1998
Legislative Recommendations

Contents

Part I: Disclosure 1
Electronic Filing Threshold (revised 1998) 1
Filing Reports Using Registered or Certified Mail 1
Waiver Authority (revised 1998) 1
Campaign-Cycle Reporting 2
Monthly Reporting for Congressional Candidates (revised 1998) 3
Reporting Deadlines for Semiannual, Year-End and Monthly Filers 3
Commission as Sole Point of Entry for Disclosure Documents (revised 1998) 4
Facsimile Machines 5
Candidates and Principal Campaign Committees 5
PACs Created by Candidates 5
Require Monthly Filing for Certain Multicandidate Committees 6
Reporting of Last-Minute Independent Expenditures 6
Reporting and Recordkeeping of Payments to Persons Providing Goods and Services 7
Excluding Political Committees from Protection of the Bankruptcy Code 7
Fundraising Projects Operated by Unauthorized Committees 8
Disclaimer Notices 8
Fraudulent Solicitation of Funds 9
Draft Committees 10
Definition of Political Committee (revised 1998) 11
Point of Entry for Pseudonym Lists 11

Part II: Contributions and Expenditures 11
Coordination of Election-Related Activities with Candidates and Political Parties (1998) 11
Quasi-Corporate Business Organizations (1998) 12
Election Period Limitations for Contributions to Candidates 13
Application of $25,000 Annual Limit 13
Certification of Voting Age Population Figures and Cost-of-Living Adjustment 14
Issue Advocacy Advertising (revised 1998) 14
Candidate's Use of Campaign Funds 15
Disposition of Excess Campaign Funds 15
Distinguishing Official Travel from Campaign Travel 15
Coordinated Party Expenditures 16
Volunteer Participation in Exempt Activity 17
Contributions from Minors 17
Application of Contribution Limitations to Family Members 17
Lines of Credit and Other Loans Obtained by Candidates 18
Broader Prohibition Against Force and Reprisals 18
Nonprofit Corporations and Express Advocacy 18
Honorarium 19
Acceptance of Cash Contributions 19

Part III: Enforcement 20
Fines for Reporting Violations 20
Expedited Enforcement Procedures and Injunctive Authority 21
Subpoena and Reason-to-Believe Notification Signature Authority 22
Ensuring Independent Authority of FEC in All Litigation 22
Enhancement of Criminal Provisions 24
Random Audits 24
Audits for Cause 25
Modifying Standard of "Reason to Believe" Finding 25
Protection for Those Who File Complaints or Give Testimony 25

Part IV: Public Financing 26
Automatic Adjustment of the Presidential Election Checkoff (1998) 26
Priorities for Public Funding Payments (1998) 26
Qualifying Threshold for Eligibility for Primary Matching Funds (1998) 28
State Expenditure Limits for Publicly Financed Presidential Primary Campaigns 28
Fundraising Limitation for Publicly Financed Presidential Primary Campaigns 29
Eligibility Requirements for Public Financing 29
Deposit of Repayments 30
Supplemental Funding for Publicly Funded Candidates 30
Applicability of Title VI to Recipients of Payments from the Presidential Election Campaign Fund (revised 1998) 30
Enforcement of Nonwillful Violations 31
Contributions to Presidential Nominees Who Receive Public Funds in the General Election 31

Part V: Miscellaneous 32
Funds and Services from Private Sources 32
Ex Officio Members of Federal Election Commission 32

Part I
Disclosure

Electronic Filing Threshold (revised 1998)
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. Starting 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.

Filing Reports Using Registered or Certified Mail
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.)

In the 1996 election cycle, because of the extra handling required, the Postal Service often delivered reports filed via registered or certified mail to the FEC more than a week after the report's due date. The delayed delivery presented an obstacle to full public disclosure of campaign finances immediately before the the 1996 election. Moreover, there is little likelihood of improvement in future election cycles because of continuing staff reductions within the Postal Service.

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.

Waiver Authority (revised 1998)
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.

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

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

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

This change would also benefit public disclosure of campaign finance activity. Currently, contributions from an individual are itemized only if the individual

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

Monthly Reporting for Congressional Candidates (revised 1998)
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 occuring 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 reqirements. (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.

Commission as Sole Point of Entry for Disclosure Documents (revised 1998)
Section: 2 U.S.C. §432(g)

Recommendation: The Commission recommends that it be the sole point of entry for all disclosure documents filed by federal candidates and political committees. This would affect Senate candidate committees only. 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 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, House campaigns and Presidential campaigns all may opt to file FEC reports electronically. This filing option is unavailable to Senate campaigns, though, because the point of entry for their reports is the Secretary of the Senate.

