, or any other communications demonstrate that its major purpose is to nominate, elect, defeat, promote, attack, support, or oppose a clearly identified candidate or candidates for Federal office or the Federal candidates of a clearly identified political party; and (2) it disburses more than $10,000 in the current calendar year or any of the previous four calendar years on the following: (1) Expenditures (including independent expenditures); (2) contributions; (3) payments for types 1 through 3 of Federal election activity; and (4) payments for all or any part of an electioneering communication, as defined in 11 CFR 100.29.

The first prong of the major purpose test in proposed section 100.5(a)(2)(i) would rely on an organization's written characterization of its own activities. This would include the organization's organizational documents, such as its charter, constitution, by-laws, etc. The second prong would require that an organization's disbursements in connection with a Federal election exceed $10,000. This two-pronged approach would ensure that documents or communications that demonstrate that an organization's avowed purpose is to nominate, elect, defeat, promote, attack, support or oppose a candidate or candidates are substantiated by its actual disbursements in connection with a Federal election.

a. Public Pronouncements. For an organization's public pronouncements and other communications to demonstrate that the organization has a major purpose of nominating, electing, promoting, attacking, supporting, or opposing clearly identified Federal candidates or the Federal candidates of a clearly identified political party, the written materials and other communications must refer to Federal candidates of a clearly identified political party or to a ''clearly identified candidate,'' which is defined in 11 CFR 100.17. Thus, under proposed paragraph (a)(2)(i), an organization would not be considered to have the nomination or election of candidates as a major purpose where the organization's public communications merely indicate that its major purpose is to elect candidates holding particular positions (*e.g.,* pro-business candidates or pro-environmental candidates) without specifying which candidates hold those positions. Such an organization, however, could still be considered to have the nomination or election of candidates as a major purpose under the other three major purpose tests—proposed paragraphs (a)(2)(ii) through (iv), which are discussed below.

The Commission seeks comment regarding whether it is appropriate to base its major purpose analysis on the written public statements, documents, solicitations, and other communications by an organization. Are there circumstances where an organization's written public statements, documents, solicitations, and other communications would not be an appropriate measure of its major purpose? Should the final rule take into account the organization's oral, as well as written, communications to determine if it satisfies the first prong of the major purpose test in proposed section 100.5(a)(2)(i)?

The Commission also seeks comment regarding how this provision should operate with respect to disavowed major purposes or apparently contradictory statements of the organization's major purposes. For example, what would be

the outcome if the leader (*e.g.,* president, chairperson, etc.) of the organization disavows the organization's previously stated purpose? What if this disavowal is attempted by someone other than the organization's leader? Should the rules account for the possibility that an organization can disavow its previous statements regarding its major purpose? Should there be a time limit on the applicability of statements made in the organization's communications? For example, should statements from five years ago be given less weight than more current statements? Are these concerns alleviated by the second prong of the major purpose test set forth in proposed section 100.5(a)(2)(i), which would require that the organization exceed $10,000 in disbursements in connection with a Federal election?

Similarly, what if some of the organization's communications indicate that its major purpose is the nomination or election of candidates, but other communications indicate that it has one or more other major purposes? How should the major purpose of the organization be assessed in these situations? Should some communications or types of communications be afforded greater weight then others when assessing major purpose under this proposed paragraph? For example, should the Commission give greater weight to statements in the organization's solicitations or in its governing documents than it gives to potentially self-serving, ambiguous or contradictory statements by its leaders or its members? Should the Commission consider only the statements it makes in its solicitations or in its organizational documents and ignore statements found elsewhere? Would these concerns be alleviated by the second prong of the major purpose test set forth in proposed section 100.5(a)(2)(i), which would require that the organization exceed $10,000 in disbursements in connection with a Federal election?

b. $10,000 Disbursement Threshold. To satisfy the second prong of the major purpose test set forth in proposed section 100.5(a)(2)(i), the organization's disbursements in connection with any election for Federal office would have to exceed the $10,000 threshold in the current year or any of the previous four calendar years. For example, to assess whether this threshold has been met in 2004, the Commission would examine the organization's disbursements in 2000, 2001, 2002, 2003 and 2004. If it exceeded the $10,000 threshold in any of those years, it would satisfy the $10,000 disbursement requirement in proposed paragraph (a)(2)(i). Because this threshold is an absolute dollar amount rather than a percentage of total spending, the current year spending would be relevant to the analysis. Consequently, this provision, unlike proposed paragraph (a)(2)(ii), would apply to both existing and newly established organizations. The Commission seeks comment regarding the use of this time period in proposed paragraph (a)(2)(i). Should the threshold have to be met in all four preceding years? If the Commission does adopt such a four-year look-back provision, would it be fair to implement it prior to 2008?

The Commission also seeks comment regarding the proposed $10,000 threshold. The Commission notes that Congress established a $10,000 threshold to trigger the reporting requirements for electioneering communications under 2 U.S.C. 434(f) and 48-hour reporting of independent expenditures under 2 U.S.C. 434(g)(2). By establishing these $10,000 thresholds, Congress indicated that it believed $10,000 in activity to be significant enough to require reporting within 48 hours of the activity. Is it appropriate for the Commission to adopt a similar threshold to use in the major purpose test set forth in proposed paragraph (a)(2)(i), or is a higher or lower threshold more appropriate and why?

The Commission also seeks comment on the proposal to count the following types of disbursements toward the $10,000 threshold: (1) Expenditures (including independent expenditures); (2) contributions; (3) payments for types 1 to 3 of Federal election activity; and (4) payments for all or any part of an electioneering communication, as defined in 11 CFR 100.29. Payments for Federal election activity would be limited to only the first three of the four types of Federal election activity described in 11 CFR 100.24(b) because the fourth type of Federal election activity—services provided during any month by an employee of a State, district, or local committee of a political party who spends more than 25 percent of that individual's compensated time during that month on activities in connection with a Federal election—applies only to certain political party committees, which are presumed to satisfy the major purpose requirement.

The Commission seeks comment regarding the types of disbursements that would count toward the $10,000 threshold. Is it appropriate to count expenditures (including independent expenditures), contributions, Federal election activity (types 1 through 3), and electioneering communications toward the spending threshold? Are there other categories or types of disbursements that should be included, such as administrative costs, overhead, and costs associated with volunteer activities? Should certain exceptions be included and, if so, how should those exceptions be crafted? For example, since some Federal election activity by non-party organizations might be truly non-partisan, should the types of voter registration, voter identification, get-out-the-vote, and generic campaign activity captured in the major purpose analysis be confined to partisan activity? Since the major purpose test envisioned in the proposed rules uses ''a major purpose to influence Federal elections'' test, should the four types of disbursements be subject to an allocation regime similar to those in 11 CFR 106.1 and 106.6, where only the allocable Federal portion would count toward the $10,000 threshold?

As discussed above with regard to the proposed amendments to the definition of ''expenditure,'' certain Federal election activity influences Federal elections. Does this justify counting the three types of Federal election activity toward the $10,000 disbursement threshold? *McConnell* concluded that ''[w]hile the distinction between ''issue'' and express advocacy seemed neat in theory, the two categories of advertisements proved functionally identical in important respects.'' *McConnell,* 124 S.Ct. at 650. The Supreme Court went on to explain that both types of communications ''were used to advocate the election or defeat of clearly identified candidates, even though the so-called issue ads eschewed the use of magic words.'' *Id.* Nonetheless, since some electioneering communications (and even some ''promote, support, attack, or oppose'' messages) by certain non-party organizations, such as 501(c) organizations might, be confined to advocating action regarding a particular legislative or executive decision, is there a need to develop a more focused content analysis for the major purpose test? *McConnell* held that it is permissible to treat an organization as a political committee even when the organization makes only independent expenditures and does not make any contributions to Federal candidates. *Id.* at 665 n.48. Does this justify counting independent expenditures toward the spending threshold?

2. Proposed 11 CFR 100.5(a)(2)(ii)—50 Percent Disbursement Threshold

The second of the four proposed major purpose tests is set forth in

proposed paragraph (a)(2)(ii). This paragraph would consider an organization to have a major purpose of nominating or electing candidates if more than 50 percent of the organization's total annual disbursements during any of the previous four calendar years was spent on: (1) Expenditures (including independent expenditures); (2) contributions; (3) payments for types 1 through 3 of Federal election activity; and (4) payments for all or any part of an electioneering communication, as defined in 11 CFR 100.29.

The Commission notes that, unlike proposed paragraph (a)(2)(i), this major purpose test does not consider the organization's public pronouncements. An organization that exceeds the 50 percent threshold would be considered to have the election or nomination of candidates as a major purpose regardless of whether or not the organization's public pronouncements or other communications indicate that it has such a major purpose. The Commission seeks comments regarding whether this major purpose test should also include consideration of the organization's public pronouncements or other communications, as is the case in proposed paragraph (a)(2)(i).

As set forth above, the relevant years for proposed paragraph (a)(2)(ii) would be the previous four calendar years. For example, to apply proposed paragraph (a)(2)(ii) for an organization during the year 2004, the relevant years would be 2000, 2001, 2002, and 2003. If an organization's election-related spending exceeded the 50 percent threshold in any of these years, it would be considered to have the nomination or election of candidates as a major purpose. Alternatively, should the organization's election-related spending have to exceed the 50 percent threshold in each of the preceding four years to trigger political committee status? Because an organization's total annual disbursements are typically unknown until the end of the year, the current year spending would not be examined under this proposed major purpose test. That is why, in the example given above, the organization's spending during 2004 was not considered. For the same reason, this proposed provision would be inapplicable to newly established organizations that have no spending in any prior years. However, newly established organizations would still be subject to the other three proposed major purpose tests, including the $50,000 disbursement threshold in proposed paragraph (a)(2)(iii).

The Commission also seeks comment on the proposal to consider the organization's spending during the previous four calendar years, which would cover groups that are active only during presidential election years. Should the proposed rule look back more years or fewer years? If so, how many calendar years would it be appropriate to examine? What should be the effective date of a rule that looks back four years?

The types of spending that would be counted toward the 50 percent threshold in the major purpose test set forth in proposed paragraph (a)(2)(ii) would be the same as those that would be counted toward the $10,000 spending threshold in proposed paragraph (a)(2)(i). The Commission seeks comment regarding counting these categories of disbursements toward the 50 percent threshold. The Commission specifically refers commenters to the questions and issues raised above with respect to counting these categories of disbursements toward the $10,000 disbursement threshold in proposed paragraph (a)(2)(i).

The Commission also seeks comment on the use of the 50 percent threshold. Is another percentage more appropriate to assess an organization's major purpose? Should the Commission apply a 25 percent threshold? Could a very large organization that spends less than 50 percent of its funds on election-related disbursements nevertheless have a profound effect on Federal elections? Does this justify the Commission adopting a threshold lower than 50 percent or would this situation be addressed by absolute dollar thresholds that would be used in proposed paragraphs (a)(2)(i) and (a)(2)(iii).

Should the size of the percentage threshold depend upon the determination of whether the nomination or election of candidates must be *the* major purpose of the organization, or must be only *a* major purpose of the organization? If the proper interpretation of the major purpose requirement is that the nomination or election of candidates must be the organization's primary purpose, should this proposed 50 percent threshold be the only test for major purpose adopted by the Commission in the final rules? In other words, if the nomination or election of candidates must be the organization's most important purpose, perhaps only those organizations that spend most (*i.e.,* more than 50 percent) of their funds on the nomination or election of candidates satisfy the major purpose requirement.

On the other hand, how should the final rule address organizations that spend a plurality, but not a majority, of their money on nomination and election activities? For example, should an organization be considered to satisfy the major purpose requirement if it spends only 30 percent of its funds on election-related activities (*i.e.,* those items that would count toward the proposed 50 percent threshold) but does not spend more than 30 percent on any other activity? To apply such a rule, would the Commission have to adopt categories of non-election spending so that the 70 percent of funds that the organization spent on non-election purposes would not be combined into a single category of ''non-election activities,'' thereby allowing the organization to avoid political committee status? If such categories are required, how should they be crafted?

3. Proposed 11 CFR 100.5(a)(2)(iii)—$50,000 Disbursement Threshold

The third of the four proposed major purpose tests, which is set forth in proposed paragraph (a)(2)(iii), would consider an organization to have the nomination or election of Federal candidates as a major purpose if it spends more than $50,000 in the current calendar year or any of the previous four calendar years on the following: (1) Expenditures (including independent expenditures); (2) contributions; (3) payments for types 1 through 3 of Federal election activity; and (4) payments for all or any part of an electioneering communication, as defined in 11 CFR 100.29. When an organization exceeds the $50,000 spending threshold, it would satisfy the major purpose standard. For example, to conclude that an organization has a major purpose of nominating and electing candidates in 2004, under proposed paragraph (a)(2)(iii), the organization would have to exceed the $50,000 threshold in either 2000, 2001, 2002, 2003 or 2004. The relevant time period in proposed 11 CFR 100.5(a)(2)(iii) is the current calendar year or any of the four previous calendar years. Because this threshold is an absolute dollar amount instead of a percentage of total spending, the current year spending would be relevant to the analysis. Consequently, this provision, unlike proposed paragraph (a)(2)(ii) would apply to newly established organizations. The Commission seeks comment regarding the use of this time period in proposed paragraph (a)(2)(iii). Would it be more appropriate to require that the threshold be met in each of the four preceding calendar years?

The Commission seeks comment regarding the proposed $50,000 threshold. The Commission notes that it uses a $50,000 threshold to determine

when a political committee is subject to mandatory electronic filing of its financial disclosure statements. *See* 11 CFR 104.18(a). Is this an appropriate dollar threshold for triggering major purpose under this proposed test or is a higher or lower threshold more appropriate and why? Is a higher or lower threshold more appropriate in certain situations or with respect to particular types of organizations? Should the proposed rule incorporate a sliding-scale dollar threshold that would increase or decrease depending upon the size or type of organization, or the type of activity in which the organization engages? How might such a sliding scale specifically work? Is it preferable not to have any major purpose criteria based upon a strict dollar amount and, if so, how would the Commission assess the major purpose of a newly established organization?

Like proposed paragraphs (a)(2)(i) and (a)(2)(ii), proposed paragraph (a)(2)(iii) would count the following types of disbursements toward the spending threshold: (1) Expenditures (including independent expenditures); (2) contributions; (3) payments for types 1 through 3 of Federal election activity; and (4) payments for all or any part of an electioneering communication, as defined in 11 CFR 100.29. The Commission seeks comment regarding counting these categories of disbursements toward the $50,000 threshold. The Commission specifically refers commenters to the questions and issues raised above with respect to counting these categories of disbursements toward the $10,000 spending threshold in proposed paragraph (a)(2)(i).

4. Proposed 11 CFR 100.5(a)(2)(iv)—527 Organizations

Proposed 11 CFR 100.5(a)(2)(iv) offers two alternatives for the fourth of the four proposed major purpose tests. Both alternatives address ''527 organizations,'' which are entities organized under section 527 of the Internal Revenue Code, 26 U.S.C. 527. A 527 organization is ''a party, committee, association, fund, or other organization (whether or not incorporated) organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for an exempt function.'' 26 U.S.C. 527(e)(1). An exempt function is defined as ''the function of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization, or the election of Presidential or Vice Presidential electors.'' 26 U.S.C. 527(e)(2).

Alternative 2–A provides that all 527 organizations would be considered to have the nomination or election of candidates as a major purpose, but carves out five exceptions: (1) Any 527 organization that is the campaign organization of an individual seeking nomination, election, appointment or selection to a non-Federal office; (2) any 527 organization that is organized solely for the purpose of promoting the nomination or election of a particular individual to a non-Federal office; (3) any 527 organization that engages in nomination and election activities only with respect to elections in which there is no candidate for Federal office on the ballot; (4) any 527 organization that operates in only one State and which is required by the law of that State to file financial disclosure reports with a State agency; and (5) any 527 organization that is organized solely for the purpose of influencing the selection, appointment, or nomination of individuals to non-elective office, or the election, selection, nomination or appointment of persons to leadership positions within a political party.

The first proposed exception would recognize that the major purpose of a campaign organization for an individual seeking non-Federal office is the nomination or election of that individual to non-Federal office. Consequently, such an organization is not likely to have as a major purpose the nomination or election of candidates to Federal office. The second proposed exception would address those organizations that are organized solely to promote the nomination or election of individuals to non-Federal offices, but do not fall within the first exception because they are not under the control of that particular non-Federal candidate.

The third and fourth proposed exceptions pertain to State political organizations. The exception in proposed section 100.5(a)(2)(iv)(C) would address 527 organizations that operate only in connection with non-Federal elections and only in States, such as Virginia, that hold non-Federal elections in years where there is no regularly scheduled Federal election (*i.e.,* odd-numbered years). Such an organization, which does not engage in activity in connection with any election for Federal office, is not likely to have as a major purpose the nomination or election of Federal candidates. The exception in proposed section 100.5(a)(2)(iv)(D) would address organizations that operate in only one State and, under State law, must disclose their financial activity to a State agency. Such organizations, because they operate in only one State, would not be deemed to have a major purpose of nominating or electing Federal candidates solely because they are 527 organizations.

The fifth proposed exception would recognize that 527 organizations established solely to influence the selection, appointment or nomination of individuals to non-elective office (*e.g.,* judicial appointments), or the nomination or election of candidates for leadership positions within a political party, should be exempt from this proposed major purpose test because they appear unlikely to have a major purpose of nominating or electing candidates to Federal office.

Organizations that do not satisfy any of the five exceptions and that receive $1,000 in contributions or make $1,000 in expenditures would be Federal political committees under proposed section 100.5(a) if they are organized under section 527 of the Internal Revenue Code. Should the Commission consider additional exceptions to proposed section 100.5(a)(2)(iv) to exclude more organizations, or should the Commission conclude that other organizations should be treated as Federal political committees if they satisfy the $1,000 thresholds in proposed section 100.5(a)(1)?

The Commission notes that any 527 organization that falls within one or more of the exceptions contained in Alternative 2–A could nevertheless be considered to have a major purpose of nominating or electing Federal candidates under one of the first three major purpose tests, such as by exceeding the 50 percent threshold set forth in proposed paragraph (a)(2)(ii) or the $50,000 spending threshold set forth in proposed paragraph (a)(2)(iii). The Commission seeks comment on whether the exceptions contained in Alternative 2–A are appropriate and whether Alternative 2–A should include additional exceptions. Alternative 2–B, in contrast, would provide that all 527 organizations would be considered to have the nomination or election of candidates as a major purpose, and does not provide for any exceptions.

The Commission seeks comment regarding whether it is necessary and appropriate to mention 527 organizations in the proposed rule, or whether it would be better to eliminate the fourth major purpose test and instead subject 527 organizations, like any other organization, to analysis under the first three tests. To the extent that 527 organizations should be explicitly mentioned in the proposed rule, which alternative is more

appropriate, Alternative 2–A, Alternative 2–B, or some other alternative?

5. Other Tax-Exempt Organizations

The proposed rule does not expressly mention other tax-exempt organizations, such as those organized under section 501(c) of the Internal Revenue Code, because, unlike 527 organizations, these organizations could lose their tax-exempt status if their primary purpose were to influence elections. Should the final rule state that certain tax-exempt organizations, such as those organized under 501(c)(3) or (c)(4) of the Internal Revenue Code, will not meet any of the major purpose tests because of the nature of their tax-exempt status, and exempt them from the definition of political committee? Or should the final rule not provide an exemption for 501(c) organizations, recognizing that the various thresholds in the major purpose tests are set high enough that certain 501(c) organizations may continue to conduct incidental or low levels of election activities without satisfying any of the major purpose tests and triggering political committee status? [7] Would it be more appropriate to discard ''*a* major purpose'' analysis and use instead ''*the* major purpose'' analysis for these types of organizations? In this regard, should the Commission fashion a test whereby it would recognize three broad categories of activity for 501(c) organizations—''election influencing activity,'' ''legislative or executive lobbying activity,'' and ''educational, research, or other activity.'' If the organization put more resources, either financially or timewise, into ''election influencing activity'' than it put into either of the other two activities, the major purpose test would be met.

C. Treatment of Contributions for the Major Purpose Requirement

Should the major purpose requirement apply when an organization's status as a political committee is based upon its making in excess of $1,000 in any contributions or expenditures, or only when its status as a political committee is based solely upon its making of independent expenditures in excess of $1,000? In *Akins* v. *FEC,* 101 F.3d 731 (D.C. Cir. 1996), *vacated,* 524 U.S. 11 (1998), one appeals court interpreted *Buckley* and *MCFL* to require application of the major purpose test only when political committee status is based upon the organization's independent expenditures, not when it is based upon the organization's other expenditures, including contributions to political committees. *See Akins,* 101 F.3d at 742 (''the Court clearly distinguished *independent expenditures* and *contributions* as to their constitutional significance, and its references to a 'major purpose' test seem to implicate only the former''). Should the *Akins* court's interpretation be incorporated into the proposed rule, or should the major purpose requirement apply to organizations that exceed $1,000 in expenditures, not just those that exceed $1,000 in independent expenditures exclusively?

D. Proper Application of the Major Purpose Requirement

The Commission seeks comment regarding whether the definition of political committee in 11 CFR 100.5(a) should include a major purpose test along the lines set forth above or whether it should instead incorporate the major purpose requirement as an exception to the definition of ''political committee.'' For example, if the major purpose requirement is incorporated into the definition of political committee (as it is in the proposed rules), an organization, regardless of the amount of its contributions and expenditures, will not be considered to be a political committee unless it is shown to have a major purpose of nominating or electing candidates. This is essentially how the proposed rules described above would work. An alternative approach, which is not reflected in the proposed rules, would be to use the major purpose requirement as an exception to the definition of political committee. Under this alternative approach, an organization would be considered to be a political committee if its expenditures or contributions exceed the $1,000 threshold unless the organization has a major purpose other than nominating or electing candidates. This alternative approach would, to a certain extent, place the burden on the organization to show that it does not have a major purpose of nominating or electing candidates. Would this alternative approach reflect the correct reading of the major purpose requirement as set forth in *Buckley, MCFL* and other cases?

Although not reflected in the proposed rules, the Commission seeks comment on the proper application of the major purpose requirement to complex organizations that include a political committee within the organization. For instance, should the Commission impute major purpose across such organizations? Thus, if an organization includes a political committee, should all other committees or organizations within the complex organization be deemed to satisfy the major purpose test? Or should the Commission conclude that its current affiliation rules at 11 CFR 100.5(g) sufficiently address this issue and no amendments to the regulations are necessary?

IV. Conversion of Federally Permissible Funds to Federal Funds

The Commission recognizes that there may be a need to provide guidance to organizations that become political committees after operating for some time as a non-political committee organization, especially concerning two issues: (1) how the new political committee should demonstrate that the contributions and expenditures that it made prior to becoming a political organization were paid for with Federally permissible funds and (2) how it should treat the funds it has cash-on-hand on the day that it became a political committee. Consequently, to address these issues, this NPRM includes proposed subpart A—Organizations that Become Political Committees, which would set forth the requirements for existing organizations that become political committees under 11 CFR 100.5(a). The proposed rules would not apply to organizations that register with the Commission as a political committee prior to making any contributions, expenditures, independent expenditures or allocable expenditures. The proposed rules do not replace any of the Commission's existing rules applicable to political committees. All political committees, including the political committees subject to these proposed rules, would remain subject to all of the Commission's rules applicable to political committees.

One purpose of the proposed 11 CFR part 102, subpart A is to provide a mechanism for organizations that become political committees to convert into Federal funds some or all of the funds received prior to the time that they became political committees. As explained below, a political committee could convert these funds into Federal funds by contacting its recent donor(s), making certain disclosures, and seeking

[7] This is especially true for 501(c)(3) organizations because their communications are exempt from the definition of ''electioneering communications.'' *See* 11 CFR 100.29(c)(6). Thus, any disbursements for such communications would not count toward a 501(c)(3)'s major purpose as electioneering communications. Furthermore, the Supreme Court recognized that the Massachusetts Citizens for Life, Inc., a nonprofit corporation, could become a political committee if its independent expenditures become ''so extensive'' that it satisfies the major purpose requirement. *MCFL,* 479 U.S. at 262.

the donor(s)' consent to use the funds for the purpose of influencing Federal elections. Allowing new political committees to convert pre-existing funds into Federal funds would achieve two goals. First, it would allow political committees to account for contributions and expenditures made before they became political committees that were required under the Act and the Commission's regulations to be paid for with Federal funds (*i.e.,* funds that comply with the source prohibitions, amount limitations and other requirements of the Act). Non-political committees are already required to ''demonstrate through a reasonable accounting method that, whenever such an organization makes a contribution or expenditure, or payment, the organization has received sufficient funds subject to the limitations and prohibitions of the Act to make such contribution, expenditure, or payment.'' 11 CFR 102.5(b)(1). The proposed rules would provide guidance on the initial reporting requirements for non-political committees that subsequently become political committees but would not impose any new requirements on those groups that never become political committees. Second, the proposed rules would, under certain circumstances, allow political committees to transfer to their Federal account some of the funds in their possession when they became political committees.

The Commission seeks comment regarding the need for a mechanism for political committees to convert funds received prior to becoming a political committee into Federal funds. The proposed rules, as mentioned above, would apply only to those organizations that, prior to becoming a political committee, made contributions or expenditures that were required by the Act and the Commission's regulations to be paid for with funds that are subject to the amount limitations and source prohibitions of the Act. Should the Commission also provide a mechanism in the final rules for political committees that, prior to becoming a political committee, did not make any disbursements that were required to be paid for with funds that are subject to the limitations and prohibitions of the Act, to convert some or all of its funds received prior to becoming a political committee into Federal funds and then transfer those converted funds into its Federal account?

A. Proposed 11 CFR 102.50

Proposed 11 CFR 102.50 would set forth the definitions of four terms used in proposed subpart A. ''Allocable expenditures'' would be defined as expenditures that are allocable under 11 CFR 106.1 or 106.6. Given that proposed 11 CFR 100.115 would make partisan voter registration, partisan voter identification and partisan get-out-the-vote activities ''expenditures'' and that some of these activities would be encompassed by ''generic voter drive'' and subject to allocation in current section 106.6, should the final rules include these types of voter drive activities as ''allocable expenditures?''

''Covered period'' would be defined as the period of time beginning on January 1 of the calendar year immediately preceding the calendar year in which the organization first satisfies the definition of ''political committee'' in 11 CFR 100.5(a) and ending on the date that the organization first satisfies the definition of ''political committee'' in 11 CFR 100.5(a). This covered period is similar to the period in 2 U.S.C. 434(f)(2)(E) for disclosing information pertaining to individuals who donate $1,000 or more to persons who make electioneering communications. Should the Commission adopt a shorter or a longer covered period in the final rule?

For example, if an organization first satisfies the definition of political committee in 11 CFR 100.5(a) on March 15, 2004, the covered period for that organization would be January 1, 2003, until March 15, 2004. For an organization that first became a political committee on December 31, 2005, would have a covered period of January 1, 2004, until December 31, 2005. Consequently, the covered period for any organization would be at least one year, but would be no longer than two years.

''Federal funds'' would have the same meaning as in 11 CFR 300.2(g). Thus, it would mean funds that comply with the limitations, prohibitions and reporting requirements of the Act.

''Federally permissible funds'' would be defined as funds that comply with the amount limitations and source prohibitions of the Act and were received during the covered period by the organization becoming a political committee. Federally permissible funds are different from Federal funds because, although both comply with the source prohibitions and amount limitations of the Act, federally permissible funds do not comply with the solicitation and reporting requirements of the Act. Moreover, federally permissible funds would be limited to those funds received during the organization's covered period. Only a political committee's federally permissible funds would be able to be converted to Federal funds under the proposed rules.

Consequently, not all of the organizations pre-existing funds would be subject to conversion to Federal funds under the proposed rules. Only those pre-existing funds that comply with the amount limitations and source prohibitions of the Act (*i.e.*, federally permissible funds) would be subject to conversion to Federal funds. Consequently, funds donated to the organization by a corporation, a labor organization or foreign national could not be converted to Federal funds because these are prohibited sources under the Act. *See* 2 U.S.C. 441b and 441e. Likewise, a political committee would not be able to convert to Federal funds an entire $20,000 donation to the organization from an individual because this amount would exceed the $5,000 limit for individual contributions to non-connected political committees. *See* 2 U.S.C. 441a(a)(1)(C). Only the first $5,000 of such a donation would be able to be converted to Federal funds under the proposed rule. The remaining $15,000 would have to be treated as non-Federal funds.

B. Proposed 11 CFR 102.51

Proposed 11 CFR 102.51 provides that subpart A would apply to a committee, club, association, or other group of persons that satisfies the definition of ''political committee'' under 11 CFR 100.5(a) and that made contributions, expenditures, independent expenditures or allocable expenditures during the covered period. Consequently, the proposed rules would apply to any organization that meets the following two criteria: (1) It satisfies the Commission's definition of ''political committee'; and (2) it has made expenditures, allocable expenditures or allocable disbursements during the covered period.

C. Proposed 11 CFR 102.52

Proposed 11 CFR 102.52 would set forth the requirements for political committees that would be subject to proposed subpart A. Proposed paragraphs (a) and (b) would remind these political committees that they are required to register with the Commission and to establish a campaign depository. These requirements already exist under 11 CFR 102.1(d) and 103.2 and would not be altered under the proposed rules.

Proposed paragraph (c) would require each political committee that would be subject to proposed subpart A to determine the amount of expenditures and allocable expenditures and disbursements it made during its

covered period. Thus, under this provision, political committees would be required to determine how much of its spending in the period of time immediately before it became a political committee was required to have been paid for with Federal funds. For example, if a disbursement was an ''expenditure'' under the Act or the Commission's regulations, it would count toward this amount. Likewise, if a disbursement was an allocable expenditure, it would also go toward this amount.

Proposed paragraph (d) would require political committees subject to proposed subpart A to determine the amount of federally permissible funds that the political committee received during its covered period. Thus, only donations of $5,000 or less from persons other than corporations, labor organizations, foreign nationals and other prohibited sources would be counted toward this amount, provided that these donations were received by the organization during its covered period.

Proposed paragraph (e) would require the political committees that would be subject to proposed subpart A to file financial disclosure reports with the Commission in accordance with part 104 of the Commission's regulations and proposed 11 CFR 102.56. Part 104 of the Commission's regulations are the general reporting requirements applicable to all political committees, including those that also would be subject to proposed subpart A. Proposed 11 CFR 102.56 are reporting requirements that the Commission proposes to adopt as part of these proposed rules. These additional reporting requirements are discussed in detail below.

D. Proposed 11 CFR 102.53

Proposed 11 CFR 102.53(a) would require a political committee subject to proposed subpart A to treat the amount of expenditures and allocable expenditures and disbursements made during its covered period as debt owed by its Federal account to its non-Federal account. For example, if, under proposed section 102.52(c), a political committee determined that, during its covered period, it made $100,000 in expenditures and allocable expenditures and disbursements, its Federal account would owe $100,000 to its non-Federal account. Consequently, virtually every political committee that would be subject to proposed subpart A would, at the time it becomes a political committee, have debt owed by its Federal account to its non-Federal account.

Under proposed paragraph (b), a political committee would not be permitted to make any contributions, expenditures, independent expenditures or allocable expenditures until the debt owed by the Federal account to the non-Federal account is satisfied. Thus, a political committee would be unable to make any disbursements that must be paid for with Federal funds until the debt is satisfied pursuant to proposed section 102.53(c).

Proposed paragraph (c) would provide two methods for a political committee subject to proposed subpart A to satisfy the debt owed by its Federal account to its non-Federal account. The first method would be for the political committee to raise Federal funds and transfer those funds to its non-Federal account. The other method would be for the political committee to convert some or all of its federally permissible funds to Federal funds. The proposed rule would allow the political committee to satisfy the debt owed by its Federal account by using either method or both methods in combination.

As set forth above, the Commission is seeking comment regarding whether political committees should be permitted to maintain non-Federal accounts. How would the conversion to Federal funds operate if the Commission were to adopt a final rule prohibiting Federal political committees from maintaining non-Federal accounts?

E. Proposed 11 CFR 102.54

Proposed section 102.54 would set forth the procedure through which a political committee that is subject to proposed subpart A may convert some or all of its federally permissible funds to Federal funds. The proposed rule would provide a two-step process for a political committee to convert its federally permissible funds into Federal funds. First, the political committee would be required to send written notification to the donor(s) of any Federally permissible funds to be converted into Federal funds. The written notification would need to:

(1) Inform the donor(s) that the political committee has registered as a Federal political committee;
(2) Make all disclaimers required by 11 CFR 110.11;
(3) Inform the donor(s) of the amount of the federally permissible funds donated by the donor(s) that the political committee seeks to convert to Federal funds and request that the donor(s) grant written consent for the political committee to use that amount of federally permissible funds for the purpose of influencing Federal elections;
(4) Advise the donor(s) that they may grant written consent for an amount of federally permissible funds lower than the amount requested, and that they may refuse to grant consent entirely; and
(5) Inform the donor(s) that, by granting consent, the donor(s) will be deemed to have made a contribution to a Federal political committee, that the contribution is subject to the amount limitations and source prohibitions of the Act, and that the contribution will be deemed to have been made on the date that the written consent is signed by the donor(s).

Second, the political committee would be required to receive the written consent from the donor(s) within 60 days after the political committee first satisfies the definition of ''political committee'' in 11 CFR 100.5.

If the political committee satisfies the requirements of proposed 11 CFR 102.54, the funds for which it receives written consent pursuant to proposed paragraph (b) would be considered to be converted to Federal funds and may be used to satisfy the debt owed by the Federal account. The Commission notes that, under the proposed rules, the political committee would need to receive the written consent from the donor(s) within sixty days after the political committee becomes a political committee under 11 CFR 100.5. The funds for which the political committee receives written consent from the donor(s) after that date would not be able to be converted to Federal funds and used to satisfy the debt owed by the Federal account.

The Commission seeks comment generally regarding the proposed procedure for converting federally permissible funds into Federal funds. The written notice requirements under proposed section 102.54(a) are designed to serve at least two purposes. First, they would ensure that the donor(s) are fully informed that their donations will be or have been used by the political committee for the purpose of influencing Federal elections and that the donor(s) are given a reasonable opportunity to object to such use. Second, the disclosures would ensure that the donor(s) have adequate information to comply with the contributions limitations of the Act. Are any of the requirements for the written notice under proposed paragraph 102.54(a) unnecessary? Should any other requirements be added? Is it appropriate to require that the donor(s) grant their consent to the conversion of their donated funds in writing? Should

oral consent, perhaps subject to a requirement that the oral consent be memorialized in writing, be sufficient?

Should the Commission adopt the 60-day time limit in proposed paragraph 102.54(b)? The 60-day time limit is designed to ensure that any conversion of Federally permissible funds to Federal funds occurs shortly after the political committee achieves political committee status under 11 CFR 100.5(a). Limiting the time period for conversion also will allow for the Commission and the public to more easily assess a political committee's compliance with these proposed rules. Is a time limit necessary? Would a time period other than 60 days be preferable? If so, how long should the conversion period last?

Would it be preferable to adopt an implied consent procedure, whereby the political committee would send a written notification to the donor(s), but would not have to wait for the donor(s) to affirmatively consent to the conversion. Instead, the political committee may consider the donor(s) to have consented to the transfer unless and until it receives an affirmative objection to the conversion from the donor(s). Such a procedure would be similar to the procedures the Commission adopted for redesignation and reattribution of certain apparently excessive contributions to authorized candidate committees under 11 CFR 110.1(k)(3)(ii)(B) and 11 CFR 110.1(b)(5)(ii)(B). Are there reasons that the Commission should or should not adopt a similar regime to govern conversion of federally permissible funds to Federal funds in proposed subpart A?

F. Proposed 11 CFR 102.55

Proposed 11 CFR 102.55 would provide a mechanism for political committees to convert an amount of Federally permissible funds to Federal funds that is greater than the amount of debt owed by its Federal account. A political committee that successfully converts an amount of federally permissible funds to Federal funds that is greater than the amount of debt owed by its Federal account would be required to first use the converted funds to satisfy the debt owed by its Federal account. The surplus converted Federal funds (*i.e.*, the amount of converted federally permissible funds exceeding the amount of debt owed by the political committee's Federal account) may then be transferred to the political committee's Federal account. The amount of converted Federal funds transferred to the Federal account under this proposed section, however, may be no greater than the amount of cash-on-hand that the political committee had in its possession at the time it first became a political committee under 11 CFR 100.5(a).

For example, if a political committee has $50,000 in debt owed by its Federal account and is able to convert $75,000 of its Federally permissible funds into Federal funds pursuant to proposed section 102.54, it would be able to transfer the surplus $25,000 to its Federal account if it had at least $25,000 cash-on-hand in its possession at the time it became a political committee. If the political committee, however, had only $10,000 of cash-on-hand in its possession when it became a political committee, it would be able to transfer only $10,000 from its non-Federal account to its Federal account. If the political committee had zero cash-on-hand in its possession when it became a political committee, it would not be permitted to transfer any funds to its Federal account.

