Legislative Recommendations for Immediate Transmission to Congress and the President of the United States

1999

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Disclosure

Electronic Filing Threshold (revised 1999)[1]

Section: 2 U.S.C. §434(a)

Recommendation: The Commission recommends that Congress give the FEC authority to require committees with a certain level of financial activity to file FEC reports electronically.

Explanation: Public Law 104-79, effective December 28, 1995, authorized the electronic filing of disclosure reports with the FEC. As of January 1997, political committees (except for Senate campaigns) may opt to file FEC reports electronically.

The FEC has created the electronic filing program and is providing software to committees in order to assist committees that wish to file reports electronically. To maximize the benefits of electronic filing, Congress should consider requiring committees that meet a certain threshold of financial activity to file reports electronically. The FEC would receive, process and disseminate the data from electronically filed reports more easily and efficiently, resulting in better use of Commission resources. Moreover, information in the FEC's database would be standardized for committees at a certain threshold, thereby enhancing public disclosure of campaign finance information. In addition, committees, once participating in the electronic filing program, should find it easier to complete and file reports.

Legislative Language:

ELECTRONIC FILING THRESHOLD

Section 302(a) of the Federal Election Campaign Act of 1971 (2 U.S.C. 434(a)) is amended by striking paragraph (11) and inserting the following:

> '(11)(A) The Commission shall promulgate a regulation under which a person required to file a designation, statement, or report under this Act—
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> > '(i) is required to maintain and file a designation, statement, or report for any calendar year in electronic form accessible by computers if the person has, or has reason to expect to have, aggregate contributions or expenditures in excess of a threshold amount determined by the Commission; and

[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 4-34 and 5-2.

'(ii) may maintain and file a designation, statement, or report in electronic form or an alternative form if not required to do so under the regulation promulgated under clause (i).

'(B) The Commission shall make a designation, statement, report, or notification that is filed electronically with the Commission accessible to the public on the Internet not later than 24 hours after the designation, statement, report, or notification is received by the Commission.

'(C) In promulgating a regulation under this paragraph, the Commission shall provide methods (other than requiring a signature on the document being filed) for verifying designations, statements, and reports covered by the regulation. Any document verified under any of the methods shall be treated for all purposes (including penalties for perjury) in the same manner as a document verified by signature.'.

Campaign-Cycle Reporting[2]
Section: 2 U.S.C. §434

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

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

This change would also benefit public disclosure of campaign finance activity. Currently, contributions from an individual are itemized only if the individual donates more than $200 in the aggregate during a calendar year. Likewise, disbursements are itemized only if payments to a specific payee aggregate in excess of $200 during a calendar year. Requiring itemization once contributions from an individual or disbursements to a payee aggregate in excess of $200 during the campaign would capture information of interest to the public that is currently not available. Moreover, to determine the actual campaign finance activity of a committee, reporters and researchers must compile the total figures from several year-end reports. In the case of Senate campaigns, which may extend over a six-year period, this change would be particularly helpful.

Legislative Language:

CAMPAIGN CYCLE REPORTING

Paragraphs (2), (3), (4), (6), and (7) of section 304(b) of the Federal Election Campaign Act of 1971 (2 U.S.C. 434(b)(2), (3), (4), (6), and (7)), are amended by inserting after "calendar year" each place it appears the following: "(election cycle, in the case of an authorized committee of a candidate for Federal office)".

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[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 4-29 and 5-2.

Contributions and Expenditures

Application of $25,000 Annual Limit

Section: 2 U.S.C. §441a(a)(3)

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

Explanation: Section 441a(a)(3) now provides that a contribution to a candidate made in a nonelection year counts against the individual donor's limit for the year in which the candidate's election is held. This provision has led to some confusion among contributors. For example, a contributor wishing to support Candidate Smith in an election year contributes to her in November of the year before the election. The contributor assumes that the contribution counts against his limit for the year in which he contributed. Unaware that the contribution actually counts against the year in which Candidate Smith's election is held, the contributor makes other contributions during the election year and inadvertently exceeds his $25,000 limit. By requiring contributions to count against the limit of the calendar year in which the donor contributes, confusion would be eliminated and fewer contributors would inadvertently violate the law. The change would offer the added advantage of enabling the Commission to better monitor the annual limit. Through the use of our data base, we could more easily monitor contributions made by one individual regardless of whether they were given to retire the debt of a candidate's previous campaign, to support an upcoming election (two, four or six years in the future) or to support a PAC or party committee. Such an amendment would not alter the per candidate, per election limits. Nor would it affect the total amount that any individual could contribute in connection with federal elections.