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, 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, either the States will need to have the technological and financial capability to link up electronically with two different federal offices, or Senate candidates 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)).

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

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

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

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

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

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

PACs Created by Candidates
Section: 2 U.S.C. §441a(a)

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

Explanation: A number of candidates for federal office, including incumbent officeholders, have created PACs in addition to their principal campaign committees. Under current law, such PACs generally are not considered authorized committees. Therefore, they may accept funds from individuals up to the $5,000 limit permitted for unauthorized

committees in a calendar year and may make contributions of up to $5,000 per election to other federal candidates once they achieve multicandidate status. In contrast, authorized committees may not accept more than $1,000 per election from individuals and may not make contributions in excess of $1,000 to other candidates.

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

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

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

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

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

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

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

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

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

Reporting and Recordkeeping of Payments to Persons Providing Goods and Services
Section: 2 U.S.C. §§432(c), 434(b)(5)(A), (6)(A) and (6)(B)

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

Explanation: The Commission has encountered on several occasions the question of just how detailed a committee's reporting of disbursements must be. See, e.g., Advisory Opinion 1983-25, 1 Fed. Election Camp. Fin. Guide (CCH), ¶ 5742 (Dec. 22, 1983) (Presidential candidate's committee not required to disclose the names, addresses, dates or amounts of payments made by a general media consultant retained by the committee); Advisory Opinion 1984-8, 1 Fed. Election Camp. Fin. Guide (CCH), ¶ 5756 (Apr. 20, 1984) (House candidate's committee only required to itemize payments made to the candidate for travel and subsistence, not the payments made by the candidate to the actual providers of services); Financial Control and Compliance Manual for Presidential Primary Election Candidates Receiving Public Financing, Federal Election Commission, pp. 123-130 (1992) (distinguishing committee advances or reimbursements to campaign staff for travel and subsistence from other advances or reimbursements to such staff and requiring itemization of payments made by campaign staff only as to the latter). Congressional intent in the area is not expressly stated, and the Commission believes that statutory clarification would be beneficial. In the area of Presidential public financing, where the Commission is responsible for monitoring whether candidate disbursements are for qualified campaign expenses (see 26 U.S.C. §§9004(c) and 9038(b)(2)), guidance would be particularly useful.

Excluding Political Committees from Protection of the Bankruptcy Code
Section: 2 U.S.C. §433(d)

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

Explanation: In 2 U.S.C. §433(d), the Commission is given authority to establish procedures for "the determination of insolvency" of any political committee, the "orderly liquidation of an insolvent political committee," the "application of its assets for the reduction of outstanding debts," and the "termination of an insolvent political committee after such liquidation..." However, the Bankruptcy Code, 11 U.S.C. §101 *et seq.,* generally grants jurisdiction over such matters to the bankruptcy courts, and at least one bankruptcy court has exercised its jurisdiction under Chapter 11 of the Bankruptcy Code to permit an ongoing political committee to compromise its debts with the intent thereafter to resume its fundraising and contribution and expenditure

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

Fundraising Projects Operated by Unauthorized Committees
Section: 2 U.S.C §432(e)

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

Explanation: Unauthorized committees are not permitted to use the name of federal candidate in their name of in the name of a fundraising project they sponsor unless, in the case of a fundraising project, the name selected clearly indicates opposition to the named candidate(s). The Commission adopted this latter prohibition after a rulemaking where the record clearly established that contributors were sometimes confused or misled into believing that they were contributing to a candidate's authorized committee (when, for example, the project's name was "Citizens for X"), when in fact they were giving to the nonauthorized committee that sponsored the event. This confusion sometimes led to requests for refunds, allegations of coordination, inadequate disclaimers, and inability to monitor contribution limits. While recent revisions to the Commission's rules at 11 CFR 102.14(b)(3) have now reduced this possibility, the Commission believes that contributor awareness might be further enhanced if Congress were to modify the statute by requiring that all checks intended for an unauthorized committee be made payable to the registered name of the unauthorized committee, and by prohibiting unauthorized committees from accepting checks payable to any other name.

Disclaimer Notices
Section: 2 U.S.C. §441d

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

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

First, the statutory language requiring the disclaimer notice refers specifically to "expenditures," possibly leading to an interpretation that the requirement does not apply to disbursements that are exempt

from the definition of "expenditure" such as "exempt activities" conducted by local and state party committees under, for example, 2 U.S.C. §431(9)(B)(viii). Believing that Congress intended such activities to be exempt only from the definitions of "contribution" and "expenditure," the Commission amended its rules at 11 CFR 110.11 to require that covered "exempt activity" communications include a statement of who paid for the communication. However, it would be helpful if Congress were to clarify that all types of communications to the public should carry a disclaimer.