The Commission seeks comment regarding whether it is appropriate for the proposed rules to allow this surplus amount to be transferred to a political committee's Federal account. Would it be preferable to limit the conversion procedures only to the amount needed by the political committee to satisfy the debt owed by its Federal account? If it is advisable for the Commission to allow political committees to convert as much of their federally permissible funds into Federal funds as possible, and to transfer any surplus to their Federal account, should the rule limit the amount transferred to the amount of cash-on-hand in the possession of the political committee when it became a political committee?

G. Proposed 11 CFR 102.56

Proposed section 102.56 would set forth the initial reporting requirements for political committees that would be subject to proposed subpart A. Under proposed section 102.56, political committees that would be subject to proposed subpart A would be required to report certain information along with other required information in the political committee's first report due under 11 CFR 104.5. Thus, political committees that are subject to proposed subpart A are also subject to the reporting requirements of 11 CFR part 104, which apply to all political committees. Proposed section 102.56 would merely require a political committee that would be subject to proposed subpart A to report certain additional information related to its compliance with proposed subpart A. The additional subpart A information would be due whenever the political committee's first financial disclosure report is due under 11 CFR part 104.

Under proposed paragraph (a) a political committee that would be subject to proposed subpart A would be required to report the amount of expenditures and allocable expenditures and disbursements made by the political committee during its covered period. This figure would reflect the amount of debt the political committee's Federal account owes to its non-Federal account pursuant to proposed section 102.53(a). Under proposed paragraph (b), a political committee that would be subject to subpart A would be required to report the amount of any federally permissible funds converted to Federal funds under proposed 11 CFR 102.54. This figure would reflect the amount of converted Federal funds that are available for the political committee to satisfy the debt owed by its Federal account and, possibly, the amount of surplus converted Federal funds that the political committee may transfer to its Federal account pursuant to proposed 11 CFR 102.55(b).

Proposed paragraph (c) would require a political committee that is subject to proposed subpart A to report the identifying information required under 11 CFR 104.3(a)(4)(i). This is the contributor information that all political committees must report to the Commission when they receive contributions. This proposed provision is designed to require political committees that would be subject to subpart A to report this information for any donation of federally permissible funds that is converted to Federal funds.

Proposed paragraph (d) would require a political committee to report the difference between the amount reported under proposed paragraph (a), which is the amount of debt owed by the political committee's Federal account under proposed 11 CFR 102.53(a), and the amount reported under proposed paragraph (b), which is the amount of federally permissible funds converted to Federal funds under proposed 11 CFR 102.54. Consequently, the amount reported pursuant to proposed paragraph (d) would reflect whether the political committee has converted a sufficient amount of federally permissible funds to Federal funds to allow it to satisfy the debt owed by its Federal account. If not, the deficiency would be required to be reported as a debt owed by the Federal account. It would also reflect whether the political committee has converted an amount of federally permissible funds to Federal funds in excess of the amount of debt owed by the Federal account, thereby possibly permitting the political

committee to transfer some or all of the surplus funds to its Federal account pursuant to proposed 11 CFR 102.55(b).

Proposed paragraph (e) would require a political committee that would be subject to proposed subpart A to report the amount and date of any transfers to its Federal account made pursuant to proposed 11 CFR 102.55(b). This would permit the Commission to assess whether the political committee complied with the transfer requirements under proposed paragraph 102.55(b).

The Commission seeks comment regarding these additional reporting requirements that would apply to political committees that would be subject to proposed subpart A. Are any of these reporting requirements unnecessary or unduly burdensome? Are there additional reporting requirements that the Commission should include in the proposed rules?

V. Proposed 11 CFR 106.6—Allocation

Alternative 1–B includes proposed changes to the allocation rules to reflect other changes proposed in Alternative 1–B and for other purposes. The Commission has not determined that any changes to its allocation rules are appropriate, and is thus seeking comment to determine what, if any, changes are advisable. Although BCRA invalidated the Commission's allocation regime for national party committees and substituted a different allocation regime for other political party committees, it did not address the Commission's allocation regulations for separate segregated funds and nonconnected committees. Although *McConnell* criticized aspects of the Commission's allocation regulations regarding political party committees, allocation by nonconnected committees and separate segregated funds was not before the Supreme Court. *McConnell,* 124 S.Ct. at 660 and 661. Accordingly, the Commission seeks comments on whether either BCRA or *McConnell* requires, permits, or prohibits changes to the allocation regulations for separate segregated funds and nonconnected committees. Does either provide any guidance as to how the Commission should exercise any discretion it may have in this regard? Given *McConnell's* criticism of the Commission's prior allocation rules for political parties, is it appropriate for the regulations to allow political committees to have non-Federal accounts and to allocate their disbursements between their Federal and non-Federal accounts? If an organization's major purpose is to influence Federal elections, should the organization be required to pay for all of its disbursements out of Federal funds and therefore be prohibited from allocating any of its disbursements? Should any changes to the allocation regulations be effective immediately, or should their effective date be January 1, 2005, which is the first day of the year following the completion of the current election cycle? Does the Commission have a legal basis for delaying the effective date of any final rules it adopts?

Under the proposed rules in Alternative 1–B, separate segregated funds and nonconnected committees would be permitted to allocate expenses for partisan voter drives and for communications that promote or oppose a political party between Federal and non-Federal accounts according to the ''funds expended'' method, which is consistent with the requirements of current section 106.6(c) for administrative expenses and generic voter drives. The proposal would add a minimum Federal percentage to the ''funds expended'' method, and would also clarify the ratio in the ''funds expended'' method by further describing the Federal component of that ratio. Finally, the proposal would specify an allocation method for communications that promote both candidates and political parties.

A. Partisan Voter Drives

The proposal would replace the references to ''generic voter drives'' in current 11 CFR 106.6(b)(1)(iii) and (2)(iii) with references to ''partisan voter drives'' as defined in proposed 11 CFR 100.34. Political committees are currently required to allocate the costs for ''generic voter drives,'' which include voter drives that urge the general public to support candidates of a particular party or associated with a particular issue, without mentioning a specific candidate. Under Alternative 1–B, most ''generic voter drives'' would be considered an allocable expenditure as a ''partisan voter drive'' under proposed 11 CFR 100.34 and 106.6(b)(1)(iii), (2)(iii), and (c). Voter drives that urge the general public to register, vote or support candidates associated with a particular issue would continue to be allocable under proposed 11 CFR 106.6(b)(1)(iii), (b)(2)(iii), and (c).

Partisan voter drives that include any communication that promotes, supports, attacks, opposes, or expressly advocates a clearly identified Federal candidate are expenditures subject to allocation under current 11 CFR 106.1, or, if the communication also promotes or opposes a political party, the partisan voter drive would be allocated under proposed 11 CFR 106.6(f), which is described below. In all other instances, expenditures for partisan voter drives would be allocable under the ''funds expended'' method of proposed 11 CFR 106.6(c). Because ''partisan voter drives'' would be defined as ''expenditures'' under proposed 11 CFR 100.34 and 100.115, the communications involved would not be limited to those that meet the definition of ''public communication'' in current 11 CFR 100.26 through 100.28.

Current 11 CFR 106.1(a)(1) provides that the allocation methods in that section shall be used to allocate payments involving both expenditures on behalf of one or more clearly identified Federal candidates and disbursements on behalf of one or more clearly identified non-Federal candidates. Proposed section 106.6(f), which is described below, would provide an allocation method similar in some respects to the ''expected benefit'' method under current section 106.1. Proposed section 106.6(g) would specify that public communications that promote, support, attack or oppose a clearly identified Federal candidate, without also promoting or opposing a political party, would be allocable under section 106.1 as expenditures or disbursements on behalf of the clearly identified Federal or non-Federal candidates. Under this approach, the Commission is not proposing any changes to 11 CFR 106.1(a)(1) and instead would rely on the limitations in proposed section 106.6(b), (c), (f) and (g) to ensure that all partisan voter drives except those that promote, support, attack, oppose, or expressly advocate a clearly identified Federal candidate would be subject to allocation under section 106.6(c). Comments are sought on this approach.

B. Public Communications That Promote or Support a Political Party

The proposal would also require nonconnected committees and separate segregated funds to allocate costs of public communications that promote or oppose a political party, which would be expenditures under proposed 11 CFR 100.116(b), under the ''funds expended'' method in proposed 11 CFR 106.6(c). If such a communication also promotes, supports, attacks, or opposes a clearly identified Federal candidate, it would be allocable under proposed 11 CFR 106.6(f), described below. Nonpartisan voter drives that include a public communication would be subject to the same allocation regime. A public communication that promotes or opposes a political party, but that does not also promote, support, attack or oppose a clearly identified Federal candidate, would be allocable under

proposed 11 CFR 106.6(c), without regard to references to Federal candidates or even express advocacy of candidates for State office. Thus, a communication that, for example, promotes the Republican Party and the Governor of New York's reelection would be allocable under proposed 11 CFR 106.6(c).

The charts below illustrate the allocation methods that would be required under Alternative 1–B.

Allocation for Nonconnected Committees and Separate Segregated Funds of Partisan Voter Drives That Include a Communication

In the communication,

How is the Federal Candidate Depicted?	Does it promote or oppose a political party?	Does it clearly identify a Non-Federal Candidate?	Allocation: citation and method
None	NO	NO	106.6(c) fund expended.
		YES	106.6(c) fund expended.
	YES	NO	106.6(c) fund expended.
		YES	106.6(c) fund expended.
Clearly ID'd Candidate	NO	NO	106.6(c) fund expended.
		YES	106.6(c) fund expended.
	YES	NO	106.6(c) fund expended.
		YES	106.6(c) fund expended.
PASO'd or Express Advocacy	NO	NO	106.1 = time/space (100% Fed).
		YES	106.1 = time/space.
	YES	NO	106.6(f) time/space & fund exp.
		YES	106.6(f) time/space & fund exp.

Allocation for Nonconnected Committees and Separate Segregated Funds of Public Communications and Non-Partisan Voter Drives That Include a Public Communication

In the communication,

How is the Federal Candidate Depicted?	Does it promote or oppose a political party?	Does it clearly identify a Non-Federal Candidate?	Allocation: citation and method
None	NO	NO	N/A
		YES	106.1 = time/space (100% NF)
	YES—*See* partisan voter drive allocation chart.		
Clearly ID'd candidate	NO	NO	N/A
		YES	106.1 = time/space
	YES—*See* partisan voter drive allocation chart.		
PASO'd or Express Advocacy	*See* partisan voter drive allocation chart.		

C. Minimum Federal percentage

The proposal would add a minimum Federal percentage to the ''funds expended'' allocation method. This minimum would be the same percentage that is applicable to State, district, and local political party committees' allocation of voter drives under current 11 CFR 106.7(d)(3). It varies with the Federal offices that appear on a particular State's ballot, ranging from 15%, in election years in which a State votes for candidates for the United States House of Representatives only, to 36%, in election years in which a State votes for president and a senator as well. *See* current 11 CFR 106.7(d)(3)(i) through (iv). Related changes to reporting requirements are also proposed for 11 CFR 104.10.

For nonconnected committees and separate segregated funds that conduct partisan voter drives, or engage in other activities subject to the ''funds expended'' allocation method, in more than one State, two alternative proposed rules are presented. Alternative 3–A would require such committees to use the greatest percentage applicable to any of the States in which the committee conducted such activities for all its disbursements allocable under proposed 11 CFR 106.6(c). Alternative 3–B would permit such committees to allocate such costs on a State-by-State basis according to the percentage applicable in each State. Under Alternative 3–B, a committee could choose to simplify its allocation by using the highest applicable percentage to avoid the complications of a State-by-State allocation.

The Commission is considering other minimum Federal percentages as alternatives to those presented in the proposed rules. Should the rules in 11 CFR 106.6 apply different minimum Federal percentages than those for State, district and local political party committees? Should the Commission adopt a fixed minimum Federal percentage? Should it select a higher minimum for committees that conduct activities in several States? For example, the allocation rule could specify that nonconnected committees and separate segregated funds that conduct activities in fewer than 10 States must use a minimum Federal percentage of 25 percent, while those that do so in 10 or more States would face a minimum Federal percentage of 50 percent. The 25 percent figure was chosen as the average of the four percentages in current 11 CFR 106.7(d)(3), and the 50 percent figure was chosen to reflect the broader scope of activities and as a slight reduction to the 60 percent or 65 percent applicable to national party committees under previous 11 CFR 106.5(b)(2), prior to its sunset on December 31, 2002. *See* 11 CFR 106.5(h)(2003). If the final rule should take such an approach, what should the minimum Federal percentages be?

D. Clarifying the Ratio in the ''Funds Expended'' Method

The ''funds expended'' allocation method provides that expenses are allocated between the Federal and non-

Federal accounts of a nonconnected committee or a separate segregated fund based on the ratio of Federal expenditures to total Federal and non-Federal disbursements made by the committee during the two-year Federal election cycle. Current section 106.6(c)(1) specifies that: ''In calculating its federal expenditures, the committee shall include only amounts contributed to or otherwise spent on behalf of specific federal candidates.'' The proposal would clarify that ''amounts * * * spent on behalf of specific Federal candidates'' includes independent expenditures and amounts spent on public communications that promote, support, attack, support, or oppose a clearly identified Federal candidate. *See* proposed 11 CFR 106.6(c)(1)(i). This proposal reflects the Commission's application of current regulations in a recent Advisory Opinion. *See* AO 2003–37, at 4 n.5. The Commission seeks comment on whether the conclusion in this Advisory Opinion should be expressly stated in proposed 11 CFR 106.6(c)(1)(i).

E. Public Communications That Promote a Political Party and a Federal Candidate

Proposed section 106.6(f) would specify an allocation method for public communications that promote or oppose a political party and promote, support, attack or oppose a clearly identified Federal candidate. This method would apply to this communication whether or not the communications also clearly identify a non-Federal candidate.

Proposed section 106.6(f) would provide an allocation method that combines the ''time and space'' method and the ''funds expended'' method for communications that support Federal candidates and a political party. The communication would first be subject to a ''time and space'' analysis to split the communication among the candidates and the political party. The portions attributed to candidates would be allocated to either the Federal or non-Federal accounts based on the candidates' status. The portion attributed to the political party would be allocated under the ''funds expended'' method in proposed 11 CFR 106.6(c).

This approach would be consistent with the Commission's analysis and conclusions based on the application of current regulations in a recent Advisory Opinion. *See* AO 2003–37, at 12. Should the Commission expressly incorporate this result in its allocation regulations?

F. Public Communications That Promote a Federal Candidate, Without Promoting or Opposing a Political Party

Proposed section 106.6(g) would specify that public communications that promote, support, attack or oppose a clearly identified Federal candidate without promoting or opposing a political party by a nonconnected committee or separate segregated fund would be allocable under current section 106.1. Nonpartisan voter drives that include a public communication with similar content would be subject to the same allocation requirements. The only other expenditures or disbursements by a nonconnected committee or separate segregated fund for a public communication or voter drive that would be allocable under current section 106.1 would involve communications that clearly identify non-Federal candidates, but do not promote, support, attack, oppose, or expressly advocate a Federal candidate.

Certification of No Effect Pursuant to 5 U.S.C. 605(b) (Regulatory Flexibility Act)

When an agency issues certain rulemaking proposals, the Regulatory Flexibility Act (''RFA'') requires the agency to ''prepare and make available for public comment an initial regulatory flexibility analysis'' which will describe the impact of the proposed rule on small entities. 5 U.S.C. 603(a). Section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an initial regulatory flexibility analysis, if the proposed rulemaking is not expected to have a significant economic impact on a substantial number of small entities.

Political Committees

One part of the proposed rule would amend the Commission's definition of ''political committee.'' Under the Federal Election Campaign Act of 1971, as amended, and the Commission's regulations, political committees have certain reporting obligations that do not apply to non-political committees. Moreover, there are restrictions and limitations on the receipt of funds by political committees that do not apply to non-political committees. This part of the proposed rule would directly affect only those organizations that are not currently political committees, but would fall within the amended definition of ''political committee'' in the proposed rule, if the Commission decides to amend the definition.

It is difficult for the Commission to estimate the number of organizations that may be affected by the proposed change in the definition of political committee. The Commission believes, however, that most of the organizations that would be affected by the proposed rule are ''political organizations'' organized under section 527 of the Internal Revenue Code. Under the North American Industry Classification System (''NAICS''), political organizations are considered to be ''small entities'' if they have less than $6 million in average annual receipts. The Commission estimates that all but a few of the 527 organizations that may be affected by the proposed rules, if adopted, have less than $6 million in average annual receipts and, therefore, qualify as small entities under the NAICS.

The Commission notes that a number of these political organizations are already registered with the Commission as political committees and therefore, would not be affected by the proposed change to the definition of political committee. The proposed rule also includes various exceptions. For example, the proposed rule would only affect those political organizations that: (1) Meet the ''major purpose'' test set forth in proposed section 100.5(a)(2) of the proposed rule; and (2) exceed the $1,000 expenditure and disbursement thresholds set forth in proposed section 100.5(a)(1) of the proposed rule. Moreover, the proposed rule would exempt from political committee status those political organizations that are involved primarily in state, as opposed to Federal, political activity. Consequently, while it is difficult for the Commission to estimate precisely the number of organizations that would be affected by the proposed rule, the Commission believes that, as a result of the exceptions described above, the proposed rule would not have an economic effect on a substantial number of the small entities.

Furthermore, the Commission does not believe that the proposed rule, if adopted, will have a significant economic impact on those small entities that would be affected. As stated above, the effect of the proposed rule would be to impose certain reporting requirements and restrictions on funding certain activities upon those political organizations that would become political committees under the amended definition of ''political committee.''

The reporting requirements, however, are not complicated and would not be costly to complete. For the most part, the reports would be filed electronically, using free software provided by the Commission. The Commission also provides free technical support and free access to the

Commission's Information Specialists to assist political committees in submitting the reports. It is highly unlikely that a political committee would need to hire additional staff or retain professional services to comply with the reporting requirements.

The Commission also notes that the Act and the Commission's regulations do not place any limit on the amount of funds that a political committee would be permitted to spend. The proposed rule would merely limit the types of funds that may be used to pay for certain activities, which are essentially those activities that fall within the definition of ''expenditure.'' Political committees are, and will remain, free to spend unlimited funds on those activities that do not fall within the definition of expenditure. Moreover, the Commission is considering alternatives that would have even less of an impact than those described above, including the possibility of not making any changes to the definition of ''political committee.''

Expenditures and Allocation

The proposed rule would also amend the Commission's definition of ''expenditure'' to include payments for activities that are not expressly included in the Commission's existing definition of expenditure. Whether a disbursement qualifies as an ''expenditure'' determines whether the disbursement must be paid for with Federal funds or may be paid for with non-Federal funds. It also impacts whether an organization satisfies the $1,000 expenditure threshold for political committee status. The proposed rule would also revise the Commission's rules regarding the allocation of certain disbursements between a political committee's Federal account and non-Federal account. Consequently, these parts of the proposed rule could impact any organization or individual that engages in activities in connection with a Federal election.

As explained above with respect to the proposed amendment of the definition of ''political committee,'' the proposed changes are unlikely to have a significant economic impact on small entities. Neither the proposed change in the definition of ''expenditure'' nor the proposed change in the allocation rules would limit the amount of money that may be raised or spent on electoral activity. The proposed rules would merely require that only funds raised in accordance with the Act may be spent in connection with Federal elections. Moreover, the Commission is considering alternatives that would have even less of an impact than those described above, including the possibility of not making any changes to the definition of ''expenditure'' and the allocation rules.

Certification

For the foregoing reasons, the Commission hereby certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities. The Commission invites comment from members of the public who believe that the proposed rule will have a significant economic impact on a substantial number of small entities.

List of Subjects

11 CFR Part 100

Elections.

11 CFR Part 102

Political committees and parties, Reporting and recordkeeping requirements.

11 CFR Part 104

Campaign funds, Political committees and parties, Reporting and recordkeeping requirements.

11 CFR Part 106

Campaign funds, Reporting and recordkeeping requirements.

11 CFR Part 114

Business and industry, Elections, Labor.

For the reasons set out in the preamble, it is proposed to amend subchapter A of chapter I of title 11 of the Code of Federal Regulations as follows:

PART 100—SCOPE AND DEFINITIONS (2 U.S.C. 431)

1. The authority citation for part 100 would continue to read as follows:

Authority: 2 U.S.C. 431, 434 and 438(a)(8).

2. Section 100.5 would be amended by revising the introductory paragraph and paragraph (a) to read as follows:

§ 100.5 Political committee (2 U.S.C. 431 (4), (5), (6)).

Political Committee means any group meeting the conditions set forth in paragraph (a), (b), (c), (d) or (e) of this section.

(a)(1) Except as provided in paragraphs (b), (c), (d), (e)(1), and (e)(3) of this section, *political committee* means any committee, club, association, or other group of persons:

(i) That receives contributions aggregating in excess of $1,000 or that makes expenditures aggregating in excess of $1,000 during a calendar year; and

(ii) For which the nomination or election of one or more Federal candidates is a major purpose.

Alternative 1–A

(iii) For purposes of paragraph (a)(1)(i) of this section only, the term *expenditure* shall include payments for Federal election activities described in 11 CFR 100.24(b)(1) through (b)(3) and payments for all or any part of an electioneering communication as defined in 11 CFR 100.29.

End of Alternative 1–A. For Alternative 1–B, *see* 11 CFR 100.34 to 114.4.

(2) For purposes of paragraph (a)(1) of this section, a committee, club, association or group of persons has the nomination or election of a candidate or candidates as a major purpose if it satisfies the conditions set forth in paragraph (a)(2)(i), (a)(2)(ii), (a)(2)(iii), or (a)(2)(iv) of this section.

(i) The organizational documents, solicitations, advertising, other similar written materials, public pronouncements, or any other communication of the committee, club, association or group of persons demonstrate that its major purpose is to nominate, elect, defeat, promote, support, attack or oppose a clearly identified candidate or candidates for Federal office or the Federal candidates of a clearly identified political party; and during the current calendar year or during any of the previous four calendar years, the committee, club, association or group of persons makes more than $10,000 total disbursements composed of any combination of the following:

(A) Contributions;

(B) Expenditures (including independent expenditures);

(C) Payments for Federal election activities described in 11 CFR 100.24(b)(1) through (b)(3); and

(D) Payments for all or any part of an electioneering communication as defined in 11 CFR 100.29.

(ii) More than 50 percent of the committee's, club's association's or group's total annual disbursements during any of the previous four calendar years are composed of any combination of the following:

(A) Contributions;

(B) Expenditures (including independent expenditures);

(C) Payments for Federal election activities described in 11 CFR 100.24(b)(1) through (b)(3); and

(D) Payments for all or any part of an electioneering communication as defined in 11 CFR 100.29.

(iii) During the current calendar year or during any of the previous four

calendar years, the committee, club, association or group of persons makes more than $50,000 in total disbursements composed of any combination of the following:

(A) Contributions;

(B) Expenditures (including independent expenditures);

(C) Payments for Federal election activities described in 11 CFR 100.24(b)(1) through (b)(3); and

(D) Payments for all or any part of an electioneering communication as defined in 11 CFR 100.29.

Alternative 2–A

(iv) The committee, club, association or group of persons is organized under Section 527 of the Internal Revenue Code, 26 U.S.C. 527, except that this paragraph (a)(2)(iv) shall not apply to:

(A) The campaign organization of an individual seeking nomination, election, appointment or selection to a non-Federal office;

(B) A committee, club, association or group of persons that is organized solely for the purpose of promoting the nomination or election of a candidate or candidates to a non-Federal office;

(C) A committee, club, association or group of persons whose election or nomination activities relate solely to elections where no candidate for Federal office appears on the ballot;

(D) A committee, club, association, or group of persons that operates solely within one State and, pursuant to State law, must file financial disclosure reports with one or more branches, departments or agencies of that State's government, showing all its activities in that State; or

(E) A committee, club, association, or group of persons that is organized solely for the purpose of influencing the nomination or appointment of individuals to a non-elected office, or the nomination, election, or selection of individuals to leadership positions within a political party.

Alternative 2–B

(iv) The committee, club, association or group of persons is organized under Section 527 of the Internal Revenue Code, 26 U.S.C. 527.

* * * * *

Alternative 1–B

3. Section 100.34 would be added to read as follows:

§ 100.34 Partisan voter drives.

Partisan voter drive means any or all of the following:

(a) Voter registration activity as described in 11 CFR 100.24(a)(2) and (b)(1), except for voter registration activity described in 11 CFR 100.133;

(b) Voter identification as described in 11 CFR 100.24(a)(1), (a)(4), and (b)(2)(i), except for voter identification when no effort has been or will be made to determine or record the party or candidate preference of individuals on the voter list; and

(c) Get-out-the-vote activity as described in 11 CFR 100.24(a)(1), (a)(3), and (b)(2)(iii), except for get-out-the-vote activity described in 11 CFR 100.133.

4. Section 100.57 would be added to subpart B to read as follows:

§ 100.57 Solicitations with express advocacy.

A gift, subscription, loan, advance, or deposit of money or anything of value made by any person in response to any communication that includes material expressly advocating, as defined in 11 CFR 100.22, a clearly identified Federal candidate is a contribution to the person making the communication.

5. Section 100.115 would be added to subpart D to read as follows:

§ 100.115 Partisan voter drives.

A payment, distribution, loan, advance, or deposit of money or anything of value made by, or on behalf of any person for partisan voter drives, as described in 11 CFR 100.34, is an expenditure, except Levin funds, as defined in 11 CFR 300.2(i), that are disbursed for partisan voter drives are not expenditures.

6. Section 100.116 would be added to subpart D to read as follows:

§ 100.116 Certain public communications.

A payment, distribution, loan, advance, or deposit of money or anything of value made by, or on behalf of any person for a public communication, as defined in 11 CFR 100.26, is an expenditure if the public communication:

(a) Refers to a clearly identified candidate for Federal office, and promotes or supports, or attacks or opposes any candidate for Federal office; or

(b) Promotes or opposes any political party.

7. Section 100.133 would be revised to read as follows:

§ 100.133 Nonpartisan voter registration and get-out-the-vote activities.

Any cost incurred for activity designed to encourage individuals to register to vote or to vote is not an expenditure if:

(a) It does not include a communication that promotes, supports, attacks, or opposes a Federal or non-Federal candidate or that promotes or opposes a political party;

(b) No effort is or has been made to determine the party or candidate preference of individuals before encouraging them to register to vote or to vote; and

(c) Information concerning likely party or candidate preference has not been used to determine which individuals to encourage to register to vote or to vote.

(d) Corporations and labor organizations that engage in such activity shall comply with the additional requirements set forth in 11 CFR 114.4(c) and (d). *See also* 11 CFR 114.3(c)(4).

8. Section 100.149 would be amended by revising the introductory paragraph to read as follows:

§ 100.149 Voter registration and get-out-the-vote activities for Presidential candidates (''coattails'' exception).

Notwithstanding 11 CFR 100.115, the payment by a State or local committee of a political party of the costs of voter registration and get-out-the-vote activities conducted by such committee on behalf of the Presidential and Vice Presidential nominee(s) of that party is not an expenditure for the purpose of influencing the election of such candidate(s) provided that the following conditions are met:

* * * * *

9. Section 100.155 would be added to read as follows:

§ 100.155 Allocated amounts.

Notwithstanding 11 CFR 100.115 or 100.116, any non-Federal funds disbursed by a separate segregated fund pursuant to 11 CFR 106.6(b)(1)(iii) through (vi) or by a nonconnected committee pursuant to 11 CFR 106.6(b)(2)(iii) through (vi) are not expenditures.

PART 102—REGISTRATION, ORGANIZATION, AND RECORDKEEPING BY POLITICAL COMMITTEES (2 U.S.C. 433)

10. The authority citation for part 102 would continue to read as follows:

Authority: 2 U.S.C. 432, 433, 434(a)(11), 438(a)(8), 441d.

11. Sections 102.18 through 102.49 would be added and reserved.

12. Subpart A would be added to read as follows:

Subpart A—Conversion Rules

Sec.

Subpart A—Conversion Rules

§ 102.50 What are the definitions for this subpart A?

For purposes of this subpart A, the following terms are defined as follows:

Allocable expenditures mean expenditures that are allocable under 11 CFR 106.1 or 106.6.

Covered period means the period of time beginning on January 1 of the calendar year immediately preceding the calendar year in which a committee, club, association, or other group of persons first satisfies the definition of ''political committee'' in 11 CFR 100.5(a) and ending on the date that the committee, club, association, or other group of persons first satisfies the definition of ''political committee'' in 11 CFR 100.5(a).

Federal funds has the same meaning as in 11 CFR 300.2(g).

Federally permissible funds mean funds that comply with the amount limitations and source prohibitions of the Act and were received during the covered period by the committee, club, association, or other group of persons that becomes a political committee.

§ 102.51 To which organizations does this subpart A apply?

This subpart A applies to a committee, club, association, or other group of persons that satisfies the definition of ''political committee'' under 11 CFR 100.5(a) and that made contributions, expenditures, independent expenditures, or allocable expenditures during the covered period.

§ 102.52 What must a committee, club, association, or other group of persons do upon becoming a political committee under 11 CFR 100.5?

The committee, club, association, or other group of persons, upon becoming a political committee shall:

(a) File a Statement of Organization pursuant to 11 CFR 102.1(d);

(b) Establish a campaign depository pursuant to 11 CFR 103.2;

(c) Determine the amount of contributions, expenditures, independent expenditures and allocable expenditures that it made during the covered period;

(d) Determine the amount of federally permissible funds that it received; and

(e) File financial disclosure reports with the Commission in accordance with 11 CFR part 104 and 11 CFR 102.56.

§ 102.53 How must a new political committee treat the amount of contributions, expenditures, independent expenditures and allocable expenditures that it made during the covered period (before it became a political committee)?

(a) A political committee must treat the amount of contributions, expenditures, independent expenditures, and allocable expenditures that it made during the covered period as a debt owed by its Federal account to its non-Federal account.

(b) The political committee may not make any additional contributions, expenditures, independent expenditures or allocable expenditures until this debt is satisfied.

(c) The political committee may satisfy this debt by:

(1) Converting some or all of its Federally permissible funds to Federal funds pursuant to this subpart A;

(2) Raising new Federal funds and transferring the Federal funds to the non-Federal account; or

(3) A combination of paragraphs (c)(1) and (c)(2) of this section.

§ 102.54 How can a political committee convert its Federally permissible funds to Federal funds?

A political committee may convert its Federally permissible funds to Federal funds only in accordance with this section. To convert Federally permissible funds to Federal funds, the political committee shall:

(a) Send a written notification to the donor(s) of the Federally permissible funds that the political committee seeks to convert to Federal funds. The written notification must:

(1) Inform the donor(s) that the political committee has registered with the Commission as a Federal political committee;

(2) Make all disclaimers required by 11 CFR 110.11;

(3) Inform the donor(s) of the amount of their donation that the political committee seeks to convert to Federal funds and request that the donor(s) grant written consent for the political committee to use that amount of their donation for the purpose of influencing Federal elections;

(4) Advise the donor(s) that they may grant written consent for an amount less than the amount the political committee seeks to convert to Federal funds and that they may refuse to grant consent to convert any of the funds; and

(5) Advise the donor(s) that, by granting written consent, the donor(s) will be considered to have made a contribution to the political committee, that the contribution will be subject to the amount limitations in 2 U.S.C. 441a(a), and that the contribution will be considered made on the date that the written consent is signed by the donor(s); and

(b) Receive the written consent described in paragraph (a) of this section within 60 days after first satisfying the definition of ''political committee'' in 11 CFR 100.5(a).

§ 102.55 What if the political committee is able to convert an amount of Federally permissible funds to Federal funds that is greater than the amount of contributions, expenditures, independent expenditures and allocable expenditures that it made during the covered period?

If the political committee is able to convert an amount of Federally permissible funds to Federal funds that is greater than the amount of contributions, expenditures, independent expenditures, and allocable expenditures that it made during the covered period, the political committee:

(a) Must use the converted Federal funds to satisfy the debt described in 11 CFR 102.53; and

(b) May, but is not required to, transfer to its Federal account the remaining converted Federal funds. The amount of converted Federal funds transferred to the political committee's Federal account under this section, however, may not exceed the total amount of funds the political committee had cash-on-hand on the date that it first satisfied the definition of political committee under 11 CFR 100.5(a).

§ 102.56 What are the initial reporting requirements?

In addition to filing its Statement of Organization under 11 CFR 102.2, the political committee shall include the following information along with other required information in the first report due under 11 CFR 104.5:

(a) All contributions, expenditures, independent expenditures and allocable expenditures it made during the covered period;

(b) The amount of any Federally permissible funds that have been

converted to Federal funds pursuant to 11 CFR 102.54;

(c) The information required in 11 CFR 104.3(a)(4)(i) for each donor who provided written consent under 11 CFR 102.54;

(d) The amount described in paragraph (a) of this section minus the amount described in paragraph (b) of this section as a debt owed by the Federal account to the non-Federal account; and

(e) The amount and date of any transfers made under 11 CFR 102.55.

PART 104—REPORTS BY POLITICAL COMMITTEES (2 U.S.C. 434)

13. The authority citation for part 104 would continue to read as follows:

Authority: 2 U.S.C. 431(1), 431(8), 431(9), 432(i), 434, 438(a)(8) and (b), 439a, and 441a.

14. Section 104.10 would be amended by revising the introductory text in paragraph (b), the heading in (b)(1), and paragraph (b)(1)(i) and the introductory text in paragraph (b)(1)(ii) to read as follows:

§ 104.10 Reporting by separate segregated funds and nonconnected committees of expenses allocated among candidates and activities.

* * * * *

(b) *Expenses allocated among activities.* A political committee that is a separate segregated fund or a nonconnected committee and that has established separate Federal and non-Federal accounts under 11 CFR 102.5(a)(1)(i) shall allocate between those accounts its administrative expenses and its costs for fundraising and partisan voter drives according to 11 CFR 106.6, and shall report those allocations according to paragraphs (b)(1) through (5) of this section, as follows:

(1) *Reporting of allocation of administrative expenses and costs of partisan voter drives.*

(i) In the first report in a calendar year disclosing a disbursement for administrative expenses or partisan voter drives, as described in 11 CFR 106.6(b), the committee shall state the allocation ratio to be applied to these categories of activity according to 11 CFR 106.6(c), (f), or (g), as applicable, and the manner in which it was derived. The committee shall also state whether the calculated ratio or the minimum Federal percentage required by 11 CFR 106.6(c)(1)(ii) will be used.

(ii) In each subsequent report in the calendar year itemizing an allocated disbursement for administrative expenses or partisan voter drives:

* * * * *

PART 106—ALLOCATIONS OF CANDIDATE AND COMMITTEE ACTIVITIES

15. The authority citation for part 106 would continue to read as follows:

Authority: 2 U.S.C. 438(a)(8), 441a(b), 441a(g).

16. Section 106.6 would be amended by:

a. Removing the words ''(c) and (d)'' from paragraph (a) and adding in their place the words ''(c), (d), (f) and (g)''; and

b. Revising the introductory text in paragraph (c) and paragraphs (b)(1)(iii), (b)(2)(iii), (c)(1), and (e)(2)(ii)(B) and adding paragraphs (b)(1)(iv), (b)(1)(v), (b)(1)(vi), (b)(2)(iv), (b)(2)(v), (b)(2)(vi), (f) and (g) to read as follows:

§ 106.6 Allocation of expenses between Federal and non-Federal activities by separate segregated funds and nonconnected committees.

* * * * *

(b) * * *

(1) * * *

(iii) Partisan voter drives as described in 11 CFR 100.34 or any other activities that urge the general public to register, vote or support candidates of a particular party or associated with a particular issue, without including a public communication that is described in paragraph (b)(1)(iv), (v), or (vi) of this section;

(iv) Public communications that promote or oppose a political party, as described in 11 CFR 100.116(b), but do not promote, support, attack, or oppose a clearly identified Federal candidate, as described in 11 CFR 100.116(a);

(v) Public communications that promote, support, attack, or oppose a clearly identified Federal candidate, as described in 11 CFR 100.116(a), and that promote or oppose a political party, as described in 11 CFR 100.116(b); and

(vi) Public communications that promote, support, attack, or oppose a clearly identified Federal candidate, as described in 11 CFR 100.116(a), but that do not promote or oppose a political party, as described in 11 CFR 100.116(b).

(2) * * *

(iii) Partisan voter drives as described in 11 CFR 100.34 or any other activities that urge the general public to register, vote or support candidates of a particular party or associated with a particular issue, without including a public communication that is described in paragraph (b)(2)(iv), (v), or (vi) of this section;

(iv) Public communications that promote or oppose a political party, as described in 11 CFR 100.116(b), but do not promote, support, attack, or oppose a clearly identified Federal candidate, as described in 11 CFR 100.116(a);

(v) Public communications that promote, support, attack, or oppose a clearly identified Federal candidate, as described in 11 CFR 100.116(a), and that promote or oppose a political party, as described in 11 CFR 100.116(b); and

(vi) Public communications that promote, support, attack, or oppose a clearly identified Federal candidate, as described in 11 CFR 100.116(a), but that do not promote or oppose a political party, as described in 11 CFR 100.116(b).