Legislative Language:

APPLICATION OF $25,000 ANNUAL LIMIT

Section 315(a)(3) of the Federal Election Campaign Act of 1971 (2 U.S.C. 441a(a)(3)) is amended by striking the second sentence of that paragraph.

1999

Supplemental

Legislative Recommendations

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Part A: Other Legislative Recommendations

Disclosure

Incomplete or False Contributor Information (1999)
Section: 2 U.S.C. §434

Recommendation: Congress should amend the Act to address the recurring problem of committees' failure to provide full disclosure about their contributors. First, Congress might wish to prohibit the acceptance of contributions until the contributor information is obtained and recorded in the committee's records. Second, Congress might wish to amend the law to make contributors or the committee liable for submitting information known by the contributor or the committee to be false.

Explanation: There is consistent concern expressed by the Commission, the public and the press about the failure of candidates and political committees to report the addresses and occupations of many of their contributors. Some press reports have suggested that this requirement is deliberately evaded in order to obfuscate the special-interest origins of contributions.

Currently, in those cases where contributor information is inadequate, the law states that committees will be in compliance if they make "best efforts" to obtain the information. In 1994, the FEC revised its "best efforts" regulations at 11 CFR 104.7 to specify that a committee can demonstrate "best efforts" by requesting contributor identification in the initial solicitation (including a statement of the law) and making one follow-up request for each contribution lacking the required information. See 58 FR 57725 (October 27, 1993), as amended at 62 FR 23335 (April 30, 1997). Even with stronger regulations in place, however, political committees are still not obtaining and disclosing important contributor information in a timely fashion.

An inducement to campaigns and political committees to fulfill this responsibility would be to prohibit the acceptance and/or expenditure of contributions until the contributor information is obtained and recorded in the committee's records. In the case of publicly funded Presidential campaigns, Congress may wish to tie the eligibility of a campaign to receive public funding to its ability to gather contributor information. These restrictions would have an immediate effect upon a committee's ability to effectively campaign before the election, which would be a powerful inducement to campaigns and political committees to obtain the information promptly. Moreover, violations would be relatively easy to detect and prove by reviewing the committee's disclosure reports.

Finally, Congress may wish to add another mechanism for improving disclosure. Congress should make clear that the contributor or committee is liable for submitting information known by the provider of the information to be false. Taken together, these measures should improve efforts to achieve full disclosure.

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 election-year reporting requirements were fully applicable to candidate committees operating under one of the following circumstances:

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

Unauthorized committees also face unnecessary reporting requirements. For example, the 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 1998 October Monthly report, covering September, was required to be postmarked October 20. Meanwhile the 1998 Pre-General report, covering October 1 -14, was required to be postmarked October 19, one day before 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 (revised 1999)[1]
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 microfilmed 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. This filing option is unavailable to Senate campaigns and to the Senatorial Campaign Committees though, because the point of entry for their reports is the Secretary of the Senate. It should be noted, however, that the FEC is working closely with the Secretary of the Senate to improve disclosure within the current law. For example, the FEC and the Secretary of the Senate are exploring ways to implement digital imaging of reports and to develop the

[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.

capacity of the Secretary's office to accept electronically filed reports. While these measures, once completed, will undoubtedly improve disclosure, absent mandatory electronic filing, a single point of entry remains desirable. It is important to note as well that, if the Congress adopted mandatory electronic filing, the recommendation to change the point of entry for Senate filers would be rendered moot.

In addition, Public Law 104-79 eliminated the requirements for a candidate to file copies of FEC reports with his or her State, provided that the State has electronic access to reports and statements filed with the FEC. In order to eliminate the State filing requirement for Senate candidates and the Senatorial Campaign Committees, it would be necessary for a State to have electronic access to reports filed with the Secretary of the Senate, as well as to reports filed with the Federal Election Commission. In other words, unless the FEC becomes the point of entry for reports filed by Senate candidates and the Senatorial Campaign Committees, either the States will need to have the technological and financial capability to link up electronically with two different federal offices, or these committees must continue to file copies of their reports with the State.