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

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

The Commission considered expanding the general disclaimer requirements in the course of the rulemaking; however, this was not included in the final rules, which rather clarify the scope of some of the subordinate requirements. Most of these problems would be eliminated if the language of 2 U.S.C. §441d were simplified to require a registered committee to display a disclaimer notice whenever it communicated to the public, regardless of the purpose of the communication and the means of preparing and distributing it. The general public would benefit by being aware of who has paid for a particular communication. Moreover, political committees and the Commission would benefit because they would no longer have to examine the content of communications or the manner in which they were disseminated to determine whether a disclaimer was required.

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

Fourth, Congress might want to consider adding disclaimer requirements for so-called "push poll" activity. This term generally refers to phone bank activities or written surveys that seek to influence voters, such as by providing false or misleading information about a candidate. This practice appears to be growing. The Commission has considered requiring disclaimers on push poll communications, but has declined to do so for a number of reasons, including difficulty in defining push polls and the fact that many such polls do not appear to expressly advocate the election or defeat of a clearly identified candidate. If Congress enacted the general disclaimer requirement proposed above, this would encompass push poll communications by political committees. Congress might also wish to require disclosure by other groups engaging in this practice.

Finally, Congress should change the sponsorship identification requirements found in the Federal Communications Act to make them consistent with the disclaimer notice requirements found in the FECA. Under the Communications Act, federal political broadcasts must contain an announcement that they were furnished to the licensee, and by whom. See FCC and FEC Joint Public Notice, FCC 78-419 (June 19, 1978). In contrast, FECA disclaimer notices focus on who authorized and paid for the communication. The Communications Act should be revised to ensure that the additional information required by the FECA is provided without confusion to licensees and political advertisers. In addition, the FECA should be amended to require that the disclaimer appear at the end of all broadcast communications.

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

Recommendation: The current §441h prohibits fraudulent misrepresentation such as speaking, writing or acting on behalf of a candidate or committee on a matter which is damaging to such candidate or committee. It does not, however, prohibit persons from fraudulently soliciting contributions.

The Commission recommends that a provision be added to this section prohibiting persons from fraudulently misrepresenting themselves as representatives of candidates or political parties for the purpose of soliciting contributions which are not forwarded to or used by or on behalf of the candidate or party.

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

Draft Committees

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

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

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

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

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

Explanation: These proposed amendments were prompted by the decisions of the U.S. Court of Appeals for the District of Columbia Circuit in *FEC v. Machinists Non-Partisan Political League* and *FEC v. Citizens for Democratic Alternatives in 1980* and of the U.S. Court of Appeals for the Eleventh Circuit in *FEC v. Florida for Kennedy Committee.* The District of Columbia Circuit held that the Act, as amended in 1979, regulated only the *reporting requirements* of draft committees. The Commission sought review of this decision by the Supreme Court, but the Court declined to hear the case. Similarly, the Eleventh Circuit found that "committees organized to 'draft' a person for federal office" are not "political committees" within the Commission's investigative authority. The Commission believes that the appeals court rulings create a serious imbalance in the election law and the political process because a nonauthorized group organized to support someone who has not yet become a candidate may operate completely outside the strictures of the Federal Election Campaign Act. However, any group organized to support someone who has in fact become a candidate is subject to the Act's registration and reporting requirements and contribution limitations. Therefore, the potential exists for funneling large aggregations of money, both corporate and private, into the federal electoral process

through unlimited contributions made to nonauthorized draft committees that support a person who has not yet become a candidate. These recommendations seek to avert that possibility.

Definition of Political Committee (revised 1998)
Section: 2 U.S.C. §431(4)(A)

Recommendation: The Commission recommends that Congress revise the definition of political committee to incorporate "major purpose" as the test recognized by the courts.

Explanation: Section 431(4)(A) of the Act defines a political committee as a group which raises or spends in excess of $1,000 during a calendar year. In *Buckley v. Valeo*, the Supreme Court, citing First Amendment concerns, ruled that the definition of political committee "need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." Subsequent court rulings have cited the Buckley case in interpreting the statute to include "major purpose" as the test. See *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) and *FEC v. GOPAC, Inc.*, 917 F.Supp. 851 (D.D.C. 1996).

Recently, however, an appeals court has interpreted the wording of the statute narrowly, ruling that the $1,000 threshold is the only applicable factor in determining if an organization is a political committee. See *Akins v. FEC*, No. 92-1864(JLG) (D.D.C. 1994); *aff'd*, 66 F.3d 348 (D.C. Cir. 1995); *rev'd*, 101 F.3d 731 (D.C. Cir. 1996); *cert. granted*, 117 S.Ct. 2451 (1997).