(c) *Method for allocating administrative expenses, costs of partisan voter drives, and certain public communications.* Nonconnected committees and separate segregated funds shall allocate their administrative expenses, costs of partisan voter drives, and costs of public communications that promote or support any political party as described in paragraph (b)(1)(i) through (iv) or (b)(2)(i) through (iv) of this section, according to the funds expended method, described in paragraphs (c)(1) and (2) as follows:

(1)(i) Under this method, expenses shall be allocated based on the ratio of Federal expenditures to total Federal and non-Federal disbursements made by the committee during the two-year Federal election cycle, subject to the minimum Federal percentage described in paragraph (c)(1)(ii) of this section. This ratio shall be estimated and reported at the beginning of each Federal election cycle, based upon the committee's Federal and non-Federal disbursements in a prior comparable Federal election cycle or upon the committee's reasonable prediction of its disbursements for the coming two years. In calculating its Federal expenditures, the committee shall include only amounts contributed to or otherwise spent on behalf of specific Federal candidates, including independent expenditures and amounts spent on public communications that promote, attack, support, or oppose clearly identified Federal candidates. Calculation of total Federal and non-Federal disbursements shall also be limited to disbursements for specific candidates, and shall not include overhead or other generic costs.

(ii) *Minimum Federal percentage for administrative expenses*, partisan voter drives, and certain public communications. The minimum Federal percentage for any costs allocable under paragraph (c) of this section is as follows:

(A) For a nonconnected committee or a separate segregated fund that conducts

partisan voter drives in or distributes public communications subject to allocation under paragraph (c) of this section to only one State, the minimum Federal percentage shall be the percentage in 11 CFR 106.7(d)(3)(i), (ii), (iii), or (iv) that is applicable to the Federal elections in that State.

Alternative 3–A

(B) For a nonconnected committee or a separate segregated fund that conducts partisan voter drives in or distributes public communications subject to allocation under paragraph (c) of this section to more than one State, the minimum Federal percentage shall be the greatest percentage in 11 CFR 106.7(d)(3)(i), (ii), (iii), or (iv) that is applicable to any of the Federal elections in any of the States in which the nonconnected committee or separate segregated fund conducts activities allocable under paragraph (c) of this section.

Alternative 3–B

(B) For a nonconnected committee or a separate segregated fund that conducts partisan voter drives in or distributes public communications subject to allocation under paragraph (c) of this section to more than one State, the minimum Federal percentage for each State in which the nonconnected committee or separate segregated fund conducts activities allocable under paragraph (c) of this section shall be the percentage in 11 CFR 106.7(d)(3)(i), (ii), (iii), or (iv) that is applicable to the Federal elections in that State.

* * * * *

(e) * * *

(2) * * *

(ii) * * *

(B) Except as provided in paragraph (d)(2) of this section or in 11 CFR part 102, subpart A, such funds may not be transferred more than 10 days before or more than 60 days after the payments for which they are designated are made.

* * * * *

(f) *Method for allocating public communications that promote, support, attack or oppose a clearly identified Federal candidate, and promote or oppose a political party.* Nonconnected committees and separate segregated funds shall allocate public communications described in paragraphs (b)(1)(v) or (b)(2)(v) of this section as follows:

(1) The public communication shall be attributed according to the proportion of space and time devoted to each candidate and political party as compared to the total space and time devoted to all candidates and political party;

(2) The portion of the public communication that is attributed to the Federal candidate(s) shall be allocated to the nonconnected committee's or separate segregated fund's Federal account;

(3) The portion of the public communication that is attributed to the political party shall be allocated in accordance with paragraph (c) of this section; and

(4) The portion of the public communication that is attributed to clearly identified non-Federal candidate(s), if any, may be allocated to either the Federal or non-Federal account.

(g) *Method for allocating public communications that promote, support, attack or oppose a clearly identified Federal candidate, without promoting or opposing a political party.* Nonconnected committees and separate segregated funds shall allocate public communications described in paragraphs (b)(1)(vi) and (b)(2)(vi) of this section under 11 CFR 106.1 as expenditures or disbursements on behalf of the clearly identified candidates.

PART 114—CORPORATE AND LABOR ORGANIZATION ACTIVITY

17. The authority citation for part 114 would continue to read as follows:

Authority: 2 U.S.C. 431(8)(B), 431(9)(B), 432, 434, 437d(a)(8), 438(a)(8), 441b.

18. Section 114.4 would be amended by revising paragraphs (c)(2), (c)(3), and the introductory text of paragraph (d) to read as follows:

§ 114.4 Disbursements for communications beyond the restricted class in connection with a Federal election.

* * * * *

(c) * * *

(2) *Registration and voting communications.* A corporation or labor organization may make registration and get-out-the-vote communications to the general public, only to the extent permitted by 11 CFR 100.133, and provided that the communications do not expressly advocate the election or defeat of any clearly identified candidate(s) or candidates of a clearly identified political party. The preparation and distribution of registration and get-out-the-vote communications shall not be coordinated with any candidate(s) or political party. A corporation or labor organization may make communications permitted under this section through posters, billboards, broadcasting media, newspapers, newsletter, brochures, or similar means of communication with the general public.

(3) *Official registration and voting information.* A corporation or labor organization may engage in the activities described in paragraphs (c)(3)(i) through (iii) of this section only to the extent permitted by 11 CFR 100.133.

* * * * *

(d) *Registration and get-out-the-vote drives.* A corporation or labor organization may support or conduct voter registration and get-out-the-vote drives that are aimed at employees outside its restricted class and the general public in accordance with the conditions set forth in paragraphs (d)(1) through (d)(6) of this section and only to the extent permitted by 11 CFR 100.133. Registration and get-out-the-vote drives include providing transportation to the polls or to the place of registration.

* * * * *

Dated: March 4, 2004.

Bradley A. Smith,

Chairman, Federal Election Commission.

[FR Doc. 04–5290 Filed 3–10–04; 8:45 am]

BILLING CODE 6715–01–P

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EMILY'S LIST,	)	
	)	
Plaintiff,	)	Civ. No. 05-0049 (CKK)
	)	
v.	)	
	)	
FEDERAL ELECTION COMMISSION,	)	EXHIBIT
	)	
Defendant.	)	

EXHIBIT 2

Political Committee Status, Definition of Contribution, and Allocation for Separate Segregated Funds and Nonconnented Committees (Nov. 23, 2004).

Parent: Department of Transportation

Components

Federal Aviation Administration
Federal Highway Administration
Federal Motor Carrier Safety Administration (effective January 30, 2003)
Federal Railroad Administration
Federal Transit Administration
Maritime Administration
National Highway Traffic Safety Administration
Saint Lawrence Seaway Development Corporation
Surface Transportation Board (effective May 16, 1997)
Transportation Security Administration (effective January 30, 2003, expiring February 22, 2005.)
United States Coast Guard (expiring February 22, 2005.)

Parent: Department of the Treasury

Components

Alcohol and Tobacco Tax and Trade Bureau (effective November 23, 2004.)
Bureau of Alcohol, Tobacco and Firearms (expiring February 22, 2005.)
Bureau of Engraving and Printing
Bureau of the Mint
Bureau of the Public Debt
Comptroller of the Currency
Federal Law Enforcement Training Center (expiring February 22, 2005.)
Financial Crimes Enforcement Network (FinCEN) (effective January 30, 2003)
Financial Management Service
Internal Revenue Service
Office of Thrift Supervision
United States Custom Service (expiring February 22, 2005.)
United States Secret Service (expiring February 22, 2005.)

■ 3. Effective February 22, 2005, appendix B to part 2641 is further amended by:

■ A. Removing the Immigration and Naturalization Service from the listing for the Department of Justice;

■ B. Removing the Transportation Security Agency and the United States Coast Guard from the listing for the Department of Transportation; and

■ C. Removing the Bureau of Alcohol, Tobacco and Firearms, the Federal Law Enforcement Training Center, the United States Custom Service and the United States Secret Service from the listing for the Department of the Treasury.

[FR Doc. 04–25897 Filed 11–22–04; 8:45 am]

BILLING CODE 6345–02–P

FEDERAL ELECTION COMMISSION

11 CFR Parts 100, 102, 104, and 106

[Notice 2004–15]

Political Committee Status, Definition of Contribution, and Allocation for Separate Segregated Funds and Nonconnected Committees

AGENCY: Federal Election Commission.

ACTION: Final rules and transmittal of regulations to Congress.

SUMMARY: The Federal Election Commission (''Commission'') is revising portions of its regulations regarding the definition of ''contribution'' and the allocation of certain costs and expenses by separate segregated funds (''SSFs'') and nonconnected committees. A new rule explains when funds received in response to certain communications by any person must be treated as ''contributions.'' In the allocation regulations, the final rules eliminate the previous allocation formula under which SSFs and nonconnected committees used the ''funds expended'' method to calculate a ratio for use of Federal and non-Federal funds for administrative and generic voter drive expenses, replacing it with a flat 50% minimum. These rules also spell out how SSFs and nonconnected committees must pay for voter drives and certain public communications. Other changes proposed previously regarding the definitions of ''political committee'' and ''expenditure'' are not being adopted. Further information is provided in the supplementary information that follows.

DATES: Effective January 1, 2005.

FOR FURTHER INFORMATION CONTACT: Ms. Mai T. Dinh, Assistant General Counsel, Mr. J. Duane Pugh Jr., Senior Attorney, Mr. Richard T. Ewell, Attorney, Mr. Robert M. Knop, Attorney, or Ms. Margaret G. Perl, Attorney, 999 E Street, NW., Washington, DC 20463, (202) 694–1650 or (800) 424–9530.

SUPPLEMENTARY INFORMATION: The Commission published a Notice of Proposed Rulemaking on March 11, 2004. *See* Notice of Proposed Rulemaking on Political Committee Status, 69 FR 11736 (Mar. 11, 2004) (''NPRM''). Written comments were due by April 5, 2004 for those commenters who wished to testify at the Commission hearing on these proposed rules, and by April 9, 2004 for commenters who did not wish to testify. The NPRM addressed a number of proposed changes to 11 CFR parts 100, 102, 104, 106 and 114. The Commission received over 100,000 comments from the public with regard to the various issues raised in the NPRM. The comments are available at *http://www.fec.gov/register.htm* under ''Political Committee Status.'' The Commission held a public hearing on April 14 and 15, 2004, at which 31 witnesses testified. A transcript of the public hearing is also available at *http://www.fec.gov/register.htm* under ''Political Committee Status.'' For the purposes of this document, the terms ''comment'' and ''commenter'' apply to both written comments and oral testimony at the public hearing.

Under the Administrative Procedure Act, 5 U.S.C. 553(d), and the Congressional Review of Agency Rulemaking Act, 5 U.S.C. 801(a)(1), agencies must submit final rules to the Speaker of the House of Representatives and the President of the Senate and publish them in the **Federal Register** at least 30 calendar days before they take effect. The final rules that follows were transmitted to Congress on November 18, 2004.

Explanation and Justification

Solicitations

The Commission is adopting one addition to the regulatory definition of ''contribution'' in 11 CFR part 100, subpart B. This addition comports with the statutory standard for ''contribution'' by reaching payments ''made * * * for the purpose of influencing any election for Federal office.'' 2 U.S.C. 431(8)(A)(i); 11 CFR 100.51 and 100.52. This addition has several exceptions to avoid sweeping too broadly.

11 CFR 100.57—Funds Received in Response to Solicitations

Section 100.57 is a new rule that explains when funds received in response to certain communications by any person must be treated as ''contributions'' under FECA. Paragraph (a) sets out the general rule, paragraphs (b) and (c) create two specific exceptions: Paragraph (b) addresses certain allocable solicitations, and paragraph (c) addresses joint fundraisers. These rules in new 11 CFR 100.57 apply to all political committees, corporations, labor organizations, partnerships, organizations and other entities that are ''persons'' under the Federal Election Campaign Act of 1971, as amended (''FECA''). *See* 2 U.S.C. 431(11). The rules apply without regard to tax status, so they reach all FECA ''persons,'' including, for example, entities described in or operating under section 501(c)(3), 501(c)(4), and 527 of the Internal Revenue Code.

1. 11 CFR 100.57(a)—Treatment as Contributions

New section 100.57(a) classifies all funds provided in response to a communication as contributions under the FECA if the communication indicates that any portion of the funds received will be used to support or oppose the election of a clearly identified Federal candidate.

Most political committees and other organizations pay careful attention to communications with potential donors. These communications are commonly the cornerstone of the relationship between a group and its donors, and their effectiveness is vital to almost all organizations. Many groups' fundraising solicitations will say nothing of an electoral objective regarding the use of funds (*i.e.*, that any funds provided in response to the solicitation will be used to support or oppose the election of clearly identified Federal candidates). Communications that do so, however, plainly seek funds ''for the purpose of influencing Federal elections.'' Thus, the new rule appropriately concludes that such funds are ''contributions'' under FECA.

The standard in new section 100.57 draws support from a 1995 decision of the United States Court of Appeals for the Second Circuit. *FEC* v. *Survival Education Fund, Inc.*, 65 F.3d 285 (2d Cir. 1995). In the Second Circuit case, the court found that a July 1984 letter from two nonprofit issue advocacy groups solicited ''contributions'' under FECA because it included a statement ''[t]hat * * * leaves no doubt that the funds contributed would be used to advocate President Reagan's defeat at the polls, not simply to criticize his policies during the election year.'' *Id.* at 295. According to the court, the critical statement from the mailing was: ''your special election-year contribution today will help us communicate your views to hundreds of thousands of members of the *voting public*, letting them know why Ronald Reagan and his anti-people policies *must* be stopped.'' *Id.* at 289 and 295 (first emphasis added by court, second in original). The mailing described in *FEC* v. *Survival Education Fund*, if used following the effective date of these rules and modified to identify clearly a current Federal candidate, would trigger new section 100.57(a) and would require the group issuing the mailing to treat all the funds received in response to the mailing as ''contributions'' under FECA.

The following are examples of solicitations based on the one that Survival Education Fund used that illustrate how a variation in the text of a solicitation would change the result of whether a solicitation is subject to new section 100.57. A solicitation might state the following:

- The President wants to cut taxes again. Our group has been fighting for lower taxes since 1960, and we will fight for the President's tax cuts. Send us money for our important work.''

Because this solicitation does not indicate that any funds received will be used to support or oppose the election of any candidates, any funds received in response are not subject to new section 100.57.

In contrast, a solicitation that would trigger the new rule might read as follows:

- The President wants to cut taxes again. Our group has been fighting for lower taxes since 1960, and we will fight to give the President four more years to fight for lower taxes. Send us money for our important work.''

Because this solicitation indicates that the funds received will be used to support the election of a Federal candidate (''give the President four more years''), any funds received in response to this solicitation are ''contributions'' under the new rule.

The rule's focus on the planned use of funds leaves the group issuing the communication with complete control over whether its communications will trigger new section 100.57. After determining that a clearly identified candidate is mentioned, new section 100.57 requires an examination of only the text of a communication. The regulation turns on the plain meaning of the words used in the communication and does not encompass implied meanings or understandings. It does not depend on reference to external events, such as the timing or targeting of a solicitation, nor is it limited to solicitations that use specific words or phrases that are similar to a list of illustrative phrases.

It is important to note that if a solicitation indicates that *any portion* of the funds received will be used to support or oppose the election of a clearly identified candidate, new section 100.57(a) applies even if the solicitation states that funds received would be used for other purposes too, subject to the exceptions in new 11 CFR 100.57(b)(2) and (c), discussed below. In addition, a disclaimer stating that any funds received that cannot be treated as contributions, or that cannot be accepted by a political committee or cannot be deposited in a committee's Federal account, will be deposited in the organization's non-Federal account does not negate the application of new section 100.57(a). Thus, an organization that sends out a solicitation that is subject to new section 100.57(a) or (b)(1) with a disclaimer similar to the one described above cannot accept any funds that are not Federal funds (funds that comply with the amount limitations, source prohibitions and reporting requirements of FECA) in response to that solicitation unless it satisfies one of the exceptions in new section 100.57(b)(2) or (c), discussed below.

Further examples of communications that solicit contributions under new section 100.57(a) are:

1. ''*Electing Joe Smith* is crucial to our efforts to preserve the environment. Please send money to us so that we can be successful in this cause.''

2. ''Our group strives to preserve Social Security, and Representative Jones has a great plan to protect this vital program. The Congressman needs *our help to stay in Washington* and implement his plan to save Social Security. Give now to help us fight to save Social Security.''

3. ''Senator Jane Doe voted against a tax package that would have helped working families. Your generous gift will enable us to *make sure Californians remember in November*.''

Because the italicized language in each of these solicitations indicates that the funds received will be used to support the election or defeat of a Federal candidate, any funds received in response to these solicitations are ''contributions'' under the new rule.

In the NPRM, the proposed regulation text for section 100.57 took a different approach. *See* NPRM at 11757. However, new section 100.57(a) is similar to an approach that the Commission sought comment on in the narrative of the NPRM. *See* NPRM at 11743. The commenters did not address the approach discussed in the NPRM's narrative, but some addressed the proposed regulation text for this provision. Those commenters raised objections to proposed section 100.57 based on some of the exemptions from the ''expenditure'' definition for certain communications, as discussed below. The exemption from the ''expenditure'' definition for the costs of internal communications by corporations, labor organizations and membership organizations in 2 U.S.C. 431(9)(B)(iii) and 11 CFR 100.134 is not affected by the Commission's promulgation of new section 100.57.

New section 100.57 does not address when the costs of communications are expenditures under FECA. Instead, it specifies when funds received in response to certain communications must be treated as contributions under

FECA. Thus, a corporation, labor organization or membership organization that issues an internal communication of the type described in new section 100.57 may consider the costs of the communication to be disbursements not subject to FECA requirements under section 100.134, but it must treat any funds received in response as FECA contributions under new section 100.57. If the corporation, labor organization, or membership organization maintains a separate segregated fund (''SSF''), treating the funds received in response to the communication as contributions to the SSF will satisfy new section 100.57.

Section 100.141 exempts from the ''expenditure'' definition any payments made by corporations or labor organizations that are permissible under 11 CFR part 114. Part 114 authorizes the use of non-Federal funds for the costs of various corporate, labor organization, and membership organization communications under certain conditions. *See, e.g.*, 11 CFR 114.3 to 114.8; 2 U.S.C. 441b(b)(2)(A), (b)(2)(B), (b)(4)(B). New section 100.57 does not make the costs of these communications expenditures; instead, it concerns the treatment of funds received in response to certain communications without regard to how the costs of those communications were paid.

One commenter argued that its status as an MCFL-type corporation (a qualified nonprofit corporation allowed to make independent expenditures pursuant to 11 CFR 114.10) means its communications that inform potential contributors of the organization's ability to advocate in connection with a Federal election must be immune from FECA consequences. The Supreme Court holding in *FEC* v. *Massachusetts Citizens for Life*, 479 U.S. 238 (1986) (''*MCFL*''), is not so broad. Indeed, the Court twice has recognized that an *MCFL*-type corporation's independent spending can have FECA consequences. *See id.* at 262 (noting: ''should MCFL's independent spending become so extensive that the organization's major purpose may be regarded as campaign activity, the corporation would be classified as a political committee''); *see also FEC* v. *Beaumont*, 539 U.S. 146, 149 (2003) (holding that the ban on corporate contributions directly to Federal candidates applies to *MCFL*-type corporations). Independent expenditures were the core of the *MCFL* holding, yet the opinion expressly notes that the independent expenditures can trigger political committee status. Nonetheless, the commenter claims that an *MCFL* corporation's ability to explain to potential contributors that it will make independent expenditures on behalf of particular Federal candidates must be immune from consequences under new section 100.57. Just as an *MCFL* corporation's independent expenditures can make it a political committee, an *MCFL* corporation's solicitations can make it the recipient of contributions under the FECA. These contributions will not transform an *MCFL* corporation into a political committee unless its expenditures and contributions become so extensive as to lead to a conclusion that the organization's major purpose is campaign activity. Therefore, new section 100.57 is not inconsistent with *MCFL*.

Some commenters addressed the interplay between this regulation and other proposed rules that the Commission is not adopting, which renders these comments moot.

New section 100.57 provides one example of communications that can generate contributions; it is not an exhaustive list. The rule addresses communications that indicate that the funds received in response will be used to support or oppose the election of a clearly identified Federal candidate. Other communications that do not include such an indication may also generate contributions under FECA. A solicitation that states that the funds received will be used to influence Federal elections will generate FECA contributions, *see* 11 CFR 102.5(a)(2)(ii), even though such a communication would not be subject to new section 100.57 because it does not mention a clearly identified Federal candidate.

Any funds that are ''contributions'' by operation of new section 100.57 are contributions for purposes of the ''political committee'' definition in 2 U.S.C. 431(4)(A) and 11 CFR 100.5(a), which defines a ''political committee'' as any group that makes $1,000 of expenditures or receives $1,000 of contributions during a calendar year. In *Buckley* v. *Valeo*, 424 U.S. 1, 79 (1976), the Supreme Court narrowed the ''political committee'' definition with a ''major purpose'' test, which is discussed further below. The ''major purpose'' test applies in the same way to groups that make or receive $1,000 of contributions and groups that make $1,000 of expenditures.

2. 11 CFR 100.57(b)—Certain Allocable Solicitations

a. 11 CFR 100.57(b)(1)

New section 100.57(b)(1) states that a solicitation that meets section 100.57(a) and refers to a political party so that its costs are allocable under 11 CFR 106.6 or 106.7 is nonetheless subject to the rule that all of its proceeds are ''contributions'' under FECA. This approach is consistent with the ''candidate-driven'' approach in the revised allocation rules, discussed below. *See, e.g., Explanation and Justification* for new 11 CFR 106.6(f)(1).

b. 11 CFR 100.57(b)(2)

New section 100.57(b)(2) provides that where the costs of a solicitation are allocable under 11 CFR 106.1, 106.6 or 106.7, if the solicitation also refers to at least one clearly identified non-Federal candidate, at least fifty percent of the proceeds of the solicitation must be treated as contributions under FECA. *See* new 11 CFR 100.57(b)(2). The funds that satisfy the requirement that fifty percent of the funds received must be contributions under the FECA under new section 100.57(b)(2) must also comply with FECA's amount limitations and source prohibitions and must be reported as contributions if the recipient is a political committee. Thus, if such a solicitation does not yield at least fifty percent in funds that meet the FECA's amount limitations and source prohibitions, then the organization must refund some of the donations to comply with new section 100.57. For example, a political committee might raise a total of $30,000 for its Federal and non-Federal accounts with a fundraising event where the invitation includes a solicitation that is subject to both new section 100.57 and allocation under section 106.6(d). Under new section 100.57(b)(2), the political committee must consider at least fifty percent of the proceeds to be contributions. If the $30,000 total receipts include only $12,000 that are in compliance with FECA's limitations and prohibitions, then the committee may retain only $12,000 in non-Federal funds. The political committee must then refund $6,000 of donations so that fifty percent of the proceeds from this solicitation are contributions.

New section 100.57 does not change the allocation of direct costs of fundraising under current 11 CFR 106.6(d) or 106.7(d)(4). These costs are subject to allocation according to the funds received method. New section 100.57, however, does affect the nature of the funds received from a solicitation and requires that either 100% or at least 50% of the funds received must be contributions. The amount of contributions received, in turn, impacts how the funds received method operates when the fundraising includes a solicitation that is subject to new section 100.57. For example, consider again the situation described above

where a political committee raised $30,000 for its Federal and non-Federal accounts and spent $2,000 in direct costs of fundraising. After the $6,000 refund, the funds received from that event were 50% Federal and 50% non-Federal, so the political committee must use at least $1,000 in Federal funds to pay for direct costs of fundraising under section 106.6(d). In accordance with 11 CFR 106.6(d)(2), the final allocation of the direct costs of fundraising must result in the Committee using at least $1,000 of Federal funds to pay those costs, and prior payments based on an estimated allocation ratio under section 106.6(d)(1) must be adjusted to match the final allocation ratio.

3. 11 CFR 100.57(c)—Joint Fundraisers

New section 100.57(c) concerns joint fundraising. It provides that funds received in response to solicitations conducted between or among the authorized committees of Federal and non-Federal candidates are excepted from being treated entirely as contributions under the new rule in section 100.57. Nevertheless, when a Federal candidate's authorized committee participates in a joint fundraiser, all funds solicited are subject to restrictions imposed on Federal candidates by BCRA. *See* 2 U.S.C. 441i(e)(1) and either 11 CFR 300.61 or 300.62. When a Federal candidate conducts a joint fundraiser with a State candidate, the candidates must divide the receipts according to the written joint fundraising agreement under 11 CFR 102.17. All funds raised for the Federal candidate are subject to 11 CFR 300.61 and all funds raised for the State candidate are subject to 11 CFR 300.62 because of the Federal candidate's participation in the joint fundraiser.

All other joint fundraising pursuant to section 102.17 is subject to new section 100.57(a) and (b). Thus, section 100.57 applies to solicitations for joint fundraisers involving unauthorized political committees or other organizations that are not political committees where the solicitations indicate that any portion of the funds received will be used to support or oppose the election of a clearly identified Federal candidate. If the communication is subject to new section 100.57(a) or (b)(1), then the entire amount of the proceeds of the joint fundraiser must be treated as contributions. Alternatively, if the solicitation is subject to new section 100.57(b)(2) (includes at least one clearly identified Federal candidate and at least one clearly identified non-Federal candidate), then at least fifty percent of the proceeds must be treated as FECA contributions, without regard to which entity receives those contributions. Any joint fundraising agreement must reflect the appropriate division of proceeds and costs in order for the joint fundraising entities to comply with new section 100.57 and in 11 CFR 102.17.

For example, two political committees, called A and B, each with a Federal and non-Federal account, sign a joint fundraising agreement stating that A will receive 75% of the proceeds and B will receive 25% of the proceeds. In accordance with the agreement, they jointly raise $100,000 with a solicitation subject to new section 100.57(b)(2), with A receiving $75,000 and B receiving $25,000. The $100,00 raised by the two committees must be distributed among their Federal and non-Federal accounts in any way that results in at least 50% of the $100,000 total proceeds being deposited in the Federal accounts. For example, A may deposit one third of its $75,000 in proceeds ($25,000) in its Federal account and the remaining two thirds ($50,000) in its non-Federal account. B would then treat all of its $25,000 in proceeds as Federal funds, deposit $25,000 in its Federal account, and nothing in its non-Federal account. All funds deposited in Federal accounts must comply with the amount limitations, source prohibitions, and reporting requirements of the Act. Furthermore, at least 50% of the direct costs of fundraising must be paid for with Federal funds.

Allocation

The Commission is adopting final rules at 11 CFR 106.6 to change the allocation regime for SSFs and nonconnected committees. These final rules establish a simpler bright-line rule providing that administrative expenses, generic voter drives, and certain public communications that refer to a political party must be paid for with at least 50% Federal funds. Under the previous regulations, SSFs and nonconnected committees applied a complex ''funds expended'' formula to arrive at a ratio of Federal funds to total Federal and non-Federal disbursements and then paid for these expenses with allocated amounts from Federal and non-Federal accounts. The previous rules were a source of confusion for some SSFs and nonconnected committees and resulted in time-consuming reporting.

These final rules also establish candidate-driven allocation rules for voter drives and public communications that refer to clearly identified Federal or non-Federal candidates regardless of whether the voter drive or public communication refers to a political party. When the voter drive or public communication refers to clearly identified Federal candidates, but no clearly identified non-Federal candidates, the costs must be paid for with 100% Federal funds. Similarly, when the voter drive or public communication refers to clearly identified non-Federal candidates, but no clearly identified Federal candidates, the costs may be paid 100% from a non-Federal account. Any voter drives or public communications that refer to both clearly identified Federal and non-Federal candidates are subject to the time/space method of allocation under 11 CFR 106.1. The final rules do not change the allocation methods in 11 CFR 106.1, which are based on the benefit reasonably expected to be derived by each candidate. Minor changes are being made in 11 CFR 102.5 and 104.10 to conform to the changes in 11 CFR 106.6.

11 CFR 102.5—Organizations Financing Political Activity in Connection With Federal and Non-Federal Elections, Other Than Through Transfers and Joint Fundraisers: Accounts and Accounting

Section 102.5(a)(1)(i) regulates how political committees, other than national committees, that finance political activity in connection with both Federal and non-Federal elections set up accounts and transfer monies between Federal and non-Federal accounts to pay for these activities. As explained below in the *Explanation and Justification* for revised 11 CFR 106.6, the Commission is revising the rules for SSFs and nonconnected committees regarding allocation of administrative and generic voter drive expenses, and adding rules regarding the payment of costs of certain voter drives and public communications. In order to conform to revised 11 CFR 106.6, the Commission is revising section 102.5(a)(1)(i) to add references to sections 106.6(c) and 106.6(f), which govern transfers from non-Federal to Federal accounts under 11 CFR 102.5(a) to pay for allocable activities.

11 CFR 104.10—Reporting by Separate Segregated Funds and Nonconnected Committees of Expenses Allocated Amount Candidates and Activities

Section 104.10 specifies how SSFs and nonconnected committees must report expenses allocated among candidates and activities pursuant to 11 CFR 106.1 and 106.6. Previously, section 104.10(b)(1) established the reporting requirements for allocation of administrative and generic voter drive expenses under the former ''funds

expended'' method in section 106.6. As explained in greater detail below (*see Explanation and Justification* for revised 11 CFR 106.6), the Commission is revising the rules for SSFs and nonconnected committees and removing the ''funds expended'' method of allocation. In order to conform to the revised 11 CFR 106.6, the Commission is deleting the requirements for reporting allocated expenditures and disbursements under the ''funds expended'' method in section 104.10(b)(1). Instead, revised paragraph (b)(1) states that in each report disclosing a disbursement for administrative expenses, generic voter drives, or public communications that refer to a political party, but do not refer to any clearly identified candidates, the committee shall state the allocation ratio used for these categories of expenses under revised 11 CFR 106.6(c). The committee must report whether it is using the 50% minimum Federal funds required under section 106.6(c) or another percentage of Federal funds (greater than 50%). Because of the simplified approach under the revised allocation provisions of section 106.6 explained below, the reporting obligations for SSFs and nonconnected committees should be easier to meet than the obligations under former section 104.10.

11 CFR 106.6—Payment for Administrative Expenses, Voter Drives and Certain Public Communications

This section specifies how SSFs and nonconnected committees must pay for certain activities that are in connection with Federal elections, non-Federal elections, or both, using Federal and non-Federal accounts established pursuant to 11 CFR 102.5. As noted in section 106.6(a), political committees required to allocate under this section do not include party committees and the authorized committees of any candidate for Federal election. The NPRM included several proposals to amend the allocation provisions in 11 CFR 106.6, which are discussed in greater detail below. NPRM at 11753–55 and 11759–60. Approximately ten commenters provided substantive comments regarding these proposals. In general, the commenters were divided as to the impact of the U.S. Supreme Court decision in *McConnell* v. *FEC*, 540 U.S. 93 (2003), on the allocation rules for SSFs and nonconnected committees. One commenter argued that *McConnell* reaffirmed that allocation between Federal and non-Federal accounts is appropriate for SSFs and nonconnected committees. Other commenters believed that *McConnell's* statements regarding the circumvention of the FECA permitted under the former party committee allocation rules could just as easily be said of the allocation regime for SSFs and nonconnected committees.

After carefully considering these public comments and examining information regarding how the allocation system under former 11 CFR 106.6 has worked over the past ten years, the Commission adopts the following amendments to 11 CFR 106.6: (1) Deleting the ''funds expended'' ratio from 11 CFR 106.6(c) and replacing it with a 50% flat minimum Federal percentage; (2) applying this new 50% Federal minimum to administrative and generic voter drive expenses, as well as to a newly added category of allocable expenses—public communications that refer to a political party but do not refer to any clearly identified Federal or non-Federal candidates; (3) providing for allocation of certain voter drives and public communications that may refer to political parties and do refer to clearly identified candidates, based upon whether the candidates are Federal, non-Federal, or both; and (4) directing SSFs and nonconnected committees to use the time/space allocation method for certain voter drives and public communications that refer to at least one clearly identified Federal candidate, and to at least one clearly identified non-Federal candidate, regardless of whether there is a reference to a political party. Through these final rules, the Commission seeks to enhance compliance with the FECA, to simplify the allocation system, and to make it easier for SSFs and nonconnected committees to comprehend and for the Commission to administer these requirements.

1. 11 CFR 106.6(b)—Payments for Administrative Expenses, Voter Drives and Certain Public Communications

Previous 11 CFR 106.6(b)(1) listed disbursements that must be allocated by SSFs, and previous 11 CFR 106.6(b)(2) listed disbursements that must be allocated by nonconnected committees. Because the allocation method is very similar for both SSFs and nonconnected committees, it is unnecessary to create separate lists for them. Rather, the distinction in the final rules concerning allocation is between the types of disbursements that are subject to allocation and the types of disbursements that are not. Thus, revised 11 CFR 106.6(b)(1) lists the disbursements that SSFs and nonconnected committees must allocate in accordance to revised 11 CFR 106.6(c). Revised 11 CFR 106.6(b)(2) lists the disbursements that are not subject to allocation but must be paid for in accordance with new 11 CFR 106.6(f).

Proposed 11 CFR 106.6(b)(1) would have applied the allocation rules to public communications that promote or support a political party or promote, support, attack or oppose a clearly identified candidate. NPRM at 11759. The final rules do not adopt this approach. Rather, revised section 106.6(b) lists public communications that refer to a political party or a clearly identified candidate. The Commission is adopting the standard in the final rules because it is an objective standard that is easy to administer.

A. 11 CFR 106.6(b)(1)—Costs To Be Allocated

The four types of disbursements in revised 11 CFR 106.6(b)(1) that are subject to allocation are: administrative expenses, direct costs of fundraising, generic voter drives and public communications that refer to a political party. The final rules retain the former descriptions of administrative expenses, direct costs of fundraising, and generic voter drives in new paragraphs (b)(1)(i), (ii) and (iii) in section 106.6, respectively. New paragraphs (b)(1)(i) and (ii) still make clear that SSFs may have the costs of administrative expenses and fundraising programs paid by their connected organization. ''Generic voter drives'' is a defined term used prior to BCRA and goes beyond the limited activities defined under ''Federal election activity.'' For example, a television ad urging the general public to vote for candidates associated with a particular issue, without mentioning a specific candidate, would be considered allocable as a generic voter drive activity under 11 CFR 106.6(b)(1)(iii). The final rules add a fourth type of disbursement that must be allocated—public communications, as defined in 11 CFR 100.26, that refer to a political party but do not refer to any Federal or non-Federal candidate. See 11 CFR 106.6(b)(1)(iv). To illustrate, public communications that use phrases such as ''the Democratic team,'' ''the Minnesota Democratic Committee,'' ''the GOP,'' ''Democrats,'' and ''Republicans in Congress,'' would fall under new paragraph (b)(1)(iv) of section 106.6 because they refer to a political party. *See also* 11 CFR 106.6.(b)(2)(iii) and (iv) discussed below.

B. 11 CFR 106.6(b)(2)—Costs Not Subject to Allocation

Revised 11 CFR 106.6(b)(2) lists the four types of disbursements that are not

subject to allocation between Federal and non-Federal accounts, but are subject to the payment requirements in new paragraph (f) of section 106.6. Two of the four types of disbursements concern voter drives and the other two types concern public communications.

The Commission recognizes that the allocation regulation for generic voter drives in new 11 CFR 106.6(b)(1)(iii) does not apply to voter drives that mention a specific Federal or non-Federal candidate. Without an additional regulatory clarification, some voter drive activity may have fallen into the gap between the regulation of generic voter drives in 11 CFR 106.6(b)(1)(iii) and the candidate-specific public communications provisions in new 11 CFR 106.6(b)(2)(iii) and (iv), discussed below. To prevent such a gap, the Commission is issuing new rules for voter drives that refer to a clearly identified Federal or non-Federal candidate.

New paragraph (b)(2)(i) of section 106.6 describes voter drives in which the printed materials or scripted messages refer to one or more clearly identified Federal candidate, or any voter drives which include written instructions that direct the committee's employee or volunteer to refer to a clearly identified Federal candidate (including voter drives that also generally refer to candidates of a particular party or those associated with a particular issue), but do not refer to any clearly identified non-Federal candidates. New paragraph (b)(2)(ii) also addresses voter drives that similarly refer to one or more clearly identified *non-Federal* candidates, including voter drives that generally refer to candidates of a particular party or candidates associated with a particular issue, but do not refer to any clearly identified Federal candidates.

In both paragraphs, the reference to the clearly identified candidate must be contained in printed materials, scripted messages, or written instructions. Only written instructions that direct the employee or volunteer to refer to a clearly identified Federal or non-Federal candidate will satisfy these paragraphs.[1] The Commission included these limitations to avoid converting an allocable generic voter drive into an unallocable candidate-specific voter drive based solely upon ''off script'' or unauthorized oral comments by an employee or volunteer. The regulation seeks to capture only authorized statements; an SSF or nonconnected committee is not required to treat an otherwise generic voter drive as a candidate-specific one based on unauthorized comments by committee employees or volunteers. SSFs and nonconnected committees should be maintaining sufficient control over their printed materials, scripts and written instructions to be on notice whether or not the voter drive would qualify as a candidate-specific voter drive in new paragraphs (b)(2)(i) or (ii) of section 106.6.