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. The delay in transmittal between two offices sometimes leads the Commission to believe that candidates and committees are not in compliance. A single point of entry would eliminate this confusion. Finally, the Commission notes that the report of the Institute of Politics of the John F. Kennedy School of Government at Harvard University, *An Analysis of the Impact of the Federal Election Campaign Act, 1972-78,* prepared for the House Administration Committee, recommended that all reports be filed directly with the Commission (Committee Print, 96th Cong., 1st Sess., at 122 (1979)).

Fraudulent Solicitation of Funds (revised 1999)
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 (revised 1999)
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 District of Columbia Circuit held that the Act, as amended in 1979, regulated only the *reporting requirements* of draft committees. The Commission sought review of this decision by the Supreme Court, but the Court declined to hear the case. Similarly, the Eleventh Circuit found that “committees organized to ‘draft’ a person for federal office” are not “political committees” within the Commission’s investigative authority. The Commission believes that the appeals court rulings create a serious imbalance in the election law and the political process because a nonauthorized group - organized to support someone who has not yet become a candidate may operate completely outside the strictures of the Federal Election Campaign Act. However, any group organized to support someone who has in fact become a candidate is subject to the Act’s registration and reporting requirements and contribution limitations. Therefore, the potential exists for funneling large aggregations of money, both corporate and private, into the federal electoral process through unlimited contributions made to nonauthorized draft committees that support a person who has not yet become a candidate. These recommendations seek to avert that possibility.

Contributions and Expenditures

Contributions by Foreign Nationals (1999)
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. However, some recent court decisions have rejected this interpretation. 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 1999)
Section: 2 U.S.C. §441a

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

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

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

It would be advisable to clarify that if a candidate has to participate in more than two elections (e.g., in a post-primary runoff as well as a primary and general), the campaign cycle limit would be $3,000. In addition, because at the Presidential level candidates might opt to take public funding in the general election and

thereby be precluded from accepting contributions, the $1,000/5,000 “per election” contribution limits should be retained for Presidential candidates.

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

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 presumption that contributors below age 16 are not making contributions on their own behalf.

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

Lines of Credit and Other Loans Obtained by Candidates (revised 1999)

Section: 2 U.S.C. §431(8)(B)(vii)

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

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

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

Broader Prohibition Against Force and Reprisals (revised 1999)
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.

Enforcement

Addition of Commission to the List of Agencies Authorized to Issue Immunity Orders According to the Provisions of Title 18 (1999)
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.

Fines for Reporting Violations (revised 1999)[2]
Section: 2 U.S.C. §437g

Recommendation: The Commission recommends that Congress consider granting the Commission authority to assess administrative fines for straightforward violations relating to the reporting of receipts and disbursements.

Explanation: In maintaining a regulatory presence covering all aspects of the Act, even the most simple and straightforward strict liability disclosure violations, e.g., the late filing or non-filing of required reports, may be addressed only through the existing enforcement process at 2 U.S.C. §437g. The enforcement procedures provide a number of procedural protections, and the Commission has no authority to impose penalties. Instead, the Commission can only seek a conciliation agreement, and without a settlement can only pursue a *de novo* civil action in federal court. This process can be unnecessarily time and resource consuming for all parties involved when applied to ministerial-type civil violations that are routinely treated via administrative fines by many other states and federal regulatory agencies. Non-deliberate and straightforward reporting violations would not have to be treated as full blown enforcement matters if the Commission had authority to assess fines for such violations, subject to a reasonable appeal procedure. The Commission would consider a number of factors (e.g., the election sensitivity of the report and the previous compliance record of the committee). Addition of such authority would introduce greater certainty to the regulated community about the consequences of noncompliance with the Act's filing requirements, as well as lessen costs and lead to efficiencies for all parties, while maintaining the Commission's emphasis on the Act's disclosure requirements. The Commission would attempt to implement this on a trial basis.

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

[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 4-78 and 5-2.

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.

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

Modifying Terminology of "Reason to Believe" Finding (revised 1999)
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."

[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 the present statute, the Commission is required to make a finding that there is "reason to believe a violation has occurred" before it may investigate. Only then may the Commission request specific information from a respondent to determine whether, in fact, a violation has occurred. The statutory phrase "reason to believe" is misleading and does a disservice to both the Commission and the respondent. It implies that the Commission has evaluated the evidence and concluded that the respondent has violated the Act. In fact, however, a "reason to believe" finding simply means that the Commission believes a violation may have occurred if the facts as described in the complaint are true. An investigation permits the Commission to evaluate the validity of the facts as alleged.

