Priority Legislative Recommendations

2001

Federal Election Commission

FEC Priority Legislative Recommendations 2001

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Part I: Priority Legislative Recommendations

Compliance

Extending Administrative Fine Program for Reporting Violations (2001)[1]

Section: 2 U.S.C. §437g

Recommendation: The Commission recommends that Congress extend the Commission's authority to assess administrative fines for straightforward violations of the law requiring the timely reporting of receipts and disbursements. Congress should extend the administrative fine authority to cover violations that relate to reporting periods that begin on or after January 1, 2002, and that end on or before December 31, 2003.

Explanation: Congress amended the Act in 1999 to permit the Commission to impose civil money penalties for violations of filing requirements that occur between January 1, 2000, and December 31, 2001. Public Law 106-58. Accordingly, the Commission promulgated new regulations at 11 CFR Part 111, Subpart B, to implement a new Administrative Fine program for violations of reporting deadlines. See 64 FR 31787 (May 19, 2000). Under the program in place, when a committee files a late report, or fails to file a report, the Commission assesses a civil penalty based on a schedule of penalties that takes into account the committee's level of financial activity in the reporting period, the election sensitivity of the report, the number of days late, and the number of previous violations. Committees have the option to either pay the civil penalty assessed or challenge the Commission's finding and/or proposed penalty.

The administrative fines program has introduced greater certainty about the consequences of noncompliance with the Act's filing requirements, with the result that compliance has increased. For example, the number of late filers dropped significantly with the July quarterly report, the first report handled under the new program. While 30 percent of filers were late for the 2000 April quarterly filing, only 18 percent of filers were late for the 2000 July quarterly filing.

Because the program is scheduled to end in December 2001, the Commission has only a limited number of reporting periods in which to evaluate the program's effectiveness. Also, new legislation and regulations on mandatory electronic filing became effective on January 1, 2001. (See Public Law 106-58, section 639, and 65 FR 38415 (June 21, 2000).) Extending the duration of the Administrative Fines pilot would give the Commission and Congress an opportunity to evaluate the effects of the impact of the pilot program on one full cycle of reporting – the final report for the current cycle is due January 31, 2003. Additionally, the extension would allow the agency to evaluate the effects of mandatory electronic

[1] The recommendation to implement an administrative fines program was also made by Pricewaterhouse Coopers LLP in its *Technology and Performance Audit and Management Review of the Federal Election Commission*, pages 4-78 and 5-2.

filing upon the ability of filers to meet reporting deadlines and avoid administrative penalties. The new mandatory electronic filing program began on January 1, 2001.

Election Administration

Duties of the Office of Election Administration, Advisory Panel (2001)
Section: 2 U.S.C. §438(a)(10)

Recommendation: The Commission recommends that Congress amend 2 U.S.C. § 438(a)(10), both to clarify that the responsibilities of the Office of Election Administration (OEA) include the periodic update and enhancement of the voluntary Voting System Standards (VSS) program, and to establish statutorily an Advisory Panel. The state and local officials who serve on the Commission's Advisory Panel counsel the Commission on the most useful allocation of resources and advise the Commission and election officials on consensus best practices in the administration of elections. A statutorily chartered Advisory Panel specifically would be responsible for advising the Commission on the VSS program, including issues relating to the scope and frequency of updates to the VSS, and the independent testing authority that would use the VSS to test voting equipment.

Explanation: The FEC's Office of Election Administration was established as part of the Commission by the Federal Election Campaign Act Amendments of 1974 (codified at 2 U.S.C. §438(a)(10)), which mandated that the Federal Election Commission serve as a national clearinghouse for the compilation of information and review of procedures with respect to the administration of federal elections. In connection with the OEA's duties, the Commission established an Advisory Panel of state and local officials by administrative action in 1976. The OEA has served as a national clearinghouse for 25 years, gathering information on the voting process and other election administration practices and issues, establishing voluntary standards for voting equipment, and providing guidance to state and local election administrators throughout the United States. The Office has acquired a wealth of experience and expertise. It successfully helped to implement the Polling Place Accessibility for the Elderly and Handicapped Act and the National Voter Registration Act ("Motor Voter"), and recently has overseen a multiyear project to revise the voluntary Voting System Standards. Since 1975, the OEA has administered more than 30 studies in the field of election administration and, as a result, has published 65 volumes on these matters.

The OEA's expertise in voting system standards, voting equipment and election administration practices and issues is well established. Building upon both this expertise and the credibility it has established with state and local election officials, the FEC's Office of Election Administration could immediately and efficiently undertake an expanded role in this field. With no need for start-up time, the OEA, with the assistance of its Advisory Panel, could help fulfill the

increased demand for "the compilation of information and the review of procedures with respect to the administration of Federal elections" (2 U.S.C. § 438(a)(10)) to directly benefit the conduct of elections in 2002. Specifically, the OEA would:

- Continue to update the VSS first developed in 1990, and expand the VSS program beyond technical standards to include voluntary management standards and voluntary performance/design standards that will optimize ease of use and minimize voter confusion;
- Increase outreach efforts to state and local jurisdictions (and vendors of voting equipment) regarding the VSS;
- Work with existing association and membership organizations to provide training and technical assistance opportunities for election officials;
- Develop and maintain a current data bank on election voting equipment;
- Facilitate the timely exchange of information among state and local officials on issues relating to election administration;
- Consult with other government agencies having responsibility for the conduct of federal elections; and
- Compile information about funding needs of state and local officials relating to voting equipment, training of poll workers, voter education, and other areas that might be appropriate for a federal grant program, if Congress chooses to fund state and local initiatives in election administration.

