



FEDERAL ELECTION COMMISSION
WASHINGTON, DC 20463

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MAY 1 2002 2:40

May 1, 2002

MEMORANDUM

AGENDA ITEM

TO: The Commission

For Meeting of: 5-9-02

THROUGH: James A. Pehrkon, Staff Director

FROM: Greg J. Scott, Assistant Staff Director, Information *GS*
George Smaragdakis, Sr. Public Affairs Specialist, Information *GS*

SUBJECT: Draft Legislative Recommendations 2002

Attached for the Commission's consideration are 23 draft legislative recommendations for 2002.

In order to categorize the recommendations according to the Commissioners' preferences, and to identify any that might be deleted, we informally canvassed the Commissioners' offices. This draft document reflects the results of that survey. We have included only those recommendations that elicited support from a majority of the offices voting. Since none of the draft recommendations were identified as Priority by all six Commissioners, this year's proposed recommendations are categorized as either Substantive or Technical.

An attached chart shows the results of our informal survey of Commissioners' preferences.

The Information Division recommends that the Commission approve the attached package of legislative recommendations for transmittal to Congress and the President. Should any recommendation included in this draft fail to garner support from a majority of Commissioners, we recommend that it be removed from the package.

FEC Legislative Recommendations 2002

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1 **Part I: Substantive Recommendations**

2 **Election Administration**

3 **Duties of the Office of Election Administration, Advisory Panel (revised**
4 **2002)**

5 *Section:* 2 U.S.C. §438(a)(10)

6 *Recommendation:* The Commission recommends that Congress amend 2
7 U.S.C. § 438(a)(10), to clarify and expand the responsibilities of the Office of
8 Election Administration (OEA) in the event Congress does not create a new
9 federal agency to oversee such functions. The Commission has been
10 performing similar responsibilities through OEA since its inception in 1975. At a
11 minimum, Congress should direct OEA to periodically update and enhance the
12 voluntary Voting System Standards (VSS) program and establish statutorily an
13 Advisory Panel. The state and local officials who serve on the Commission's
14 Advisory Panel counsel the Commission on the most useful allocation of
15 resources and advise the Commission and election officials on consensus best
16 practices in the administration of elections. A statutorily chartered Advisory Panel
17 specifically would be responsible for advising the Commission on the VSS
18 program, including issues relating to the scope and frequency of updates to the
19 VSS, and the independent testing authority that would use the VSS to test voting
20 equipment. Beyond these legislative revisions, Congress could assign whatever
21 additional responsibilities it deems appropriate.

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

40 The OEA's expertise in voting system standards, voting equipment and election
41 administration practices and issues is well established. Building upon both this

1 expertise and the credibility it has established with state and local election
2 officials, the FEC's Office of Election Administration could immediately and
3 efficiently undertake an expanded role in this field. With no need for start-up
4 time, the OEA, with the assistance of its Advisory Panel, could help fulfill the
5 increased demand for "the compilation of information and the review of
6 procedures with respect to the administration of Federal elections" (2 U.S.C. §
7 438(a)(10)) to directly benefit the conduct of elections in 2002 and 2004.

8 Specifically, the OEA would:

- 9 • Expand the VSS program beyond technical standards to include voluntary
10 management standards and voluntary performance/design standards that will
11 optimize ease of use and minimize voter confusion;
 - 12 • Increase outreach efforts to state and local jurisdictions (and vendors of
13 voting equipment) regarding the VSS;
 - 14 • Work with existing association and membership organizations to provide
15 training and technical assistance opportunities for election officials;
 - 16 • Develop and maintain a current data bank on election voting equipment;
 - 17 • Work with existing associations and membership organizations to provide
18 training and technical assistance opportunities for election officials; and
 - 19 • Facilitate the timely exchange of information among state and local officials
20 on issues relating to election administration;
- 21

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

25 **Disclosure**

26

27 **Electronic Filing of Senate Reports (2002)**

28 *Section:* 2 U.S.C. §§432(g) and 434(a)(11)

29 *Recommendation:* The Commission recommends that Congress require:

- 30 • Mandatory electronic filing, at a date to be determined by Congress, for those
31 persons and political committees filing designations, statements, reports or
32 notifications pertaining only to Senate elections if they have, or have reason
33 to expect to have, aggregate contributions or expenditures in excess of
34 \$50,000 in a calendar year.
 - 35 • Electronically filed designations, statements, reports or notifications
36 pertaining only to Senate elections to be made accessible to the public on the
37 Internet and to be forwarded to the Commission within 24 hours of receipt, if
38 Congress does not change the point of entry for filings pertaining only to
39 Senate elections.
- 40

1 *Explanation:* Public Law 106-58 required, among other things, that the
2 Commission make electronic filing mandatory for political committees and other
3 persons required to file with the Commission who, in a calendar year, have, or
4 have reason to expect to have, total contributions or total expenditures
5 exceeding a threshold set by the Commission. The Commission set this
6 threshold at \$50,000 and, in the Commission's experience, that threshold has
7 worked well. Extending electronic filing to political committees and persons who
8 file designations, statements, reports or notifications pertaining only to Senate
9 elections would standardize the information received, thereby enhancing public
10 disclosure of campaign finance information. Additionally, data from electronically
11 filed reports is received, processed and disseminated more easily and efficiently,
12 resulting in better use of resources.

13
14 Electronic filing (by means other than diskette) is also unaffected by disruptions
15 in the delivery of first class mail, such as those arising from the terrorist attacks
16 on the U.S. Postal Service. As a result of these disruptions, some amendments
17 to Senate campaign reports that were filed via regular mail in late 2001 took
18 months to arrive at the Secretary of the Senate (and the FEC), delaying
19 disclosure. In contrast, amendments electronically filed during the same time
20 period by other types of filers were received and processed in a timely manner.
21

22 **Filing Reports Using Overnight Delivery, Priority or Express Mail (2002)**

23 *Section:* 2 U.S.C. §§434(a)(2)(A)(i), (a)(4)(A)(ii) and (a)(5)
24

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

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

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

40 Overnight delivery, Priority Mail and Express Mail were not widely used when the
41 registered or certified mail provisions were adopted as part of the 1979
42 amendments to the FECA. Since that time, these services have come into wide

1 use and are frequently used by political committees to file their FEC
2 designations, reports and statements. Equating the date of receipt by one of
3 these services with the registered or certified mail date would aid the regulated
4 community in its efforts to comply with the Act's reporting requirements.

5 Overnight delivery, Priority Mail and Express Mail ensure that there is written
6 evidence that a package was mailed and received. Additionally, due to their
7 reliability and speed, the Commission's ability to collect, process and
8 disseminate information would be improved if Congress were to amend 2 U.S.C.
9 §§434(a)(2)(A)(i), (a)(4)(A)(ii) and (a)(5) to include these services.
10

11 **Increasing Registration and Reporting Thresholds for Unauthorized**
12 **Committees, Local Party Committees and Independent Expenditure Filers**
13 **(2002)**

14 *Section:* 2 U.S.C. §§431(4)(A), 431(4)(C) and 434(c)
15

16 *Recommendation:* The Commission recommends that Congress require
17 unauthorized political committees (excluding separate segregated funds, but
18 including nonconnected PACs and state party committees) to register and file
19 reports once they exceed \$5,000 in contributions or expenditures, rather than at
20 the current \$1,000 threshold. Local party committees should be required to
21 register and file reports once they exceed \$5,000 in contributions made or
22 received, or \$5,000 in expenditures or payments made for exempt party
23 activities. Additionally, persons other than political committees should be
24 required to file a statement disclosing their activity when they make independent
25 expenditures in excess of \$1,000, rather than the current \$250 threshold.
26

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

1 **Waiver Authority**

2 *Section: 2 U.S.C. §434*

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

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

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

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

36 In other situations, disclosure would be served if the Commission had the
37 authority to adjust the filing requirements, as is currently allowed for special
38 elections. For example, runoff elections are often scheduled shortly after the
39 primary election. In many instances, the close of books for the runoff pre-
40 election report is the day after the primary—the same day that candidates find
41 out if there is to be a runoff and who will participate. When this occurs, the 12-
42 day pre-election report discloses almost no runoff activity. In such a situation,
43 the Commission should have the authority to adjust the filing requirements to

1 allow for a 7-day pre-election report (as opposed to a 12-day report), which
2 would provide more relevant disclosure to the public.

