Legislative Recommendations

2002

Federal Election Commission

FEC Legislative Recommendations 2002

Table of Contents

PART I: SUBSTANTIVE **1**

ELECTION ADMINISTRATION **1**
Duties of the Office of Election Administration, Advisory Panel (revised 2002) . 1

DISCLOSURE **2**
Electronic Filing of Senate Reports (2002) 2
Filing Reports Using Overnight Delivery, Priority or Express Mail (2002) 3
Increasing Registration and Reporting Thresholds for Unauthorized Committees, Local Party Committees and Independent Expenditure Filers (2002) 4
Waiver Authority 5
Commission as Sole Point of Entry for Disclosure Documents (revised 2002) .. 6
Reporting Deadlines for Semiannual, Year-End and Monthly Filers 7

COMPLIANCE **8**
Addition of Commission to the List of Agencies Authorized to Issue Immunity Orders According to the Provisions of Title 18 8

PUBLIC FINANCING **9**
Repayment of Primary Election Funds (2002) 9
Averting Impending Shortfall in Presidential Public Funding Program (revised 2002) 9
Qualifying Threshold for Eligibility for Primary Matching Funds 11
State Expenditure Limits for Publicly Financed Presidential Primary Campaigns (revised 2002) 11

PART II: TECHNICAL RECOMMENDATIONS **13**

DISCLOSURE **13**
Election Cycle Reporting of Operating Expenditures and Other Disbursements 13
Point of Entry for Pseudonym Lists 14

CONTRIBUTIONS AND EXPENDITURES **14**
Republication of Campaign-Prepared Materials (2002) 14
Certification of Voting Age Population Figures and Cost-of-Living Adjustment 15
Honorarium 15
Acceptance of Cash Contributions 16

COMPLIANCE **16**
Modifying Terminology of "Reason to Believe" Finding 16

PUBLIC FINANCING **17**
Fundraising Limitation for Publicly Financed Presidential Primary Campaigns 17
Enforcement of Nonwillful Violations 18
Deposit of Repayments 19

MISCELLANEOUS **19**
Ex Officio Members of Federal Election Commission 19

Part I: Substantive Recommendations

Election Administration

Duties of the Office of Election Administration, Advisory Panel (revised 2002)

Section: 2 U.S.C. §438(a)(10)

Recommendation: The Commission recommends that Congress amend 2 U.S.C. § 438(a)(10), to clarify and expand the responsibilities of the Office of Election Administration (OEA) in the event Congress does not create a new federal agency to oversee such functions. The Commission has been performing similar responsibilities through OEA since its inception in 1975. At a minimum, Congress should direct OEA to periodically update and enhance the voluntary Voting System Standards (VSS) program and 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. Beyond these legislative revisions, Congress could assign whatever additional responsibilities it deems appropriate.

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 and 2004. Specifically, the OEA would:

- 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;
- Develop and maintain a current data bank on election voting equipment;
- Work with existing associations and membership organizations to provide training and technical assistance opportunities for election officials; and
- Facilitate the timely exchange of information among state and local officials on issues relating to election administration;

While the Commission retains other responsibilities regarding the federal campaign finance statutes, it would work closely with Congress to assure that adequate resources are earmarked for election administration.

Disclosure

Electronic Filing of Senate Reports (2002)
Section: 2 U.S.C. §§432(g) and 434(a)(11)

Recommendation: The Commission recommends that Congress require:

- Mandatory electronic filing, at a date to be determined by Congress, for those persons and political committees filing designations, statements, reports or notifications pertaining only to Senate elections if they have, or have reason to expect to have, aggregate contributions or expenditures in excess of $50,000 in a calendar year.

- Electronically filed designations, statements, reports or notifications pertaining only to Senate elections to be forwarded to the Commission within 24 hours of receipt and to be made accessible to the public on the Internet, if Congress does not change the point of entry for filings pertaining only to Senate elections.

Explanation: Public Law 106-58 required, among other things, that the Commission make electronic filing mandatory for political committees and other persons required to file with the Commission who, in a calendar year, have, or

have reason to expect to have, total contributions or total expenditures exceeding a threshold set by the Commission. The Commission set this threshold at $50,000 and, in the Commission's experience, that threshold has worked well. Extending electronic filing to political committees and persons who file designations, statements, reports or notifications pertaining only to Senate elections would standardize the information received, thereby enhancing public disclosure of campaign finance information. Additionally, data from electronically filed reports is received, processed and disseminated more easily and efficiently, resulting in better use of resources.