Supplemental (Valid and Technical) Legislative Recommendations

2001

Federal Election Commission

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Part II: (Valid and Technical) Supplemental Legislative Recommendations

Part II: (Valid and Technical) Supplemental Legislative Recommendations

Part A: Other Valid Legislative Recommendations

Disclosure

Waiver Authority (revised 2001)
Section: 2 U.S.C. §434

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

Explanation: In cases where reporting requirements are excessive or unnecessary, it would be helpful if the Commission had authority to suspend the reporting requirements of the Act. For example, the Commission has encountered several problems relating to the reporting requirements of authorized committees whose respective candidates were not on the election ballot. The Commission had to consider whether the 12-day pre-election reporting requirements and 48-hour notice requirements for large last-minute contributions were fully applicable to candidate committees operating under one of the following circumstances:

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

Unauthorized committees also face unnecessary reporting requirements. For example, the Act requires monthly filers to file Monthly reports on the 20th day of each month. If sent by certified mail, the report must be postmarked by the 20th day of the month. The Act also requires monthly filers to file a Pre-General election report 12 days before the general election. If sent by certified or registered mail, the Pre-General report must be postmarked by the 15th day before the election. As a result of these specific due dates mandated by the law, the 2002 October Monthly report, covering September, will be required to be postmarked October 20. Meanwhile, the 2002 Pre-General report, covering October 1 -16, will be required to be postmarked October 21, one day after the October Monthly. A waiver authority would enable the Commission to eliminate the requirement to file the monthly report, as long as the committee includes the activity in the Pre-General Election Report and files the report on time. The same disclosure would be available before the election, but the committee would only have to file one of the two reports.

In other situations, disclosure would be served if the Commission had the authority to adjust the filing requirements, as is currently allowed for special elections. For example, runoff elections are often scheduled shortly after the primary election. In many instances, the close of books for the runoff pre-election report is the day after the primary—the same day that candidates find out if there is to be a runoff and who will participate. When this occurs, the 12-day pre-election report discloses almost no runoff activity. In such a situation, the Commission should have the authority to adjust the filing requirements to allow for a 7-day pre-election report (as opposed to a 12-day report), which would provide more relevant disclosure to the public.

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

Monthly Reporting for Congressional Candidates (revised 2001)
Section: 2 U.S.C. §434(a)(2)

Recommendation: The Commission recommends that the principal campaign committee of a Congressional candidate have the option of filing monthly reports in lieu of quarterly reports in both election and non-election years.

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

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

The Commission notes, however, that, in certain circumstances, switching to a monthly reporting schedule would create a lag in disclosure directly before a primary or run-off election or a nominating convention[1]. In States where a primary (including a run-off or nominating convention) is held in the beginning of the month, the financial activity occurring the month before the primary would not be disclosed until after the election. To remedy this, Congress should specify that Congressional committees continue to be required to file a 12-day Pre-Primary report (or pre-run-off or pre-convention report), regardless of whether a campaign has opted to file quarterly or monthly. However, where the timing of a primary will cause an overlap of reporting due dates between a regular monthly report and the Pre-election report, Congress should grant the Commission the authority to waive one of the reports or adjust the reporting requirements. (See

[1] In several states, a nominating convention is held in lieu of or in addition to a primary election, and has the ability to determine the general election nominee.

the recommendation entitled "Waiver Authority.") Congress should also clarify that campaigns must still file 48-hour notices disclosing large last-minute contributions of $1,000 or more during the period immediately before the primary, run-off or nominating convention, regardless of their reporting schedule.

Commission as Sole Point of Entry for Disclosure Documents (revised 2001)[2]

Section: 2 U.S.C. §432(g)

Recommendation: The Commission recommends that it be the sole point of entry for all disclosure documents filed by federal candidates and political committees. This would primarily affect Senate candidate committees, but would also apply to the Republican and Democratic Senatorial Campaign Committees. Under current law, those committees alone file their reports with the Secretary of the Senate, who then forwards copies to the FEC.

Explanation: The Commission has offered this recommendation for many years. Public Law 104-79, effective December 28, 1995, changed the point of entry for reports filed by House candidates from the Clerk of the House to the FEC. However, Senate candidates and the Senatorial Campaign Committees still must file their reports with the Secretary of the Senate, who then forwards the copies on to the FEC. A single point of entry is desirable because it would conserve government resources and promote public disclosure of campaign finance information.

For example, Senate candidates sometimes file reports mistakenly with the FEC, rather than with the Secretary of the Senate. Consequently, the FEC must ship the reports back to the Senate. Disclosure to the public is delayed and government resources are wasted.