Congress should amend the statute to rectify the conflicting court rulings and to clarify Congressional intent regarding the meaning of "major purpose."

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.

Part II Contributions and Expenditures

Coordination of Election-Related Activities with Candidates and Political Parties (1998)
Section: 2 U.S.C. §§431(17), 441a and 441b(b)(2)

Recommendation: The Commission recommends that Congress revise the statute to include a definition of the term "coordination."

Explanation: The Supreme Court has ruled that "expenditures controlled by or coordinated with the candidate and his campaign....are treated as contributions rather than expenditures under the Act....[The Act's] contribution ceilings...prevent attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions." Further, the Court said, "In view of [the] legislative history and the purposes of the Act, we find that the "authorized or requested" standard of the Act operates to treat all expenditures placed in cooperation with or with the consent of a candidate, his agents, or an authorized committee of the candidate as contributions subject to the limitations [of the Act]." *Buckley v. Valeo*, 424 U.S. 1(1976), pp. 40-41. See also *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986); and *Colorado Republican Federal Campaign Committee v. FEC*, 116 S.Ct. 2309(1996).

Whether an activity is "coordinated" (with a candidate or political committee) has become increasingly significant under the law, in the wake of two cases: *MCFL* and *Colorado Republicans*. These cases have heightened the importance of the distinction between "independent" and "coordinated" activity as a result of having broadened the class of persons who may lawfully engage in "independent" (and therefore unlimited) expenditures. The *MCFL* case created a new class of corporations that could engage in candidate advocacy as long as they conducted the activity independently. In the *Colorado Republicans* case, the Supreme Court rejected the Commission's presumption of coordination between candidates and their party, and created a new category of unlimited party committee expenditures that had to be made independently of the candidate. In both instances, the concept of independence meant that there was no coordination between the candidate and the committee or group making the expenditure. Thus, the definition of "coordination" is key to determining how an activity is regulated under the Act and whether it is subject to the Act's prohibitions or limitations.

The Commission has addressed this issue in several ways through its regulations, and is currently engaged in a rulemaking based on the *Colorado* case. The notice of proposed rulemaking seeks answers to a range of questions, such as what would constitute coordination between the party and the candidate for purposes of the contribution limits and the coordinated party expenditure limits (section 44la(d)). Congress may wish to offer additional guidance on these matters.

Quasi-Corporate Business Organizations (1998)
Section: 2 U.S.C. §441b

Recommendation: The Commission recommends that Congress consider whether the Act's prohibition on corporate contributions and expenditures, at 2 U.S.C. §441b, should be modified to explicitly exempt Subchapter S corporations.

Explanation: The Federal Election Campaign Act prohibits contributions and expenditures by corporations. The prohibition does not extend to unincorporated business entities, such as sole proprietorships, partnerships and, in those states that explicitly categorize limited liability companies as noncorporate entities, limited liability companies. Through regulations and advisory opinions, the Commission has clarified that these entities may make contributions and expenditures in connection with federal elections. In the case of limited liability companies, the Commission determined that LLCs in three states and the District of Columbia should not be considered either partnerships or corporations, but would be considered "any other organization or group of persons" for purposes of the Act. See 11 CFR 110.1(e) and Advisory Opinions 1997-17, 1996-13, 1995-11 and 1984-21. The question has arisen as to whether Subchapter S corporations should be made exempt from the prohibition at Section 441b. Subchapter S corporations are small business corporations that are separate legal entities from their investors and possess all of the characteristics of a corporate entity. However, they are taxed in a fashion similar to partnerships under the

Internal Revenue Code and are controlled by individuals who are personally taxed on their income from the ownership of the corporation. Since partnerships and sole proprietorships may legally make contributions in connection with federal elections, Congress may want to exempt Subchapter S corporations from the prohibitions of Section 441b.

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

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

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

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

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

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

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

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

Explanation: Section 441a(a)(3) now provides that a contribution to a candidate made in a nonelection year counts against the individual donor's limit for the year in which the candidate's election is held. This provision has led to some confusion among contributors. For example, a contributor wishing to support Candidate Smith in an election year contributes to her in November of the year before the election. The contributor assumes that the contribution

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

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.

Issue Advocacy Advertising (revised 1998)
Section: 2 U.S.C. §§431(8)(A)(i) and (9)(A)(i); 441d

Recommendation: The Commission recommends that Congress consider when "issue advocacy" advertising by corporations, labor organizations, political parties, and other organizations is an in-kind contribution because it is coordinated with a candidate or a candidate's campaign.