Revised 11 CFR 106.6(b)(2) also includes two types of public communications, as defined in 11 CFR 100.26. First, paragraph (b)(2)(iii) describes public communications that refer to one or more clearly identified Federal candidates, regardless of whether there is reference to a political party, but do not refer to any clearly identified non-Federal candidates. Second, paragraph (b)(2)(iv) of section 106.6 describes public communications that refer to a political party and one or more clearly identified non-Federal candidates, but do not refer to any clearly identified Federal candidates. References to clearly identified Federal or non-Federal candidates that come within new 11 CFR 106.6(b)(2)(iii) and (iv) include ''the President,'' ''your Senators,'' and ''the Republican candidate for Senate in the State of Georgia.'' *See also* 11 CFR 100.17 (definition of ''clearly identified'').

2. 11 CFR 106.6(c)—Method for Allocating Administrative Expenses, Costs of Voter Drives and Certain Public Communications

A. Proposals in the NPRM

In the NPRM, the Commission set forth several proposals to amend the allocation regulations in 11 CFR 106.6 that apply to SSFs and nonconnected committees other than state and local party committees. Those included a number of proposals where minimum Federal percentages would be added to the funds expended method. One alternative in the proposed rules would have required SSFs and nonconnected committees to use the greatest percentage applicable in any of the States in which the committee conducted its activities as the minimum Federal percentage applied to all allocations under the funds expended method. *See* NPRM at 11754. A competing alternative would have allowed committees to choose between allocating costs on a State-by-State basis according to the percentage applicable in each State, or using the highest applicable percentage across the board. *See id.*

The NPRM also discussed other possible minimums including a ''two tier'' system where SSFs and nonconnected committees that operate in fewer than 10 States would have used a lower minimum Federal percentage (such as 25%), while any committees operating in more than 10 States would have been subject to a higher percentage (such as 50%). *See id.* The NPRM also proposed the alternative of a fixed minimum Federal percentage as a replacement for the ''funds expended'' method. Finally, the NPRM also sought comment on eliminating the allocation scheme and requiring SSFs and nonconnected committees to use 100% Federal funds for partisan voter drives and public communications listed in proposed 11 CFR 106.6(b).

B. Comments on Allocation Proposals

Little attention was focused on allocation issues during the public comment period. Fewer than 10 comments provided a substantive response to the allocation issues raised in the NPRM. One commenter wanted to eliminate allocation altogether and require 100% Federal funds for almost all activities, and two commenters recommended revamping the allocation scheme by eliminating the funds expended method.

The commenters differed regarding whether it was appropriate to add a Federal minimum percentage into the ''funds expended'' method in former section 106.6(c). One commenter supported revision of the section 106.6 allocation scheme to avoid ''absurd results'' under the former system by requiring a ''significant minimum hard money share'' for allocated expenses. Another commenter noted that the new bookkeeping, reporting, and calculations required for the proposed ''funds expended method plus a minimum percentage'' approach in the NPRM would be burdensome for political committees. Some commenters supported 100% Federal funds for certain expenditures, others supported a State-by-State approach, one supported a modified ''two tier'' approach to minimums, and others expressed concern that any number chosen as a minimum would be arbitrary.

The commenters also differed with regard to the proposals for allocation of public communications and voter drives. One commenter noted that if a communication promotes, supports,

[1] For example, a written instruction to the employees or volunteers that states ''do not mention or refer to Candidate Y'' would not by itself be covered by paragraphs (b)(2)(i) or (ii) of section 106.6.

attacks, or opposes (''PASOs'')[2] a Federal candidate, then it should be paid for with 100% Federal funds. Likewise, this commenter noted that if a communication only includes non-Federal candidates, then the committee should be allowed to use 100% non-Federal funds to pay its costs. Some commenters supported a minimum Federal percentage for both PASO communications and partisan voter drives. One commenter asserted that allocation based on the PASO standard would be vague. Another commenter argued that adding PASO communications to the ''funds expended'' ratio would be unenforceable, arbitrary, and unbalanced. In addition, some commenters suggested also revising 11 CFR 106.1 to include a minimum Federal percentage under the time/space methodology of allocation. The Commission is not able to adopt this latter suggestion because the NPRM did not seek public comment on amending section 106.1.

C. Final Rules

In examining public disclosure reports filed by SSFs and nonconnected committees over the past ten years, the Commission discovered that very few committees chose to allocate their administrative and generic voter drive expenses under former section 106.6(c). Anecdotal evidence suggested that many committees, including those that allocated, were confused as to how the funds expended ratio should be calculated and adjusted throughout the two-year election cycle. Committees have consistently requested guidance on the proper application of the allocation methods under former section 106.6 at various Commission conferences, roundtables and education events. Audit experience has also shown that some committees were not properly allocating under the complicated funds expended method. *See* Final Report of the Audit Division on Volunteer PAC (Sept. 21, 2004) (improper application of flat state ballot composition ratio instead of calculating ratio under funds expended method in section 106.6) and Final Report of the Audit Division on Republicans for Choice PAC (Dec. 2, 1999) (apparent confusion between calculation of funds received ratio and funds expended ratio in section 106.6). In addition, calculating and adjusting the funds expended ratio may have posed an administrative burden to some committees, particularly those with limited resources, because compliance required committees to monitor their Federal expenditures and non-Federal disbursements, compare their current spending to the ratio reported at the start of the election cycle, and then adjust the ratio to reflect their actual behavior. The confusion and administrative burden associated with the funds expended method may at least partly explain why, historically, SSFs and nonconnected committees have not adjusted their allocation ratios during an election cycle, or from one election cycle to the next election cycle.

Given the complexity of former section 106.6(c), the confusion regarding the proper application of this rule exhibited by some SSFs and nonconnected committees, and the administrative burden of compliance, the Commission seeks to simplify, not further complicate, the allocation system. Thus, the Commission is not retaining the funds expended method in any form.

A flat minimum percentage makes the allocation scheme easier to understand and apply, while preserving the overall rationale underlying allocation. The flat minimum percentage eliminates the requirement—and, thus, the accompanying burdens—of calculating the ratio and monitoring it continuously for accuracy. Furthermore, the Commission's recent experience with State and local party allocation ratios in 11 CFR 106.7 and 300.33 indicates that flat minimum allocation ratios are easier for committees to understand and for the Commission to administer. A flat minimum Federal percentage will also result in less complex, less intrusive, and speedier enforcement actions, thereby enhancing compliance with the law. Finally, SSFs and nonconnected committees will retain the flexibility to allocate more than the flat minimum percentage of these expenses to their Federal account if they wish to do so. Accordingly, the Commission has decided to replace the funds expended method of allocation with a flat minimum allocation percentage.

Neither FECA nor any court decision dictates how the Commission should determine appropriate allocation ratios. In fact, at least one court has recognized that the Commission has the discretion to establish the Federal funds percentage it deems best for administrative and generic voter drive expenses. *See Common Cause* v. *FEC*, 692 F. Supp. 1391, 1396 (D.D.C. 1987).

A flat 50% allocation minimum recognizes that SSFs and nonconnected committees can be ''dual purpose'' in that they engage in both Federal and non-Federal election activities. These committees have registered as *Federal* political committees with the FEC; consistent with that status, political committees should not be permitted to pay for administrative expenses, generic voter drives and public communications that refer to a political party with a greater amount of non-Federal funds than Federal funds. However, the 50% figure also recognizes that some Federal SSFs and nonconnected committees conduct a significant amount of non-Federal activity in addition to their Federal spending. The Commission has concluded that this approach is preferable to importing percentages used in other contexts for dissimilar entities, such as the former national party committee ratios repealed by BCRA or the current ratios applicable to State and local party committees, as suggested in the NPRM.

Public communications that refer to a political party without referring to any clearly identified Federal or non-Federal candidates are subject to the new 50% flat minimum percentage in revised 11 CFR 106.6(c). Like the administrative expenses and generic voter drives (which may refer to a political party), which are also allocated under section 106.6(c), these references solely to a political party inherently influence both Federal and non-Federal elections. Therefore, the 50% Federal funds requirement reflects the dual nature of the communication. As with other expenses under revised section 106.6(c), an SSF or nonconnected committee may choose to allocate more than 50% of the costs of any such public communication to its Federal account, if it wishes to do so.

The past decade of reports filed with the FEC indicate that most SSFs and nonconnected committees do not allocate under section 106.6(c). In fact, fewer than 2% of all registered non-party political committees filed H1 and H4 schedules allocating administrative and generic voter drive expenses under former section 106.6(c) in each election cycle since these regulations were made effective in 1991. Any SSF or nonconnected committee that was not allocating under section 106.6 was presumably already using 100% Federal funds for these expenses, except where those expenses were paid by other entities in accordance with the Act and Commission regulations, such as an SSF's connected organization paying its administrative expenses. Thus, removing the funds expended method and replacing it with a flat minimum percentage in section 106.6 should only affect a small fraction of all SSFs and nonconnected committees.

Even for those SSFs and nonconnected committees that were

[2] ''PASO'' has emerged as a convenient acronym for ''promote, support, attack or oppose.''

allocating, the impact of the final rules should not be substantial. A review of past reports filed with the FEC shows that almost half of these committees were already paying for these expenses with at least 50% Federal funds under the former system. These committees will not need to adjust their payments under the 50% flat percentage method in revised 11 CFR 106.6(c). Moreover, the actual dollar amounts of non-Federal funds that were spent in past cycles on administrative and generic voter drive expenses under former section 106.6(c), and which will have to be partially replaced with Federal funds under the final rules, is relatively low. With the exception of one or two committees per election cycle whose spending was out of line with other SSFs and nonconnected committees, the final rules affect each committee by requiring only a minimal increase in Federal funds expended. Additionally, these amounts were not high compared to total disbursements from these committees' Federal accounts in an election cycle (and would have been even smaller if disbursements from non-Federal accounts were taken into consideration). Thus, revised 11 CFR 106.6(c) should not impose a significant fundraising burden on these committees.

3. 11 CFR 106.6(f)—Payments for Public Communications and Voter Drives That Refer to One or More Clearly Identified Federal or Non-Federal Candidates

The final rules add new paragraph (f) to 11 CFR 106.6 to address payments for voter drives that refer to clearly identified Federal or non-Federal candidates, as described in new 11 CFR 106.6(b)(2)(i) and (ii), and public communications that refer to clearly identified Federal or non-Federal candidates, with or without a reference to a political party, as described in new 11 CFR 106.6(b)(2)(iii) and (iv). The final rules also direct SSFs and nonconnected committees to use the time/space allocation method for voter drives and public communications that refer to at least one clearly identified Federal candidate and to at least one clearly identified non-Federal candidate, without regard to any references to a political party.

The Commission views voter drives and public communications that refer to a political party and either Federal or non-Federal candidates, but not both, as ''candidate-driven.'' The Federal or non-Federal nature of the political party reference is determined by whether the clearly identified candidates in the communication are Federal or non-Federal. Thus, voter drives and public communications that refer to a political party and also refer only to clearly identified Federal candidates must be paid for with 100% Federal funds from the Federal account under new 11 CFR 106.6(f)(1). Permitting these voter drives and communications to be paid for with some non-Federal funds based on a cursory reference to a political party would invite circumvention of the intent of the allocation scheme. Voter drives and public communications that refer to clearly identified Federal candidates, without any reference to political parties or non-Federal candidates, similarly must be paid for with 100% Federal funds from the Federal account.[3]

On the other hand, voter drives and public communications that refer to a political party and also refer only to clearly identified non-Federal candidates may be paid for entirely by the non-Federal account under new 11 CFR 106.6(f)(2). SSFs and nonconnected committees may pay for these communications referring to non-Federal candidates partly or entirely with Federal funds, but are not required to do so. Finally, voter drives and public communications that refer to both Federal and non-Federal candidates, regardless of whether there is also a reference to a political party are subject to a time/space allocation method in new 11 CFR 106.6(f)(3), which is similar to the method outlined in 11 CFR 106.1. *See* new 11 CFR 106.6(f)(3).[4] SSFs and nonconnected committees must comply with section 106.6(f) when allocating public communications and voter drive activities, but must comply with 11 CFR 106.1 for allocation of any other expenditures made on behalf of more than one clearly identified Federal candidate.

The final rules are simpler than the approach taken in Advisory Opinion 2003–37 and proposed in the NPRM at proposed 11 CFR 106.6(f) and (g). These required a combined application of the time/space allocation method under 11 CFR 106.1 and the funds expended method under former 11 CFR 106.6 for public communications that refer to a party and to specific Federal candidates. Advisory Opinion 2003–37 is hereby superseded. The candidate-driven approach for these voter drives and public communications, coupled with the removal of the funds expended method in favor of a flat percentage method, reduces the amount of recordkeeping, tracking, and calculating that SSFs and nonconnected committees must do to allocate properly administrative expenses, and to pay properly for voter drives, and public communication costs under 11 CFR 106.6.

The revised 11 CFR 106.6 allocation regulations should reduce the burden of compliance on SSFs and nonconnected committees. Incorporation of certain voter drives and public communications into 11 CFR 106.6 provides more specific guidance to committees that conduct such activity. The Commission believes that these final rules best resolve the problems with the former allocation scheme revealed through reviewing past FEC reports and the issues raised by the commenters on the NPRM.

Effective Date

Many commenters on the NPRM argued that any changes made effective before the general election on November 2, 2004 would cause great disruption to political committees and other organizations. Taking into account the statutorily mandated waiting period before a regulation may be effective under the Administrative Procedure Act, these regulations could not be effective until after the November 2, 2004 general election. To provide an orderly phase-in of the new rules and transition from one election cycle to the next election cycle, the Commission is establishing January 1, 2005 as the effective date for all amendments and additions to 11 CFR parts 100, 102, 104 and 106. This effective date allows affected political committees to ''close out'' the 2003–2004 election cycle by making final adjustments to their section 106.6(c) ratios and any final transfers of money between Federal, non-Federal, and allocation accounts. It also provides sufficient time for all those affected to make whatever internal changes necessary to comply with the new rules.

Other Proposals

The NPRM proposed several additional new and revised rules, including changes to the definitions of ''political committee'' and ''expenditure.'' Other than the Final Rules that follow, the Commission is not promulgating any of the proposed rules. The NPRM also raised many issues in the narrative describing the proposed rules. The Commission cautions that no

[3] Because section 106.6 of the Commission's regulations applies only to separate segregated funds and non-connected committees, the final rules do not apply to the activities of other types of political committees, including state and local party committees, which are subject to separate allocation rules. *See* 11 CFR 300.30 to 300.33 (establishing allocation rules for state and local party committees).

[4] The Commission notes that State law may also govern communications referring to non-Federal candidates.

inferences should be made as to the Commission's position on any of the issues that are not discussed in this document or on any of the proposed rules that are not adopted as final rules. Discussed below are some of the proposals from the NPRM that the Commission did not adopt. As noted above, the Commission received many comments on the NPRM. The comments related to proposed rules that the Commission did not adopt are not specifically described and addressed in this document.

Proposed 11 CFR 100.5—Political Committee (2 U.S.C. 431(4), (5), (6))

Under current law, any committee, club, association, or other group of persons that receives contributions aggregating in excess of $1,000 or which makes expenditures aggregating in excess of $1,000 during a calendar year is a political committee. *See* 2 U.S.C. 431(4)(A); 11 CFR 100.5(a). Nearly three decades ago, the Supreme Court narrowed the Act's references to ''political committee'' in order to prevent their ''reach [to] groups engaged purely in issue discussion.'' *Buckley* v. *Valeo,* 424 U.S. 1, 79 (1976). The Court concluded that ''[t]o fulfill the purpose of the Act [the words ''political committee'] need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate.'' *Id.*

The NPRM proposed four alternatives for revisions to the definition of a ''political committee'' in 11 CFR 100.5(a). NPRM at 11743–49 and 11756–57. The proposed alternatives differed mainly in whether, and if so, how, the definition of ''political committee'' should include a test to determine an organization's ''major purpose.''

The Commission received tens of thousands of comments addressing these proposals and the various individual components of the proposed ''major purpose'' tests. Many commenters supported the idea of incorporating a major purpose test into the definition of ''political committee'' and offered a variety of alternatives for what the test should be. In contrast, many other commenters opposed all of the proposals set forth in the NPRM and expressed concerns about the potential impact of the proposed rules on non-electoral speech. Several provisions in BCRA, such as those barring the use of corporate funds for electioneering communications but permitting the use of unlimited individual funds for that purpose, were cited for the proposition that an overly broad rule defining ''political committee'' would conflict with the structure Congress established in BCRA.

Many commenters questioned whether new rules were necessary or appropriate at this time and suggested that *Buckley's* ''major purpose'' language might be better addressed by Congress or the Supreme Court. A joint comment from hundreds of 501(c) organizations contended that the Commission has not obtained access to the types of comprehensive reports that Congress has at its disposal, and the Commission is therefore poorly positioned at this time to assess properly the operations of the variety of organizations that might be affected by new regulations.

Some observed that Congress did not address political committee status in BCRA even though Congress appeared to be fully aware that some groups were operating outside FECA's registration and reporting requirements as well as its limitations and prohibitions. These commenters found it significant that Congress had recently focused on 527 organizations in 2000 and 2002 when it added and revised IRS-based reporting requirements for many of these organizations. According to the commenters, Congress consciously did not require 527 organizations to register with the Commission as political committees.

There were additional concerns raised about the constitutional and practical issues relating to the ''major purpose'' test. Some commenters noted that the ''major purpose'' test is not a statutory trigger for political committee status, but rather a court-created protection to avoid over-reach of the triggers for political committee status actually contained in the FECA. Many commenters argued that a ''major purpose'' test would chill constitutionally protected speech, some expressing the view that the boundaries of the test would be inherently vague and thus force organizations to curtail permissible activities. Other commenters expressed concern about the practical difficulties they perceived in implementing a test intended to ascertain a group's ''purpose.'' For instance, a number of commenters similarly expressed concern that the ''major purpose'' test set out in the NPRM might unfairly categorize organizations as political committees based on a few statements or organizational documents where those statements and documents might not accurately convey the actual purpose of the organization. Other commenters also asserted that the Commission's determinations of an organization's purpose would often result in intrusive investigations into the private internal workings of an organization. Another commenter feared that any definition of ''political committee'' potentially encompassing nonprofit organizations would force them to choose between accepting foundation funds or corporate donations and advocating ballot questions as a part of the organization's overall activity.

In addition, arguments were made that the Commission would be in a better position to address the issue of political committee status after monitoring the behavior of various organizations during at least one election cycle following the enactment of BCRA. A number of commenters asserted that it would be improper for the Commission to add a new ''major purpose'' test without sufficient data demonstrating the existence of corruption or the appearance of corruption to justify the new regulations.

After evaluating these comments, the Commission considered two separate draft Final Rule approaches that would have revised the definition of ''political committee.'' Each of these approaches incorporated modified portions of the rules proposed in the NPRM. Each approach included a ''major purpose'' test, but the tests were different in purpose and operation. *See* draft 11 CFR 100.5(a), Agenda Document 04–75, at 37–41, and draft 11 CFR 100.5(a), Agenda Document 04–75–A, at 2–3 (Aug. 19, 2004 meeting).

The draft Final Rules in Agenda Document 04–75 would have incorporated one construction of the *Buckley* test into the definition of ''political committee'' in 11 CFR 100.5(a) by requiring an organization to have ''as its major purpose the nomination or election of one or more candidates *for Federal office*.'' *See* draft 11 CFR 100.5(a)(1)(ii) of Agenda Document 04–75 (emphasis added); *see also Buckley,* 424 U.S. at 79. Draft paragraph (a)(2) presented three ways in which any organization could have satisfied that test: (1) By publicly declaring that the purpose of the group is to influence Federal elections; (2) by spending more than 50% of its funds on certain specified activities; or (3) by receiving more than 50% of its funding through ''contributions,'' as defined in 2 U.S.C. 431(8) and 11 CFR Part 100, Subpart B. These draft Final Rules would have also established an additional test whereby 527 organizations could satisfy the ''major purpose'' test through the application of a broader 50% disbursements test.

The other set of draft Final Rules that the Commission considered, but did not

adopt, would have incorporated a different construction of *Buckley's* major purpose test into the definition of ''political committee'' in 11 CFR 100.5(a). This test would have focused on whether an organization's major purpose was the ''election of one or more *Federal or non-Federal* candidates.'' *See* draft 11 CFR 100.5(a)(1)(ii) of Agenda Document 04–75–A (emphasis added). Coupled with the Commission rule allowing a political committee to report only its Federal activity, this was designed to prevent groups from avoiding political committee status altogether because a majority of the campaign activity is non-Federal. The major purpose test would have been satisfied in one of two ways. Under draft 11 CFR 100.5(a)(2), an organization described in section 527 of the Internal Revenue Code (a ''527 organization'') would have satisfied the ''major purpose'' test just by virtue of its having registered with the Internal Revenue Service under 26 U.S.C. 527, unless covered by one of five enumerated exceptions. All other organizations would have been subject to the previously existing standards for determining their major purpose. *See* draft 11 CFR 100.5(a)(4) of Agenda Document 04–75–A.

The comments raise valid concerns that lead the Commission to conclude that incorporating a ''major purpose'' test into the definition of ''political committee'' may be inadvisable. Thus, the Commission has decided not to adopt any of the foregoing proposals to revise the definition of ''political committee.'' As a number of commenters noted, the proposed rules might have affected hundreds or thousands of groups engaged in non-profit activity in ways that were both far-reaching and difficult to predict, and would have entailed a degree of regulation that Congress did not elect to undertake itself when it increased the reporting obligations of 527 groups in 2000 and 2002 and when it substantially transformed campaign finance laws through BCRA. Furthermore, no change through regulation of the definition of ''political committee'' is mandated by BCRA or the Supreme Court's decision in *McConnell*. The ''major purpose'' test is a judicial construct that limits the reach of the statutory triggers in FECA for political committee status. The Commission has been applying this construct for many years without additional regulatory definitions, and it will continue to do so in the future.

Proposed 11 CFR 100.34, 100.115, 100.133, 100.149, 114.4—Voter Drive Provisions

The NPRM proposed to define a new term, ''partisan voter drive,'' in proposed 11 CFR 100.34, to revise the exemption from the ''expenditure'' definition for nonpartisan voter drives in proposed 11 CFR 100.133, and to specify that the costs for partisan voter drives are ''expenditures'' in proposed 11 CFR 100.115. Corresponding changes were also proposed for 11 CFR 100.149 and 114.4. *See* NPRM at 11740–41, 11757, and 11760.

In its consideration of Final Rules, the Commission considered a different version of these rules. Under this proposal, draft 11 CFR 100.115 would have specified that costs for certain Federal election activities would have been ''expenditures'' when incurred by political committees or a 527 organization. *See* draft 11 CFR 100.115, Agenda Document No. 04–75–A, at 4 (Aug. 19, 2004 meeting). The exemption from the ''expenditure'' definition for nonpartisan voter drives also would have been revised to state that voter drives that PASO a Federal candidate, a non-Federal candidate, or a political party can not be considered ''nonpartisan'' exempt voter drives. *See* draft 11 CFR 100.133, Agenda Document No. 04–75–A, at 4–5 (Aug. 19, 2004 meeting). The Commission rejected a motion to approve draft 11 CFR 100.115 and revisions to current 11 CFR 100.133. The Commission determined that the changes and additions to the allocation rules in 11 CFR 106.6 related to voter drives that are described above sufficiently address these issues at this time, and therefore the new and revised voter drive rules in proposed sections 100.34, 100.115, 100.133, 100.149, and 114.4 are not needed.

Proposed 11 CFR 100.116—Certain Public Communications

FECA defines ''expenditure'' to include a payment for a communication that is ''made * * * for the purpose of influencing any election for Federal office.'' 2 U.S.C. 431(9)(A)(i). The NPRM proposed to include in the definition of ''expenditure'' payments for communications that PASO any candidate for Federal office or that promote or oppose any political party. *See* proposed 11 CFR 100.116, NPRM at 11741–42 and 11757.

In its consideration of Final Rules, the Commission considered and rejected two different versions of this rule. One version of this rule would have applied to public communications that PASO a clearly identified candidate for Federal office or that PASO a political party, but only when made by a political committee or 527 organizations. *See* draft 11 CFR 100.116, Agenda Document No. 04–75–A, at 4 (Aug. 19, 2004 meeting). The second version of this rule would have been limited to communications that PASO a clearly identified candidate, but only when made by Federal political committees and unregistered groups that meet *Buckley's* ''major purpose'' test, which was the subject of another draft rule discussed above. *See* draft 11 CFR 100.115, Agenda Document No. 04–75, at 19–23 and 42 (Aug. 19, 2004 meeting).

The Commission did not adopt a rule addressing this subject. Without the ''major purpose'' rules, the rules addressing PASO communications could not have been adopted in the forms considered by the Commission.

Proposed 11 CFR 100.155—Allocated Amounts

The NPRM proposed a new regulation that would have specifically stated that when costs are properly allocable between a Federal account and a non-Federal account, the costs that must be paid by a Federal account are ''expenditures'' under FECA, and the costs that may and in fact are paid by a non-Federal account are not ''expenditures'' under FECA. The proposed regulation was linked to proposed 11 CFR 100.115 and 100.116 regarding PASO communications and voter drives. *See* NPRM at 11757. The Commission considered a version of this regulation that was broader than the version in the NPRM, in that it would have extended this principle to any non-Federal funds disbursed pursuant to allocation rules at 11 CFR 106.1, 106.6, 106.7, or 300.33. *See* draft 11 CFR 100.155, Agenda Document No. 04–75–A, at 5 (Aug. 19, 2004 meeting). For the reasons that the Commission did not adopt draft 11 CFR 100.115 and 100.116 in Agenda Document No. 04–75–A, it also did not adopt draft 11 CFR 100.155.

Proposed 11 CFR Part 102, Subpart A—Conversion Rules

The NPRM included proposed rules to address how organizations that become political committees after operating for some time as non-political committee organizations would demonstrate that they used Federally permissible funds to pay for expenditures made before becoming political committees. The proposed rules would have included a new subpart A in 11 CFR part 102. *See* NPRM at 11749–53, 11757–59. The

proposed rules would have required a new political committee to convert funds received during the two years prior to the time the organization became a political committee into Federal funds in an amount equal to the amount of its expenditures during the same time period. To do so, the new political committee would have been required to contact recent donors, make certain disclosures, and seek the donors' consent to use the funds for the purpose of influencing Federal elections. *See* NPRM at 11757–59.

The Commission received numerous comments in response to these proposed changes. Although one commenter supported the proposed rules, most commenters who addressed this topic expressed broad opposition to the proposals. Several commenters especially disagreed with the proposed rules that would have required political committees to look back at past activity and repay debts of Federal money for activities completed up to two years before the organizations became political committees. Some commenters also opposed the specific two-step conversion process in the proposed rules, including the requirement to contact and obtain permission from past donors and the 60-day deadline for converting funds to Federal funds.

In response to these comments and the Commission's further consideration of the issued raised by the proposed rules, the Commission has decided not to promulgate final rules establishing subpart A of 11 CFR part 102.

Certification of No Effect Pursuant to 5 U.S.C. 605(b) (Regulatory Flexibility Act)

The Commission certifies that the final rules do not have a significant economic impact on a substantial number of small entities.

The final rules amend the Commission's definition of ''contribution'' to include funds received in response to certain communications that are not expressly included in the Commission's prior definition of ''contribution.'' For political committees, whether a receipt qualifies as a ''contribution'' determines whether it is subject to amount limitations and source prohibitions for Federal funds imposed by FECA. For organizations that are not political committees, whether a receipt is a ''contribution'' may affect whether the organization is a political committee. New section 100.57 does not, however, limit the overall amount of money that may be raised or spent on electoral activity. The rule in new section 100.57 is carefully tailored to reach communications that seek funds ''for the purpose of influencing Federal elections,'' and includes a limited exception for communications that refer to a non-Federal candidate, and a complete exception for joint fundraising efforts between or among authorized committees of Federal and non-Federal candidates. Therefore, any economic impact on Federal and non-Federal candidate committees, some of which might qualify as small entities, is not significant.

The final rules also revise the Commission's rules regarding the allocation of certain disbursements between a political committee's Federal account and non-Federal account. Thus, these revisions affect only some political committees. As discussed in the *Explanation and Justification* for revised 11 CFR 106.6(c), a review of the past ten years of public disclosure reports filed with the FEC revealed that few current political committees allocate their administrative expenses and generic voter drives under former 11 CFR 106.6, and among those political committees, many already use 50% or more as their Federal allocation ratio. Although the new section 106.6(f) requires Federal funds be used for certain public communications and voter drive activities by political committees, the final rule does not limit the overall amount of money that political committees may raise and spend on such activity. Consequently, the final rules' changes are unlikely to have a significant economic impact on substantial number of small entities.

List of Subjects

11 CFR Part 100

Elections.

11 CFR Part 102

Political committees and parties, Reporting and recordkeeping requirements.

11 CFR Part 104

Campaign funds, Political committees and parties, Reporting and recordkeeping requirements.

11 CFR Part 106

Campaign funds, Political committees and parties, Reporting and recordkeeping requirements.

■ For the reasons set out in the preamble, the Federal Election Commission amends subchapter A of chapter 1 of title 11 of the *Code of Federal Regulations* as follows:

PART 100—SCOPE AND DEFINITIONS (2 U.S.C. 431)

■ 1. The authority citation for part 100 continues to read as follows:

Authority: 2 U.S.C. 431, 434, and 438(a)(8).

■ 2. Section 100.57 is added to subpart B to read as follows:

§ 100.57 Funds received in response to solicitations.

(a) *Treatment as contributions.* A gift, subscription, loan, advance, or deposit of money or anything of value made by any person in response to any communication is a contribution to the person making the communication if the communication indicates that any portion of the funds received will be used to support or oppose the election of a clearly identified Federal candidate.

(b) *Certain allocable solicitations.* If the costs of a solicitation described in paragraph (a) of this section are allocable under 11 CFR 106.1, 106.6 or 106.7 (consistent with 11 CFR 300.33(c)(3)) as a direct cost of fundraising, the funds received in response to the solicitation shall be contributions as follows:

(1) If the solicitation does not refer to any clearly identified non-Federal candidates, but does refer to a political party, in addition to the clearly identified Federal candidate described in paragraph (a) of this section, one hundred percent (100%) of the total funds received are contributions.

(2) If the solicitation refers to one or more clearly identified non-Federal candidates, in addition to the clearly identified Federal candidate described in paragraph (a) of this section, at least fifty percent (50%) of the total funds received are contributions, whether or not the solicitation refers to a political party.

(c) *Joint fundraisers.* Joint fundraising conducted under 11 CFR 102.17 shall comply with the requirements of paragraphs (a) and (b) of this section except that joint fundraising between or among authorized committees of Federal candidates and campaign organizations of non-Federal candidates is not subject to paragraph (a) or (b) of this section.

PART 102—REGISTRATION, ORGANIZATION AND RECORDKEEPING BY POLITICAL COMMITEES (2 U.S.C. 433)

■ 3. The authority citation for part 102 continues to read as follows:

Authority: 2 U.S.C. 432, 433, 434(a)(11), 438(a)(8), 441d.

■ 4. Section 102.5 is amended by revising paragraph (a)(1)(i) to read as follows:

§ 102.5 Organizations financing political activity in connection with Federal and non-Federal elections, other than through transfers and joint fundraisers: Accounts and Accounting.

(a) * * *

(1) * * *

(i) Establish a separate Federal account in a depository in accordance with 11 CFR part 103. Such account shall be treated as a separate Federal political committee that must comply with the requirements of the Act including the registration and reporting requirements of 11 CFR parts 102 and 104. Only funds subject to the prohibitions and limitations of the Act shall be deposited in such separate Federal account. *See* 11 CFR 103.3. All disbursements, contributions, expenditures, and transfers by the committee in connection with any Federal election shall be made from its Federal account, except as otherwise permitted for State, district and local party committees by 11 CFR part 300 and paragraph (a)(5) of this section. No transfers may be made to such Federal account from any other account(s) maintained by such organization for the purpose of financing activity in connection with non-Federal elections, except as provided by 11 CFR 300.33, 300.34, 106.6(c), 106.6(f), and 106.7(f). Administrative expenses for political committees other than party committees shall be allocated pursuant to 11 CFR 106.6(c) between such Federal account and any other account maintained by such committee for the purpose for financing activity in connection with non-Federal elections. Administrative expenses for State, district, and local party committees are subject to 11 CFR 106.7 and 11 CFR part 300; or

* * * * *

PART 104—REPORTS BY POLITICAL COMMITTEES AND OTHER PERSONS (2 U.S.C. 434)

■ 5. The authority citation for part 104 continues to read as follows:

Authority: 2 U.S.C. 431(1), 431(8), 431(9), 432(i), 434, 438(a)(8) and (b), 439a, 441a, and 36 U.S.C. 510.

■ 6. Section 104.10 is amended by revising the introductory text in paragraph (b) and paragraph (b)(1) to read as follows:

§ 104.10 Reporting by separate segregated funds and nonconnected committees of expenses allocated among candidates and activities.

* * * * *

(b) *Expenses allocated among activities.* A political committee that is a separate segregated fund or a nonconnected committee and that has established separate Federal and non-Federal accounts under 11 CFR 102.5(a)(1)(i) shall allocate between those accounts its administrative expenses and its costs for fundraising, generic voter drives, and certain public communications according to 11 CFR 106.6, and shall report those allocations according to paragraphs (b)(1) through (5) of this section, as follows:

(1) *Reporting of allocation of administrative expenses and costs of generic voter drives and public communications that refer to any political party.* In each report disclosing a disbursement for administrative expenses, generic voter drives, or public communications that refer to any political party, but do not refer to any clearly identified candidates, as described in 11 CFR 106.6(b)(1)(i), (b)(1)(iii) and (b)(1)(iv), as applicable, the committee shall state the allocation ratio to be applied to each category of activity according to 11 CFR 106.6(c).

* * * * *

PART 106—ALLOCATIONS OF CANDIDATE AND COMMITTEE ACTIVITIES

■ 7. The authority citation for part 106 continues to read as follows:

Authority: 2 U.S.C. 438(a)(8), 441a(b), 441a(g).

■ 8. Section 106.6 is amended by:

■ a. Removing the words ''(c) and (d)'' from paragraph (a) and adding in their place the words ''(c), (d), and (f)'';

■ b. Removing the words ''or (b)(1)(i)'' from paragraphs (a) and (e) introductory text;

■ c. Removing the citation ''102.5(b)(1)(ii)'' from paragraph (a) and adding in its place the citation ''102.5(a)(1)(ii)''; and

■ d. Revising paragraphs (b) and (c) and adding paragraph (f) to read as follows:

§ 106.6 Allocation of expenses between federal and non-federal activities by separate segregated funds and nonconnected committees.

* * * * *

(b) *Payments for administrative expenses, voter drives and certain public communications.*

(1) *Costs to be allocated.* Separate segregated funds and nonconnected committees that make disbursements in connection with Federal and non-Federal elections shall allocate expenses for the following categories of activity in accordance with paragraphs (c) or (d) of this section:

(i) Administrative expenses including rent, utilities, office supplies, and salaries not attributable to a clearly identified candidate, except that for a separate segregated fund such expenses may be paid instead by its connected organization;

(ii) The direct costs of a fundraising program or event including disbursements for solicitation of funds and for planning and administration of actual fundraising events, where Federal and non-Federal funds are collected through such program or event, except that for a separate segregated fund such expenses may be paid instead by its connected organization;

(iii) Generic voter drives including voter identification, voter registration, and get-out-the-vote drives, or any other activities that urge the general public to register, vote or support candidates of a particular party or associated with a particular issue, without mentioning a specific candidate; and

(iv) Public communications that refer to a political party, but do not refer to any clearly identified Federal or non-Federal candidate;

(2) *Costs not subject to allocation.* Separate segregated funds and nonconnected committees that make disbursements for the following categories of activity shall pay for those activities in accordance with paragraph (f) of this section:

(i) Voter drives, including voter identification, voter registration, and get-out-the-vote drives, in which the printed materials or scripted messages refer to, or the written instructions direct the separate segregated fund's or nonconnected committee's employee or volunteer to refer to:

(A) One or more clearly identified Federal candidates, but do not refer to any clearly identified non-Federal candidates; or

(B) One or more clearly identified Federal candidates and also refer to candidates of a particular party or associated with a particular issue, but do not refer to any clearly identified non-Federal candidates;

(ii) Voter drives, including voter identification, voter registration, and get-out-the-vote drives, in which the printed materials or scripted messages refer to, or the written instructions direct the separate segregated fund's or nonconnected committee's employee or volunteer to refer to:

(A) One or more clearly identified non-Federal candidates, but do not refer

to any clearly identified Federal candidates; or

(B) One or more clearly identified non-Federal candidates and also refer to candidates of a particular party or associated with a particular issue, but do not refer to any clearly identified Federal candidates;

(iii) Public communications that refer to one or more clearly identified Federal candidates, regardless of whether there is reference to a political party, but do not refer to any clearly identified non-Federal candidates; and

(iv) Public communications that refer to a political party, and refer to one or more clearly identified non-Federal candidates, but do not refer to any clearly identified Federal candidates.