Public Law 104-79 also authorized the electronic filing of disclosure reports with the FEC. As of January 1997, political action committees, political party committees (except for the Senatorial Campaign Committees), House campaigns and Presidential campaigns all could opt to file FEC reports electronically. Moreover, Public Law 106-58, section 639, mandated electronic filing for committees who meet certain thresholds as specified by the Commission. Senate candidates and the Senatorial Campaign Committees, however, do not have the official authority to file electronic reports because the point of entry for their reports is the Secretary of the Senate (not the FEC). It should be noted, however, that such committees may file unofficial electronic copies of their reports with the FEC. It is also important to note that the FEC has worked closely with the Secretary of the Senate to improve disclosure within the current law. For example, the FEC and the Secretary of the Senate have implemented digital imaging of Senate reports and have developed the capacity

[2] This recommendation was also made by Pricewaterhouse Coopers LLP in its *Technology and Performance Audit and Management Review of the Federal Election Commission*, pages 4-37 and 5-2.

of the Secretary's office to accept electronically filed reports. While these measures have undoubtedly improved disclosure, absent mandatory electronic filing for Senate campaigns and Senatorial Campaign Committees, a single point of entry remains desirable. It is important to note as well that, if the Congress adopted mandatory electronic filing for Senate campaigns and Senatorial Campaign Committees, the recommendation to change the point of entry for Senate filers would be rendered moot.

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

The Commission has authority to prepare and publish lists of nonfilers. It is extremely difficult to ascertain who has and who has not filed when reports may have been filed at or are in transit between two different offices. Separate points of entry also make it difficult for the Commission to track responses to compliance notices. Many responses and/or amendments may not be received by the Commission in a timely manner, even though they were sent on time by the candidate or committee. A single point of entry would eliminate this confusion. Finally, the Commission notes that the report of the Institute of Politics of the John F. Kennedy School of Government at Harvard University, *An Analysis of the Impact of the Federal Election Campaign Act, 1972-78,* prepared for the House Administration Committee, recommended that all reports be filed directly with the Commission (Committee Print, 96th Cong., 1st Sess., at 122 (1979)).

Fraudulent Solicitation of Funds
Section: 2 U.S.C. §441h

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

Explanation: The Commission has received a number of complaints that substantial amounts of money were raised fraudulently by persons or committees purporting to act on behalf of candidates. Candidates have complained that contributions which people believed were going for the benefit of

the candidate were diverted for other purposes. Both the candidates and the contributors were harmed by such diversion. The candidates received less money because people desirous of contributing believed they had already done so. The contributors' funds were used in a manner they did not intend. The Commission has been unable to take any action on these matters because the statute gives it no authority in this area.

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

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

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

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

3. Limit Contributions to Draft Committees. The law should include explicit language stating that no person shall make contributions to *any* committee (including a draft committee) established to influence the nomination or election of a clearly identified *individual* for any federal office which exceed the contribution limits applicable to federal candidates (e.g., in the case of individuals, $1,000 per election). Further, the law should clarify that a draft committee is separate from a campaign committee, for purposes of the contribution limits.

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

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

Registration of Candidates and Principal Campaign Committees (revised 2001)
Section: 2 U.S.C. §§432(e)(1) and 433(a)

Recommendation: The Commission recommends that Congress revise section 433(a) to require a principal campaign committee to file its Statement of Organization at the same time that the candidate is required, under section 432(e)(1), to file his or her Statement of Candidacy.

Explanation: An individual becomes a candidate under the FECA once he or she crosses the $5,000 threshold in raising contributions or making expenditures. Under current law, the candidate has 15 days to file his/her Statement of Candidacy, designating the principal campaign committee, which will subsequently disclose all of the campaign's financial activity. This committee, in turn, has 10 days from the candidate's designation to file a Statement of Organization, the document that officially registers the committee. This schedule allows 25 days to pass before the committee's reporting requirements are triggered.

Consequently, the financial activity that occurred prior to the registration is not disclosed until the committee's first report. During an election year, this period can be so long that it interferes with effective disclosure. For example, if a candidate triggered candidate status 44 days before his or her primary, he or she would be required to file the Statement of Candidacy 29 days before the primary. The committee in turn would not be required to register (i.e., file the Statement of Organization) until 19 days before the primary. This would allow the committee to avoid filing the pre-primary report (which covers financial activity up through 20 days before the primary and is due 12 days before the primary). Although the committee would have to file 48-hour notices of last-minute large contributions received between 19 days and 48 hours before the primary, it would not provide complete financial disclosure of contributions and expenditures until after the primary election because the committee's first required financial report would be the quarterly report (not due possibly for 2 more months).

By requiring simultaneous registration of both the candidate and the principal campaign committee within 15 days of the date that the candidate triggered

candidate status under the Act, the public would be assured of more timely disclosure of the campaign's activity. Applying this principle to the example above, the candidate and committee in question would register with the Commission 29 days before the primary, and the committee would file the pre-primary report due 12 days before the primary, assuring complete disclosure of financial activity before the election.

Reporting Deadlines for Semiannual, Year-End and Monthly Filers
Section: 2 U.S.C. §§434(a)(3)(B) and (4)(A) and (B)

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

Explanation: Committees are often confused because the filing dates vary from report to report. Depending on the type of committee and whether it is an election year, the filing date for a report may fall on the 15th, 20th or 31st of the month. Congress should require that monthly, quarterly, semiannual and year-end reports are due 15 days after the close of books of each report. In addition to simplifying reporting procedures, this change would provide for more timely disclosure, particularly in an election year. In light of the increased use of computerized recordkeeping by political committees, imposing a filing deadline of the fifteenth of the month would not be unduly burdensome.