Electronic filing (by means other than diskette) is also unaffected by disruptions in the delivery of first class mail, such as those arising from the terrorist attacks on the U.S. Postal Service. As a result of these disruptions, some amendments to Senate campaign reports that were filed via regular mail in late 2001 took months to arrive at the Secretary of the Senate (and the FEC), delaying disclosure. In contrast, amendments electronically filed during the same time period by other types of filers were received and processed in a timely manner.

Filing Reports Using Overnight Delivery, Priority or Express Mail (2002)
Section: 2 U.S.C. §§434(a)(2)(A)(i), (a)(4)(A)(ii) and (a)(5)

Recommendation: The Commission recommends that Congress amend 2 U.S.C. §§434(a)(2)(A)(i), (a)(4)(A)(ii) and (a)(5) to offer filers additional means of ensuring timely filing of designations, reports, and statements. Specifically, the Commission recommends that Congress equate the date of receipt by one of the following delivery services with the registered or certified mail postmark dates currently set forth in section 434:

- Overnight delivery with an on-line tracking system that allows delivery status to be verified; and
- Priority Mail or Express Mail with U.S. Postal Service delivery confirmation.

Explanation: Section 434 of the Act permits committees that do not file electronically to rely upon a registered or certified mail postmark as evidence that their designations, reports and statements were filed on time. For example, quarterly, monthly, semiannual and post-general election reports must be postmarked by the due date, and pre-primary and pre-general election reports must be postmarked 15 days before the election.

Overnight delivery, Priority Mail and Express Mail were not widely used when the registered or certified mail provisions were adopted as part of the 1979 amendments to the FECA. Since that time, these services have come into wide use and are frequently used by political committees to file their FEC designations, reports and statements. Equating the date of receipt by one of these services with the registered or certified mail date would aid the regulated

community in its efforts to comply with the Act's reporting requirements.

Overnight delivery, Priority Mail and Express Mail ensure that there is written evidence that a package was mailed and received. Additionally, due to their reliability and speed, the Commission's ability to collect, process and disseminate information would be improved if Congress were to amend 2 U.S.C. §§434(a)(2)(A)(i), (a)(4)(A)(ii) and (a)(5) to include these services.

Increasing Registration and Reporting Thresholds for Unauthorized Committees, Local Party Committees and Independent Expenditure Filers (2002)

Section: 2 U.S.C. §§431(4)(A), 431(4)(C) and 434(c)

Recommendation: The Commission recommends that Congress require unauthorized political committees (excluding separate segregated funds, but including nonconnected PACs and state party committees) to register and file reports once they exceed $5,000 in contributions or expenditures, rather than at the current $1,000 threshold. Local party committees should be required to register and file reports once they exceed $5,000 in contributions made or received, or $5,000 in expenditures or payments made for exempt party activities. Additionally, persons other than political committees should be required to file a statement disclosing their activity when they make independent expenditures in excess of $1,000, rather than the current $250 threshold.

Explanation: The current registration thresholds for unauthorized political committees, except SSFs and local party committees, were set in the 1974 amendments to the FECA at $1,000 in contributions or expenditures. The 1979 amendments to the FECA set the registration threshold for local party committees at $5,000 in contributions received, $1,000 in contributions made or expenditures made for non-exempt activities or $5,000 in payments for exempt party activities. The 1979 amendments to the FECA set the registration threshold for persons other than political committees making independent expenditures at $250. Because these thresholds have not been indexed for inflation, they impose registration and reporting requirements on political committees and persons whose financial activity is considerably smaller in inflation-adjusted dollars than that of those who were required to register and report when these amendments were enacted. Moreover, some committees and persons currently required to register and report may lack the resources and technical expertise to comply with the FECA's registration and reporting requirements. Finally, because of the effect of inflation, increasing the registration thresholds would continue to capture the significant financial activity envisioned by Congress in enacting the FECA.

Waiver Authority
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 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.

Commission as Sole Point of Entry for Disclosure Documents[1] (revised 2002)
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 worked

[1] 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.

together to have Senate digitzed images on the FEC web site. The FEC has also proposed assisting the Secretary in developing the capacity 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, except for remaining paper filers.

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.

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 15th of the month would not be unduly burdensome.

Compliance

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.

Public Financing

Repayment of Primary Election Funds (2002)
Section: 26 U.S.C. §9038(b).

Recommendation: Congress should revise 26 U.S.C. §9038(b) to specifically state whether repayments must be made by publicly funded primary candidates who have made expenditures that exceed the spending limits.