Explanation: The 1996 election cycle saw an explosion in "issue advocacy" advertising. Such advertising explores an officeholder's, a party's or a candidate's stand on a particular issue, but does not expressly advocate the election or defeat of a clearly identified candidate or party. Courts have ruled that the Act's prohibition on expenditures by corporations and labor organizations does not extend to issue advocacy that does not contain express advocacy. See *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986); *FEC v. Christian Action Network*, 894 F.Supp. 946 (W.D. Va. 1995), *aff'd*, 92 F.3d 1178 (4th Cir. 1996); *Clifton v. FEC*, 927 F.Supp. 493 (D.Me. 1996); 114 F.3d 1309 (1st Cir. 1997) and *Maine Right to Life v. FEC*, 914 F. Supp. 8 (D.Me. 1996), *aff'd*, 98 F.3d 1 (1st Cir. 1996); *cert. denied*, 188 S.Ct. 52 (1997).

The Act defines the term "contribution" to include funds that are spent "for the purpose of influencing an election." Although advertisements devoted solely to issue advocacy do not contain express

advocacy, such advertising may benefit or harm a candidacy and consequently influence the election process, particularly if the communication is coordinated with a candidate or his/her campaign. In a series of cases, the Supreme Court has viewed public communications coordinated with campaigns as in-kind contributions. As contributions, such communications were subject to the Act's limitations and prohibitions, but were not subject to the same level of First Amendment protection as expenditures. See *Buckley v. Valeo*, 424 U.S. 1 (1976); *FEC v. Massachusetts Citizens for Life,* 479 U.S. 238 (1986); and *Colorado Republican Federal Campaign Committee v. FEC,* 116 S.Ct. 2309 (1996).

In accordance with these rulings, Congress should stipulate when coordination of an issue advocacy advertisement with a candidate or campaign would be considered an in-kind contribution. Additionally, Congress should state that coordination of such a public communication with a corporation or a labor organization would be prohibited activity. Such a prohibition would help the Commission address the public's concern about the use of soft money--funds that are raised or spent outside the prohibitions of the Act (such as corporate or union treasury funds)--to influence federal elections.

Candidate's Use of Campaign Funds
Section: 2 U.S.C. §439a

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

Explanation: Under §439a of the Act, excess campaign funds cannot be converted by any person to personal use. The Commission has promulgated final rules on what would constitute "personal use" of excess funds. See 11 CFR 113.1(g). It was unable, however, to decide whether excess campaign funds may be used to pay a salary to the candidate. In the past, some have argued before the Commission that candidate salary payments are legitimate campaign expenditures, while others have felt that such payments constitute a personal use of excess funds prohibited by §439a. Congressional guidance on this issue would be helpful.

Disposition of Excess Campaign Funds
Section: 2 U.S.C. §439a

Recommendation: In those cases where a candidate has largely financed his campaign with personal funds, the Commission recommends that Congress consider limiting the amount of excess campaign funds that the campaign may transfer to a national, state or local committee of any political party to $100,000 per year.

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

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

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

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

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

Coordinated Party Expenditures
Section: 2 U.S.C. §441a(d)

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

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

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

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

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

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

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

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

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

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

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

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

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

Application of Contribution Limitations to Family Members
Section: 2 U.S.C. §441a

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

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

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

Problems have also occurred in situations where the candidate uses assets held jointly with a spouse. When the candidate uses more than one-half of the value of the asset held commonly with the spouse (for example, offering property as collateral for a loan), the amount over one-half represents a contribution from the spouse. If that amount exceeds $1,000, it becomes an excessive contribution from the spouse.

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

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

Lines of Credit and Other Loans Obtained by Candidates
Section: 2 U.S.C. §431(8)(B)(vii)

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

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

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

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

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

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

Nonprofit Corporations and Express Advocacy
Section: 2 U.S.C. §441b

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

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

Since the Court decision and subsequent related decisions (e.g., *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990)), the Commission has concluded a rulemaking proceeding to implement changes necessitated by the current case law. See 60 FR 35293 (July 6, 1995). However, the Commission believes that statutory clarification would also be beneficial.

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

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.

Part III
Enforcement

Fines for Reporting Violations
Section: 2 U.S.C. §437g

Recommendation: The Commission recommends that Congress consider granting the Commission authority to assess fines on a published schedule 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 published 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 under a published fine schedule, subject to a reasonable appeal procedure. Congress could authorize the Commission to promulgate a fine schedule that 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.