Contributions and Expenditures

Application of $25,000 Annual Limit (revised 2001)
Section: 2 U.S.C. §441a(a)(3)

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

Explanation: Section 441a(a)(3) now provides that a contribution to a candidate made in a nonelection year counts against the individual donor's limit for the year in which the candidate's election is held. For example, a contributor wishing to support Candidate Smith in an election year contributes to her in November of the year before the election. The contributor assumes that the contribution counts against his limit for the year in which he contributed. Unaware that the contribution actually counts against the year in which Candidate Smith's election is held, the contributor makes other contributions during the election year and inadvertently exceeds his $25,000 limit. (For example, see FEC Matters Under Review (MURs) 4790 (Democratic contributor paid $13,989 civil penalty for exceeding annual limit in one calendar year) and 3929 (Republican contributor paid $32,000 civil penalty for exceeding annual limit in three calendar years).)

By requiring contributions to count against the limit of the calendar year in which the donor contributes, confusion would be eliminated and fewer contributors would inadvertently violate the law. Such an amendment would not alter the per candidate, per election limits.

The change would also offer the added advantage of enabling the Commission to better monitor the annual limit. Through the use of our data base, we could more easily monitor contributions made by one individual regardless of whether they were given to retire the debt of a candidate's previous campaign, to support an upcoming election (two, four or six years in the future) or to support a PAC or party committee.

Contributions by Foreign Nationals
Section: 2 U.S.C. §441e

Recommendation: The Commission recommends that Congress explicitly clarify that section 441e of the Act applies to both contributions and expenditures received and made in connection with both federal and nonfederal elections.

Explanation: The Commission has consistently interpreted and enforced section 441e of the Act, banning contributions by foreign nationals, as applying to both federal and nonfederal elections. Although two district court decisions have rejected this interpretation, the U.S. Court of Appeals for the District of Columbia interpreted section 441e to apply to both federal and nonfederal elections (*United States v. Trie*, 21 F.Supp.2d 7 (DDC 1998); 23 F.Supp.2d 55 (DDC 1998); *United States v. Kanchanalak et al.,* 37 F.Supp.2d 1 (DDC 1999); *rev'd.*, 192 F.3d 1037 (D.C. Cir. 1999). While the Commission continues to believe that the statute permits, and the legislative history supports, application of section 441e to nonfederal elections, statutory clarification of this point would be useful. Congress could clarify section 441e either by changing the term "contribution" to "donation," or by explicitly applying the definition of contribution included in section 441b(b)(2) to section 441e. In this regard, Congress may also wish to note that, while section 441b (banning corporate, national bank and union spending in connection with elections) prohibits both "contributions" and "expenditures," section 441e (foreign nationals) prohibits "contributions" only. The Commission has sought to clarify this apparent discrepancy through its regulation at 11 CFR 110.4(a), which prohibits both contributions and expenditures by foreign nationals. A statutory clarification would make clear Congress's intent.

Election Period Limitations for Contributions to Candidates (revised 2001)
Section: 2 U.S.C. §441a

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

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

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

Moreover, Public Law No. 106-58 (the fiscal 2000 appropriations bill) amended the Federal Election Campaign Act to require authorized candidate committees to report on a campaign-to-date basis, rather than on a calendar year basis, as of the reporting period beginning January 1, 2001. Placing the limits on contributions to candidates on an election cycle basis would complement this change and streamline candidate reporting.

It would be advisable to clarify that if a candidate participates in more than two elections (e.g., in a post-primary runoff as well as a primary and general), the campaign cycle limit would be $3,000. In addition, because Presidential candidates might opt to take public funding for the general election, but not the primary, and thereby be precluded from accepting general election contributions, the $1,000/5,000 "per election" contribution limits should be retained for Presidential candidates.

A campaign cycle contribution limit would allow contributors to give more than $1,000 toward a particular primary or general election, but this would be balanced by the tendency of campaigns to plan their fundraising and manage their resources so as not to be left without fundraising capability at a crucial time. Moreover, adoption of this recommendation would eliminate the current requirement that candidates who lose the primary election refund or redesignate any contributions made for the general election after the primary is over.

Distinguishing Official Travel from Campaign Travel
Section: 2 U.S.C. §431(9)

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

Explanation: Many candidates for federal office hold elected or appointed positions in federal, state or local government. Frequently, it is difficult to determine whether their public appearances are related to their official duties or whether they are campaign related. A similar question may arise when federal officials who are not running for office make appearances that could be considered to be related to their official duties or could be viewed as campaign appearances on behalf of specific candidates.

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

Contributions from Minors
Section: 2 U.S.C. §441a(a)(1)

Recommendation: The Commission recommends that Congress establish a minimum age of 16 for making contributions.

Explanation: The Commission has found that contributions are sometimes given by parents in their children's names. Congress should address this potential abuse by establishing a minimum age of 16 for contributors, or otherwise provide guidelines ensuring that parents are not making contributions in the name of another.