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

5 **Commission as Sole Point of Entry for Disclosure Documents¹ (revised**
6 **2002)**

7 *Section:* 2 U.S.C. §432(g)

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

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

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

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

¹ This recommendation was also made by Pricewaterhouse Coopers LLP in its *Technology and Performance Audit and Management Review of the Federal Election Commission*, pages 4-37 and 5-2.

1 implemented digital imaging of Senate reports and have developed the capacity
2 of the Secretary's office to accept electronically filed reports. While these
3 measures have undoubtedly improved disclosure, absent mandatory electronic
4 filing for Senate campaigns and Senatorial Campaign Committees, a single point
5 of entry remains desirable. It is important to note as well that, if the Congress
6 adopted mandatory electronic filing for Senate campaigns and Senatorial
7 Campaign Committees, the recommendation to change the point of entry for
8 Senate filers would be rendered moot, except for remaining paper filers.

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

19 The Commission has authority to prepare and publish lists of nonfilers. It is
20 extremely difficult to ascertain who has and who has not filed when reports may
21 have been filed at or are in transit between two different offices. Separate points
22 of entry also make it difficult for the Commission to track responses to
23 compliance notices. Many responses and/or amendments may not be received
24 by the Commission in a timely manner, even though they were sent on time by
25 the candidate or committee. A single point of entry would eliminate this
26 confusion.
27

28 **Reporting Deadlines for Semiannual, Year-End and Monthly Filers**

29 *Section:* 2 U.S.C. §§434(a)(3)(B) and (4)(A) and (B)

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

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

42

1 **Compliance**

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

4 *Section:* 18 U.S.C. §6001(1)

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

8 *Explanation:* Congress has entrusted the Commission with the exclusive
9 jurisdiction for the civil enforcement of the Federal Election Campaign Act of
10 1971, as amended, the Presidential Election Campaign Fund Act and the
11 Presidential Primary Matching Payment Account Act. The Commission is
12 authorized, in any proceeding or investigation, to order testimony to be taken by
13 deposition and to compel testimony and the production of evidence under oath
14 pursuant to subpoena. See 2 U.S.C. §437d(a)(3) and (4). However, in some
15 instances, an individual who has been called to testify or provide other
16 information refuses to do so on the basis of his privilege against self-
17 incrimination. There is currently no mechanism whereby the Commission, with
18 the approval of the Attorney General, can issue an order providing limited
19 criminal immunity for information provided to the Commission. A number of
20 other independent agencies do have access to such a mechanism.

21 Federal immunity grants are controlled by 18 U.S.C. §§6001-6005. 18 U.S.C. §§
22 6002 and 6004(a) provide that if a witness asserts his Fifth Amendment privilege
23 against self-incrimination and refuses to answer questions at any "proceeding
24 before an agency of the United States," the agency may seek approval from the
25 Attorney General to immunize the witness from criminal prosecution for
26 testimony or information provided to the agency (and any information directly or
27 indirectly derived from such testimony or information). If the Attorney General
28 approves the agency's request, the agency may then issue an order immunizing
29 the witness and compelling his testimony. Once that order is issued and
30 communicated to the witness, he cannot continue to refuse to testify in the
31 inquiry. The order issued by the agency only immunizes the witness as to
32 criminal liability, and does not preclude civil enforcement action. The immunity
33 conferred is "use" immunity, not "transactional" immunity. The government also
34 can criminally prosecute the witness for perjury or giving false statements if the
35 witness lies during his immunized testimony, or for otherwise failing to comply
36 with the order.

37 Only "an agency of the United States," as that term is defined in 18 U.S.C.
38 §6001(1), can avail itself of the mechanism described above. The term is
39 currently defined to mean an executive department or military department, and
40 certain other persons or entities, including a large number of enumerated
41 independent federal agencies. The Commission is not one of the enumerated
42 agencies. When the provision was added to title 18 in 1970, the enumerated

1 agencies were those which already had immunity granting power, but additional
2 agencies have been substituted or added since then. Adding the Commission
3 as one of the enumerated agencies in 18 U.S.C. §6001(1) would facilitate its
4 obtaining of information relevant to the effective execution of its enforcement
5 responsibilities.