(c) *Method for allocating administrative expenses, costs of generic voter drives, and certain public communications.* Nonconnected committees and separate segregated funds shall pay their administrative expenses, costs of generic voter drives, and costs of public communications that refer to any political party, as described in paragraphs (b)(1)(i), (b)(1)(iii) or (b)(1)(iv) of this section, with at least 50 percent Federal funds, as defined in 11 CFR 300.2(g).

* * * * *

(f) *Payments for public communications and voter drives that refer to one or more clearly identified Federal or non-Federal candidates.* Nonconnected committees and separate segregated funds shall pay for the costs of all public communications that refer to one or more clearly identified candidates, and voter drives that refer to one or more clearly identified candidates, as described in paragraphs (b)(2)(i) and (b)(2)(ii) of this section, as follows:

(1) The following shall be paid 100 percent from the Federal account of the nonconnected committee or separate segregated fund:

(i) Public communications that refer to one or more clearly identified Federal candidates, regardless of whether there is reference to a political party, but do not refer to any clearly identified non-Federal candidates, as described in paragraph (b)(2)(iii) of this section; and

(ii) Voter drives described in paragraph (b)(2)(i) of this section.

(2) The following may be paid 100 percent from the non-Federal account of the nonconnected committee or separate segregated fund:

(i) Public communications that refer to a political party and one or more clearly identified non-Federal candidates, but do not refer to any clearly identified Federal candidates, as described in paragraph (b)(2)(iv) of this section; and

(ii) Voter drives described in paragraph (b)(2)(ii) of this section.

(3) Notwithstanding 11 CFR 106.1(a)(i), public communications and voter drives that refer to one or more clearly identified Federal candidates and one or more clearly identified non-Federal candidates, regardless of whether there is a reference to a political party, including those that are expenditures, independent expenditures or in-kind contributions, shall be allocated as follows:

(i) Public communications and voter drives, other than phone banks, shall be allocated based on the proportion of space or time devoted to each clearly identified Federal candidate as compared to the total space or time devoted to all clearly identified candidates, or

(ii) Public communications and voter drives that are conducted through phone banks shall be allocated based on the number of questions or statements devoted to each clearly identified Federal candidate as compared to the total number of questions or statements devoted to all clearly identified candidates.

Dated: November 18, 2004.

Bradley A. Smith,

Chairman, Federal Election Commission.

[FR Doc. 04–25946 Filed 11–22–04; 8:45 am]

BILLING CODE 6715–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 327

RIN 3064–AC84

Deposit Insurance Assessments—Certified Statements

AGENCY: Federal Deposit Insurance Corporation.

ACTION: Final rule.

SUMMARY: The Federal Deposit Insurance Corporation (FDIC) is modernizing and simplifying its deposit insurance assessment regulations governing certified statements, to provide regulatory burden relief to insured depository institutions. Under the final rule, insured institutions will obtain their certified statements on the Internet via the FDIC's transaction-based e-business Web site, FDIC*connect*. Correct certified statements will no longer be signed by insured institutions or returned to the FDIC, and the semiannual certified statement process will be synchronized with the quarterly invoice process. Two quarterly certified statement invoices will comprise the semiannual certified statement and reflect the semiannual assessment amount. If an insured institution agrees with its quarterly certified statement invoice, it will simply pay the assessed amount and retain the invoice in its own files. If it disagrees with the quarterly certified statement invoice, it will either amend its report of condition or similar report (to correct data errors) or amend its quarterly certified statement invoice (to correct calculation errors). The FDIC will automatically treat either as the insured institution's request for revision of its assessment computation, eliminating the requirement of a separate filing. In addition, the FDIC will provide e-mail notification each quarter to let depository institutions know when their quarterly certified statement invoices are available on FDIC*connect*. An institution that lacks Internet access will be able request from the FDIC a one-year renewable exemption from the use of FDIC*connect*, during which it will continue to receive quarterly certified statement invoices by mail. With these amendments, the time and effort required to comply with the certified statement process will be reduced, a result of the FDIC's ongoing program under the Economic Growth and Regulatory Paperwork Reduction Act (EGRPRA) to provide regulatory burden relief to insured depository institutions.

DATES: This final rule will become effective on March 1, 2005.

FOR FURTHER INFORMATION CONTACT: Steve Wagoner, Senior Assessment Specialist, Division of Finance, (202) 416–7152; Linda A. Abood, Supervisory IT Specialist, Division of Information Resources Management, (703) 516–1202; or Christopher Bellotto, Counsel, Legal Division, (202) 898–3801, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429.

SUPPLEMENTARY INFORMATION:

I. Background

On June 8, 2004, the FDIC published in the **Federal Register**, for a 60-day comment period, a notice of proposed rulemaking with request for comment on the proposed amendments to section 327.2, the certified statement regulation. (69 FR 31922). The comment period closed on August 9, 2004. The FDIC received 22 comment letters, one from a trade organization (Independent Community Bankers of America) and 21 from depository institutions. Seventeen of the commenters generally supported the proposal and the remaining five generally opposed, although in varying

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EMILY'S LIST,	)	
	)	
Plaintiff,	)	Civ. No. 05-0049 (CKK)
	)	
v.	)	
	)	
FEDERAL ELECTION COMMISSION,	)	EXHIBIT
	)	
Defendant.	)	

EXHIBIT 3

FEC Committee Summary Report, EMILY's List 2003–2004 Reported Activity, available at http://herndon1.sdrdc.com/cgi-bin/cancomsrs/?_04+C00193433.

Presented by the Federal Election Commission - 2003-2004 Cycle

TRY A: NEW SEARCH **RETURN TO: FEC HOME PAGE**

EMILY'S LIST

C00193433 Non-Party Qualified District of Columbia

Total Receipts:	$33,780,318
Transfers From Authorized:	$40,778
Individual Contributions:	$25,652,289
Other Committee Contributions:	$77,020
Other Loans:	$0
Non-Federal Transfers:	$6,477,228
Total Disbursements:	$33,066,486
Transfers To Authorized:	$0
Contributions To Other Committees:	$1,007,334
Independent Expenditures:	$837,982
Coordinated Expenditures:	$0
Individual Refunds:	$0
Other Committee Refunds:	$0
Other Loan Repayments:	$0
Non-Federal Expenditures:	$8,036,363

Beginning Cash:	$448,541
Latest Cash On Hand:	$1,162,374
Debts Owed By:	$0

Through: 11/22/2004

TRY A: NEW SEARCH **RETURN TO: FEC HOME PAGE**

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EMILY'S LIST,	)	
	)	
Plaintiff,	)	Civ. No. 05-0049 (CKK)
	)	
v.	)	
	)	
FEDERAL ELECTION COMMISSION,	)	EXHIBIT
	)	
Defendant.	)	

EXHIBIT 4

Sidoti, Liz, "Bush, Kerry to Pull Ads on Friday,"
Associated Press Newswires, June 7, 2004.

6/7/04 Associated Press (AP) Newswires 22:43:08

Associated Press Newswires

Monday, June 7, 2004

Bush, Kerry to Pull Ads on Friday

By LIZ SIDOTI
Associated Press Writer

WASHINGTON (AP) - President Bush and Democratic rival John Kerry will pull their campaign ads Friday, the day of former President Reagan's funeral. The two campaigns are trying to avoid overt politicking during a time of national mourning. The Kerry campaign said Sunday that the candidate would take a week off the campaign trail. The Bush campaign announced Monday that Vice President Dick Cheney's trip to Springfield, Mo., for a rally had been canceled in honor of Reagan.

The Bush campaign also plans to stop airing a hard-hitting television commercial this week that assails Kerry on the Patriot Act. The spot had been widely criticized for taking liberties with Kerry's position on the legislation that expanded the government's surveillance and detention powers following the Sept. 11, 2001, terrorist attacks.

Instead of that ad, Bush will run a commercial that trumpets recent job growth under his administration and that jabs Kerry, calling him a pessimist on the economic turnaround.

The ad, which is far less critical of Kerry than other commercials, started running Monday on national cable networks but also will air in media markets in 19 battleground states.

The funeral for Reagan will be held Friday at Washington's National Cathedral.

A group that supports Democratic women candidates asked federal election officials Monday to reconsider a ruling that could scale back its ability to use unlimited "soft money" donations.

EMILY's List raises millions of dollars to recruit and support Democratic women candidates at all levels of government who favor abortion rights. It collects limited donations known as hard money for use in congressional races and unlimited soft money to help cover operating costs and other election expenses. Some spending requires a mix of hard and soft money.

The group contends a recent Federal Election Commission decision has left it unclear what expenses can be paid for with soft money and has thrown into doubt the ratio of hard money needed when both types of donations can be used.

EMILY's List also argues that the rules shouldn't change in an election year. It wants the FEC to throw out the parts of the decision covering the shares of hard and soft money groups can use.

The ruling, issued as advice to a pro-Republican organization, could require groups to use only hard money to finance voter drives and other activities that promote, support, attack or oppose only federal candidates.

The FEC considered going a step further and making new hard and soft money allocation requirements part of its official rules, but decided against that last month. EMILY's List said that move throws the earlier decision into question.

EMILY's list is No. 1 among federal political action committees in fund raising, with more than $20 million in hard money this election cycle. It has raised at least $3 million in soft money.

"EMILY's List is the biggest PAC, which means we have the most hard money, so it's not an issue of not having it," president Ellen Malcolm said. Instead, the group wants the FEC to make it clear what the rules are, she said.

The commission had no immediate comment.

Two gun control groups launched an advertising campaign Monday asking Bush to pressure Congress to renew the federal ban on assault weapons.

The Brady Campaign to Prevent Gun Violence and the Million Mom March started running their first TV ad on cable networks in Washington. The 10-year-old law, which prohibits military style assault weapons from being manufactured, will expire in September unless Congress renews it.

The 30-second ad asks: "President Bush, are you going to let the assault weapons ban die? Why in this day and age would you put these weapons back on the street? Tell Speaker (Dennis) Hastert you want Congress to ban assault weapons."

The Brady Campaign is led by James Brady, who as President Reagan's press secretary was shot and permanently disabled by John W. Hinckley Jr. during the assassination attempt on Reagan in March 1981.

Associated Press Writer Sharon Theimer contributed to this report.

On the Net:

Bush campaign: http://www.georgewbush.com

Kerry campaign: http://www.johnkerry.com

Brady Campaign to Prevent Gun Violence: http://bradycampaign.org

Million Mom March: http://www.millionmommarch.com/

Federal Election Commission: http://www.fec.gov

EMILY's List: http://www.emilyslist.org
TABULAR OR GRAPHIC MATERIAL SET FORTH IN THIS DOCUMENT IS NOT DISPLAYABLE

image

---- INDEX REFERENCES ----

NEWS SUBJECT: (Advertising (C32); Domestic Politics (GPOL); Executive Branch (GVEXE); National/Presidential Elections (GVOTE1); Marketing (C31); Corporate/Industrial News (CCAT); Political/General News (GCAT); Politics/International Relations (GPIR); Government Bodies (GVBOD); Elections (GVOTE))

REGION: (United States (USA); North American Countries (NAMZ))

Language: EN

OTHER INDEXING: Elections/Politics; Campaign Ads; D832EUV80; tagpf1apon; sel-----; catp; 1131

Word Count: 743

6/7/04 APWIRES 22:43:08

END OF DOCUMENT

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EMILY'S LIST,	)	
	)	
Plaintiff,	)	Civ. No. 05-0049 (CKK)
	)	
v.	)	
	)	
FEDERAL ELECTION COMMISSION,	)	EXHIBIT
	)	
Defendant.	)	

EXHIBIT 5

FEC Notice, dated April 7, 2004, available at
http://www.fec.gov/press/press2004/20040407advisory.html.

Notice

The deadline for comments on the Federal Election Commission's rulemaking on political committees is April 9, 2004.

No comments received after that date will be considered in the rulemaking process. Comments sent to the email account after that date will be automatically rejected. Comments received by fax, mail, or hand delivery after that date will be returned.

# # #

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EMILY'S LIST,	)	
	)	
Plaintiff,	)	Civ. No. 05-0049 (CKK)
	)	
v.	)	
	)	
FEDERAL ELECTION COMMISSION,	)	EXHIBIT
	)	
Defendant.	)	

EXHIBIT 6

Disclosure Reports, Year End Form H1s filed by
EMILY's List with FEC (1998-2004).

SCHEDULE H1 (FEC Form 3X) 6 / 8642

METHOD OF ALLOCATION FOR:

- **SHARED FEDERAL AND NON-FEDERAL ADMINISTRATIVE, GENERIC VOTER DRIVE AND EXEMPT ACTIVITY COSTS**
- **SHARED FEDERAL AND LEVIN FUNDS FEDERAL ELECTION ACTIVITY EXPENSES**

NAME OF COMMITTEE (In Full)
EMILY's List

USE ONLY ONE SECTION

State and Local Party Committees

Fixed Percentage (select one)

Presidential-Only Election Year (28% Federal)

Presidential and Senate Elction Year (36% Federal)

Senate-Only Election Year (21% Federal)

_____ Non-Presidential and Non-Senate Election Year (15% Federal)

Seperate Segregated Funds and Non-Connected Committees

Fixed Percentage (select one)

Estimated Direct Candidates Support – Federal ..... 50.00 %

Estimated Direct Candidates Support – Non-Federal ..... 50.00 %

ADJUSTMENTS TO FUNDS EXPENDED:

Actual Direct Candidate Support -- Federal ..... 0.00 %

Actual Direct Candidate Support – Non-Federal 0.00

SCHEDULE H1 (FEC Form 3X)

METHOD OF ALLOCATION FOR SHARED FEDERAL AND NON-FEDERAL ADMINISTRATIVE EXPENSES AND GENERIC VOTER DRIVE COSTS

NAME OF COMMITTEE (In Full)
EMILY's List

USE ONLY ONE SECTION

Transaction ID: H1-EL-461

A. NATIONAL PARTY COMMITTEES

FIXED FEDERAL PERCENTAGE (Check the appropriate line and enter % in box to right) ..... 0.00 %

- [ ] Presidential Year (65%)
- [ ] All Other Years (60%)

B. HOUSE AND SENATE PARTY CAMPAIGN COMMITTEES

- [ ] **MINIMUM FEDERAL PERCENTAGE** (65%) (If checked, enter 65% in box to right) ..... 0.00 %

OR

- [x] **FUNDS EXPENDED :**

. Estimated Direct Candidate Support – Federal ..... 0.00 %

. Estimated Direct Candidate Support – Non-Federal ..... 0.00 %

ADJUSTMENTS TO FUNDS EXPENDED:

Actual Direct Candidate Support – Federal	0.00	.....	0.00 %
Actual Direct Candidate Support – Non-Federal	0.00		

NOTE: Funds expended must be used if the Federal proportion is greater than 65% in any year.

C. SEPARATE SEGREGATED FUNDS AND NON-CONNECTED COMMITTEES

FUNDS EXPENDED :

. Estimated Direct Candidate Support – Federal ..... 50.00 %

. Estimated Direct Candidate Support – Non-Federal ..... 50.00 %

ADJUSTMENTS TO FUNDS EXPENDED:

Actual Direct Candidate Support – Federal	0.00	.....	0.00 %
Actual Direct Candidate Support – Non-Federal	0.00		

D. STATE AND LOCAL PARTY COMMITTEES

BALLOT COMPOSITION

Check all Offices appearing on the next Genral Election Ballot:

			NUMBER OF POINTS
1. President	[ ]	(1 point)	
2. U.S. Senate	[ ]	(1 point)	
3. U.S. Congress	[ ]	(1 point)	
4. SUBTOTAL -- Federal (ADD 1, 2, AND 3)			
5. Governor	[ ]	(1 point)	
6. Other Statewide Office(s)	[ ]	(1 point or 2 Points) ..	
7. State Senate	[ ]	(1 point)	
8. State Representative	[ ]	(1 point)	
9. Local Candidates	[ ]	(1 point or 2 Points) ..	
10. Extra Non-Federal Point	[ ]	(1 point)	
11. SUBTOTAL – Non-Federal (Add 5, 6, 7, 8, 9, and 10)			
12. TOTAL POINTS (Line 4 plus Line 11)			

FEDERAL ALLOCATION = Line 4 divided by Line 12 ..... %

SCHEDULE H1
(revised 5/93)

METHOD OF ALLOCATION FOR SHARED FEDERAL AND NON-FEDERAL ADMINISTRATIVE EXPENSES AND GENERIC VOTER DRIVE COSTS

NAME OF COMMITTEE
EMILY's List

NATIONAL PARTY COMMITTEES

FIXED FEDERAL PERCENTAGE (CHECK THE APPROPRIATE LINE AND ENTER % IN BOX TO RIGHT) ..... %

☐ PRESIDENTIAL YEAR (65%)
☐ ALL OTHER YEARS (60%)

HOUSE AND SENATE PARTY CAMPAIGN COMMITTEES

☐ MINIMUM FEDERAL PERCENTAGE (65%) (IF CHECKED, ENTER 65% IN BOX TO RIGHT) ..... %

OR

☐ FUNDS EXPENDED:

- ESTIMATED DIRECT CANDIDATE SUPPORT — FEDERAL ..... %
- ESTIMATED DIRECT CANDIDATE SUPPORT — NON-FEDERAL ..... %

ADJUSTMENTS TO FUNDS EXPENDED:
ACTUAL DIRECT CANDIDATE SUPPORT — FEDERAL ..... $ ..... %
ACTUAL DIRECT CANDIDATE SUPPORT — NON-FEDERAL ..... $

NOTE: FUNDS EXPENDED MUST BE USED IF THE FEDERAL PROPORTION IS GREATER THAN 65% IN ANY YEAR.

SEPARATE SEGREGATED FUNDS AND NON-CONNECTED COMMITTEES

FUNDS EXPENDED: (November 28, 2000-December 31, 2000)

- ESTIMATED DIRECT CANDIDATE SUPPORT — FEDERAL ..... 50 %
- ESTIMATED DIRECT CANDIDATE SUPPORT — NON-FEDERAL ..... 50 %

ADJUSTMENTS TO FUNDS EXPENDED:
ACTUAL DIRECT CANDIDATE SUPPORT — FEDERAL ..... $ ..... %
ACTUAL DIRECT CANDIDATE SUPPORT — NON-FEDERAL ..... $

STATE AND LOCAL PARTY COMMITTEES

BALLOT COMPOSITION
CHECK ALL OFFICES APPEARING ON THE NEXT GENERAL ELECTION BALLOT:

		NUMBER OF POINTS
1. PRESIDENT	☐ (1 POINT)	
2. U.S. SENATE	☐ (1 POINT)	
3. U.S. CONGRESS	☐ (1 POINT)	
4. SUBTOTAL — FEDERAL (ADD 1, 2, AND 3)		
5. GOVERNOR	☐ (1 POINT)	
6. OTHER STATEWIDE OFFICE(S)	☐ (1 OR 2 POINTS)	
7. STATE SENATE	☐ (1 POINT)	
8. STATE REPRESENTATIVE	☐ (1 POINT)	
9. LOCAL CANDIDATES	☐ (1 OR 2 POINTS)	
10. EXTRA NON-FEDERAL POINT	☐ (1 POINT)	
11. SUBTOTAL — NON-FEDERAL (ADD 5, 6, 7, 8, 9, AND 10)		
12. TOTAL POINTS (LINE 4 PLUS LINE 11)		

FEDERAL ALLOCATION = LINE 4 DIVIDED BY LINE 12 ..... %

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EMILY'S LIST,	)	
	)	
Plaintiff,	)	Civ. No. 05-0049 (CKK)
	)	
v.	)	
	)	
FEDERAL ELECTION COMMISSION,	)	EXHIBIT
	)	
Defendant.	)	

EXHIBIT 7

Disclosure Reports, Year End Form H1 filed by
EMILY's List with FEC (1995-1996).

SCHEDULE H1
(revised 5/93)

METHOD OF ALLOCATION FOR SHARED FEDERAL AND NON-FEDERAL ADMINISTRATIVE EXPENSES AND GENERIC VOTER DRIVE COSTS

NAME OF COMMITTEE

EMILY's List

NATIONAL PARTY COMMITTEES

FIXED FEDERAL PERCENTAGE (CHECK THE APPROPRIATE LINE AND ENTER % IN BOX TO RIGHT) ..... %

☐ PRESIDENTIAL YEAR (55%)

☐ ALL OTHER YEARS (60%)

HOUSE AND SENATE PARTY CAMPAIGN COMMITTEES

☐ MINIMUM FEDERAL PERCENTAGE (65%) (IF CHECKED, ENTER 65% IN BOX TO RIGHT) ..... %

OR

☐ FUNDS EXPENDED:

- ESTIMATED DIRECT CANDIDATE SUPPORT — FEDERAL ..... %
- ESTIMATED DIRECT CANDIDATE SUPPORT — NON-FEDERAL ..... %

ADJUSTMENTS TO FUNDS EXPENDED: ..... %

ACTUAL DIRECT CANDIDATE SUPPORT — FEDERAL ..... $

ACTUAL DIRECT CANDIDATE SUPPORT — NON-FEDERAL ..... $

NOTE: FUNDS EXPENDED MUST BE USED IF THE FEDERAL PROPORTION IS GREATER THAN 65% IN ANY YEAR.

SEPARATE SEGREGATED FUNDS AND NON-CONNECTED COMMITTEES

FUNDS EXPENDED: (For Expenses 11/25/96 - 12/31/96)

- ESTIMATED DIRECT CANDIDATE SUPPORT — FEDERAL ..... 70 %
- ESTIMATED DIRECT CANDIDATE SUPPORT — NON-FEDERAL ..... 30 %

ADJUSTMENTS TO FUNDS EXPENDED: ..... %

ACTUAL DIRECT CANDIDATE SUPPORT — FEDERAL ..... $

ACTUAL DIRECT CANDIDATE SUPPORT — NON-FEDERAL ..... $

STATE AND LOCAL PARTY COMMITTEES

BALLOT COMPOSITION

CHECK ALL OFFICES APPEARING ON THE NEXT GENERAL ELECTION BALLOT:

		NUMBER OF POINTS
1. PRESIDENT	☐ (1 POINT)	
2. U.S. SENATE	☐ (1 POINT)	
3. U.S. CONGRESS	(1 POINT)	
4. SUBTOTAL — FEDERAL (ADD 1, 2, AND 3)		
5. GOVERNOR	☐ (1 POINT)	
6. OTHER STATEWIDE OFFICE(S)	(1 OR 2 POINTS)	
7. STATE SENATE	(1 POINT)	
8. STATE REPRESENTATIVE	☐ (1 POINT)	
9. LOCAL CANDIDATES	(1 OR 2 POINTS)	
10. EXTRA NON-FEDERAL POINT	(1 POINT)	
11. SUBTOTAL — NON-FEDERAL (ADD 5, 6, 7, 8, 9, AND 10)		
12. TOTAL POINTS (LINE 4 PLUS LINE 11)		

FEDERAL ALLOCATION = LINE 4 DIVIDED BY LINE 12 ..... %

FEBA1(5/93)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EMILY'S LIST,	)	
	)	
Plaintiff,	)	Civ. No. 05-0049 (CKK)
	)	
v.	)	
	)	
FEDERAL ELECTION COMMISSION,	)	EXHIBIT
	)	
Defendant.	)	

EXHIBIT 8

Transcript of Public Hearing on Political
Committee Status, April 14, 2004.

FEDERAL ELECTION COMMISSION
Washington, DC 20463

July 7, 2004

MEMORANDUM

TO: The Commission
General Counsel
Staff Director
Public Information
Press Office
Public Records

FROM: Mai T. Dinh
Assistant General Counsel

SUBJECT: Transcript from the hearing on Political Committee Status

Attached is the transcript from the April 14, 2004 hearing on Political Committee Status.

Attachment

cc: Deputy General Counsel
Associate General Counsel
Congressional Affairs Officer
Executive Assistants

FEDERAL ELECTION COMMISSION
PUBLIC HEARING ON POLITICAL COMMITTEE STATUS

NOTICE OF PROPOSED RULEMAKING

999 E Street, N.W.
Ninth Floor Hearing Room Washington,
D.C. 20463

Wednesday, April 14, 2004

The hearing convened, pursuant to notice, at 9:05 a.m.

COMMISSION MEMBERS PRESENT:

BRADLEY A. SMITH, Chairman

ELLEN WEINTRAUB, Vice Chair

DAVID M. MASON, Commissioner

DANNY McDONALD, Commissioner

SCOTT E. THOMAS, Commissioner

MICHAEL E. TONER, Commissioner

LAWRENCE H. NORTON, General Counsel

JAMES E. PEHRKON, Staff Director

TABLE OF CONTENTS

your view that with the exemptions you're talking about, the regulation option that would treat 527s as satisfying the major purpose test, is it your view that if the 527 spent more than $1,000 on an ad that promoted, supported, attacked, opposed a Federal candidate, it would be your view that that type of organization should be under the law of a political committee?

MR. SIMON: Yes, because based on the analysis I gave you before. As a 527, it's a group whose major purpose by definition is campaign activity; therefore, it's not subject to the bright line narrowing gloss that the Court in Buckley put on the definition of expenditure. It's subject to the statutory definition of expenditure. Money it spends for the purpose of influencing a Federal election is an expenditure, and that includes money spent promoting, supporting, attacking, or opposing candidates.

Now, there is a lot of discussion about that promote, support, attack, oppose standard. That standard--and I think this is where the

Commission's proposed regulations go badly off track, because that standard, I believe, cannot be applied to corporations, to 501[c]s, to labor unions, but it can be applied to 527s precisely because those are major purpose organizations.

COMMISSIONER TONER: Is the reason you don't believe they can be applied to 501[c]s and corporations because of the constitutional command of the major purpose test?

MR. SIMON: That's right, because of the distinction that the Supreme Court drew in Buckley. So, again, to get to the bottom line, if we have a 527, but statutory definition, that group has a major purpose to influence elections. That meets the first prong of the political committee test. Then the question is has it spent $1,000 in contributions or expenditures. If it has under the statutory standard or for the purpose of influencing, that meets the second prong; therefore, it's a political committee.

COMMISSIONER TONER: I'd be interested in anybody else's views on these issues.

in its entirety.

II. PANEL II

CHAIRMAN SMITH: I'd the panelist to come on up for our second panel, another very distinguished panel. We'll have Nan Aron, President of the Alliance for Justice; Richard Clair, Corporate Counsel for the National Right to Work Committee; Craig Holman, Legislative Counsel for Public Citizen. Is Ms. Aron here?

Okay. And we had--I don't know if you three were before, but there is a light system. The flashing green will mean you've got a minute. The yellow will mean you've got 30 seconds, and we are asking the opening comments to be held to just three minutes, which is very short. It gives us a bit more time for questioning and a chance, perhaps, to expound some on that time. So we'll try to keep it very short.

With that, I think we're prepared to go, and, Ms. Aron, I'm going to call on you first because we'll go alphabetically.

MS. ARON: Thank you. I'm pleased to be

here. Thank you very much.

My name is Nan Aron, and I'm president of the Alliance for Justice, a national association of over 65 member organizations representing environmental, civil rights, mental health, women's, children's and consumer advocacy organizations. The Alliance for Justice collates the Coalition to Protect Nonprofit Advocacy, a coalition formed by 501[c]s and 527 organizations, representing every state in the country, large and small nonprofits, public and private foundations, and countless issues, areas from both the left and the right. More than 672 of these organizations joined us in our comments filed with the Commission last week opposing this rulemaking. On behalf of the Coalition and the Alliance for Justice members, I strongly reaffirm the opposition and ask that the Commission vote against adopting these rules.

Today, I will focus on the real world implications this rulemaking will have on nonprofit advocacy. In needlessly attempting to regulate a handful of groups, this rule cuts a swath across

the entire nonprofit community. Nonprofits often speak for those who cannot, the underrepresented and neediest in our society. During an election year, a time in which artful politicians react more to polls than policy, the voices of nonprofits fill the void on many critical issues. These new rules issued now will silence these voices.

By classifying nonprofits as political committees, these rules impose a de facto gag that will impoverish a debate on public policy, diminish civic engagement, and force many nonprofits to choose between the lesser of two evils: ceasing their normal operations or facing restrictions on the fund-raiding. These rules are flawed on a number of grounds. In addition to our staunch position that there is no need or authority to impose these new rules, they lack clarity.

The rulemaking fails to define exactly what promote, support, oppose, or attack means. Would placing an ad in the newspaper criticizing Representative Don Young from Alaska for adding over a billion dollars to the transportation bill

be seen as opposing his candidacy? This leads nonprofits to a conundrum. How can any nonprofit know whether its activity meets this standard if the rulemaking fails to define it?

The proposed rules will also reclassify nonprofits as political committees if they engage in nonpartisan voter registration or get-out-the-vote activity. The Commission's own web site posts our countries appalling national voter registration and turn-out statistics. Without the involvement of nonprofits, these disheartening numbers will drop even further. The Civil Rights movement was only possible in this country because of the wonderful work of foundations and nonprofits coming together.

I haven't talk even talked about the most draconian of these proposals, and that is the look back rule. This could jeopardize the survival of a vast number of nonprofits who would be forced to pay off an unknown debt with small individual contributions for activities from four years ago that are now subject to these new rules. Political

to ask the FEC to revise its regulations in order to implement FECA as defined by the McConnell decision.

COMMISSIONER TONER: I wanted to follow up on one aspect of your comments regarding allocation. As I understand your comments, and I want to confirm that I read the accurately, is it your view that any political committee, that is an outside organization, that there is no basis under FECA for any allocation whatsoever?

MR. HOLMAN: To tell the truth, the way I--I've read the law over and over, and I cannot imagine where the Federal Election Commission came up with the justification for an allocation ratio to warrant the use of soft money, money that should be illegal under FECA, for the purpose of political committees, for their activity that affects Federal elections. I cannot imagine a justification for the allocation ratio, and I know I've come out with a stronger statement than most other organizations have, but quite frankly, I see nothing in FECA that would justify an allocation ratio as applied to

political committees, and I would reverse that regulation that justifies that.

COMMISSIONER TONER: Is your view of that grounded in your understanding of FECA as opposed to BCRA or any other subsequent congressional action?

MR. HOLMAN: The allocation ratio justification came out of FECA and Buckley's decision and the regulations that the FEC developed, yes. It wasn't addressed by BCRA.

COMMISSIONER TONER: Let me ask you, briefly, if we do not prohibit allocation outright, but instead considered requiring a minimum 50 percent hard dollar threshold, would you be supportive of that?

MR. HOLMAN: It certainly would be an improvement over the existing allocation ratio that I've seen. I've been running through the FEC regulations in an effort to comprehend.

COMMISSIONER TONER: My condolences.

MR. HOLMAN: I've run into at least five different formulations of the allocation ratio, and

it would appear that groups are relatively free to use whichever one they want to try to justify the lowest need of having legal money used in their activities. And so from what I've seen of the allocation methodology and the allocation ratio of the FEC, it appears to be a mess, and it allows groups to do almost freely whatever they want to do. If you choose not to get rid of the allocation ratio, it would certainly be a healthier improvement to at least come out with some sort of fixed percentage, that is a clear bright line test of how much illegal money can be used in Federal elections.

COMMISSIONER TONER: Wouldn't that be sort of similar to our minimum 65 percent requirement that we had for national parties when they were able to use soft money?

MR. HOLMAN: Of which I did not support at all. As you know, what the national parties did is they pumped their money down to the state parties where they could use a much higher ratio of soft money, and they directed and conduct

television advertising campaigns by the state parties.

COMMISSIONER TONER: So the bottom line from your perspective, our current allocation regulations for these organizations are contrary to law; that's your bottom line?

MR. HOLMAN: Yes.

COMMISSIONER TONER: Thank you, Mr. Chairman.

CHAIRMAN SMITH: Thank you, Commissioner Toner.

Vice Chair Weintraub.

By the way, I just want to announce we get five minutes for questioning in this round. That's why it's going to go by even quicker than before.

VICE CHAIR WEINTRAUB: Five minutes, okay.

Ms. Aron, I think you said you were here on behalf of 527 as well as 501[c] organizations. So if we were to carve out all the 501[c]s as some people have suggested, just take them off the

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EMILY'S LIST,	)	
	)	
Plaintiff,	)	Civ. No. 05-0049 (CKK)
	)	
v.	)	
	)	
FEDERAL ELECTION COMMISSION,	)	EXHIBIT
	)	
Defendant.	)	

EXHIBIT 9

Transcript of Public Hearing on
Political Committee Status, April 15, 2004.

FEDERAL ELECTION COMMISSION
Washington, DC 20463

July 7, 2004

MEMORANDUM

TO: The Commission
General Counsel
Staff Director
Public Information
Press Office
Public Records

FROM: Mai T. Dinh
Assistant General Counsel

SUBJECT: Transcript from the hearing on Political Committee Status

Attached is the transcript from the April 15, 2004 hearing on Political Committee Status.

Attachment

cc: Deputy General Counsel
Associate General Counsel
Congressional Affairs Officer
Executive Assistants

FEDERAL

ELECTION COMMISSION

PUBLIC HEARING

"POLITICAL COMMITTEE STATUS NOTICE OF

PROPOSED RULEMAKING"

Thursday, April 15, 2004 9:30 a.m.

9th Floor Meeting Room 999 E Street, N.W.
Washington, D.C. 20463

P A R T I C I P A N T S

BRADLEY A. SMITH, Chairman

ELLEN L. WEINTRAUB, Vice Chair
DANNY LEE McDONALD, Commissioner
SCOTT E. THOMAS, Commissioner
MICHAEL E. TONER, Commissioner
DAVID M. MASON, Commissioner

ALSO PRESENT:

JAMES A. PEHRKON, Staff Director

LAWRENCE H. NORTON, General Counsel

TABLE OF CONTENTS

P R O C E E D I N G S

CHAIRMAN SMITH: We'll go ahead and call to order this public hearing on political committee status, the Federal Election Commission. This is the second day of this hearing, which began yesterday. Yesterday we heard from four panels, and today we have four more panels and, I believe, 16 witnesses who are going to testify for us.

Those witnesses come from over approximately some 200,000 people who commented. Of course, many of those were relatively short comments and a much smaller number of more

election of candidates and it spends more than $1,000 in expenditures as defined for that type of group, and, yes, you're required to say they're a political committee.

COMMISSIONER TONER: Let me follow up briefly also on the allocation side. Is it your position basically that for 527 organizations that do the kind of activities you're talking about for the purpose of influencing an election, if they operate in multiple states, four or more states, is it your view that we have a requirement to have a minimum federal percentage of 50-percent hard dollars on those types of groups? Is that your bottom line?

MR. NOBLE: Well, first let me clarify something. If it's a 527 organization that's a

political committee, then obviously there's no allocation. But if you're talking about with groups that can allocate, we think that--what we do think is that the present situation is untenable.

COMMISSIONER TONER: Why is that?

MR. NOBLE: Well, because we have a situation where--take Mr. Bauer's client. They are saying that 98 percent of their activity is non-federal, 2 percent is federal.

I think if you look at their own mailings, it is very clear that that is just not reality. I mean, their mailings yesterday to make passing reference to state and local candidates, but their mailings are very much focused on defeating President Bush.

So what we're saying is in the allocation rules which were put into place for a different situation, for a different factual situation at a different time, if they're allowing this type of activity, then, in fact, they're violating the law. They are not consistent with the law and the FEC's mandate to stop soft money to be used for federal

election activity. We do suggest the 50-percent rule. You might be able to come up with a different line, but you did come up in the proposed rulemaking with one that's 50 percent.

COMMISSIONER TONER: You think 50 percent would be permissible?

MR. NOBLE: Yes, I think 50 percent would be permissible as a bottom line, yes. It might be higher, but I would be a minimum.

MR. BAUER: May I respond?

COMMISSIONER TONER: Please, Mr. Bauer. MR. BAUER: First of all, I'm really struck, years ago, in 1980 when Bill Brock was Chairman of the Republican National Committee, which would be here today to celebrate, no doubt, that memory if it had chosen to testify, the Republican National Committee was widely championed for having understood and having run a massive integrated, national operation that focused on the presidential campaign in many respects, was nonetheless intended to mobilize voters around specific issues and to achieve success across the

entire ballot--integrated politics where the politics keys to the key figure, the presidential candidate in many respects whose policies will be debated in all corners of the country in a variety of ways, but which has a whole host of objectives--a whole host of objectives in rallying voters around specific issues and assuring that the success is not simply success in one office but in a whole host of offices.

We've now gotten away from that, and if George Bush's name is even mentioned, needless to say, for reasons that Jim Bopp referred to, those that would like to see him

re-elected become apoplectic and begin alleging that the law has been violated.

The law is not being violated because the person in this country whose policies are under review in this election and the outcome of the debate with certainly affect a whole host of races and a whole host of issues, the law is not violated by criticisms that are directed to this administration as part of an effort to mobilize

voters on issues and to achieve success up and down the ballot for people who hold to a different view than this administration holds.