Expedited Enforcement Procedures and Injunctive Authority
Section: 2 U.S.C. §437g

Recommendation: The Commission recommends that Congress consider whether the Act should provide for expedited enforcement of complaints filed shortly before an election, permit injunctive relief in certain cases, and allow the Commission to adopt expedited procedures in such instances.[2]

Explanation: The statute now requires that before the Commission proceeds in a compliance matter it must wait 15 days after notifying any potential respondent of alleged violations in order to allow that party time to file a response. Furthermore, the Act mandates extended time periods for conciliation and response to recommendations for probable cause. Under ordinary circumstances such provisions are advisable, but they are detrimental to the political process when complaints are filed immediately before an election. In an effort to avert intentional violations that are committed with the knowledge that sanctions cannot be enforced prior to the election, and to quickly resolve matters for which Commission action is not warranted, Congress should consider granting the Commission some discretion to deal with such situations on a timely basis.

Even when the evidence of a violation has been clear and the potential impact on a campaign has been substantial, without the authority to initiate a civil suit for injunctive relief, the Commission has been unable to act swiftly and effectively in order to prevent a violation. The Commission has felt constrained from seeking immediate judicial action by the requirement of the statute that conciliation be attempted before court action is initiated, and the courts have indicated the Commission has little if any discretion to deviate from the administrative procedures of the statute. *Perot '96 and Natural Law Party v. FEC et al.*, Nos. 96-2196 and 96-2132 (D.D.C. 1996), *aff'd,* 97 F.3d 553, (D.C. Cir. 1996); *RNC v. DNC and FEC*, No. 96-2494 (D.D.C. 1996); *In re Carter-Mondale Reelection Committee, Inc.,* 642 F.2d 538 (D.C. Cir. 1980); *Common Cause v. Schmitt*, 512 F.Supp. 489 (D.D.C. 1980), *aff'd by an equally divided court,* 455 U.S. 129 (1982); *Durkin for U.S. Senate v. FEC,* 2 Fed. Election Camp. Fin. Guide (CCH) ¶9147 (D.N.H. 1980).

If Congress allows for expedited handling of compliance matters, it should authorize the Commission to implement changes in such circumstances to expedite its enforcement procedures. As part of this

[2] Commissioner Elliott filed the following dissent:

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

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

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

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

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

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

effort, Congress should consider whether the Commission should be empowered to promptly initiate a civil suit for injunctive relief in order to preserve the status quo when there is clear and convincing evidence that a substantial violation of the Act is about to occur. Congress should consider whether the Commission should be authorized to initiate such civil action in a United States District Court, under expressly stated criteria, without awaiting expiration of the 15-day period for responding to a complaint or the other administrative steps enumerated in the statute. The person against whom the Commission brings the action would enjoy the procedural protections afforded by the courts.

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

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

2. Failure of the Commission to act expeditiously will result in irreparable harm to a party affected by the potential violation.

3. Expeditious action will not result in undue harm or prejudice to the interests of other persons; and

4. The public interest would be served by expeditious handling of the matter.

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.

Ensuring Independent Authority of FEC in All Litigation
Section: 2 U.S.C. §§437c(f)(4) and 437g

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

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

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

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

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

Explanation: The first recommendation states explicitly that the Commission is authorized to petition the Supreme Court for a writ of *certiorari* in cases relating to the Commission's administration of Title 2 and to independently conduct its Supreme Court litigation under that Title. The Commission explicitly has this authority under Title 26 and had a long-standing practice of doing so under Title 2, until the Supreme Court ruled that Title 2 does not grant the Commission such authority. See *FEC v. NRA Political Victory Fund, cert. dismissed for want of jurisdiction,* 115 S.Ct. 537 (December 6, 1994). Under this ruling, the Commission must now obtain permission from the Solicitor General before seeking *certiorari* in a Title 2 case. The Solicitor General may decline to authorize this action in cases where the Commission believes Supreme Court review is advisable. Even where acting in accordance with the Commission's recommendation to seek *certiorari* in a given case, the Solicitor General would still control the position taken in the case and the arguments made on behalf of the Commission. This transfer of the Commission's Supreme Court litigation authority to the Solicitor General, who is an appointee of and subject to removal by the President, misconstrues Congressional intent in establishing the Commission as a bipartisan and independent civil enforcement agency. Pertinent provisions of Title 2 should be revised to clearly state the Commission's exclusive and independent authority on all aspects of Supreme Court litigation in all cases it has litigated in the lower courts.