Broader Prohibition Against Force and Reprisals
Section: 2 U.S.C. §441b(b)(3)(A)

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

Explanation: Current §441b(b)(3)(A) could be interpreted to narrowly apply to the making of contributions or expenditures by a separate segregated fund which were obtained through the use of force, job discrimination, financial reprisals and threats. Thus, Congress should clarify that corporations and labor organizations

are prohibited from using such tactics in the solicitation of contributions for the separate segregated fund. In addition, the FEC has revised its rules to clarify that it is not permissible for a corporation or a labor organization to use coercion, threats, force or reprisal to urge any individual to contribute to a candidate or engage in fundraising activities. See 60 FR 64260 (December 14, 1995). However, Congress should include language to cover such situations.

Compliance

Ensuring Independent Authority of FEC in Supreme Court Litigation (2001)
Section: 2 U.S.C. §§437c(f)(4), 437d(a)(6), 437g(a)(9) and 437h

Recommendation: Congress should clarify that the Commission is authorized to initiate and/or conduct Supreme Court litigation on matters arising under Title 2 of FECA.

Explanation: The Commission, rather than the Solicitor General's Office, should be responsible for initiating and/or conducting Supreme Court litigation on matters arising under Title 2 of the Federal Election Campaign Act (FECA). This would include civil enforcement actions brought by the agency, actions against the agency for its dismissal or failure to act on enforcement matters, subpoena enforcement actions and actions challenging or construing the constitutionality of the FECA.

The statute clearly provides Supreme Court litigation authority to the Commission under the Title 26 presidential public funding provisions. The Commission had conducted its own Supreme Court litigation, even under Title 2, for 18 years. In 1994, however, the Supreme Court interpreted the statute to preclude the FEC from having authority to conduct Supreme Court litigation without the prior authorization of the Solicitor General's Office. See FEC v. NRA Political Victory Fund, cert. dismissed for want of jurisdiction, 513 U.S. 88 (1994) ("NRA"). Under this ruling, the Solicitor General may decline to authorize action even in cases where the six-member Commission believes Supreme Court review is advisable. Indeed, on several cases since the NRA decision, the Commission's requests have been denied. This has occurred even though the Commission clearly had authority to conduct the litigation in the lower courts.

The Commission should be able to determine which issues merit Supreme Court resolution. Some difficult legal questions for which the Commission sought Supreme Court review might have been resolved by now, one way or another, if the Solicitor General's Office had not declined the Commission's requests.

The Commission is a unique federal agency that regulates those persons seeking election to the Presidency and the political parties that support them. No more than three commissioners may be from any one political party; thus, the required majority vote to take any action cannot be controlled by any one party. This insures that any Commission litigation decisions in the Title 2 area are not subject to an appearance of conflict. This certainly underlies the legislative

history indicating that Congress intended the Commission to have broad independent litigation authority. In the Commission's view, the difference in language between the Title 26 provisions and the Title 2 provisions was not intended by Congress to deprive the Commission of Supreme Court litigating authority under Title 2.

Addition of Commission to the List of Agencies Authorized to Issue Immunity Orders According to the Provisions of Title 18
Section: 18 U.S.C. §6001(1)

Recommendation: The Commission recommends that Congress revise 18 U.S.C. §6001(1) to add the Commission to the list of agencies authorized to issue immunity orders according to the provisions of title 18.

Explanation: Congress has entrusted the Commission with the exclusive jurisdiction for the civil enforcement of the Federal Election Campaign Act of 1971, as amended, the Presidential Election Campaign Fund Act and the Presidential Primary Matching Payment Account Act. The Commission is authorized, in any proceeding or investigation, to order testimony to be taken by deposition and to compel testimony and the production of evidence under oath pursuant to subpoena. *See* 2 U.S.C. §437d(a)(3) and (4). However, in some instances, an individual who has been called to testify or provide other information refuses to do so on the basis of his privilege against self-incrimination. There is currently no mechanism whereby the Commission, with the approval of the Attorney General, can issue an order providing limited criminal immunity for information provided to the Commission. A number of other independent agencies do have access to such a mechanism.

Federal immunity grants are controlled by 18 U.S.C. §§6001-6005. 18 U.S.C. §§ 6002 and 6004(a) provide that if a witness asserts his Fifth Amendment privilege against self-incrimination and refuses to answer questions at any "proceeding before an agency of the United States," the agency may seek approval from the Attorney General to immunize the witness from criminal prosecution for testimony or information provided to the agency (and any information directly or indirectly derived from such testimony or information). If the Attorney General approves the agency's request, the agency may then issue an order immunizing the witness and compelling his testimony. Once that order is issued and communicated to the witness, he cannot continue to refuse to testify in the inquiry. The order issued by the agency only immunizes the witness as to criminal liability, and does not preclude civil enforcement action. The immunity conferred is "use" immunity, not "transactional" immunity. The government also can criminally prosecute the witness for perjury or giving false statements if the witness lies during his immunized testimony, or for otherwise failing to comply with the order.