The effect of the argument that you're hearing on allocation is fairly simple. Number one, organizations that wish to do and indeed politically need to do what is being alleged that ACT does, which is criticize the President as part of a coordinated program of mobilizing voters and seeking the election of candidates of sympathetic points of view across the ballot, would be, arguably, required in future cycles to simply criticize the President less. It's going to lessen, it's going to undermine robust criticism of the President of the United States. That's an extraordinary regulatory result, certainly one that I do not believe to be healthy. Or as discussed yesterday, many registered political committees which wish to, in fact, criticize the President of the United States will abandon registered political committee status and will simply find much more flexible vehicles outside the ambit of regulation,

which is the responsibility of this Commission, to do it.

Last but not least, the suggestion--and Larry has made it both in writing, he's made it here, and he's not alone because some of the simpatico reform organizations are going to be making it--that ACT is violating the law by complying with 106.6 of the Commission rules is simply preposterous on its face. We're complying with a specific existing rule. We're here in this agency, registered, operating under your rules, reporting, following your dictate. I might say in that respect, rather unique among the many organizations that have appeared before this agency.

[Laughter.]

MR. BAUER: So the notion that we should be on the defensive I think is telling.

And last but not least, let's take a look at some of these percentages. This is the absolute heart of arbitrary and capricious behavior that is being urged on the agency, which is to pluck

numbers out of the air--25 percent if four states or less, 50 percent if more than five states, or more than ten states. On what basis is that judgment being made? Let's set aside the question of whether or not the judgment should be made now, seven and a half months before the election. The question is: Under this timetable can the judgment be made wisely?

And so I want to close this with an appeal that deferral is not sufficient. It's not a question of deferring a bad decision. It's making a right decision. And I don't see how you can make the correct decision in these circumstances, even if you wish to revisit the allocation regulations.

COMMISSIONER TONER: Thank you, Mr. Chairman.

CHAIRMAN SMITH: Thank you, Commissioner Toner.

Vice Chair Weintraub?

VICE CHAIR WEINTRAUB: Thank you, Mr. Chairman. I thank the panel. I knew this would be an entertaining panel.

Let me start by agreeing with some--some--of what's been said here about enforcement. Ever since I've gotten to this agency--I know the general counsel will back me up on this--I have had just a bee in my bonnet about the pace of enforcement at

But again, I think you have to go back to the idea that the vagueness of these standards depends very much, whether you like it or not, on

the group that's involved, and the Supreme Court has said, Promote, Support, Attack or Oppose is not vague. People of ordinary intelligence will understand what it means when they are dealing with a political organization.

VICE CHAIR WEINTRAUB: Let me stop you right there, and then I do want to hear from the rest of the panel, and I see my time's already half up. I have to say, before you were talking about how if we just look at the 527s and there inherently ought to be political committees, and you're not a tax lawyer, but hey, you spent some time last night reading a tax opinion. And I saw the tax lawyer who testified here yesterday. You can't see him from where you're sitting, but I can see him from where I'm sitting. He's in the audience behind you. And as you were saying that, he was sitting there shaking his head. This 527 stuff is a lot more complicated than a lot of people think it is. These words have become terms of art. You're a lawyer, Mr. Noble. You understand this concept. Glosses develop on words

that, you know, if somebody on the street picks up a statute and says, "Oh, I can understand that," well, maybe they can if they're coming at it fresh. But if over a course of years the words have acquired legal meaning based on the interpretations of the IRS, we can't start from scratch. I'm sorry, I'm not going to give you a chance to respond to that because I want to hear from the other panelists about PASO and PASO Plus.

Mr. Bopp.

MR. BOPP: I would comment two ways. I would encourage you to define and provide further guidance on what those words mean. I do represent state and local political parties. I do represent state candidates that are subject to this restriction, and frankly, when the Supreme Court said that political parties and state candidates would understand when they attack, promote, support or oppose a federal candidate, it was just a laugher. I mean they're going like this, "what does this mean? Can I mention President Bush? Can I say that I worked for President Bush," in one

case? "Can I say something good about what I did

in the White House?"

VICE CHAIR WEINTRAUB: But do you have a suggestion for me?

MR. BOPP: Well, no. I think you're on the right track. In other words, I think using those additional ones that you mentioned is on the right track and I do think it's necessary. But the other point is, but the Supreme Court, even albeit somewhat disingenuously saying that people who are candidates or political parties would understand what Attack, Promote, Support or Oppose a federal candidate means. They were clear to say that it was those people, it's not the advocacy group out here, the AIDS Awareness Council in Sacramento that wants more money for AIDS and is going to think about saying something about the President. Surely we can't expect them to understand what that is. That's just completely out of context. That is unfortunately a part of this rulemaking, which is to apply that to that.

MR. BAUER: If I may make one just general

procedural point which I think would be helpful on this PASO point, which is you were asking--and I think quite correctly--what it means because it's clear to you and I think it's clear to most people in this room, it's clear to this panel that nobody knows what it means.

[Laughter.]

MR. BAUER: And yet, lo and behold, it was incorporated into the revisions that the Commission urged upon the nonexistent ABC Committee in 2000-37 Advisory Opinion. So talk about a steaming case of

the cart going before the horse. You did it. You put it in an advisory opinion to a committee that does not exist, changing the rules in the middle of the game, and you're asking us at this hearing what does it mean. That is one of the reasons why we're urging you to step back to the pre-2000-37 position and take the time, take the time to work through these issues. It cannot be done, given the complexity of the legal considerations. I take to heart, for example, your exchange with Larry Noble right now, in which clearly you don't agree at all

with his position on the tax code. Mr. Thomas, Commissioner Thomas, didn't agree with his assessment of the electioneering message history. PASO is a term that was used in the political party context and is now being imported with great difficulty into the nonpolitical party context, and to boot, Larry said some other things about the exempt function test and its compatibility with FECA standards which I think is open to significant dispute much along the lines you suggest.

In this environment, it just seems to me that the Commission needs to slow the train down and take some time to make sure that these various parts fit together and that the proposals you offer to the regulated community have received the thought that they deserve.

MS. MITCHELL: If I might add, I will say that I was struck yesterday--or in the middle of the night, listening to the panels yesterday, about the conversations and about the testimony, and thought this is all--and it's in the wrong form because it needs to be in Congress, and I'm pleased

that all these members of Congress are giving you all of their best advice, but I have long thought that there were many places in which the tax code and

the Commission's regulations were at odds. The only way to reconcile those two codes--these are two separate legal codes--and the only way to reconcile inconsistencies is in Congress, and I do think Congress has abandoned its responsibility if it does not take up the responsibility for sorting this out. The Supreme Court has said until Congress comes up with another standard, we need Congress to make this decision.

If I were the Commission, I would go back to the Congress and say, "We need your guidance. We need the statutory authority to move forward," because I think there are a lot of these issues that have to be resolved ultimately by Congress.

VICE CHAIR WEINTRAUB: It's your position that we need congressional guidance to define "promote, support, attack or oppose?"

MS. MITCHELL: I do. I absolutely do because I think that otherwise it is arbitrary on

the part of the Commission trying to make something out of whole cloth.

MR. BOPP: I have a specific proposal for you.

VICE CHAIR WEINTRAUB: I'll take it. I won't necessarily agree with it, but I'm happy to hear it.

MR. BOPP: When you all defined "Expressly Advocate," you have two subsections. One is the Express Advocacy Test, but the other one has been struck down now by three courts as being well in excess of the definition

he's given him money to defeat President Bush. Now, defeat is one of the magic

words of Express Advocacy, and what I don't understand--and I think for instance the Malnek Triad case supports this--is why that solicitation for funds to defeat President Bush and the donation of funds to defeat President Bush is not a contribution within the meaning of the Federal Election Campaign Act.

MS. UTRECHT: Well, first of all, the Media Fund, through the report that's filed today which covers the period to March 31st has not received any donations from George Soros.

COMMISSIONER MASON: Thank you. I certainly wouldn't want to leave a misimpression about that.

MS. UTRECHT: And that's been a misimpression that I think has been caused by some newspaper stories that weren't necessarily accurate about where the donations were going.

The Media Fund was specifically set up to comply with both the 527 requirement that it be involved, that it have a purpose that is at least indirectly related to the election of candidates,

but not to engage in Express Advocacy under the Federal Election Law. And we looked at--in setting it up, we looked both at the IRS rule-

COMMISSIONER MASON: Could I stop you there? I appreciate that. I'm trying to focus not on the Express Advocacy side but on the contribution side, and if your organization says, "Give me money to defeat President Bush," and donors respond to that explicit appeal for money to defeat President Bush, why is that not a contribution

regardless of what the money is ultimately spent for?

MS. UTRECHT: I have two answers to that question. One is the factual answer. The Media Fund's solicitations alone do not include Express Advocacy. The Media Fund is a participant in a joint fund raising program with ACT that have both a federal account and a nonfederal account. And even after BCRA the FEC joint fund raising regulations are still in effect, and they still do permit organizations like this to engage in joint fund raising even if there is a federal--you know,

with a federal component and a nonfederal component. So any solicitations that you're talking about would be in that context of joint fund raising.

My second response to that is that I'm going back to this definition of contributions and expenditures. I don't believe that the contributors' intent is what the law is in determining whether an organization is a political committee under the law. My reading of Buckley is that when you look at contributions and expenditures, a contribution--it becomes a contribution if a donation is used for the purpose of making contributions to candidates, or for the purpose of making Express Advocacy communications or for the purpose of making coordinated communications or activities with federal candidates. And if you don't do that, the donors' intent really is not determinative of what is a contribution.

COMMISSIONER MASON: I'm interested but my time is up.

CHAIRMAN SMITH: Thank you, Commissioner Mason.

circular definition. First you have to figure out what an expenditure is. The Supreme Court has told us what it is. I respectfully submit the Commission has no authority to go further.

COMMISSIONER THOMAS: I think what I was getting at is the other part of the statutory definition which talks about you can become a political committee based on contributions coming in.

MS. McCORMICK: Can I just help? I'm not going to get into the legal argument on this, but I'd just like to focus you on some practical examples, sort of the host sense aspect of this dialogue, which is, for example, under the proposed notice of rulemaking, the idea is if you solicit contributions and you say that your solicitation specifically says it will be used to support or defeat a specific candidate, the idea is that the

contributions come back in. Then you become a political committee. One example of that would be a labor organization. Labor organizations are specifically allowed, under the exemptions to 441(b), to communicate with their members on any subject, to say anything they need to, or to do whatever they wanted to solicit voluntary contributions from their members. So they make an expenditure, which is not an expenditure, exempt from the Act to solicit contributions from their members. And in that solicitation letter, they say, "We're going to use the money to defeat Senator so-and-so."

That's not a contribution when that money comes back in, right? It's coming into the federal committee, but the solicitation itself isn't a separate contribution by the organization.

Three or four more examples. You solicit the money and say, "I want to use the money to defeat this particular federal candidate," but you use the money only for a totally nonpartisan voter guide, you use the money for nonpartisan

GOTV. It

makes no sense to separate the two concepts because if you make it a contribution and then the money is spent for something which is clearly outside the Act, all you do is end up pulling in organizations that aren't political committees because they're not making expenditures.

COMMISSIONER THOMAS: Well, I think that's the heart of the issue. I can see an argument the way you're bringing it. I can see an argument the other way, which is, look, if an organization is saying right there in all of its solicitations that this is what the money is going to be used for and people are giving it for that purpose, the way I look at the statute I see some hint that maybe Congress contemplated that we look at that side of the equation separately and say--even if they turn around and spend that money for nonpartisan activity, we nonetheless should treat that group as a political committee.

MS. UTRECHT: What if they think the way to win the election is simply to publicize an issue? I mean there's--to say that you want to

influence an election--

COMMISSIONER THOMAS: I think that's very common actually. In my heart of hearts I think that's what's going on out there.

MS. UTRECHT: --an entity. That doesn't mean it's a contribution, that they don't have the nexus to influencing an election.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EMILY'S LIST,	)	
	)	
Plaintiff,	)	Civ. No. 05-0049 (CKK)
	)	
v.	)	
	)	
FEDERAL ELECTION COMMISSION,	)	EXHIBIT
	)	
Defendant.	)	

EXHIBIT 10

Comments of Senators McCain and Feingold, Representatives Shays and Meehan (April 9, 2004).

"Schiff, Bob (Judiciary)" <Bob_Schiff@judiciary-dem.senate.gov> on 04/09/2004 03:26:01 PM

To: politicalcommitteestatus@fec.gov
cc: mdinh@fec.gov, "Schiff, Bob (Judiciary)" <Bob_Schiff@judiciary-dem.senate.gov>

Subject: Notice 2004-6

Dear Ms. Dinh:

Attached are the comments of Senators John McCain and Russell D. Feingold and Representatives Christopher Shays and Marty Meehan on Notice 2004-6. If you have any questions, please contact me at 202-224-8059. Thank you for your attention.

Bob Schiff

Chief Counsel

Sen. Feingold

 - comments-final.doc

April 9, 2004

VIA FAX and E-MAIL

Ms. Mai T. Dinh
Acting Assistant General Counsel
Federal Election Commission
Washington, DC 204630

Re: Notice 2004-6

Dear Ms. Dinh:

We appreciate the opportunity to comment in response to the Commission's Notice of Proposed Rulemaking on the definition of "political committee," issued as Notice 2004-6, and published in the Federal Register on March 11, 2004, at 69 Fed. Reg. 11736.

As the primary congressional sponsors of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), which was signed by President Bush on March 27, 2002, and upheld by the Supreme Court in *McConnell v. FEC*, 124 S. Ct. 619 (2003), we have a keen interest in the implementation and enforcement of the federal election laws. We believe that the Commission's failure to properly enforce the Federal Election Campaign Act of 1974 ("FECA") made necessary our seven-year legislative effort to enact BCRA. The Supreme Court agrees. *See McConnell*, slip op. at 32-33 & n. 44, 35-36. We urge the Commission to learn from this history and to take measured, but decisive action to apply the law correctly and prevent the development of a massive new loophole that would allow 527 organizations to spend unlimited soft money on activities plainly designed to influence federal elections.

While our interest in this proceeding stems from our long involvement in the enactment of BCRA, the legal issues that the Commission must address do not. Our conviction that many 527 organizations must register as political committees is based not on BCRA, but on FECA. That is a very important point. A number of our colleagues in the Congress have commented in this rulemaking, and in connection with the recent Advisory Opinion proceeding, AO 2003-37, that BCRA was not intended to address 527s. They are correct. Our bill was

concerned with the raising and spending of soft money by the political parties and federal candidates, and with phony issue ads run by any organization in close proximity to an election. That does not mean, however, that 527s are free to operate without restrictions. BCRA is not the only law that Congress has passed to address the financing of federal election campaigns. The question of whether and how 527s should be regulated in their fundraising and in their spending on activities other than electioneering communications is a question that has to be answered under FECA.

527 Organizations as Political Committees

527 organizations by definition have the primary purpose of influencing elections. *See* 26 U.S.C. § 527(e). That is the basic characteristic of tax-exempt political organizations that distinguishes them from other entities, including other tax-exempt groups. The Commission's pre-BCRA approach permitted certain 527s active in federal elections not to register as federal political committees if they did not engage in express advocacy. In light of the *McConnell* court's holding that the express advocacy test is not constitutionally mandated, and indeed is "functionally meaningless," that approach was clearly wrong. *See McConnell,* slip op. at 62 n.64, 84, 86.

Groups that claim a tax exemption because their primary purpose is to influence elections should be required to register as political committees unless their activities are entirely directed at state and local elections. 527s should be subject to the same rules that all other political committees are bound by, the rules that Congress has enacted to protect the integrity of our political process. They should be required to raise and spend money that complies with federal contribution limits and source prohibitions for ads they run that promote or attack federal candidates. In addition, like other political committees, a reasonable portion of their spending on partisan voter mobilization activities that are intended to influence federal elections should come from federal funds.

Regulation of 501(c) Organizations

The Supreme Court made it plain in *Buckley v. Valeo,* 424 U.S. 1 (1976), that the FECA must be narrowly interpreted with respect to 501(c) organizations and other groups that do not have as their major purpose the influencing of elections. *See Buckley,* 424 U.S. at 42-44 & n.52. That is why the term "expenditure" has a different meaning in the federal election laws depending on what entity is doing the spending. The *Buckley* court did not apply the "express advocacy" test to political parties or other political committees. *See Buckley,* 424 U.S. at 79. It is wholly appropriate for the Commission to undertake in this rulemaking to regulate 527s, whose major purpose *is* to influence elections, but

not 501(c) organizations, whose major purpose, under the tax laws, must be something other than influencing elections.

It is very unfortunate that this NPRM included proposals that would cover a wide variety of 501(c) organizations, and also corporations and unions. In light of *Buckley* and *McConnell,* we cannot imagine that the Commission would adopt a proposal that would apply the "promote, support, attack, or oppose" test to 501(c) organizations or would require any organization that spends $50,000 or more on voter registration activities within four months of an election, regardless of the rest of its activities, to register as a political committee under FECA. It was irresponsible for the Commission to put such an absurd and patently unconstitutional test on the table for comment.

We want to be very clear. We oppose the proposals for regulation of 501(c) organizations contained in the Commission's Notice. The Commission should instead focus on deciding when a 527 is required to register as a political committee. This is an important test for the Commission in the post-BCRA world.

Allocation Rules

The Commission must also revise the allocation formulas applicable to organizations that engage in partisan voter mobilization activities. Commission regulations already make clear that any organization engaging in such activities must register as a political committee. But they also allow the allocation of expenses between federal and nonfederal accounts. *See* 11 CFR 106.6(c).

The formulas for that allocation, however, allow for absurd results. In particular, political organizations that aim to influence federal elections through targeted, partisan voter drives can exploit those formulas to use almost exclusively soft money to finance their activities. It is just this kind of result that brings public scorn on the election laws and on the agency sworn to uphold them. The Commission must revise its allocation rules to require a significant minimum hard money share for spending on voter mobilization in a federal election year.

Conclusion

We believe that the Commission improperly applied the law to 527 organizations in previous election cycles. Those errors are now magnified because BCRA's restrictions on state and federal political party committees have increased the prominence of the 527s' fundraising and campaign activities. The Commission's responsibility to clarify and properly enforce the federal election laws with respect to 527 organizations is clear. We believe that the Commission must address now the two key issues identified in these comments. To do nothing

would be to bless a loophole that will have grave consequences for the efficacy of both BCRA and FECA and again leave the public with the impression that the election laws can be treated with disdain without any consequence. This result, coming so soon after Congress closed the last loophole created by the Commission, would be most unfortunate.

Thank you for your consideration of these comments.

Sincerely,

_____/s/_____
John McCain
United States Senate

_____/s/_____
Christopher Shays
Member of Congress

_____/s/_____
Russell D. Feingold
United States Senate

_____/s/_____
Marty Meehan
Member of Congress

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EMILY'S LIST,	)	
	)	
Plaintiff,	)	Civ. No. 05-0049 (CKK)
	)	
v.	)	
	)	
FEDERAL ELECTION COMMISSION,	)	EXHIBIT
	)	
Defendant.	)	

EXHIBIT 11

Comments of the United States Chamber of Commerce (April 5, 2004).

Wiley Rein & Fielding LLP

1776 K STREET NW
WASHINGTON, DC 20006
PHONE 202.719.7000
FAX 202.719.7049

Virginia Office
7925 JONES BRANCH DRIVE
SUITE 6200
McLEAN, VA 22102
PHONE 703.905.2800
FAX 703.905.2820

www.wrf.com

April 5, 2004

Jan Witold Baran
202.719.7330
jbaran@wrf.com

Ms. Mai T. Dinh
Acting Assistant General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: Written Comments of the Chamber of Commerce of the United States (Notice 2004-6, Political Committee Status) and Request to Testify

Dear Ms. Dinh:

The Chamber of Commerce of the United States submits the attached comments in response to the Notice of Proposed Rulemaking published at 69 Fed. Reg. 11736, *Political Committee Status* (March 11, 2004). A hard copy will follow via hand delivery.

In addition, Jan Witold Baran and Stephen A. Bokat respectfully request an opportunity to testify on behalf of the Chamber at the public hearings scheduled for April 14 and 15, 2004, on this matter.

Sincerely,

Jan Witold Baran

Stephen A. Bokat
General Counsel
Chamber of Commerce of the United States
1615 H Street, N.W.
Washington, DC 20062

BEFORE THE FEDERAL ELECTION COMMISSION

Notice of Proposed Rulemaking	)	63 Fed. Reg. 11736 (March 11, 2004)
	)	
Political Committee Status	)	

COMMENTS OF THE CHAMBER OF COMMERCE OF THE UNITED STATES

Stephen A. Bokat
General Counsel
Chamber of Commerce of the United States
1615 H Street, N.W.
Washington, DC 20062

Jan Witold Baran
WILEY REIN & FIELDING LLP
1776 K Street, N.W.
Washington, DC 20006
(202) 719-7330

Counsel to the Chamber of Commerce of the United States

April 5, 2004

A. Proposed § 100.116 improperly expands the definition of expenditure to capture vastly more communication than intended under BCRA

The NPRM proposes to expand the definition of "expenditure" by adding a new provision, 11 C.F.R. § 100.116, which provides:

> A payment, distribution, loan, advance, or deposit of money or anything of value made by, or on behalf of any person for a public communication, as defined in 11 CFR 100.26, is an expenditure if the public communication:
>
> > (a) Refers to a clearly identified candidate for Federal office, and promotes or supports, or attacks or opposes any candidate for Federal office; or
> >
> > (b) Promotes or opposes any political party.

The definition improperly incorporates the "promote, support, attack or oppose" standard from BCRA's provisions on "federal election activity." Limits on FEA were applied in BCRA only to state and local political parties, and in certain circumstances to officeholders soliciting funds. Nowhere in the BCRA or the legislative history is there any evidence that Congress intended to apply the new FEA restrictions, or its definitional elements, to nonparty groups. For the FEC to do so is inconsistent with the text and structure of Congress' deliberately limited legislative solution to party soft money. Furthermore, by expanding the definition of "expenditure" the proposal threatens, like so much else in the NPRM, to bring within the definition of "political committee" nonparty groups who make public communications critical of political parties or candidates, under a standard, "promotes or supports, or attacks or opposes." Congress never intended such a standard to apply to issue advocacy by nonparty groups.

To the contrary, such a standard was adopted in part solely as a back-up provision to the definition of "electioneering communication." See 2 U.S.C. § 434(f)(3)(A)(ii). Moreover, a "promotes or supports, or attacks or opposes" standard was not incorporated into the revised prohibitions on corporate and union expenditures in 2 U.S.C. § 441b. While Congress amended

that statute to prohibit corporate and union "electioneering communications," it did not change (or even proposed to change) the FECA definitions which would have expanded the term "expenditure" and therefore expand, not only the definition of "political committee," but the scope of prohibited corporate and union disbursements.

B. The regulation of voter outreach in proposed § 100.133 is vague and will chill grassroots efforts to encourage voter participation

The NPRM suggests an amendment to 11 C.F.R. § 100.133, an exception to the definition of expenditure, which would further broaden the definition of "expenditure" and possibly subject the Chamber and other nonparty groups to inappropriate regulation. Section 100.133 provides an exception from the definition of "expenditure" for certain GOTV, voter registration activities; the NPRM proposes to narrow that exception. By including more activity in the definition of "expenditure" the FEC will be subjecting important grassroots activity to the prohibitory and regulatory limitations contained in the FECA. The Chamber engages in GOTV and voter registration activities that, under the vague definition in the NPRM, will be unnecessarily chilled.[5]

The proposed amendment subjects outside groups to unpredictable enforcement, as the proposed rule offers little guidance about what standards will govern the interpretation and application of the new restrictions. We have stated earlier the impropriety of using the "promotes or supports, or attacks or opposes" standard which reappears in subsection (a). In

[5] The Chamber of Commerce is an active participant in non-partisan GOTV and voter registration activities. *See* http://www.voteforbusiness.com. Among its many outreach activities, the Chamber assists and encourages absentee voting, an important option for members' employees, who are frequently traveling out of their voting districts on election day. See also MUR 5342 (Mar. 2, 2004) (finding no cause to proceed on complaint against Chamber with respect to certain of its voter outreach efforts, including an online voter guide and voter registration efforts). In addition, the Chamber conducts activities directed at its restricted class, which activity may be partisan and is outside the prohibition of 2 U.S.C. § 441b.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EMILY'S LIST,	)	
	)	
Plaintiff,	)	Civ. No. 05-0049 (CKK)
	)	
v.	)	
	)	
FEDERAL ELECTION COMMISSION,	)	EXHIBIT
	)	
Defendant.	)	

EXHIBIT 12

Comments of Public Citizen (April 5, 2004).

Craig Holman <cholman@citizen.org> on 04/05/2004 05:02:03 PM

To: pcstestify@fec.gov
cc:

Subject: Public comments

Public Citizen submits the attached comments on NPRM 2004-06.

Attachments.

Craig Holman, Ph.D.
Legislative Representative
Public Citizen
215 Pennsylvania Avenue SE
Washington DC 20003
TEL: 202-454-5182
FAX: 202- 547-7392
Holman@aol.com

- FEC draft final2.doc

- AJS_Gore_Are_You_Taxed_Enough_Already.PDF

Public Citizen

Buyers Up • Congress Watch • Critical Mass • Global Trade Watch • Health Research Group • Litigation Group
Joan Claybrook, President

April 5, 2004

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

Dear Ms. Dinh:

Public Citizen is pleased to submit the attached comments on the Notice of Proposed Rulemaking on political committee status (NPRM 2004-06). Please permit Craig Holman to testify before the Commission on the matter.

Respectfully Submitted,

Joan Claybrook
President
Public Citizen

Frank Clemente
Director
Public Citizen's Congress Watch

Scott Nelson
Attorney
Public Citizen Litigation Group

Craig Holman
Legislative Representative
Public Citizen's Congress Watch

under FECA would sweep within the scope of FECA regulation almost everything done by organizations devoted to discussion of, or advocacy of positions on, issues of public importance.[3]

The implications of such an expansion of FECA coverage would be huge. It is one thing to say that political parties or political committees whose business is electioneering may be subject to regulation aimed at electioneering. It is another thing altogether to sweep in organizations that engage in criticism of elected officials as a necessary part of commenting on public issues, but whose tax status forbids them to make electioneering their major focus (or, in the case of 501(c)(3)'s, any part of their focus). Although such organizations are not constitutionally immune from regulation where Congress determines that particular activities have a direct and significant effect on elections, and then tailors its regulation precisely to address that effect (as it did in the case of electioneering communications), the significant constitutional issues raised by subjecting them to wholesale regulation are best avoided absent a clear congressional directive.

Here, such a directive is lacking. Nothing in BCRA suggests that Congress intended such a far-reaching change. Congress did not perform major surgery on the expenditure provisions construed in *Buckley*, but instead made a far more modest change by introducing regulation of "electioneering communications." The limits on the definition of "electioneering communications," however, would be rendered meaningless by a revision that turned all communications that criticize or praise candidates into regulated "expenditures." Similarly, Congress's decision in Title I of BCRA to regulate "federal election activity" by *parties* would be rendered superfluous by an expenditure definition that applied the same regulation, in effect, to the whole world. The Congress that enacted BCRA's carefully considered extension to such activities by parties could not have intended to revolutionize the world of non-profits by subjecting them to regulation whenever their issue discussions involve "attacks" on or "promotion" of persons who are candidates for office.

Indeed, the unique nature of the 501(c) non-profit community is widely recognized throughout FECA, the *McConnell* decision, and the Internal Revenue Code, as well as BCRA. FECA specifically exempts nonpartisan voter mobilization and education activity – the type of political activity frequently engaged in by 501(c) non-profits – from the definition of expenditure. 2 U.S.C. 431(9)(B)(ii).

Similarly, *McConnell* praised the restraint of BCRA, and some of the FEC's implementing regulations, in attempting to avoid over-extending the campaign regulatory regime into the 501(c) non-profit community. The *McConnell* court clearly upheld the authority of Congress to subject most interest groups, including 501(c) non-profit groups, to the electioneering communications restriction. However, while acknowledging the evidentiary record showing that both Section 527s and some 501(c) non-profits have served as soft money conduits in federal elections, the Court recognized the value of treating the regulation of 501(c) non-profits differently from the regulation of Section 527 groups. "First, and most obviously, §323(d) restricts solicitations [by federal officeholders and national parties] only to those 501(c)

[3] It is just as important to protect the advocacy rights of for-profit corporations and labor unions, as well as 501(c) non-profit groups. Corporations and unions should not be swept into FECA's regulatory regime simply by addressing specific candidates or officeholders in their communications.

groups 'making expenditures or disbursements in connection with an election for federal office,'" as opposed to most "Section 527 organizations, which *by definition* engage in partisan political activity." 124 S. Ct. at 679 (emphasis added).

The court went on to single out Section 527 groups as major conduits for evasion of federal campaign finance law. The court cited several studies by Public Citizen documenting the extensive circumvention of FECA's contribution limits posed by Section 527 organizations. "Parties and candidates have also begun to take advantage of so-called 'politician 527s,' which are little more than soft money fronts for the promotion of particular federal officeholders and their interests.... These 527s have been quite successful at raising substantial sums of soft money from corporate interests, as well as from the national parties themselves." 124 S. Ct. at 679..

McConnell was reluctant, however, to throw similar barbs at the 501(c) non-profit community. The court again noted that "Section 527 'political organizations' are, unlike 501(c) groups, organized for the express purpose of engaging in partisan political activity." 124 S. Ct. at 678 n.67.

Underlying the different treatment of Section 527s and 501(c) non-profits by FECA, BCRA, and the courts is the fact that these groups are constituted as very distinct entities in terms of permissible political activities under the Internal Revenue Code. Groups that avoid the express advocacy or electioneering communications definitions of FECA, but which pursue other electioneering activity as their *primary purpose*, must register with the IRS as Section 527 groups. Business, labor and ideological groups that intend to conduct substantial electioneering activity, but not as the "primary purpose" of the organization, may register with the IRS as 501(c) non-profit groups, entitled to dramatically reduced disclosure requirements as compared to Section 527s. Finally, groups that do not plan to conduct substantial lobbying and electioneering activity may register as 501(c)(3) charities, entitled to generous tax benefits.[4]

4. The Appropriateness of a Bifurcated Definition of Expenditure

Although BCRA and *McConnell* do not justify significant revision of the expenditure standard articulated in *Buckley* for organizations that are *not* political committees, the FEC's regulations should be amended to establish definitively that, consistent with *Buckley*'s original construction of FECA, expenditures of political committees may be regulated more broadly. *Buckley* acknowledged that expenditures by political committees (that is, organizations whose major purpose is electing candidates) are, like candidate expenditures, inherently designed to influence elections.

Accordingly, the FEC should adopt regulations applying a more comprehensive definition of expenditure as embodied in Alternative 1-A for organizations whose major purpose is to affect the election or defeat of federal candidates, while retaining the current narrow

[4] 501(c) non-profits other than 501(c)(3)'s may conduct substantial electioneering activities, so long as those activities are pertinent to the interests of the organization. Precisely how much electioneering activity is permissible is an issue to be decided by the facts and circumstances of each particular case—in other words, it is a gray area. It is perhaps easier for the IRS to determine when the electioneering activities of a non-profit group have exceeded the legitimate interests of the organization than to define when an organization is in compliance with the tax code.

definition of expenditure consisting of express advocacy, plus those communications that fall within the definition of electioneering communications, for organizations that do not have as their major purpose the election or defeat of federal candidates. Two distinct constructions of expenditure would be consistent both with the original FECA and the amendments offered by BCRA[5].

For entities whose major purpose is electioneering for or against federal candidates, an "expenditure" should be defined by regulation as a payment or obligation for: (1) voter registration activity in connection with a Federal election; (2) voter identification, get-out-the-vote ('GOTV'), and generic campaign activity that is conducted in connection with an election in which a candidate for Federal office appears on the ballot; (3) a public communication that refers to a clearly identified Federal candidate and that promotes, supports, attacks, or opposes a candidate for that office; or (4) an electioneering communication as defined in 11 CFR 100.29. (In these comments, we refer to an expenditure falling within this definition as a "political expenditure.")[6]

For entities that do not have electioneering for or against federal candidates as their major purpose, an "expenditure" should be defined by regulation as a payment or obligation for any communication that expressly advocates the election or defeat of a candidate or candidates, or a partisan slate of candidates, or for an electioneering communication as defined in 11 CFR 100.29. (In these comments, we refer to an expenditure falling within this definition as an ["electioneering expenditure."") Voter registration and voter mobilization activities should not constitute an expenditure under FECA for a 501(c) non-profit group, *as long as political activity does not become the group's major purpose.*

This bifurcated regulatory definition of expenditure returns federal election law to its original stated objective in FECA, as amended by BCRA, while preserving the court-sanctioned protections of legitimate advocacy work by independent groups. It also stays the course of BCRA, which is to capture a narrowly-tailored class of communications by any and all entities – express advocacy and electioneering communications – as campaign activity, subject to the reporting requirements and source prohibitions and contribution limits of FECA.

C. Political Committee Status

Under the definition of "expenditure" proposed above, whether an entity is a "political committee" assumes even greater importance than under existing regulations. This is potentially

---

[5] It would also more clearly capture the financing of electioneering communications under the full regulatory regime of FECA, including limits on contributions from individuals and PACs.

[6] While the first three parts of this definition track parts of the BCRA definition of "federal election activity," that is *not* because that definition in itself applies to organizations other than parties. Rather, in light of the Supreme Court's recognition that the "federal election activity" definition permissibly and appropriately identifies categories of expenditures that are "for the purpose of influencing federal elections" if engaged in by political parties (*McConnell*, 124 S. Ct. at 674), it is appropriate for the FEC to use a similar standard to define expenditures for the purpose of influencing federal elections when engaged in by entities that, like parties, have the major purpose of influencing elections. Not all of the limitations on the "federal election activity" standard applicable to parties necessarily need apply, however, since the Title I definition of "federal election activity" may be under-inclusive as to activities of political committees that are directed at influencing federal elections.

The other expenditure tests proposed in the NPRM – more than 50% of an entity's budget spent on activities that promote, support, oppose or attack federal candidates, and the $50,000 disbursement threshold – are far too sweeping and could unjustly capture legitimate advocacy organizations. The avowed purpose and exempt function tests are sufficient for capturing the entities whose major purpose is to affect the election or defeat of federal candidates.

D. Allocation Ratio

In *McConnell*, the Supreme Court rightly identified the FEC's "allocation formulas" – allowing regulated entities to pay for activities that influence elections with a mix of hard and soft money – as a major loophole in FECA's regulatory regime. As observed by the court in relation to political parties: "[T]he FEC's allocation regime has invited widespread circumvention of FECA's limits on contributions to parties for the purpose of influencing federal elections.... The evidence in the record shows that candidates and donors alike have in fact exploited the soft money loophole, the former to increase the prospects for election and the latter to create debt on the part of officeholders, with the national parties serving as willing intermediaries." 124 S. Ct. at 662.

FECA has no language whatsoever allowing for such an allocation ratio of hard money and soft money spending by candidates, parties or committees. BCRA specifically ended the practice for the national parties; the FEC should do the same for political committees and return to the plain language of federal election law.

Corporate and union treasury funds, and money in excess of the contribution limits, are generally prohibited by FECA to be spent on FECA-regulated "expenditures." Expanding the definition of political expenditures to include a larger pool of election activity by political committees would substantially curtail the FEC's allocation ratio loophole. Soft money could not be used by political committees to finance voter registration drives and GOTV activities under the proposed definition. In our view, it would be entirely appropriate to go still further and end the allocation ratio altogether for expenditures (as defined above) by political committees. The effect of this change would be to require political committees to use only hard money for expenditures, except where FECA explicitly permits committees to use soft money (e.g., to pay for administrative expenses, as to which some allocation may be appropriate), or where a political committee expended funds that were *entirely* unrelated to influencing a federal election (such as communications relating solely to an election where no federal candidates appear on the ballot).

The folly of the FEC's allocation ratio is made evident in its very complexity. Over the decades, the FEC has opened the soft money spigot through a variety of different allocation formulas. This NPRM speaks of a "funds expended" formula, which conceivably could permit up to 85% of a committee's expenditures in soft money under certain conditions. But the FEC has also toyed with formulas based on a fixed percentage method, funds received ratio, time or space ratio, and ballot composition ratio. All the formulas have essentially the same effect: to permit soft money expenditures to influence federal elections.

The Federal Election Commission should return to its reasoning in a 1976 advisory opinion – before it broke open the soft money loophole – prohibiting the use of soft money by political committees to pay for voter registration and voter mobilization activities or for other supposedly "mixed purpose" expenditures.[9]

E. Effective Date

The FEC has requested comment on whether these regulatory proceedings are occurring too late in the election cycle and that changing the rules of the game in mid-stream imposes undue burdens on Section 527 groups that may be affected. Although this is a genuine concern, it is our view that, *with prompt action*, the FEC can still make changes affecting this election, and should proceed to do so.