6 **Public Financing**

8 **Repayment of Primary Election Funds (2002)**

9 *Section:* 26 U.S.C. §9038(b).

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

13 *Explanation:* Section 9007 of the Fund Act (26 U.S.C. §9007), which governs
14 general election financing, provides four bases for determining repayments of
15 general election funds, including amounts incurred for qualified campaign
16 expenses that exceed the candidate's entitlement to public funds. 26 U.S.C.
17 §9007(b)(2). Section 9038(b) of the Matching Payment Act (26 U.S.C.
18 §9038(b)), which governs primary election financing, provides three bases for
19 determining repayments of primary election funds but does not specifically
20 include exceeding the spending limits. Thus, an argument has been made that
21 the Commission is not authorized to require publicly financed primary candidates
22 to make repayments based on expenditures made in excess of the primary
23 spending limits.

24 The Commission has sought repayments of primary election funds based
25 on excess spending since the first publicly-funded presidential election, and so
26 provides in its rules at 11 CFR 9038.2(b)(2)(ii)(A). An argument can be made
27 that "excess" primary expenditures are "non qualified," since that term is limited
28 at 26 U.S.C. §9032(9) to expenses where "neither the incurring nor payment . . .
29 constitutes a violation of any law of the United States," and amounts exceeding
30 the expenditure limitations violate both 26 U.S.C. §9035 and 2 U.S.C.
31 §441a(b)(1). Additional arguments can be fashioned on both sides of this
32 question. Thus, Congress should revise section 9038(b) to specifically state
33 whether repayments must be made by publicly funded primary candidates who
34 have made expenditures that exceed the spending limits.

35 **Averting Impending Shortfall in Presidential Public Funding Program** 36 **(revised 2002)**

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

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

1 *Explanation:* The Presidential public funding program experienced a shortfall for
2 the election of 2000 because participation in the check-off program is declining
3 and the checkoff is not indexed to inflation while payouts are indexed. This
4 shortfall impacted foremost upon primary candidates. In January 2000, when
5 the U.S. Treasury made its first payment for the 2000 election, it was only able to
6 provide approximately 50 percent of the public funds that qualified Presidential
7 candidates were entitled to receive. Specifically, only \$16.9 million was available
8 for distribution to qualified primary candidates on January 1, 2000, after the
9 Treasury paid the convention grants and set aside the general election grants.²
10 However, the entitlement (i.e., the amount that the qualified candidates were
11 entitled to receive) on that date was \$34 million, twice as much as the amount of
12 available public funds. By January 2001, total payments made to primary
13 candidates was in excess of \$61 million.

14 Moreover, preliminary FEC staff projections indicate a significant shortfall exist in
15 the 2004 election cycle. While these are unofficial projections and are subject to
16 change, FEC staff project the balance in the Presidential Election Campaign
17 Fund in January 2004 to be approximately \$4.6 million while demand is
18 estimated to be between \$23.9 and 36.2 million. Based on those estimates,
19 candidates will receive approximately 13 to 19 cents on the dollar with the first
20 payment. Estimates show that the shortfall will extend until May 2004 and may
21 last as long as April 2005. The Commission recommends that Congress take
22 appropriate action to eliminate the shortfall.

23
24 The Commission recommends several specific legislative changes. First, the
25 statute should be revised so that Treasury will be able to rely on *expected*
26 available proceeds from the voluntary checkoff, rather than relying solely on
27 actual proceeds *on hand* as of the dates of the matching fund payments. Since
28 large infusions of voluntary checkoff proceeds predictably occur in the first few
29 months of the election year, including such estimated proceeds in the calculation
30 of funds available for matching fund payouts would virtually eliminate the shortfall
31 in the near future. Because estimates for expected payouts are an acceptable
32 part of the calculations (e.g., setting aside sufficient funds to cover general
33 election payouts), estimates of the checkoff proceeds could be incorporated, as
34 well. A very simple change in the wording of 26 U.S.C. §9037 would accomplish
35 this: changing "are available" to "will be available." Expected payments should
36 be based on sound statistical methods to produce a cautious, conservative
37 estimate of the funds that will be available to cover convention and general
38 election payments.