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

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

Public Financing

Averting Impending Shortfall in Presidential Public Funding Program (1999)
Section: 26 U.S.C. §§6096, 9008(a) and 9037(a)

Recommendation: The Commission strongly recommends that Congress take immediate action to avert the impending shortfall in the Presidential public funding program in the 2000 election year.

Explanation: The Presidential public funding program faces 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 will impact foremost upon primary candidates. The Commission projects that, in January 2000, the U.S. Treasury will be able to provide approximately 32 percent of the public funds to which qualified Presidential candidates will be entitled to receive. Specifically, an estimated $20.4 million will be available for distribution to qualified primary candidates on January 1, 2000, after the Treasury sets aside the convention and general election grants[4]. However, the Commission expects the entitlement as of that date to be $62.9 million, which equates to 32 cents on the dollar. Moreover, the total entitlement for primary candidates for the entire election cycle is estimated to be $98.7 million. Thus, if FEC staff estimates and presumptions are correct, a significant shortfall will exist throughout calendar year 2000 and into 2001. Solvency would not be restored until April 2001 with the deposit of the March 2001 checkoff receipts. The Commission recommends

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

that Congress take appropriate action to avoid this impending shortfall.

Qualifying Threshold for Eligibility for Primary Matching Funds (revised 1999)
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 raise the set dollar threshold, which would eventually require additional inflationary adjustments, Congress may wish to express the threshold as a percentage of the primary 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, which is the current statutory requirement.

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

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

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

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

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

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

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

Fundraising Limitation for Publicly Financed Presidential Primary Campaigns
Section: 2 U.S.C. §§431(9)(B)(vi) and 441a

Recommendation: The Commission recommends that the separate fundraising limitation provided to publicly financed Presidential primary campaigns be combined with the overall limit. Thus, instead of a candidate's having a $10 million (plus 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.

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

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

Explanation: Neither of the Presidential public financing statutes expressly restricts eligibility for funding because of a candidate's prior violations of law, no matter how severe. And yet public confidence in the integrity of the public financing system would risk serious erosion if the U.S. Government were to provide public funds to candidates who had been convicted of felonies related to

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

the public funding process. Congress should therefore amend the eligibility requirements to ensure that such candidates do not receive public financing for their Presidential campaigns. The amendments should make clear that a candidate would be ineligible for public funds if he or she had been convicted of fraud with respect to raising funds for a campaign that was publicly financed, or if he or she had failed to make repayments in connection with a past publicly funded campaign or had willfully disregarded the statute or regulations. See *LaRouche v. FEC*, 992 F.2d 1263 (D.C. Cir. 1993) *cert. denied*, 114 S. Ct. 550 (1993). In addition, Congress should make it clear that eligibility to serve in the office sought is a prerequisite for eligibility for public funding.

Applicability of Title VI to Recipients of Payments from the Presidential Election Campaign Fund
Section: 26 U.S.C. §§9006(b), 9008(b)(3) and 9037.

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

Explanation: This proposed amendment was prompted by the decision of the U.S. District Court for the District of Columbia in *Freedom Republicans, Inc., and Lugenia Gordon v. FEC,* 788 F. Supp. 600 (1992), *vacated,* 13 F.3d 412 (D.C. Cir 1994). The Freedom Republicans' complaint asked the district court to declare that the Commission has jurisdiction to regulate the national parties' delegate selection process under Title VI. It also requested the court to order the Commission to adopt such regulations, direct the Republican Party to spend no more of the funds already received for its 1992 national nominating convention, and seek refunds of moneys already disbursed if the Republican Party did not amend its delegate selection and apportionment process to comply with Title VI. The district court found that the Commission "does have an obligation to promulgate rules and regulations to insure the enforcement of Title VI. The language of Title VI is necessarily broad, and applies on its face to the FEC as well as to both major political parties and other recipients of federal funds." 788 F. Supp. at 601.

The Commission appealed this ruling on a number of procedural and substantive grounds, including that Title VI does not apply to the political parties' apportionment and selection of delegates to their conventions. However, the court of appeals overruled the district court decision on one of the non-substantive grounds, leaving the door open for other lawsuits involving the national nominating conventions or other recipients of federal funds certified by the Commission. No. 92-5214, slip op. at 15.