Only "an agency of the United States," as that term is defined in 18 U.S.C. §6001(1), can avail itself of the mechanism described above. The term is currently defined to mean an executive department or military department, and certain other persons or entities, including a large number of enumerated independent federal agencies. The Commission is not one of the enumerated agencies. When the provision was added to title 18 in 1970, the enumerated agencies were those which already had immunity granting power, but additional agencies have been substituted or added since then. Adding the Commission as one of the enumerated agencies in 18 U.S.C. §6001(1) would facilitate its obtaining of information relevant to the effective execution of its enforcement responsibilities.

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

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

Explanation: The Commission has noted an upsurge of §441f contribution reimbursement schemes, that may merit heavy criminal sanction. Although there is no prohibition preventing the Department of Justice from initiating criminal FECA prosecutions on its own, the vehicle for the Commission to bring such matters to the Department's attention is found at §437g(a)(5)(C), which provides for referral only after the Commission has found probable cause to believe that a criminal violation of the Act has taken place.[3] Thus, even if it is apparent at an early stage that a case merits criminal referral, the Commission must pursue the matter to the probable cause stage before referring it to the Department for criminal prosecution. To conserve the Commission's resources, and to allow the Commission to bring potentially criminal FECA violations to the Department's attention at the earliest possible time, the Commission recommends that consideration be given to explicitly empower the Commission to refer apparent criminal FECA violations to the Department at any stage in the enforcement process.

Audits for Cause
Section: 2 U.S.C. §438(b)

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

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

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

Public Financing

Averting Impending Shortfall in Presidential Public Funding Program (revised 2001)

Section: 26 U.S.C. §§6096, 9008(a) and 9037(a)

Recommendation: The Commission strongly recommends that Congress take immediate action to avert a projected impending shortfall in the Presidential public funding program in the 2004 election year.

Explanation: The Presidential public funding program experienced a shortfall for the election of 2000 because participation in the check-off program is declining and the checkoff is not indexed to inflation while payouts are indexed. This shortfall impacted foremost upon primary candidates. In January 2000, when the U.S. Treasury made its first payment for the 2000 election, it was only able to provide approximately 50 percent of the public funds that qualified Presidential candidates were entitled to receive. Specifically, only $16.9 million was available for distribution to qualified primary candidates on January 1, 2000, after the Treasury paid the convention grants and set aside the general election grants[4]. However, the entitlement (i.e., the amount that the qualified candidates were entitled to receive) on that date was $34 million, twice as much as the amount of available public funds. By January 2001, total payments made to primary candidates was in excess of $61 million.

Moreover, FEC staff predict that an even more significant shortfall will exist in the 2004 election cycle. The balance in the Presidential Election Campaign Fund in January 2004 is estimated to be approximately $8.5 million while demand is estimated to be $37 million. Based on those estimates, candidates will receive approximately 23 cents on the dollar with the first payment, and it is estimated that the shortfall will extend until March 2005. The Commission recommends that Congress take appropriate action to reduce the impact of this shortfall.

Qualifying Threshold for Eligibility for Primary Matching Funds

Section: 26 U.S.C. §9033

Recommendation: The Commission recommends that Congress raise the qualifying threshold for eligibility for publicly funded Presidential primary candidates and make it adjustable for inflation.

[4] The Commission has certified a total of $28.9 million in convention grants, and $147.2 million will be set aside for use by general election candidates.

Explanation: The present law sets a very low bar for candidates to qualify for federal primary matching funds: $100,000 in matchable contributions ($5,000 in each of at least 20 states from individual donations of $250 or less). In other words, to qualify for matching funds, a candidate needs only 400 individual contributors, contributing $250 each. The threshold was never objectively high; now, a quarter century of inflation has effectively lowered it yet by two thirds. Congress needs to consider a new threshold that would not be so high as to deprive potentially late blooming candidates of public funds, nor so low as to permit individuals who are clearly not viable candidates to exploit the system.

Rather than establishing a new set dollar threshold, which would eventually require additional inflationary adjustments, Congress may wish to express the threshold as a percentage of the previous Presidential primary election spending limit, which itself is adjusted for inflation. For example, a percentage of 5% of the 1996 spending limit would have computed to a threshold of a little over $1.5 million. In addition, the test for broad geographic support might be expanded to require support from at least 30 states, as opposed to 20, along with an increase in the amount to be raised from within each state, which is the current statutory requirement.

State Expenditure Limits for Publicly Financed Presidential Primary Campaigns (revised 2001)
Section: 2 U.S.C. §441a(b)(1)(A)

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

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

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

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

Our experience has also shown that the limitations have been only partially successful in limiting expenditures in the early primary states. The use of the

fundraising limitation, the compliance cost exemption, the volunteer service provisions, the unreimbursed personal travel expense provisions, the use of a personal residence in volunteer activity exemption, and a complex series of allocation schemes have developed into an art which, when skillfully practiced, can partially circumvent the state limitations.

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

Eligibility for Public Funding Following Violations of the Public Finance Laws (revised 2001)
Section: 26 U.S.C. §§ 9003 and 9033

Recommendation: The Commission recommends that Congress amend the eligibility requirements for publicly funded Presidential candidates to make clear that candidates who have been convicted of a knowing and willful (criminal) violation of the Presidential Primary Matching Payment Account Act (26 U.S.C. § 9042), the Presidential Election Campaign Fund Act (26 U.S.C. § 9012), or other offenses relating to public funding – or who have failed to make repayments in connection with a past campaign – will not be eligible for public funding in subsequent elections.