Explanation: Section 9007 of the Fund Act (26 U.S.C. §9007), which governs general election financing, provides four bases for determining repayments of general election funds, including amounts incurred for qualified campaign expenses that exceed the candidate's entitlement to public funds. 26 U.S.C. §9007(b)(2). Section 9038(b) of the Matching Payment Act (26 U.S.C. §9038(b)), which governs primary election financing, provides three bases for determining repayments of primary election funds but does not specifically include exceeding the spending limits. Thus, an argument has been made that the Commission is not authorized to require publicly financed primary candidates to make repayments based on expenditures made in excess of the primary spending limits.

The Commission has sought repayments of primary election funds based on excess spending since the first publicly-funded presidential election, and so provides in its rules at 11 CFR 9038.2(b)(2)(ii)(A). An argument can be made that "excess" primary expenditures are "non qualified," since that term is limited at 26 U.S.C. §9032(9) to expenses where "neither the incurring nor payment . . . constitutes a violation of any law of the United States," and amounts exceeding the expenditure limitations violate both 26 U.S.C. §9035 and 2 U.S.C. §441a(b)(1). Additional arguments can be fashioned on both sides of this question. Thus, Congress should revise section 9038(b) to specifically state whether repayments must be made by publicly funded primary candidates who have made expenditures that exceed the spending limits.

Averting Impending Shortfall in Presidential Public Funding Program (revised 2002)
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.[2] 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, preliminary FEC staff projections indicate a significant shortfall exist in the 2004 election cycle. While these are unofficial projections and are subject to change, FEC staff project the balance in the Presidential Election Campaign Fund in January 2004 to be approximately $4.6 million while demand is estimated to be between $23.9 and 36.2 million. Based on those estimates, candidates will receive approximately 13 to 19 cents on the dollar with the first payment. Estimates show that the shortfall will extend until May 2004 and may last as long as April 2005. The Commission recommends that Congress take appropriate action to eliminate the shortfall.

The Commission recommends several specific legislative changes. First, the statute should be revised so that Treasury will be able to rely on *expected* available proceeds from the voluntary checkoff, rather than relying solely on actual proceeds *on hand* as of the dates of the matching fund payments. Since large infusions of voluntary checkoff proceeds predictably occur in the first few months of the election year, including such estimated proceeds in the calculation of funds available for matching fund payouts would virtually eliminate the shortfall in the near future. Because estimates for expected payouts are an acceptable part of the calculations (e.g., setting aside sufficient funds to cover general election payouts), estimates of the checkoff proceeds could be incorporated, as well. A very simple change in the wording of 26 U.S.C. §9037 would accomplish this: changing "are available" to "will be available." Expected payments should be based on sound statistical methods to produce a cautious, conservative estimate of the funds that will be available to cover convention and general election payments.

A second revision in the statute would further the long-term stability of the presidential public funding program: indexing the voluntary checkoff amount to inflation. Although the checkoff amount was increased from $1 to $3 beginning with 1993 returns, there was no indexing built in to account for further inflation

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

thereafter. Since the payments are indexed to inflation, the statute all but assures a permanent 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.

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 2002)
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 seven 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.

Part II: 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 technically 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

Republication of Campaign-Prepared Materials (2002)
Section: 2 U.S.C. §441a(a)(7)(B)

Recommendation: The Commission recommends that Congress amend section 441a(a)(7) to clarify whether payments to disseminate, distribute or republish materials that were originally prepared by a candidate or his authorized committee or agents are considered to be contributions under the Act.

Explanation: Within subsection (B) of section 441a(a)(7), there appears to be a discrepancy between subparagraphs (i) and (ii). Subparagraph (i) states that "expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of," a candidate, his authorized committee or agents, "shall be considered to be a **contribution** to such candidate." (emphasis added)

Subparagraph (ii), however, states that the financing by any person of the dissemination, republication or distribution of any broadcast or any other form of campaign materials prepared by the candidate, his campaign or his agents, "shall be considered to be an **expenditure** for purposes of this paragraph." (emphasis added) While Commission regulations at 11 CFR 109.1(d)(1) define such activity as a contribution to the candidate in question, Congressional

clarification would be helpful.

The term “expenditure” could be read to suggest that payments to republish and redistribute materials that were originally prepared by a campaign could be independent expenditures within the meaning of 2 U.S.C. §431(17). If Congress intends for such activity to be defined as a contribution, it should amend subparagraph (ii) to change the word “expenditure” to “contribution to such candidate”.

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
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 [3]) 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

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

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
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.

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.

Miscellaneous

Ex Officio Members of Federal Election Commission
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.