The last time the FEC made significant changes in its campaign finance regulations well into the election cycle happened in 1976, in response to *Buckley*. Then, as now, the FEC had to balance the needs of establishing fair and clear campaign finance regulations with their potential impact on political players late in the game. Though it would have been preferable to receive an earlier ruling in *McConnell*, the Supreme Court did an admirable job expediting its review of a complex law. Similarly, the FEC has proceeded expeditiously in weighing this matter, though temporarily sidetracked by Advisory Opinion 2003-37 (Americans for a Better Country).

The *McConnell* decision is as sweeping as the *Buckley* decision, accompanied with directions from the Court for the FEC to fix its regulations concerning the types of political activity that is subject to regulation. Changing the definition of political activity necessarily changes the class of entities subject to regulation. This order from the Court came in December, leaving the FEC with little choice but to re-consider its regulations as we enter the general election.

Some of the fundraising and spending by Section 527 groups that would be subject to revisions in these rules has already occurred, but to a quite limited extent. The last available financial records with the IRS show that the 527 groups under consideration have met only about 10% of their stated fundraising goals thus far. Moreover, some of these groups, such as MoveOn.org, have raised much of their money in "hard" dollars permissible under FECA. If the FEC can promulgate a rule on this issue by May 2004, prior to the flurry of financial activity expected in the summer as the conventions and general election period approach, the disruption to outside groups planning to participate in the 2004 federal elections is likely to be minimal. A May ruling (perhaps, if necessary, in the form of an interim final rule) would provide Section 527 groups with ample time to modify their operations and to ensure the bulk of their finances complies with federal election law prior to the summer launch of electioneering activity.[10] If

---

[9] Advisory Opinion 1976-83.

[10] As described in a publicly-distributed action plan of Americans Coming Together, the Section 527 organized by Steve Rosenthal: "We'll begin with an early canvass, knocking on people's doors, getting the lay of the land. Then, come summer, we'll launch a massive door-to-door effort – contacting voters, identifying our supporters, and learning what issues matter most in their lives. We'll follow up with a stream of individual communications around the issues people have told us they are most concerned about." America Coming Together, "A Bold Action Plan Essential to Victory 2004." (n.d.).

A. Proposed § 100.116 improperly expands the definition of expenditure to capture vastly more communication than intended under BCRA

The NPRM proposes to expand the definition of "expenditure" by adding a new provision, 11 C.F.R. § 100.116, which provides:

> A payment, distribution, loan, advance, or deposit of money or anything of value made by, or on behalf of any person for a public communication, as defined in 11 CFR 100.26, is an expenditure if the public communication:
>
> > (a) Refers to a clearly identified candidate for Federal office, and promotes or supports, or attacks or opposes any candidate for Federal office; or
> >
> > (b) Promotes or opposes any political party.

The definition improperly incorporates the "promote, support, attack or oppose" standard from BCRA's provisions on "federal election activity." Limits on FEA were applied in BCRA only to state and local political parties, and in certain circumstances to officeholders soliciting funds. Nowhere in the BCRA or the legislative history is there any evidence that Congress intended to apply the new FEA restrictions, or its definitional elements, to nonparty groups. For the FEC to do so is inconsistent with the text and structure of Congress' deliberately limited legislative solution to party soft money. Furthermore, by expanding the definition of "expenditure" the proposal threatens, like so much else in the NPRM, to bring within the definition of "political committee" nonparty groups who make public communications critical of political parties or candidates, under a standard, "promotes or supports, or attacks or opposes." Congress never intended such a standard to apply to issue advocacy by nonparty groups.

To the contrary, such a standard was adopted in part solely as a back-up provision to the definition of "electioneering communication." See 2 U.S.C. § 434(f)(3)(A)(ii). Moreover, a "promotes or supports, or attacks or opposes" standard was not incorporated into the revised prohibitions on corporate and union expenditures in 2 U.S.C. § 441b. While Congress amended

that statute to prohibit corporate and union "electioneering communications," it did not change (or even proposed to change) the FECA definitions which would have expanded the term "expenditure" and therefore expand, not only the definition of "political committee," but the scope of prohibited corporate and union disbursements.

B. The regulation of voter outreach in proposed § 100.133 is vague and will chill grassroots efforts to encourage voter participation

The NPRM suggests an amendment to 11 C.F.R. § 100.133, an exception to the definition of expenditure, which would further broaden the definition of "expenditure" and possibly subject the Chamber and other nonparty groups to inappropriate regulation. Section 100.133 provides an exception from the definition of "expenditure" for certain GOTV, voter registration activities; the NPRM proposes to narrow that exception. By including more activity in the definition of "expenditure" the FEC will be subjecting important grassroots activity to the prohibitory and regulatory limitations contained in the FECA. The Chamber engages in GOTV and voter registration activities that, under the vague definition in the NPRM, will be unnecessarily chilled.[5]

The proposed amendment subjects outside groups to unpredictable enforcement, as the proposed rule offers little guidance about what standards will govern the interpretation and application of the new restrictions. We have stated earlier the impropriety of using the "promotes or supports, or attacks or opposes" standard which reappears in subsection (a). In

[5] The Chamber of Commerce is an active participant in non-partisan GOTV and voter registration activities. *See* http://www.voteforbusiness.com. Among its many outreach activities, the Chamber assists and encourages absentee voting, an important option for members' employees, who are frequently traveling out of their voting districts on election day. See also MUR 5342 (Mar. 2, 2004) (finding no cause to proceed on complaint against Chamber with respect to certain of its voter outreach efforts, including an online voter guide and voter registration efforts). In addition, the Chamber conducts activities directed at its restricted class, which activity may be partisan and is outside the prohibition of 2 U.S.C. § 441b.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EMILY'S LIST,	)	
	)	
Plaintiff,	)	Civ. No. 05-0049 (CKK)
	)	
v.	)	
	)	
FEDERAL ELECTION COMMISSION,	)	EXHIBIT
	)	
Defendant.	)	

EXHIBIT 13

Comments of America Coming Together (April 5, 2004).

"Svoboda, Brian-WDC" <BSvoboda@perkinscoie.com> on 04/05/2004 03:34:08 PM

To: "'pcstestify@fec.gov'" <pcstestify@fec.gov>
cc: "Corley, Judy-WDC" <JCorley@perkinscoie.com>, "'legold@legoldlaw.com'" <legold@legoldlaw.com>, "Bauer, Bob-WDC" <RBauer@perkinscoie.com>, "Reese, Ezra-WDC" <EReese@perkinscoie.com>, "Gordon, Rebecca-WDC" <RGordon@perkinscoie.com>

Subject: NPRM Comments

Attached please find comments submitted on behalf of America Coming Together on the Commission's Notice of Proposed Rulemaking on Political Committee Status. If there are problems with the transmission of these comments, please contact Brian G. Svoboda at (202) 434-1654. Thank you for your attention.

Please open the attached document.
This document was sent to you using an HP Digital Sender.

Sent by:	<BSvoboda@perkinscoie.com>
Number of pages:	38
Document type:	B/W Document
Attachment File Format:	Adobe PDF

To view this document you need to use the Adobe Acrobat Reader.
For free copy of the Acrobat reader please visit:

http://www.adobe.com

For more information on the HP Digital Sender please visit:

http://www.digitalsender.hp.com

 . NPRM_Com.pdf

Perkins Coie

607 Fourteenth Street N.W.
Washington, D.C. 20005-2011
PHONE: 202.628.6600
FAX: 202.434.1690
www.perkinscoie.com

April 5, 2004

VIA ELECTRONIC MAIL, FACSIMILE AND MESSENGER

Ms. Mai T. Dinh
Acting Assistant General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

RE: Political Committee Status Notice of Proposed Rulemaking

Dear Ms. Dinh:

The undersigned respectfully submit these comments regarding the Notice of Proposed Rulemaking ("NPRM") on political committee status, 67 Fed. Reg. 11,736 (Mar. 11, 2004), to be considered by the Federal Election Commission. We submit these comments on behalf of America Coming Together ("ACT"), an unincorporated political entity consisting of a federal account registered with and reporting to the Federal Election Commission (FEC) under sections 433 and 434 of the Federal Election Campaign Act (FECA), and a non-federal account registered with the Internal Revenue Service under section 527 of the Internal Revenue Code. We respectfully request the opportunity for ACT representatives to testify on its behalf at the Commission's hearings in this matter.

The Commission's proposed rulemaking represents an effort to rewrite, hurriedly and yet radically, the rules by which various groups and organizations have been operating for years. The agency is embarking on this venture in the middle of an election year. In this rushed environment, the Commission's proposed rules are inevitably an amalgamation of conflicting theories and approaches.

The proposed rules are not grounded in any evidence of corruption as found by Congress, the Supreme Court, or the Commission itself. They are severely overinclusive, limiting vast swaths of protected First Amendment activity. The Commission has done no factfinding to determine what problem areas should be targeted or how best to address them. Many of the proposed rules also present intractable practical difficulties for the regulated community and for the Commission.

addressing current political phenomena; misread and misapply the Supreme Court's decision in *McConnell*; and conflict with the Commission's own regulatory and litigation positions since BCRA was enacted.

As the Commission itself pointed out just days ago, BCRA was "an arduously negotiated compromise that took years in the making." Federal Election Commission's Response in Support of Its Motion and Opposition to Plaintiffs' Motion for Summary Judgment at (March 31, 2004) *Shays v. FEC*, No. 02-CV-1984 (D.D.C). Certainly, at no time was it ever suggested by anyone that the enactment and upholding of BCRA by the courts would give the Commission license to appropriate statutory language and concepts in BCRA in order to infuse unexpected new and expanded meanings to FECA terms that Congress left unamended, with dramatic and adverse consequences to entities that Congress declined to so disturb. But the Commission now confronts the regulated community – literally thousands of private political and civic organizations and millions of their adherents, members and donors – with an extraordinarily far-reaching proposal that is fundamentally flawed in every significant respect.

A. Constitutional Issues

1. Promote, Support, Attack, or Oppose

a) Vagueness

Laws must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). The Supreme Court found that the words "promote," "support," "attack," and "oppose," *see* 2 U.S.C. § 431(20)(A)(iii), were not unconstitutionally vague, but only as applied to political parties, "since actions taken by political parties are presumed to be in connection with election campaigns." *McConnell*, 124 S. Ct. at 675 n.64.

The NPRM includes proposals to incorporate the definition of "Federal election activity," or to use the terms "promote," "support," "attack," and "oppose," in the definition of "political committee." This use of these terms, while constitutionally valid in those circumstances where they are applied to political parties and candidates, would be unconstitutionally vague as applied to other organizations. In the context of political parties, it may be clear what will be considered promoting or opposing candidates, because political parties exist in large measure, if not predominantly, to

promote or oppose candidates. Outside of this narrow realm, it is considerably less clear how these terms would apply to other entities. The *McConnell* Court's approval of these terms as applied to political parties does not give the Commission license to apply this language to all organizations and people who communicate publicly on public policy issues.

b) Overbreadth

The use of these terms outside of the political party context would also be vastly overbroad. The Supreme Court found that the regulation of Federal election activity is "narrowly focused on regulating contributions that pose the greatest risk of this kind of corruption . . . . Further, these regulations all are reasonably tailored, with various temporal and substantive limitations designed to focus the regulations on the important anti-corruption interests to be served." *McConnell*, 124 S. Ct. at 674. The restrictions were closely drawn, because any time a political party is promoting or opposing a federal candidate, it does so for the purpose of influencing the election of that candidate; electing candidates is, after all, a core purpose of political parties.

The same is simply not true of other entities. An outside organization may have myriad reasons for promoting, supporting, attacking, or opposing a federal candidate; those reasons may or may not include a purpose of influencing an election. The sponsors of BCRA were aware of the dangers of overregulation of political speech. "Congress self-consciously evaluated ways to limit the reach of the law without sacrificing its purpose, so as to leave unregulated as many avenues of speech as possible." Opposition Brief for Defendants at I-84, *McConnell v. FEC*, 251 F. Supp. 2d 176 (D.D.C. 2003) (Civ. No. 02-582). Using BCRA's language to regulate entities other than political parties would not be reasonably tailored. The proposed rules are lacking in any attempt to achieve the tailoring necessary to protect constitutional interests.

2. "Avowed" Purpose

The NPRM's proposal to consider "organizational documents, solicitations, advertising, other similar written materials, public pronouncements, or any other communication" of the organization to determine whether its "major purpose is to nominate, elect, defeat, promote, support, attack or oppose" clearly identified federal candidates is also unconstitutionally vague. The approach of the Commission here is keyed specifically to speech, and requires evaluation of speech, and for that reason it

nonfederal end. Second, the proposed rule presents PACs with a false choice. They may either adopt an impenetrably complicated method of state-by-state allocation, or "choose to simplify [their] ... allocation" by opting for a less efficient method that wastes federal money. *See* 69 Fed. Reg. at 11,754.

The most extreme version of this approach can be found in the Commission's query as to whether a PAC should "be required to pay for all of its disbursements out of Federal funds and therefore be prohibited from allocating any of its disbursements" if its "major purpose" – whatever that means – "is to influence Federal elections...". *Id.* at 11,753. Yet this query has been asked and answered before. A federal district court squarely rejected the notion, propounded by Common Cause, that the statutory language of the Act compels a non-allocation regime:

> This reading of the [1999 FECA] amendments goes too far. It is clear from the statute as a whole that the FECA regulates federal elections only. This limit on the FECA's reach underlies the entire act. Congress would have had to have spoken much more clearly in the amendments at issue to contradict this.

Common Cause v. FEC, 692 F. Supp. 1391, 1395 (D.D.C. 1987). Made with regard to political parties after the Federal Election Campaign Act Amendments of 1979, it is no less true of non-connected PACs after BCRA, which left their activities almost entirely untouched. Indeed, the Supreme Court in *McConnell* affirmed that allocation remained appropriate under the statute, notwithstanding the specific restrictions placed on party committees:

> As a practical matter, *BCRA merely codifies the principles of the FEC allocation scheme* while at the same time justifiably adjusting the formulas applicable to these activities in order to restore the efficacy of the FECA's longtime statutory restrictions – approved by the Court and eroded by the FEC's allocation regime – on contributions to state and local party committees for the purpose of influencing federal elections.

124 S. Ct. at 673-74 (emphasis added). *See also* Federal Election Commission's Response in Support of Its Motion and in Opposition to Plaintiff's Motion for Summ. Judgment, *Shays v. FEC*, at 16-18 (D.D.C. 2004) (No. 02-CV-1984).

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EMILY'S LIST,	)	
	)	
Plaintiff,	)	Civ. No. 05-0049 (CKK)
	)	
v.	)	
	)	
FEDERAL ELECTION COMMISSION,	)	EXHIBIT
	)	
Defendant.	)	

EXHIBIT 14

Comments of Republican National Committee (April 5, 2004).

Charles Spies - Legal <CSpies@rnchq.org> on 04/05/2004 05:28:51 PM

To: pcstestify@fec.gov
cc:

Subject: RNC Comment

Attached please find the Comment of the Republican National Committee on the Political Committee Status NPRM. In addition, we wish to testify at the hearings on this matter.

- Charlie

Charles R. Spies
Election Law Counsel
Republican National Committee
310 First Street, SE
Washington, DC 20003

Phone: (202) 863-8638
Fax: (202) 863-8654

<<RNC Cmnts on Political Cmte NPRM 2004.doc>>

- RNC Cmnts on Political Cmte NPRM 2004.doc

Republican National Committee

Counsel's Office

April 5, 2004

Mai T. Dinh, Acting Assistant General Counsel
Office of the General Counsel
Federal Election Commission
999 E St., N.W.
Washington, DC 20463

VIA E-MAIL: **pcstestify@fec.gov**

RE: Political Committee Status Notice of Proposed Rulemaking

Dear Ms. Dinh:

These comments on the Federal Election Commission's ("FEC" or "Commission") Notice of Proposed Rulemaking ("NPRM"), 69 Fed. Reg. 11736, regarding political committee status, are submitted on behalf of the Republican National Committee ("RNC"). The RNC requests an opportunity to testify before the Commission at its hearing on this subject and will be pleased to clarify and expand upon any of our responses at that time.

"I fought the law and the law won."
- Bobby Fuller, 1965
- RNC Chairman Ed Gillespie, 2004

The starting point for analysis of this NPRM must be the plain language of the law. No matter how much the RNC or members of the Commission dislike the law, the reality is that notwithstanding that dislike (and what we believed were legitimate Constitutional concerns), the Bipartisan Campaign Reform Act of 2002 was passed into law and upheld by the United States Supreme Court in *McConnell v. FEC* ("*McConnell*"), 540 U.S. ____, 124 S.Ct. 619 (2003). The obligation of the Commission

purpose, the Commission creates a clear bright-line standard. While we can all think of hypotheticals that would not be captured by this standard, the reality of the past six months has shown that there is a significant fundraising advantage for organizations that have a stated purpose of supporting or opposing a specific federal candidate. With that fundraising advantage, however, must come the burden of complying with the Act. If an organization, instead of focusing on supporting or opposing a federal candidate or candidates, instead focuses on issues, then it rightfully avoids this standard.

An argument has been made that in *McConnell*, the Supreme Court acknowledged, "Interest groups, however, remain free to raise soft money to fund voter registration, GOTV activities, mailings, and broadcast advertising (other than electioneering communications)." *McConnell,* 124 S. Ct. at 686. That quotation is self evident, but only goes so far. "Interest groups" do indeed, even under the most restricting of the proposed rules in this NPRM, remain free to engage in grassroots GOTV activities, so long as they are not for the purpose of supporting or opposing a federal candidate or candidates. The RNC, Democrat Party, Liberterian Party, and Socialist Party, after all, are "interest groups," yet do not remain free to fund the above listed activities with soft money and, in fact, are required to use federal funds for these activities. 2 USC 441i(a). This is not to say there should be a specific equivalence between nonconnected groups and political parties; rather, it merely occasions the observation that a single quotation from the Court's opinion cannot carry the weight that some wish it would.[8]

2. Allocation

The NPRM seeks comment on a number of issues related to allocation and non-connected political committees. First, political committees raising or spending money for activities which promote, attack, support, or oppose clearly identified Federal candidates exclusively must of course be paid for with 100% Federal funds. Second, if the communication has in it even one clearly identified Federal candidate, the activity should be paid for by 100% Federal funds, consistent with the Commission's current treatment of electioneering communications and political committees. *See, generally,* 11 CFR 300.33 (allocation of costs of Federal election activity). Conversely, if the communication only refers to a clearly identified non-federal candidate, and has no generic message, then it may be paid for with 100% non-federal funds. If the activity contains a generic partisan or GOTV message, with no mention of a Federal candidate, then the political committee should use the current state party allocation formula for the state in which the activity occurs. This simple approach would require a political committee to determine its formula based on the presence of a Presidential and/or U.S. Senate candidate on the next ballot. *See, e.g.,* 11 CFR 300.33(b)(1)-(4). If the activity occurs in multiple states, the political committee could either make a state-by-state determination for payment allocation, or could for administrative efficiency purposes use the highest potentially applicable Federal allocation percentage (the required minimum federal percentage is a floor, not a ceiling). In contrast to the pages of charts and explanations in the NPRM, this proposed method of allocation is clear and fair, in as

[8] In another context, the NPRM itself warns against "dissect[ing] the sentences of the United States Reports as though they were the United States Code," *St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 502, 515 (1993).

much as it mirrors treatment of other similarly situated political committees in the Regulations.

3. Effective Date

The Commission seeks comment on whether the effective date for any final rules that the Commission may adopt should be delayed until after the next general election and whether there is a legal basis for delaying the effective date. There is no legitimate legal basis. Congress, in a duly enacted law, has spoken to the question of political committee status in section 431(4) of the Act. The Commission is mandated to administer and seek compliance with the Act. 2 U.S.C. 437c(b)(1). While the Commission may enjoy some authority to delay the effective date of rules under the Administrative Procedures Act, it enjoys no such privilege to flaunt the effective dates provided for in enabling legislation of its organic statutes, the Federal Election Act of 1971, as amended, and the Bipartisan Campaign Reform Act of 2002, for which effective dates have passed. The statutory language at 2 U.S.C. §§ 431(4) and (9)(A)(i) is clear, and absent the former court imposed express advocacy constraints, the Commission is obligated to uphold the current clear language of the statute. To quote Justice Brennan, "It may be presumed that Congress does not intend administrative agencies, agents of Congress' own creation, to ignore clear jurisdictional, regulatory, statutory, or constitutional commands." *Heckler v. Chaney,* 105 S. Ct. 1649, 1660 (1985) (Brennan, J., concurring),

Along with an immediate effective date, the Commission should knock down the disingenuous argument that some have put forth that organizations do not have to comply with the law until any Regulations passed by the Commission have sat before Congress for the full 30 legislative days. That argument belies the fact that the statute governing the activities of such organizations is currently the law. In addition, the Commission has indicated through AO 2003-37 that it has accepted the post-*McConnell* reality that the statutory language at 2 U.S.C. §§ 431(4) and (9)(A)(i) now governs the activities such 527 organizations. It is incumbent upon the Commission to make clear in the Explanation and Justification for new Regulations that it will immediately treat intentional violations of the statute from that point forward as "knowing and willful" under the Act.

In addition, the RNC supports "conversion rules" outlined in the NPRM because they provide clear, straightforward guidelines and instructions for groups that have already undertaken activities in connection with Federal elections. Any group engaged in this type of activity would be afforded an opportunity, through the clear mechanism provided in the rule, to prove that it possessed the appropriate type of funds it has used to pay for the Federal activity. The RNC strongly supports several concepts in the NPRM designed to require political committees to confirm that only federally permissible funds can be converted to federal funds because this is requiring nothing more than what is required for political committees already registered and reporting under the Act. 11 CFR 102.5(a)(1). The definition of "covered period", as it is based on a comparable time period established in the statute in 2 U.S.C. 434(f)(2)(E), is sound for this reason.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EMILY'S LIST,	)	
	)	
Plaintiff,	)	Civ. No. 05-0049 (CKK)
	)	
v.	)	
	)	
FEDERAL ELECTION COMMISSION,	)	EXHIBIT
	)	
Defendant.	)	

EXHIBIT 15

Comments of Democracy 21, Campaign Legal Center, and
Center for Responsive Politics (April 5, 2004).

Donald Simon <DSimon@SONOSKY.COM> on 04/05/2004 05:09:50 PM

To: "'pcstestify@fec.gov'" <pcstestify@fec.gov>
cc: fwertheimer@democracy21.org, 'Trevor Potter' <TP@Capdale.com>, "'lnoble@crp.org'" <lnoble@crp.org>, Paul Sanford <psanford@crp.org>

Subject: Comments in Notice 2004-06 of Democracy 21, the Campaign Legal Ce nter and Center for Responsive Politics

Attached for filing are the comments of Democracy 21, the CampaignLegalCenterand the Center for Responsive Politics. All three commenters request the opportunity to testify.

Donald Simon will testify on behalf of Democracy 21. His contact information is:

Donald Simon

Sonosky, Chambers, Sachse, Endreson & Perry, LLC

Suite600, 1425 K Street NW

Washington, DC20005

202-682-0240

dsimon@sonosky.com

Trevor Potter will testify on behalf of the CampaignLegalCenter. His contact information is:

Trevor Potter

CampaignLegalCenter

Suite330, 1101 Connecticut Ave NW

Washington, DC 20036

202-736-2200

tp@capdale.com

Lawrence Noble and Paul Sanford will both testify on behalf of the Center for Responsive Politics. Their contact information is:

LawrenceNoble

Paul Sanford

The Center for Responsive Politics

Suite1030, 1101 14th Street NW
Washington, DC 20005

202-857-0044

lnoble@crp.org

psanford@crp.org

Thank you.

Donald J. Simon

Sonosky, Chambers, Sachse,
Endreson & Perry, LLP
Suite600, 1425 K St. NW

Washington, DC 20005

Telephone: (202) 682-0240
Facsimile: (202) 682-0249
E-Mail: dsimon@sonosky.com

reader of this message is not the intended recipient or the employee or agent responsible for delivering this message to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us by reply e-mail or by telephone (you may call collect to the sender's number listed above), and immediately delete this message and all of its attachments.

 - Comments on Notice 2004-6 -- FINAL.DOC

 - 501cDearColleague.pdf

April 5, 2004

By Electronic Mail

Ms. Mai T. Dinh
Acting Assistant General Counsel
Federal Election Commission
999 E Street NW
Washington, DC 20463

Re: Comments on Notice 2004-6: Political Committee Status

Dear Ms. Dinh:

These comments are submitted jointly by Democracy 21, the Campaign Legal Center and the Center for Responsive Politics in response to the Commission's Notice of Proposed Rulemaking 2004-6, published at 69 Fed. Reg. 11736 (March 11, 2004), seeking comment on "whether to amend the definition of 'political committee' applicable to non-connected committees," *id.*, and other matters.

All three commenters have been actively engaged in the issues raised in this NPRM. On January 15, 2004, we filed a complaint with the Commission against three "section 527 groups," alleging that under existing law the groups are required to register as federal political committees and to comply with federal campaign finance laws for their spending, which is clearly for the purpose of influencing the 2004 federal elections. *See Democracy 21 et al. v. ACT et al.* (FEC) (filed January 15, 2003). We also filed extensive comments in two advisory opinion requests, AOR 2003-37 and AOR 2004-05, that raised related questions. We wrote the Commission on February 25, 2004 urging that the Commission in this rulemaking address the critical issue of the need to revise its allocation rules to conform with federal campaign finance laws. We wrote to the Commission again on March 16, 2004, urging that this rulemaking be bifurcated to focus on the most pressing violations of law now occurring in this election cycle.

All three commenters request the opportunity to testify at the hearing to be held by the Commission on these rules. Donald Simon, counsel to Democracy 21, will testify on behalf of that organization. Trevor Potter, chair and general counsel of the Campaign Legal Center, will testify on behalf of that organization. Lawrence Noble, executive director, and Paul Sanford, general counsel, of the Center for Responsive Politics, will both testify on behalf of that organization.

1. Introduction

Faced with specific violations of the campaign finance laws that are taking place in this election – the spending of tens of millions of dollars of soft money explicitly for the purpose of

The Commission must recognize that this message from the Supreme Court applies equally to the allocation rules for non-connected committees, and revise these rules now in order to ensure that such committees are not able to massively circumvent the FECA and use nonfederal funds to influence federal elections.

D. The effect of the current rules. The current rules essentially allow PACs to establish their own allocation ratios for their administrative expenses and generic voter drive activities. This enables them to manipulate the ratio so that the federal portion is zero or close to zero, even if their activities are, in fact, entirely directed at influencing the outcome of a federal election.

The ratio of federal funds required for generic activity and administrative costs is entirely based on the committee's candidate-specific disbursements. As noted above, the current formula compares the committee's expenditures on behalf of specific federal candidates to its total disbursements for specific federal and non-federal candidates (not including overhead or other generic costs) during the two-year federal election cycle. 11 C.F.R. § 106.6.

Thus, if a committee avoids making any federal candidate-specific disbursements, and then makes even a single small disbursement from nonfederal funds on behalf of a specific nonfederal candidate, the rule allows the committee to pay for all of its administrative expenses and generic partisan voter drive activity entirely with nonfederal funds, since it will have made *no* expenditures "on behalf of specific federal candidates."[12]

This is not merely an abstract or theoretical possibility. At least one non-connected committee that is heavily involved in the 2004 presidential election, America Coming Together, or ACT, is currently using an allocation ratio of 2% federal and 98% nonfederal. In so doing, it is proving that the Supreme Court's position about the subversion and circumvention made possible by the Commission's party allocation rules also applies to the Commission's PAC allocation rules.

As we have explained in detail in two other submissions to the Commission,[13] ACT was set up as a federal PAC with an associated nonfederal 527 committee to conduct voter mobilization activity designed to defeat President Bush in the 2004 presidential election. According to its public statements, the group plans to conduct "a massive get-out-the-vote operation that [it] think[s] will defeat George W. Bush in 2004."[14] In addition, the group is

---

12 The rule does not address the very real possibility that a PAC might make no candidate-specific disbursements whatsoever, a situation that would generate a ratio of 0/0, which is mathematically incoherent. Although PACs may currently view this as authorization to use 100% nonfederal funds, the spirit of the regulation would be better served by the use of a 50/50 allocation ratio in this circumstance. In any case, this flaw is yet another reason to revise the rule to include a minimum federal percentage.

13 See Democracy 21 et al. v. ACT et al. (FEC) (filed January 15, 2004); Comments of Democracy 21 et al in AOR 2004-5 (filed February 12, 2004) at 2-12.

14 T. Edsall, "Liberals Form Fund to Defeat President; Aim is to Spend $75 Million for 2004," The Washington Post (Aug. 8, 2003).

raising funds to finance this activity by asking donors "to help send President Bush home to Texas.[15] Its fundraising solicitations explain that it will be targeting its GOTV operation specifically to the *presidential* battleground states.[16]

Despite the fact that its overwhelming purpose is to defeat a federal candidate, ACT is claiming that its funds expended allocation ratio is 2% federal and 98% nonfederal.[17] It can achieve this result, under the Commission's existing rules, by spending its funds primarily for generic partisan voter drive activity, and avoiding any federal candidate-specific disbursements. Under the Commission's allocation formula, this makes the numerator in the formula zero or nearly zero, whatever the size of the denominator, thus resulting in a federal allocation ratio of at or close to zero.

In the real world, this yields absurd results which violate common sense and subvert the law. ACT is a group which is overwhelmingly, if not entirely, devoted to defeating President Bush. It has announced that its purpose is to defeat President Bush, is raising money on the basis of saying those funds will be used to influence the presidential election, and it is targeting its spending specifically to the *presidential* battleground states. That it can claim that only two percent of its allocated spending has to be funded with federally legal funds, and that ninety-eight percent of its spending is, in effect, for state and local purposes, plainly illustrates that the Commission's existing allocation rules are wrong as a matter of law, and lack any credibility. As with the Commission's previously discredited party allocation rules, the existing PAC rules allow committees "to use vast amounts of soft money in their efforts to elect federal candidates." *McConnell,* 124 S. Ct. at 660.

E. Recommended changes to 106.6

i. The minimum federal percentage.

In order to prevent this abuse of the allocation rules, the Commission should revise the "funds expended" allocation formula in section 106.6 to include a minimum federal percentage.[18]

---

15 A copy of the ACT solicitation letter, which is suffused throughout with evidence of its principal purpose to raise funds to influence the presidential election, is attached to the comments filed by Democracy 21 et al. in regard to 2004-05 (February 12, 2004).

16 *Id.*

17 A copy of the Schedule H-1 filed with the Commission by ACT, setting forth its allocation ratio, is attached to the letter of Democracy 21 et al. to the Commission, dated February 25, 2004.

18 We note that the whole allocation system was not initially a statutory matter, but a regulatory construct created by the Commission, e.g. Adv.Op. 1978-10, and one that, as the Supreme Court repeatedly indicated in McConnell, has caused fundamental problems that served to "subvert," "circumvent" and "erode" the law. 157 L.Ed.2d at 548, n.44, 563. It may be time for the Commission to undertake a future rulemaking to re-examine the whole concept of allocation. In the same vein, it is important to recognize that the underlying rationale of allocation is the assumption that a committee's activities are intended to have a mixed purpose of influencing state and local as well as federal elections.

The NPRM seeks comments on a number of ways to implement a minimum federal percentage. One alternative, described in the narrative, would use a two-tiered minimum based on the number of states in which the committee conducts activities. Committees active in fewer than ten states would use a minimum of 25% federal funds. Those active in ten states or more would use a minimum of 50% federal funds. 69 Fed.Reg. at 11754.

The Commission should adopt this two-tiered approach, with one critically important modification. The number of states at which a committee's minimum federal percentage increases to 50% should be set at a level that ensures that committees pursuing anything more than a local campaign strategy will be subject to the higher minimum. At the same time, it should recognize that organizations operating in metropolitan areas that straddle state boundaries (*e.g.*, New York City, Washington, D.C.) will likely be required by the nature of media markets to conduct activity in multiple states even if they are seeking to influence the outcome of state or local elections. The threshold should be set to strike an appropriate balance between these concerns.

It is widely believed that the outcome of this year's presidential election will be decided in just seventeen key battleground states. With so few states "in play," the ten state threshold proposed in the NPRM is far too high. Setting the threshold at three states, or at most, five states, will ensure that committees pursuing federal electoral goals will be required to use the 50% allocation ratio, while also allowing organizations whose activities cross over into two or three jurisdictions to be subject to the 25% minimum.

The NPRM contains several variations of the minimum percentage that would use the state party Levin fund allocation ratios. These ratios were derived from the ballot composition ratios for state party committees in repealed section 106.5(d), which gauged the relative priorities of a state party committee by using the types of offices on the ballot in the committee's state in a particular year. Using these ratios might be appropriate for a committee operating in a single state, but uniform minimum federal percentages would be much easier to understand and administer for PACs operating in multiple states. Therefore, the Commission should decline to adopt a minimum percentage based on the Levin fund ratios.

ii. Affiliation for purposes of the minimum federal percentage

Requiring committees to use a minimum federal percentage based on the number of states in which the committee is active may well prompt some organizations to set up multiple, ostensibly independent, committees to operate in different states, in order to claim entitlement to the lower tier 25% minimum ratio. As a result, the Commission will be called upon to determine whether a number of nominally separate committees are in fact one organization, conducting activity in multiple states, for purposes of the minimum allocation ratio.

This calls attention to the limitations of the current affiliation rules, which the Commission has historically been reluctant to apply aggressively to non-connected committees. In their current form, these rules leave the Commission ill-equipped to effectively prevent a

---

Thus, where a political committee has an overriding purpose to influence federal elections, allocation is inappropriate and should not be permitted.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EMILY'S LIST,	)	
	)	
Plaintiff,	)	Civ. No. 05-0049 (CKK)
	)	
v.	)	
	)	
FEDERAL ELECTION COMMISSION,	)	EXHIBIT
	)	
Defendant.	)	

EXHIBIT 16

Comments of the Media Fund (April 5, 2004).

RYAN, PHILLIPS, UTRECHT & MACKINNON*

ATTORNEYS AT LAW
* NONLAWYER PARTNER

1133 CONNECTICUT AVENUE, N.W.
SUITE 300
WASHINGTON, D.C. 20006

(202) 293-1177
FACSIMILE (202) 293-3411

April 5, 2004

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

Re: Notice of Proposed Rulemaking – Political Committee Status

Dear Ms. Dinh:

These comments are submitted in reference to the above rulemaking on behalf of The Media Fund, a political organization formed under Section 527 of the Internal Revenue Code (IRC). 26 U.S.C. § 527. The Media Fund requests an opportunity for counsel to appear at the FEC hearing on April 14 or 15, 2004.

I. Summary

Under current law, 527 organizations that do not qualify as "political committees" under Federal election law register only with the IRS and not with the Federal Election Commission (FEC). The statutory test for whether an entity is a Federal "political committee" is whether it receives "contributions" or makes "expenditures" as those terms are defined in the Federal Election Campaign Act of 1971, 2 U.S.C. § 431 et seq., (FECA). In *Buckley v. Valeo,* 424 U.S. 1 (1976), the Supreme Court narrowly construed the definition of "expenditure" to reach "only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." *Buckley*, 424 U.S. at 79-80. Similarly, the Court construed "contributions" as those donations that would be used to make contributions to candidates, to make express advocacy communications, or to make expenditures coordinated with candidates. *Buckley*, 424 U.S. at 77-78, 80.

Thus, under FECA, 527 organizations operating independently of any Federal candidate or political party that do not make contributions to Federal candidates and do not use any funds for communications that expressly advocate the election or defeat of a clearly identified Federal candidate are not Federal political committees. This has been the law for thirty years, and there is no basis or compelling reason for the FEC to change these rules now six months before the 2004 general election.

E. Allocation Concerns

The *NPRM* sets forth a series of proposed revisions to the Commission's allocation rules. The major flaw in this proposal is the requirement that an entity allocate activities that promote, support, attack, or oppose Federal candidates as Federally allocable expenditures. If applied to every activity in which an organization participates, it is nearly impossible to apply at all, let alone with any degree of accuracy.

The burdensome nature of this requirement is unmatched in current Commission regulations. Not only will new reporting forms be required – and presumably implemented in the middle of an election cycle – but all groups would also have to stop and examine their internal accounting or bookkeeping systems and significantly revise those to track and allocate spending in a completely new way.

Congress itself chose not to apply this standard to all activities, but limited it to Federal election activity, as specifically defined. This standard is now being broadened beyond congressional intent to reach additional activities and require allocation thereof to Federal accounts. In the absence of appropriate congressional intent, this overreach is contrary to law and unsupported.

How can an organization possibly look at all of the ranges of activities which it might engage and determine if it promotes, supports, attacks, or opposes a Federal candidate, regardless of whether it is intended to do so or not. Clearly, intent cannot be dispositive since that would allow organizations to subjectively make these determinations, but in the absence of intent, there are no objective factors by which to make this determination.

Even worse, legitimate issue advocacy and grass roots lobbying activities will be swept into this test. The overbreadth of this proposal will be subject to First Amendment criticisms because it limits the ability of individuals and organizations to criticize their government and public officials.