Explanation: Neither Presidential public financing statute expressly restricts eligibility for funding because of a candidate's prior violations of law, no matter how severe. In *LaRouche v. FEC*, 996 F.2d 1263 (D.C. Cir. 1993), *cert. denied*, 510 U.S. 992 (1993), the court held that the Commission could not deny funding to a candidate who had been convicted of fraud involving election-related activities. The court reasoned that the Matching Payment Act did not authorize the Commission to evaluate a candidate's "good faith" as part of the funding process. The same reasoning would seemingly apply to the Fund Act.

There is a risk of serious erosion in the public confidence in the integrity of the public financing system if the U.S. Government were to provide public funds to candidates who had been convicted of crimes related to the public funding process, or additional funds to those who had not made past repayments. Congress should therefore amend the eligibility requirements to ensure that such candidates do not receive public financing for their Presidential campaigns. The amendments should make clear that a candidate would be ineligible for public funds if he or she had been convicted of fraud with respect to raising funds for a campaign that was publicly financed, or if he or she had failed to make repayments in connection with a past publicly funded campaign.

Some criminal violations of the public finance laws are classified as felonies, while others are misdemeanors. (Under federal law, a misdemeanor is any crime for which the maximum penalty is one year's imprisonment or less, and a felony is any crime for which the maximum penalty is more than one year's imprisonment. *See* 18 U.S.C. § 3559.) Accordingly, we recommend that this prohibition encompass all criminal violations covered by these Acts, be they misdemeanors or felonies.

Part B: Technical Recommendations

Disclosure

Election Cycle Reporting of Operating Expenditures and Other Disbursements

Section: 2 U.S.C. §434(b)(5) and (6)

Recommendation: The Commission recommends that Congress make technical amendments to sections 434(b)(5) and (6) to require itemization of operating expenditures by authorized committees on an election-cycle basis rather than on a calendar-year basis and to clarify the basis for itemization of other disbursements. More specifically, Congress should make a technical amendment to section 434(b)(5)(A) to ensure that authorized committees (i.e., candidate committees) itemize operating expenditures on an election-cycle basis. Section 434(b)(6)(A) should be modified to address only election-cycle reporting since the subparagraph applies only to authorized candidate committees. Finally, section 434(b)(6)(B)(iii) and (v) should be amended to address only calendar-year reporting since these subparagraphs apply only to unauthorized political committees (i.e., PACs and party committees).

Explanation: In 1999, Congress amended the statute at section 434(b) to require authorized candidate committees to report on an election-cycle basis, rather than on a calendar-year basis, with respect to reporting periods beginning after December 31, 2000. Pub. Law No. 106-58, Section 641. However, the 1999 amendment did not include section 434(b)(5)(A), which states that operating expenditures must be itemized on a calendar-year basis and details the information required in that itemization. The result is that, under section 434(b)(4), operating expenditures will be required to be aggregated on an election-cycle basis, while under section 434(b)(5), they are still required to be itemized on a calendar-year basis.

To establish consistency within the Act, the Commission recommends that Congress make a technical amendment to section 434(b)(5)(A) by inserting "(or election cycle in the case of an authorized committee of a candidate for Federal office)" after "calendar year". This amendment would require authorized committees to itemize operating expenditures on an election-cycle basis.

Congress also should tighten up the language in section 434(b)(6)(B)(iii) and (v) by striking "(or election cycle, in the case of an authorized committee of a candidate for Federal office)". The references to authorized committees are unnecessary as section 434(b)(6)(B) applies solely to unauthorized political committees. Similarly, in section 434(b)(6)(A), Congress should strike "calendar year (or election cycle, in the case of an authorized committee of a candidate for

Federal office)" and insert in its place the phrase, "election cycle," as section 434(b)(6)(A) only applies to authorized committees.

Point of Entry for Pseudonym Lists
Section: 2 U.S.C. §438(a)(4)

Recommendation: The Commission recommends that Congress make a technical amendment to section 438(a)(4) by deleting the reference to the Clerk of the House.

Explanation: Section 438(a)(4) outlines the processing of disclosure documents filed under the Act. The section permits political committees to "salt" their disclosure reports with 10 pseudonyms in order to detect misuse of the committee's FEC reports and protect individual contributors who are listed on the report from unwanted solicitations. The Act requires committees who "salt" their reports to file the list of pseudonyms with the appropriate filing office.

Public Law No. 104-79 (December 28, 1995) changed the point of entry for House candidate reports from the Clerk of the House to the FEC, effective December 31, 1995. As a result, House candidates must now file pseudonym lists with the FEC, rather than the Clerk of the House. To establish consistency within the Act, the Commission recommends that Congress amend section 438(a)(4) to delete the reference to the Clerk of the House as a point of entry for the filing of pseudonym lists.