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

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

Enforcement of Nonwillful Violations
Section: 26 U.S.C. §§9012 and 9042

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

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

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

Part B: Technical Recommendations

Disclosure

Candidates and Principal Campaign Committees

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

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

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

Filing Reports Using Registered or Certified Mail (revised 1999)

Section: 2 U.S.C. §434(a)(2)(A)(i), (a)(4)(A)(ii) and(a)(5)

Recommendation: The Commission recommends that Congress delete the option to file campaign finance reports via registered or certified mail when the report is postmarked by a specific date. Instead, Congress should consider simply requiring political committees to file their reports with the Commission (or the Secretary of the Senate) by the due date of the report.

Explanation: Section 434 of the Act permits committees to file their reports by registered or certified mail, provided that the report is postmarked by a certain date. (In the cases of a quarterly, monthly, semi-annual or post general report, the report must be postmarked by the due date if sent by registered or certified mail. In the case of a pre-primary or pre-general election report, the report must be postmarked 15 days before the election.)

To minimize this delay in disclosure, Congress should eliminate the option in the law that allows committees to rely on the postmark of a registered or certified mailed report. Instead, Congress should simply require that reports be filed with

the FEC (or the Secretary of the Senate) by the due date specified in the law. This approach would result in more effective public disclosure of campaign finance information, because reports would be available for review at an earlier point before the election. It would also simplify the law and eliminate confusion about the appropriate due date for a report.

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

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

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

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

The Commission notes, however, that, in certain circumstances, switching to a monthly reporting schedule would create a lag in disclosure directly before a primary election. In States where a primary 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, 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-Primary report, Congress should grant the Commission the authority to waive one of the reports or adjust the reporting requirements. (See 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, regardless of their reporting schedule.

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.

Facsimile Machines (revised 1999)
Section: 2 U.S.C. §434(b)(6)(B)(iii) and (c)(2)

Recommendation: The Commission recommends that Congress modify the Act to provide for the acceptance and admissibility of 24-hour notices of independent expenditures via telephone facsimiles or by other technologies such as e-mail.

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

Reporting of Last-Minute Independent Expenditures
Section: 2 U.S.C. §434(c)

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

Explanation: The statute requires that independent expenditures aggregating $1,000 or more and made after the 20th day, but more than 24 hours, before an election be *reported* within 24 hours after they are made. This provision is in contrast to other reporting provisions of the statute, which use the words "shall be filed." Must the report be received by the filing office within 24 hours after the independent expenditure is made, or may it be sent certified/registered mail and postmarked within 24 hours of when the expenditure is made? Should Congress decide that committees must report the expenditure within 24 hours after it is made, committees should be able to file via facsimile (fax) machine. (See Legislative Recommendation titled "Facsimile Machines.") Clarification by Congress would be very helpful.

Require Monthly Filing for Certain Multicandidate Committees
Section: 2 U.S.C. §434(a)(4)

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

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

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

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.

Enforcement

Subpoena and Reason-to-Believe Notification Signature Authority
Section: 2 U.S.C. §§437d(a)(3) and 437g(a)(2)

Recommendation: The Commission recommends that Congress clarify these provisions to permit any member of the Commission to sign duly-authorized subpoenas and notifications of findings of reason-to-believe, rather than limiting signature authority to the Chairman and Vice Chairman.

Explanation: Section 437d(a)(3) grants the Commission the power to issue subpoenas requiring the attendance and testimony of witnesses and the production of documentary evidence. This provision specifies that subpoenas be signed by the Chairman or Vice Chairman of the agency. In those instances where the Commission has duly authorized the issuance of a subpoena, but neither the Chairman nor the Vice Chairman are available to sign, the subpoena is delayed. Providing for the signature of another member of the Commission would enable subpoenas to be issued in a more timely manner.

Likewise, §437g(a)(2) requires that the Commission, through its Chairman or Vice Chairman, notify respondents of a finding of reason-to-believe in an enforcement matter. For the reasons listed above, it would be beneficial to allow other Members of the Commission to sign such notifications when neither the Chairman nor the Vice Chairman are available.

Public Financing

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
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, 115 S. Ct. 537 (12/6/94).) 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.