The addition of minimum federal percentages, rather than helping to cure or simplify this matter, merely makes it more complicated and burdensome. Minimum percentages in the political party context have a basis in the underlying purpose of the party itself – to promote its candidates ticket-wide. Non-connected entities do not possess a similarity of purpose or mission, and whether or not they engage in some activities in support of candidates, they also engage in much more far-ranging non-candidate activities.

On first blush, it may be assumed that an organization – if it wanted to avoid the more burdensome method – would simply use the minimums. However, no organization would adopt such a simplistic analysis. Instead, groups would have to determine which method resulted in a more favorable allocation for their unique circumstances – primarily to avoid wasting crucial federal resources. In essence, this would require groups to calculate under both alternatives. That will increase, rather than ease, their burdens.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EMILY'S LIST,	)	
	)	
Plaintiff,	)	Civ. No. 05-0049 (CKK)
	)	
v.	)	
	)	
FEDERAL ELECTION COMMISSION,	)	EXHIBIT
	)	
Defendant.	)	

EXHIBIT 17

EMILY's List Website, Where We Come From, available at
http://www.emilyslist.org/about/where-from.html.

E-list Sign Up

Enter Email Address GO

- About EMILY's List
- Support EMILY's List
- Candidates
- Team EMILY
- Campaign Corps
- What's Happening at EMILY's List
- What We Do
- Newsroom
- E-Cards
- Home

About EMILY's List

Where We Come From

EMILY's List has helped elect 11 Democratic women senators, 60 congresswomen, and eight governors.

Nineteen Years of Progress...

In 1985, 25 women, rolodexes in hand, gathered in Ellen Malcolm's basement to send letters to their friends about a network they were forming to raise money for pro-choice Democratic women candidates. These "founding mothers" pioneered a new concept in fundraising: a donor network that would provide its members with information about candidates and encourage them to write checks directly to the candidates they choose.

At that time, no Democratic woman had been elected to the U.S. Senate in her own right, no woman had been elected governor of a large state, and the number of

Democratic women in the U.S. House of Representatives had declined. Frustrated by the barriers that prevented women from making it to the top political offices, these women founded EMILY's List to elect more women to the House and Senate, and as governors.

Since that day, EMILY's List has grown to over 100,000 members, raised millions of dollars, and helped elect record numbers of women to office. An acronym for "Early Money Is Like Yeast" (it makes the dough rise...), EMILY's List has become the nation's biggest political action committee. Here is a sketch of 20 years of progress.

1986

EMILY's List raised over $350,000 for two Senate candidates. Barbara Mikulski of Maryland became the first Democratic woman elected to the Senate in her own right. Membership in EMILY's List was at 1,155.

1988

Nita Lowey (NY) and Jolene Unsoeld (WA) reversed a 14-year decline in the number of Democratic women in the U.S. House, raising it to 14. EMILY's List recommended nine congressional candidates to more than 2,000 members and raised $650,000.

1990

EMILY's List broke the million-dollar mark. Members contributed $1.5 million to 14 candidates and helped elect two governors and seven members of Congress. Membership exceeded 3,500.

1992

In what was called "The Year of the Woman," EMILY's List helped elect four new pro-choice Democratic women senators and 20 new congresswomen. Membership grew more than 600 percent. More than 23,000 members contributed over $6.2 million to recommended

candidates.

1994

EMILY's List became a full-service political organization that raises money for women candidates, helps them build strong campaigns, and mobilizes women voters. Members helped elect four new Democratic congresswomen and return Dianne Feinstein to the U.S. Senate. The first WOMEN VOTE!® project was launched in California, where women voters provided the margin of victory for Feinstein and other Democrats. Members contributed $8 million to recommended candidates and membership grew to 33,156.

1996

45,000 EMILY's List members contributed $6.5 million to women candidates, $2 million to build winning campaigns, and $3 million for EMILY's List WOMEN VOTE!®. EMILY's List helped 31 states conduct WOMEN VOTE!® projects, which targeted

2.7 million women voters with 7.5 million pieces of mail and 500,000 phone calls urging them to vote. EMILY's List helped elect a pro-choice Democratic woman senator, nine congresswomen, and one governor. The EMILY's List Women's Monitor, a national survey of women voters, provided a barometer of women voters' attitudes to the press and public.

1998

50,000 members contributed $7.5 million to elect a pro-choice Democratic woman senator and seven new congresswomen, bringing the total to a record high of 56 women in Congress. WOMEN VOTE!® projects in 26 states targeted 3.4 million women with nearly 8 million pieces of mail and over 2 million phone calls.

2000

In the 2000 election, 68,000 members of EMILY's List contributed $9.3 million to candidates, helping to bring four new pro-

choice Democratic women to the Senate and four to the House. Democratic women reached an all time high of 10 in the Senate and 41 in the House. In addition, New Hampshire Gov. Jeanne Shaheen won a third term, and Ruth Ann Minner became the first woman governor of Delaware. EMILY's List raised and contributed $10.8 million for WOMEN VOTE!® projects to mobilize women voters in key battleground states. In 2001, EMILY's List created the Political Opporutnity Program which recruits, trains, and supports pro-choice Democratic women running for state legislative, constitutional and key local offices.

2002

In the 2002 elections, EMILY’s List and its almost 73,000 members contributed nearly $9.7 million to pro-choice Democratic women candidates; members contributed $23 million to fund EMILY’s List operations and political program, including the nationwide WOMEN VOTE!® project to

mobilize women voters on behalf of Democrats. In 2002, EMILY's List developed Campaign Corps, a competitive program that trains a select group of recent college graduates to work in targeted progressive Democratic campaigns for the three months leading up to election day.

2004

In the 2004 election, more than 100,000 members of EMILY's List contributed $10.1 million to candidates, adding five new women to the U.S. House - the most since 1998. Every single EMILY's List incumbent seeking reelection won, including Sens. Barbara Boxer (CA), Patty Murray (WA), Barbara Mikulski (MD) and Governor Ruth Ann Minner (DE). In addition, EMILY's List helped elect 141 women to state and local offices across the country with support from our Political Opporutniy Program. These victories at the state level helped Democrats regain control of legislative bodies in 6 states where women will serve in leadership positions.

EMILY's List developed the "Air EMILY" project, which trained and mobilized 1300 activists to get out the vote on election day in Florida and launched a new web site for our online activist community, Team EMILY.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EMILY'S LIST,	)	
	)	
Plaintiff,	)	Civ. No. 05-0049 (CKK)
	)	
v.	)	
	)	
FEDERAL ELECTION COMMISSION,	)	EXHIBIT
	)	
Defendant.	)	

EXHIBIT 18

EMILY's List Website, Welcome from Ellen R. Malcolm, available at http://www.emilyslist.org/about/welcome.html.

E-list Sign Up

Enter Email Address

- About EMILY's List
- Support EMILY's List
- Candidates
- Team EMILY
- Campaign Corps
- What's Happening at EMILY's List
- What We Do
- Newsroom
- E-Cards
- Home

About EMILY's List

Welcome from Ellen R. Malcolm

Welcome to EMILY's List!

EMILY's List, the nation's largest grassroots political network, is dedicated to electing pro-choice Democratic women to federal, state, and local office.

We are a network of more than 100,000 men and women -- from all across the country and all walks of life -- committed to recruiting and funding viable women candidates; helping them build and run effective campaign organizations; and mobilizing women voters to help elect progressive candidates across the nation.

This web site is yours. It is here to provide the information you need to become a more effective, powerful, and politically savvy individual. It is here to gather your ideas and suggestions -- and to link you with the tens of thousands of women and men in our

network who want to turn back the right-wing Bush Republican agenda and build a progressive America.

Make us your home on the Internet and, working together, we can elect pro-choice Democratic women to office across the nation and use the power of women voters to defeat George W. Bush and other right-wing Republicans. We can make our voices heard -- and change the face of American politics.

Warmest regards,

Ellen R. Malcolm
President, EMILY's List

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EMILY'S LIST,	)	
	)	
Plaintiff,	)	Civ. No. 05-0049 (CKK)
	)	
v.	)	
	)	
FEDERAL ELECTION COMMISSION,	)	EXHIBIT
	)	
Defendant.	)	

EXHIBIT 19

Wisconsin Right to Life, Inc. v. FEC, Civ. No. 04-1260 (DBS, RWR, RLJ)
(D.D.C. Aug. 17, 2004), slip op.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WISCONSIN RIGHT TO LIFE, INC.,	
Plaintiff,	**Civil No. 04-1260 (DBS, RWR, RJL)**
v.	**THREE-JUDGE COURT**
FEDERAL ELECTION COMMISSION,	
Defendant.	

MEMORANDUM OPINION AND ORDER

This matter coming before the court on plaintiff's motion for a preliminary injunction, and the court having considered the affidavits and representations of counsel, solely for the purposes of the motion for a preliminary injunction, the court makes the following findings of fact:

1. Plaintiff Wisconsin Right to Life, Inc. (WRTL) is a nonprofit, nonstock, Wisconsin, ideological advocacy corporation recognized by the Internal Revenue Service as tax-exempt under § 501(c)(4) of the Internal Revenue Code.

2. Defendant Federal Election Commission (FEC) is the government agency charged with enforcing the relevant provisions of the Federal Election Campaign Act, as amended by the Bipartisan Campaign Reform Act of 2002 (BCRA).

3. WRTL admits that it does not qualify for any exception permitting it to pay for

(2)

electioneering communications from corporate funds because (a) it is not a "qualified nonprofit corporation" (QNC) within the definition of 11 C.F.R. § 114.10 so as to qualify for the exception found at 11 C.F.R. § 114.2(b)(2) to the electioneering communication prohibition and (b) its advertisements are "targeted" so that it does not fit the exception for § 501(c)(4) organizations as described in 2 U.S.C. § 441b(c)(2). 2 U.S.C. § 441b(c)(6)(A).

4. U.S. Senator Russell Feingold of Wisconsin is running for reelection this year.

5. As early as September, 2003, candidates opposing Senator Feingold made Senator Feingold's support of Senate filibusters against judicial nominees a campaign issue. Def.'s Opp'n to Pl.'s Mot. for Prelim. Inj. (Def.'s Opp'n) Exh. 10-14.

6. WRTL maintains a political action committee (PAC).

7. In March 2004, WRTL's PAC endorsed three candidates opposing Senator Feingold and announced that the defeat of Senator Feingold was a priority. Def.'s Opp'n Ex. 4, 5, 6, 7.

8. In a news release on July 14, 2004, WRTL criticized Senator Feingold's record on Senate filibusters against judicial nominees. Def.'s Opp'n Exh. 16.

9. WRTL had used a variety of non-broadcast communications to convey its criticism of Senate filibusters against judicial nominees in the months leading up to August 2004.

10. WRTL is now paying to broadcast on television and radio a series of advertisements inclusive of those depicted in Exhibits A, B, and C to the complaint and attached as Exhibits A, B, and C hereto, all of which refer to and will continue to refer to and clearly identify Senator Russell Feingold.

11. The Wisconsin primary for the office for which Senator Feingold is a candidate will occur thirty days after August 15, 2004. The general election will occur November 2, 2004.

12. WRTL anticipates that its ongoing advertisements will be considered electioneering communications for purposes of federal statutory and regulatory definitions under 2 U.S.C. § 434(f)(3) and 11 C.F.R. § 100.29 during the period between August 15, 2004, and November 2, 2004.

LEGAL CONCLUSIONS AND ANALYSIS

Plaintiff Wisconsin Right to Life seeks a judgment declaring portions of the BCRA unconstitutional as applied to it under the facts set forth in its complaint, and it seeks preliminary injunctive relief preventing FEC enforcement of those portions of BCRA against it.

The focus of the litigation is 2 U.S.C. § 441b, which regulates the extent to which such corporations as WRTL may finance and produce "applicable electioneering communications," which are defined at 2 U.S.C. § 434(f)(3) as being "any broadcast, cable, or satellite communication which (I) refers to a clearly identified candidate for Federal office; (II) is made within (aa) 60 days before a general . . . election . . .; or (bb) 30 days before a primary . . . election; and (III) . . . is targeted to the relevant electorate."

In this case, WRTL cites three specific ads, first aired July 26, which contain references to Sen. Russell Feingold, currently the sole Democrat contender for the Senate seat. Complaint 5. As the primary election occurs on September 14 and the general election occurs on November 2, BCRA's (in this case, overlapping) "blackout" periods prohibit the airing of the advertisements from August 15 until November 2. *Id.* at 6.

WRTL's prayer for relief is sweeping, seeking both declaratory and injunctive relief

declaring 2 U.S.C. § 441b unconstitutional as applied to "electioneering communications . . . that constitute grass-roots lobbying," and specifically as applied to the three advertisements incorporated in its complaint. Complaint 13. However, the motion before us today concerns only its motion for a preliminary injunction. The standards for the granting of a preliminary injunction are familiar. To prevail, a plaintiff seeking such relief must demonstrate: (1) a substantial likelihood of success on the merits; (2) that it would suffer irreparable harm if an injunction is not granted; (3) that an injunction would not cause substantial injury to other parties; and (4) that the public interest would be furthered by the injunction. *See, e.g., CityFed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 746 (D.C. Cir. 1995). Plaintiff's showing in the present litigation cannot survive this standard.

First, WRTL has not established that it has a substantial likelihood of success on the merits. Just last year, in *McConnell v. Federal Election Commission*, 124 S. Ct. 619 (2003), the Supreme Court upheld the electioneering communication provisions of the BCRA in their entirety. *Id.* at 686-700. WRTL is correct that in *McConnell* the Court was considering a facial challenge while the current challenge subjects the statute to constitutional analysis in the context of its specific application, but the reasoning of the *McConnell* Court leaves no room for the kind of "as applied" challenge WRTL propounds before us. More specifically, the Court noted that the statute included a "back up" definition of electioneering communications, 2 U.S.C. § 434(f)(3)(A)(I), to take effect only if the primary definition were held to be "constitutionally insufficient." The Court expressly stated that it need not rule on the constitutionality of that back up provision because "*we uphold all applications of the primary definition* and accordingly have no occasion to discuss the backup definition." 124 S.Ct. at 687 n.73 (emphasis added). The

Court's deliberate declaration of its ruling as encompassing "*all applications* of the primary definition" suggests little likelihood of success for an "as applied" challenge to some applications of that definition, such as the one plaintiff brings before us.

Furthermore, the Court's deliberate upholding of "all applications" stands in informative contrast to its explicit acknowledgment that other parts of the statute which it upheld against facial challenge might be subject to "as applied" challenges in the future. For example, the Court upheld a Title I provision of BCRA restricting state parties from spending "soft money for federal election activities." 2 U.S.C. § 441i(b). But the Court stated that "as-applied challenges remain available" if some future state party could show that the restriction had become "'so radical in effect as to . . . drive the sound of [the recipient's] voice below the level of notice.'" *Id.* at 677 (brackets in the original) (quoting *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 397 (2000)). Similarly, in upholding the ban on soft money fundraising by national party committees, 2 U.S.C. § 441i(a), the Court noted that "'a nascent or struggling minor party can bring an as-applied challenge" should the ban prevent it from "amassing the resources necessary for effective advocacy.'" *Id.* at 669 (quoting *Buckley v. Valeo*, 424 U.S. 1, 21 (1976)).

Again, in upholding the Title V recordkeeping requirement on broadcasters, the Court noted that the regulated entities "remain free to challenge the provisions, as interpreted by the FCC in regulations, or as otherwise applied." *Id.* at 717. And finally, the Court noted that its ruling upholding against facial challenge the § 201 disclosure provisions of Title II "does not foreclose possible future challenges to particular applications" of that statutory requirement. *Id.* at 692.

While these dicta concerning the possible future facial challenges to other provisions do

not preclude the possibility that the Supreme Court might uphold an as-applied challenge to the provisions before us, in the face of the strength of the Court's holding with specific reference to these provisions, we cannot possibly conclude that plaintiff has made out a substantial likelihood of success on the merits.

Our reading of *McConnell* that as-applied challenges to § 441b are foreclosed is but one reason we find little likelihood of success on the merits. The facts suggest that WRTL's advertisements may fit the very type of activity *McConnell* found Congress had a compelling interest in regulating. *Id.* at 695. In *McConnell*, the Court voiced the suspicion of corporate funding of broadcast advertisements just before an election blackout season because such broadcast advertisements "will *often* convey [a] message of support or opposition" regarding candidates. *Id.* at 651, 697, 715. Here, WRTL and WRTL's PAC used other print and electronic media to publicize its filibuster message – a campaign issue – during the months prior to the electioneering blackout period, and only as the blackout period approached did WRTL switch to broadcast media. (See Def.'s Opp. Exh. 4, 16, 18.) This followed the PAC endorsing opponents seeking to unseat a candidate whom WRTL names in its broadcast advertisement (Def.'s Opp. Exh. 10-14), and the PAC announcing as a priority "sending Feingold packing." (Def.'s Opp'n Exh. 4.)

As to the second part of the preliminary injunction standard, we hold that plaintiff has not demonstrated that it will suffer irreparable harm in the absence of a preliminary injunction. Plaintiff relies on the general statement that "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Unquestionably, as a general proposition of law, that statement is true.

However, in adjudicating entitlement of a plaintiff to a preliminary injunction, we must apply the whole four-part test, which requires us to determine whether the "balance of harms favor[s] plaintiffs." *Twelve John Does v. District of Columbia*, 841 F.2d 1133, 1137 (D.C. Cir. 1988). That said, the actual limitation on plaintiff's freedom of expression, as protected by the First Amendment, is not nearly so great as plaintiff argues. At least for purposes of a preliminary injunction, the present showing appears to be that plaintiff is not precluded from forwarding its message, or even from exposing the public to the particular advertisements at issue. As we understand it, the BCRA does not prohibit the sort of speech plaintiff would undertake, but only requires that corporations and unions engaging in such speech must channel their spending through political action committees (PACs).[1] In *McConnell*, the Supreme Court noted that though "corporations . . . may not use their general treasury funds to finance electioneering communications, . . . they remain free to organize and administer segregated funds, or PACs, for that purpose." *Id.* at 695. The Court went on to reason that "'the PAC option allows corporate political participation without the temptation to use corporate funds for political influence . . . .'" *Id.* (quoting *Federal Election Commission v. Beaumont*, 123 S. Ct. 2200, 2211 (2003)).

The *Beaumont* decision quoted by the Supreme Court in *McConnell*, while not directly on point as it did not deal with the current statute, is instructive. That case involved a challenge to the regulation of a corporation's political contributions while the present involves regulation of electioneering communications. Nonetheless, the analogy is obvious. In *Beaumont*, the Supreme

[1]WRTL also has alternative methods available to communicate its message in addition to using PAC funding for broadcast ads, namely, using print media, such as newspaper or magazine advertisements, press releases, pamphlets, informational mailings, and billboards; using electronic communications, such as e-mailing and internet posting; and placing telephone calls.

Court endorsed the constitutional adequacy of "the PAC option." That holding by the Supreme Court not only weighs against the likelihood of success on the merits, but it also suggests that plaintiff has not advanced a strong case of irreparable harm in the absence of a preliminary injunction. Certainly, it suggests that the harm established by plaintiff will not weigh much in the balance against potential harm to others under the third step of the test or against the public interest under the fourth. Therefore, WRTL has failed the second as well as the first step of the four-part test.

Given the absence of merit in plaintiff's case on the first element of the preliminary injunction test and the near-total absence of irreparable harm to the plaintiff under the second, we need not linger long over the third and fourth elements. The harm to the opposing party, the Federal Election Commission, is evident. Everyone agrees that it is the statutory duty of the defendant to enforce the BCRA. If we enter the preliminary injunction, then, to the extent of that injunction, the Commission cannot perform its duty. We hold that an injunction against the performance of its statutory duty constitutes a substantial injury to the Commission, although given plaintiff's failure on the first two elements, we do not consider that showing essential to our denial of the preliminary injunction.

Similarly, since plaintiff has not established any entitlement to a preliminary injunction, it is not essential that we determine that the grant of such an injunction would fail to further the public interest, but for the sake of completion of record for the purposes of any review that might be sought, we do hold that plaintiff has not established that the public interest would be furthered by the injunction. The Supreme Court has already determined that the provisions of the BCRA serve compelling government interests. *See McConnell*, 124 S.Ct. at 695-96. To the extent that

the injunction of the proposed application of those provisions interferes with the execution of the statute upheld by the Supreme Court in *McConnell*, the public interest is already established by the Court's holding and by Congress's enactment, and the interference therewith is inherent in the injunction.

In short, plaintiff's case falls far short of the four-part test for the grant of a preliminary injunction. Therefore, we have denied plaintiff's motion. In light of this disposition, we further order that the parties hereto file supplemental memoranda within ten days of the date of this memorandum and order addressing the question whether this matter should be dismissed.

This the 17th day of August, 2004.

United States Circuit Judge

United States District Judge

United States District Judge

Radio Script

Client: Wisconsin Right to Life
Title: "Wedding" :60
Job#: WRL-8136
Date: July 15, 2004

AUDIO	TALENT
We hear church bells up and under...	PASTOR: And who gives this woman to be married to this man? BRIDE'S FATHER (rambling): Well, as father of the bride, I certainly could. But instead, I'd like to share a few tips on how to properly install drywall. Now you put the drywall up... VO: Sometimes it's just not fair to delay an important decision. But in Washington it's happening. A group of Senators is using the filibuster delay tactic to block federal judicial nominees from a simple "yes" or "no" vote. So qualified candidates don't get a chance to serve. Yes, it's politics at work, causing gridlock and backing up some of our courts to a state of emergency. BRIDE'S FATHER (rambling): Then you get your joint compound and your joint tape and put the tape up over... Contact Senators Feingold and Kohl and tell them to oppose the filibuster. Visit: BeFair.org. That's BeFair.org Paid for by Wisconsin Right to Life (befair.org), which is responsible for the content of this advertising and not authorized by any candidate or candidate's committee.

Exhibit

Radio Script

Client: Wisconsin Right to Life
Title: "Loan" :60
Job#: WRL-8136
Date: July 14, 2004

AUDIO	TALENT
	LOAN OFFICER: Welcome Mr. and Mrs. Shulman. We've reviewed your loan application, along with your credit report, the appraisal on the house, the inspections, and, well...
	COUPLE: Yes, yes... we're listening.
	OFFICER: Well, it all reminds me of a time I went fishing with my father. We were on the Wolf River in Waupaca...
	VO: Sometimes it's just not fair to delay an important decision.
	But in Washington it's happening. A group of Senators is using the filibuster delay tactic to block federal judicial nominees from a simple "yes" or "no" vote. So qualified candidates aren't getting a chance to serve.
	It's politics at work, causing gridlock and backing up some of our courts to a state of emergency.
	Contact Senators Feingold and Kohl and tell them to oppose the filibuster.
	Visit: BeFair.org
	Paid for by Wisconsin Right to Life (befair.org), which is responsible for the content of this advertising and not authorized by any candidate or candidate's committee.

Exhibit

B

TV Script

Client: Wisconsin Right to Life
Title: "Waiting" :30
Job#: WRL-8136
Date: July 14, 2004

VIDEO	AUDIO
We see vignettes of a middle-aged man being as productive as possible while his professional life is in limbo:	
He reads the morning paper He polishes his shoes He checks for mail, which hasn't arrived He scans through his Rolodex He reads his Palm Pilot manual He pays bills	VO: There are a lot of judicial nominees out there who can't go to work. Their careers are put on hold because a group of U.S. Senators is filibustering—blocking qualified nominees from a simple "yes" or "no" vote. It's politics at work and it's causing gridlock. Contact Senators Feingold and Kohl and tell them to oppose the filibuster.
SUPER: www.BeFair.org	Visit: BeFair.org
4-SECOND DISCLAIMER (4% or 20 scan lines): Paid for by Wisconsin Right to Life (befair.org), which is responsible for the content of this advertising, not authorized by any candidate or candidate's committee.	WRL REPRESENTATIVE VO: Wisconsin Right to Life is responsible for the content of this advertising.

Exhibit
C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EMILY'S LIST,	)	
	)	
Plaintiff,	)	Civ. No. 05-0049 (CKK)
	)	
v.	)	
	)	
FEDERAL ELECTION COMMISSION,	)	EXHIBIT
	)	
Defendant.	)	

EXHIBIT 20

Disclosure Report (excerpt) filed by EMILY's List (July, 24, 2002).

07/24/2002 16:31

FEC FORM 3X

REPORT OF RECEIPTS AND DISBURSEMENTS

For Other Than An Authorized Committee

Office Use Only

1. NAME OF COMMITTEE (in full) — USE FEC MAILING LABEL OR TYPE OR PRINT ▼ — Example: If typing, type over the lines

EMILY's List

ADDRESS (number and street) ▼: 805 15th Street NW

Ste 400

Check if different than previously reported. (ACC)

Washington | DC | 20005 -

2. FEC IDENTIFICATION NUMBER ▼: C00193433

CITY ▲ | STATE ▲ | ZIPCODE ▲

3. IS THIS REPORT: NEW (N) OR X AMENDED (A)

4. TYPE OF REPORT (Choose One)

(a) Quarterly Reports:
- April 15 Quarterly Report(Q1)
- July 15 Quarterly Report(Q2)
- October 15 Quarterly Report(Q3)
- X January 31 Quarterly Report(YE)
- July 31 Mid-Year Report(Non-election Year Only) (MY)
- Termination Report (TER)

(b) Monthly Report Due On:
- Feb 20 (M2)
- Mar 20 (M3)
- Apr 20 (M4)
- May 20 (M5)
- Jun 20 (M6)
- Jul 20 (M7)
- Aug 20 (M8)
- Sep 20 (M9)
- Oct 20 (M10)
- Nov 20 (M11) (Non-Election Year Only)
- Dec 20 (M12) (Non-Election Year Only)
- Jan 31 (M13)

(c) 12-Day PRE-Election Report for the: Primary (12P); General (12G); Runoff (12R); Convention (12C); Special (12G)
Election on ____ in the State of ____

(d) 30-Day Post-Election Report for the: General (30G); Runoff (30R); Special (30S)
Election on ____ in the State of ____

5. Covering Period 12 01 2001 through 12 31 2001

I certify that I have examined this Report and to the best of my knowledge and belief it is true, correct and complete.

Type or Print Name of Treasurer: Caroline C Fines

Signature of Treasurer: Electronically Filed by Caroline C Fines — Date: 07 24 2002

NOTE: Submission of false, erroneous, or incomplete information may subject the person signing this Report to the penalties of 2 U.S.C 437g.

Office Use Only			

FEC FORM 3X (Revised 1/2001)

SUMMARY PAGE
OF RECEIPTS AND DISBURSEMENTS

FEC Form 3X (Revised 1/2001) Page 2

Write or Type Committee Name
EMILY's List

Report Covering the Period: From 12 01 2001 To: 12 31 2001

		COLUMN A This Period	COLUMN B Calendar Year-to-Date
6.	(a) Cash on Hand January 1 2001		533655.98
	(b) Cash on Hand at Begining of Reporting Period	3641510.11	
	(c) Total Receipts (from Line 19)	663783.31	11547727.14
	(d) Subtotal (add lines 6(b) and 6(c) for Column A and Lines 6(a) and 6(c) for Column B)	4305293.42	12081383.02
7.	Total Disbursements (from Line 30)	609958.82	8386048.42
8.	Cash on Hand at Close of Reporting Period (subtract Line 7 from Line 6(d))	3695334.60	3695334.60
9.	Debts and Obligations owed TO the committee (Itemize all on Schedule C and/or Schedule D)	0.00	
10.	Debts and Obligations owed BY the committee (Itemize all on Schedule C and/or Schedule D)	0.00	

X This Committee has qualified as a multicandidate committee (see FEC FORM 1M)

For further information contact:

Federal Election Commission
999 E street, NW
Washington DC 20463

Toll Free 800-424-9530
Local 202-694-1100

DETAILED SUMMARY PAGE
OF RECEIPTS

FEC Form 3X (Revised 1/2001) Page 3

Write or Type Committee Name
EMILY's List

Report Covering the Period: From: M M 12 D D 01 Y Y Y Y 2001 To: M M 12 D D 31 Y Y Y Y 2001

I. Receipts	COLUMN A Total This Period	COLUMN B Calendar Year-to-Date
11. Contributions (other than loans) From:		
(a) Individuals/Persons Other Than Political Committees		
(i) Itemized (use Schedule A)	201529.50	
(ii) Unitemized	102909.70	
(iii) TOTAL (add Lines 11(a)(i) and (ii)) ▶	304439.20	8658538.06
(b) Political Party Committees	0.00	0.00
(c) Other Political Committees (such as PACs)	0.00	51830.83
(d) Total Contributions (add Lines 11(a)(iii),(b) and (c)) (Carry Totals to Line 32, page 4) ▶	304439.20	8710368.89
12. Transfers From Affiliated/Other Party Committees	0.00	47907.62
13. All Loans Received	0.00	0.00
14. Loan Repayments Received	0.00	0.00
15. Offsets To Operating Expenditures (Refunds, Rebates, etc.) (Carry Totals to Line 36, page 4)	1492.80	158841.89
16. Refunds of Contributions Made to Federal candidates and Other Political Committees	0.00	0.00
17. Other Federal Receipts (Dividends, Interest, etc.)	5865.29	105694.62
18. Transfers from Nonfederal Account for Joint Activity	351986.02	2524914.12
19. Total Receipts (add Lines 11(d), 12, 13, 14, 15, 16, 17, and 18) ▶	663783.31	11547727.14
20. Total Federal Receipts (subtract Line 18 from Line 19) ▶	311797.29	9022813.02

DETAILED SUMMARY PAGE
of Disbursements

FEC Form 3X (Revised 1/2001) Page 4

II. DISBURSEMENTS	COLUMN A Total This Period	COLUMN B Calendar Year-to-Date
21. Operating Expenditures: (a) Shared Federal/Non-Federal Activity (from Schedule H4) (i) Federal Share	176929.22	2317725.49
(ii) Non-Federal Share	174180.70	2219372.78
(b) Other Federal Operating Expenditures	222158.90	3473349.11
(c) Total Operating Expenditures (add 21(a)(i), (a)(ii) and (b)) ▶	573268.82	8010447.38
22. Transfers to Affiliated/Other Party Committees	0.00	177.20
23. Contributions to Federal Candidates/Committees and Other Political Committees	27890.00	313763.58
24. Independent Expenditure (use Schedule E)	0.00	0.00
25. Coordinated Expenditures Made by Party Committees (2 U.S.C. 441a(d)) (use Schedule F)	0.00	0.00
26. Loan Repayments Made	0.00	0.00
27. Loans Made	0.00	0.00
28. Refunds of Contributions To: (a) Individuals/Persons Other Than Political Committees	4050.00	30590.50
(b) Political Party Committees	0.00	0.00
(c) Other Political Committees (such as PACs)	0.00	0.00
(d) Total Contribution Refunds (add Lines 28(a), (b), and (c)) ▶	4050.00	30590.50
29. Other Disbursements	4750.00	31069.76
30. Total Disbursements (add Lines 21(c), 22, 23,24,25,26,27,28(d) and 29) ▶	609958.82	8386048.42
31. Total Federal Disbursements (subtract Line 21(a)(ii) from Line 30) ▶	435778.12	6166675.64
III. Net Contributions/Operating Expenditures		
32. Total Contributions (other than loans) from Line 11(d), page 3)	304439.20	8710368.69
33. Total Contribution Refunds (from Line 28(d))	4050.00	30590.50
34. Net Contributions (other than loans) (subtract Line 33 from Line 32)	300389.20	8679778.39
35. Total Federal Operating Expenditures (add Line 21(a)(i) and Line 21(b)) ▶	399088.12	5791074.60
36. Offsets to Operating Expenditures (from Line 15, page 3)	1492.80	158841.89
37. Net Operating Expenditures (subtract Line 36 from Line 35) ▶	397595.32	5632232.71

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EMILY'S LIST,	)	
	)	
Plaintiff,	)	Civ. No. 05-0049 (CKK)
	)	
v.	)	
	)	
FEDERAL ELECTION COMMISSION,	)	EXHIBIT
	)	
Defendant.	)	

EXHIBIT 21

ACT Website, About ACT, available at
http://www.actforvictory.org/act.php/home/content/about.

ACT Home »

About ACT

ACT is the largest and most sophisticated voter mobilization project in American history. Unprecedented in scale and strategy, ACT is laying the groundwork for Democratic victories in the 17 states that will determine America's future in the 2004 election.

With thousands of paid and volunteer canvassers, ACT is already at work empowering people to speak the truth about Republican policies by focusing on the issues that matter most in their state. Person-to-person, neighbor-to-neighbor, and friend-to-friend, ACT will help voters understand the power they have to change this nation for the better and then get them to the polls on Election Day.

Close elections are always won on the ground, and ACT is the only organization exclusively focused on the mobilization of new and persuadable voters in 17 states. ACT is also a founding member of America Votes, an extraordinary new partnership between 30 national issue groups and unions created to ensure that resources in those states are spent strategically and efficiently.

America Coming Together (ACT) is dedicated to energizing the electorate to achieve crucial changes – the mobilization of millions of people to register and vote around the critical issues facing our country, the defeat of George W. Bush and his Republican allies, and the election of progressives in vitally important state, local, and federal contests. We are outraged at the policies and abuses of the past four years: the jobs lost, lives wasted, health care denied, air and water fouled, and rights abridged.

And we are organizing to make a change.

In seventeen battleground states America Coming Together (ACT)

- will listen to voters' concerns about issues that affect them and their families;
- will communicate with voters about those issues, highlighting the extremist positions of the Bush Republican agenda and discussing positive, progressive alternatives
- will partner with progressive organizations so we will all be more effective and efficient, working together to mobilize millions of voters who will say NO to the Republican agenda by voting to defeat George W. Bush and elect progressives at all

levels of government.

ACT is a unique alliance of committed people like you working together to defeat Republican reactionaries in races up and down the ticket. ACT is a proud member of America Votes, a historic coalition of progressive membership-based groups.

Together, we will create the largest turnout of voters in history, voters who will go to the polls in November and elect progressive candidates from the school boards to the White House.

ACT founders include Ellen Malcolm and Steve Rosenthal,veterans in the fight against right-wing extremism. Now people from all over the country are pitching in too—people who care, are committed and are prepared to take the fight to the grassroots.

Our ACTion Plan will help elect progressive candidate in vitally important state, local and federal contests—we know there is nothing more powerful than America Coming Together to create change in 2004.

More on ACT founders

See our Plan for Victory in 2004.

Join Our Struggle – Donate Now to ACT.

We are ready to fight back and defeat Bush in 2004. We are ready to defeat right-wing Republicans and elect progressive Democrats across the country. We are ready for America Coming Together.

Any portion of a contribution to America Coming Together in excess of the federal election limit ($5,000 per year), or not permitted under federal regulations, will be placed in the America Coming Together non-federal account. We cannot accept funds from minors due to campaign finance laws. Contributions placed in the federal account will be used in connection with federal elections.

Contributions to America Coming Together are not deductible for federal income tax purposes.

Our Founders

Grassroots and political leaders who share a vision of a progressive America and are committed to help defeat George W. Bush, elect progressives up and down the ticket, and mobilize millions of people to register and vote around the critical issues facing our country started America Coming Together (ACT).

Ellen R. Malcolm, President of ACT, is the founder and president of EMILY's List – a political action committee that supports pro-choice Democratic women candidates. Under her leadership, EMILY's List – an acronym for "Early Money is Like Yeast" because it "makes the dough rise" – has grown to be the largest political action committee in the country. Since its founding, EMILY's List has help send 11 pro-choice Democratic women to the U.S. Senate, 55 to the U.S. House of Representatives, and to elect seven governors. Malcolm will lead the effort to build ACT's membership and raise $95 million to support ACT's voter contact program.

Steve Rosenthal , Chief Executive Officer of ACT, was Political Director of the AFL-CIO from 1996-2002, where he developed a groundbreaking voter contact program that increased voter turnout of union members by 4.8 million during a time when nonunion turnout decreased by 15 million. During the first three years of the Clinton Administration, Rosenthal served as Associate Deputy Secretary of the U.S. Department of Labor where he acted as former-Secretary Robert Reich's chief advisor on union matters. Before that he was Deputy Political Director for the Democratic National Committee under Chairman Ron Brown and Political Director Paul Tully. Rosenthal will design and execute ACT's voter contact program.

Minyon Moore heads Dewey Square's state and local practice. She was formerly Chief Operations Officer of the Democratic National Committee and before that Assistant to the President of the United States and Director of White House Political Affairs.

Gina Glantz has a distinguished 30-year career in campaigns and grassroots organizing. She was National Campaign Manager for the Bill Bradley for President campaign.

Carl Pope, Treasurer, is Executive Director of the Sierra Club, an organization of 700,000 environmental activists. Pope has spent 30 years in the environmental trenches, and worked to enact such statutes as the Clean Air and Clean Water Acts, the Superfund and California Desert Protection Act.

Cecile Richards is President of America Votes, a coalition of almost 30 national organizations working together to educate and mobilize voters in the 2004 elections on a broad range of issues including the environment, civil and human rights, women's rights, choice, education and labor.

Contributions to ACT are not deductible for federal income tax purposes.