With regard to the second of these recommendations, most district courts have rules requiring that all litigants be represented by counsel located within the district. The Commission, which conducts all of its litigation nationwide from its offices in Washington, D.C., is unable to comply with those rules without compromising its independence by engaging the local United States Attorney to assist in representing it in courts outside of Washington, D.C. Although most judges have been willing to waive applying these local counsel rules to the Commission, some have insisted that the Commission obtain local representation. An amendment to the statute specifying that such local counsel rules cannot be applied to the Commission would eliminate this problem.

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

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

the Commission to the United States Marshal's Service would alleviate this problem and assist the Commission in carrying out its mission.

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

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

Explanation: The Commission has noted an upsurge of §441f contribution reimbursement schemes, that may merit heavy criminal sanction. Although there is no prohibition preventing the Department of Justice from initiating criminal FECA prosecutions on its own, the vehicle for the Commission to bring such matters to the Department's attention is found at §437g(a)(5)(C), which provides for referral only after the Commission has found probable cause to believe that a criminal violation of the Act has taken place.[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.

[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.

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

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

Explanation: In 1979, Congress amended the FECA to eliminate the Commission's explicit authority to conduct random audits. The Commission is concerned that this change has weakened its ability to deter abuse of the election law. Random audits can be an effective tool for promoting voluntary compliance with the Act and, at the same time, reassuring the public that committees are complying with the law. Random audits performed by the IRS offer a good model. As a result of random tax audits, most taxpayers try to file accurate returns on time. Tax audits have also helped create the public perception that tax laws are enforced.

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

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

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

Regardless of how random selections were made, it would be essential to include all types of political committees—PACs, party committees and candidate committees—and to ensure an impartial, even-handed selection 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 Standard of "Reason to Believe" Finding
Section: 2 U.S.C. §437g

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

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

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

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

Protection for Those Who File Complaints or Give Testimony
Section: 2 U.S.C. §437g

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

Explanation: The Act requires that the identity of anyone filing a complaint with the Commission be provided to the respondent. In many cases, this may put complainants at risk of reprisals from the respondent, particularly if an employee or union member files a complaint against his or her employer or union. This risk may well deter many people from filing complaints, particularly under §441b. *See, e.g., NLRB v. Robbins Tire & Rubber Company,* 437 U.S. 214, 240 (1978); *Brennan v. Engineered Products, Inc.,* 506 F.2d 299, 302 (8th Cir. 1974); *Texas Industries, Inc. v. NLRB,* 336 F.2d 128, 134 (5th Cir. 1964). In other statutes relating to retaliation for filing complaints, Congress has made it unlawful to discriminate against employees or

other individuals for filing charges or giving testimony under the statute. *See, e.g.*, 29 U.S.C. §158(a)(4) (National Labor Relations Act); 29 U.S.C. §215(3) (Fair Labor Standards Act); 42 U.S.C. §2000e-3(a) (Equal Employment Opportunity Act); 42 U.S.C. §3617 (Fair Housing Act). The Commission recommends that Congress consider including a similar provision in the FECA.

Part IV
Public Financing

Automatic Adjustment of the Presidential Election Checkoff (1998)
Section: 26 U.S.C. §6096

Recommendation: The Commission recommends that Congress help maintain the solvency of the Presidential Election Campaign Fund by indexing the value of the checkoff to inflation. This would provide an automatic adjustment similar to that provided for payouts from the Fund.

Explanation: With regard to funding for the Presidential election of 2000, FEC staff project a shortfall in the Presidential Election Campaign Fund. To help avert future shortfalls, the Commission recommends that Congress correct a fundamental flaw in the public funding law, namely, that the demand for funds is tied to inflation, but the supply (the value of the checkoff) is not. From 1973 to 1993, the checkoff value remained fixed at $1, but during that same time frame, inflation and amendments to the Act increased the payouts more than threefold.

The 1993 Omnibus Budget Reconciliation Act included a provision increasing the taxpayer checkoff value from $1 to $3, as a one-time adjustment for the 300% inflation since enactment. Changing the checkoff value to $3, while obviously beneficial, was, by itself, an incomplete remedy for two reasons. First, it failed to make up for the depletion of the Fund caused by the uncompensated inflationary pressure in the prior presidential elections. Secondly, it created another static figure, which future inflation, however minor, would ultimately erode.

Thus, as a way of restoring solvency to the Fund, the Commission suggests that Congress structure the checkoff mechanism in a manner similar to the automatic adjustment to the spending limits and to the corresponding public subsidies. In order to present the taxpayer with an understandable figure, the law could require that, after adjusting the value for inflation, the figure be rounded up to the nearest quarter dollar. Alternatively, the law could be amended to describe the $3 as a 1993 value that would be automatically and precisely adjusted for inflation since that date.