Contributions and Expenditures

Certification of Voting Age Population Figures and Cost-of-Living Adjustment
Section: 2 U.S.C. §441a(c) and (e)

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

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

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

Honorarium
Section: 2 U.S.C. §431(8)(B)(xiv)

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

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

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

Acceptance of Cash Contributions
Section: 2 U.S.C. §441g

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

Explanation: Currently this provision focuses only on persons making the cash contributions. However, these cases generally come to light when a committee has accepted these funds. Yet the Commission has no recourse with respect to the committee in such cases. This can be a problem, particularly where primary matching funds are received on the basis of such contributions.

While the Commission, in its regulations at 11 CFR 110.4(c)(2), has included a provision requiring a committee receiving such a cash contribution to promptly return the excess over $100, the statute does not explicitly make acceptance of these cash contributions a violation. The other sections of the Act dealing with

prohibited contributions (i.e., §§ 441b on corporate and labor union contributions, 441c on contributions by government contractors, 441e on contributions by foreign nationals, and 441f on contributions in the name of another) all prohibit both the making and accepting of such contributions.

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

Compliance

Modifying Terminology of "Reason to Believe" Finding (revised 2001)
Section: 2 U.S.C. §437g

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

Explanation: Under the present statute, the Commission is required to make a finding that there is "reason to believe a violation has occurred" before it may investigate. Only then may the Commission request specific information from a respondent to determine whether, in fact, a violation has occurred. The statutory phrase "reason to believe" is misleading and does a disservice to both the Commission and the respondent. It implies that the Commission has evaluated the evidence and concluded that the respondent has violated the Act. In fact, however, a "reason to believe" finding simply means that the Commission believes a violation may have occurred if the facts as described in the complaint or referral are true. An investigation permits the Commission to evaluate the validity of the facts as alleged. It would therefore be helpful to substitute words that sound less accusatory and that more accurately reflect what, in fact, the Commission is doing at this early phase of enforcement.

In order to avoid perpetuating the erroneous conclusion that the Commission believes a respondent has violated the law every time it finds "reason to believe," the statute should be amended. Note that the change in terminology recommended by the Commission would not change the standard that this finding simply represents that the Commission believes a violation may have occurred if the facts as described are accurate.

Public Financing

Fundraising Limitation for Publicly Financed Presidential Primary Campaigns

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

Recommendation: The Commission recommends that the separate fundraising limitation provided to publicly financed Presidential primary campaigns be combined with the overall limit. Thus, instead of a candidate's having a $10 million (plus COLA [5]) limit for campaign expenditures and a $2 million (plus COLA) limit for fundraising (20 percent of overall limit), each candidate would have one $12 million (plus COLA) limit for all campaign expenditures.

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

Enforcement of Nonwillful Violations (revised 2001)

Section: 26 U.S.C. §§9012 and 9042

Recommendation: The Commission recommends that Congress consider amending the Presidential Election Campaign Fund Act and the Presidential Primary Matching Payment Account Act to clarify that the Commission has authority for civil enforcement of nonwillful violations (as well as willful violations) of the public funding provisions. Congress should also consider amending the Presidential Election Campaign Fund Act to clarify how unlawful uses of payments by convention committees, if nonwillful, are to be penalized.

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

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

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

Section 9012(c)(2) governs the unlawful use of payments by a convention committee. The language of 9012(c) fails, however, to specify the appropriate criminal penalty for such violations. Since criminal penalties are specified for all the other violations listed in section 9012(c), the absence of such a penalty for the convention violation mentioned in (c)(2) may be a statutory oversight.

Alternatively, Congress may wish to clarify whether the unlawful use of payments by a convention committee under section 9012(c)(2) is a criminal violation. This is unclear because the language of section 9012(c)(2) does not contemplate a "knowing and willful" violation, This contrasts with other violations of section 9012. Also, as noted above, the penalties specified in paragraph (c)(3) apply to other violations of the section, but not to violations by convention committees.

Deposit of Repayments
Section: 26 U.S.C. §9007(d)

Recommendation: The Commission recommends that Congress revise the law to state that: All payments received by the Secretary of the Treasury under subsection (b) shall be deposited by him or her in the Presidential Election Campaign Fund established by §9006(a).

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

Contributions to Presidential Nominees Who Receive Public Funds in the General Election
Section: 26 U.S.C. §9003

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

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

Miscellaneous

Ex Officio Members of Federal Election Commission (revised 2001)
Section: 2 U.S.C. §437c(a)(1)

Recommendation: The Commission recommends that Congress amend section 437c by removing the Secretary of the Senate, the Clerk of the House, and their designees from the list of the members of the Federal Election Commission.

Explanation: In 1993, the U.S. Court of Appeals for the District of Columbia ruled that the ex officio membership of the Secretary of the Senate and the Clerk of the House on the Federal Election Commission was unconstitutional. *(FEC v. NRA Political Victory Fund,* 6 F.3d 821 (D.C. Cir. 1993), cert. dismissed for want of jurisdiction, 513 U.S. 88 (1994).) This decision was left in place when the Supreme Court dismissed the FEC's appeal on the grounds that the FEC lacks standing to independently bring a case under Title 2.

As a result of the appeals court decision, the FEC reconstituted itself as a six-member body whose members are appointed by the President and confirmed by the Senate. Congress should accordingly amend the Act to reflect the appeals court's decision by removing the references to the ex officio members from section 437c.