Priorities for Public Funding Payments (1998)
Section: 26 U.S.C. §§9008(a) and 9037(a)

Recommendation: The Commission recommends that Congress reconsider the priorities for payments made by the Presidential Election Campaign Fund in order to help alleviate the projected shortfall in the Presidential Election Campaign Fund for the year 2000. Additionally, Congress may want to clarify the mechanism for allocating funds between the primary election candidates and the general election nominees to help ensure a steady cash flow to Presidential primary candidates during the early months of the campaign.

Explanation: An FEC staff projection of funding available for the Presidential election of 2000 projects a shortfall in the Presidential Election Campaign Fund. Treasury regulations require that public funds be set aside for the national nominating conventions and the general election candidates prior to distributing matching funds to primary election candidates.

Because of a structural problem in financing the Fund and a declining rate of taxpayers who check off their dollars for the Fund, the Fund is facing a

shortage of cash. As a result, the Commission anticipates that, once funds have been set aside for the conventions and general election in 2000, there will be insufficient funds to make the matching payments to the primary candidates during crucial early primary contests.

If, however, the priorities were rearranged, there would be sufficient funds for the primary candidates. Currently, the convention grant is the first priority among the three elements of the program. Congress may want to reset these priorities so that the convention funding becomes the last priority.

Since 1960, the means by which major parties select their presidential nominee has shifted from the conventions to the state primaries and caucuses. The conventions still serve a valuable role in party building and promoting the nominee, but no longer do the conventions serve as an electoral body. Furthermore, the original intent of the program to have the conventions financed exclusively with public moneys has been eroded by various avenues for private financing. At present, when one includes all elements of convention financing, the majority of the expenses are being covered by private sources. If the role of conventions has changed since enactment of the public funding statute and if private financing is readily available, then it is worth considering whether the convention grant program should continue to outrank the general election grant and the primary matching program.

If convention financing became the third priority, public financing for the conventions could be accomplished on an ex-post, reimbursement basis for audited expenditures. This adjustment will help ensure sufficient funds to pay candidates participating in the primary and general election process.

In addition to shifting the priorities among the three funding recipients, Congress may want to clarify the mechanism of allocating the funds between the primary campaigns and the general election campaigns. More specifically, Congress may wish to clarify that the statute does, in fact, give the Treasury Department latitude to help ensure a steady cash flow to Presidential primary candidates during the early months of the campaign.

Under the statute, the Secretary [of the Treasury] "shall deposit into the matching payment account...the amount available after the Secretary determines that amounts for payments under section 9006(c) [for general election nominees] and for payments under section 9008(b)(3) [for the nominating conventions] are available for such payments." 26 U.S.C. §9037(a). In effect, the Treasury is not allowed to make payments to primary candidates until after it has determined that there are sufficient funds (based on the amount of checkoff dollars) for payments to the general election nominees. Treasury has interpreted this provision to mean that the necessary funds for the general election must actually be in hand and set aside before it can make any payments to the primary candidates. There is, however, another way of interpreting the statute. Under an alternative interpretation, Treasury would calculate, based on 20 years of experience, the amount of new funds that would be received, under the checkoff,[4] during the early months of the election year (February through April). Based on that calculation, Treasury could determine on January 1 of the election year that sufficient funds are "available" for the general election nominees. By doing so, Treasury would be able to free up funds already on hand and make them available for payment to the primary candidates on January 1 of the election year. By the time Treasury had to make payments for the general election (in July or

[4] On their annual income tax forms, individual tax payers may "check off" $3 of their taxes for the Presidential Election Campaign Fund. When individuals check "yes," they do not increase or decrease their tax liability. Equivalent amounts are placed in the Presidential Campaign Fund, which is used to fund Presidential elections through a convention grant, primary matching funds and a general election grant.

August), the fund would be sufficiently replenished with new receipts (from the checkoff) that Treasury could make a full payment to the general election nominees.

Congress might want to make explicit that Treasury could interpret the statute in this way.

Qualifying Threshold for Eligibility for Primary Matching Funds (1998)
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. A candidate need only raise $100,000 in matchable contributions ($5,000 in each of at least 20 states from individual donations of $250 or less). 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 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

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

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.

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.

Supplemental Funding for Publicly Funded Candidates
Section: 26 U.S.C. §§9003 and 9004

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

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

Applicability of Title VI to Recipients of Payments from the Presidential Election Campaign Fund (revised 1998)
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 quirements 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.

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.

Part V
Miscellaneous

Funds and Services from Private Sources
Section: 2 U.S.C. §437c

Recommendation: The Commission recommends that Congress give the Commission authority to accept funds and services from private sources to enable the Commission to provide guidance and conduct research on election administration and campaign finance issues.

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

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.