39
40 A second revision in the statute would further the long-term stability of the
41 presidential public funding program: indexing the voluntary checkoff amount to
42 inflation. Although the checkoff amount was increased from \$1 to \$3 beginning
43 with 1993 returns, there was no indexing built in to account for further inflation

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

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

3
4 Third, as this is a congressionally approved program to improve the election
5 process, the Commission should be authorized and funded to undertake an
6 educational program promoting the checkoff. The Commission, working with IRS
7 could identify several means for explaining the purpose of the program and the
8 benefits of checking "yes" to assure adequate public funding.

9 **Qualifying Threshold for Eligibility for Primary Matching Funds**

10 *Section:* 26 U.S.C. §9033

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

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

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

32 **State Expenditure Limits for Publicly Financed Presidential Primary
33 Campaigns (revised 2002)**

34 *Section:* 2 U.S.C. §441a(b)(1)(A)

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

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

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

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

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

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

1 **Part II: Technical Recommendations**

2 **Disclosure**

3 **Election Cycle Reporting of Operating Expenditures and Other**
4 **Disbursements**

5 *Section:* 2 U.S.C. §434(b)(5) and (6)
6

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

19 *Explanation:* In 1999, Congress amended the statute at section 434(b) to
20 require authorized candidate committees to report on an election-cycle basis,
21 rather than on a calendar-year basis, with respect to reporting periods beginning
22 after December 31, 2000. Pub. Law No. 106-58, Section 641. However, the
23 1999 amendment did not include section 434(b)(5)(A), which states that
24 operating expenditures must be itemized on a calendar-year basis and details
25 the information required in that itemization. The result is that, under section
26 434(b)(4), operating expenditures will be required to be aggregated on an
27 election-cycle basis, while under section 434(b)(5), they technically are still
28 required to be itemized on a calendar-year basis.

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

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

1 434(b)(6)(A) only applies to authorized committees.

2 **Point of Entry for Pseudonym Lists**

3 *Section:* 2 U.S.C. §438(a)(4)

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

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

13 Public Law No. 104-79 (December 28, 1995) changed the point of entry for
14 House candidate reports from the Clerk of the House to the FEC, effective
15 December 31, 1995. As a result, House candidates must now file pseudonym
16 lists with the FEC, rather than the Clerk of the House. To establish consistency
17 within the Act, the Commission recommends that Congress amend section
18 438(a)(4) to delete the reference to the Clerk of the House as a point of entry for
19 the filing of pseudonym lists.

20 **CONTRIBUTIONS AND EXPENDITURES**

21 **Republication of Campaign-Prepared Materials (2002)**

22 *Section:* 2 U.S.C. §441a(a)(7)(B)

23

24 *Recommendation:* The Commission recommends that Congress amend section
25 441a(a)(7) to clarify whether payments to disseminate, distribute or republish
26 materials that were originally prepared by a candidate or his authorized
27 committee or agents are considered to be contributions under the Act.

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

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

1 clarification would be helpful.

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

8 **Certification of Voting Age Population Figures and Cost-of-Living** 9 **Adjustment**

10 *Section:* 2 U.S.C. §441a(c) and (e)

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

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

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

31 **Honorarium**

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

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

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

1 effective date of the law.

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

6 **Acceptance of Cash Contributions**

7 *Section:* 2 U.S.C. §441g

8 *Recommendation:* The Commission recommends that Congress modify the
9 statute to make the treatment of 2 U.S.C. §441g, concerning cash contributions,
10 consistent with other provisions of the Act. As currently drafted, 2 U.S.C. §441g
11 prohibits only the *making* of cash contributions which, in the aggregate, exceed
12 \$100 per candidate, per election. It does not address the issue of *accepting* cash
13 contributions. Moreover, the current statutory language does not plainly prohibit
14 cash contributions in excess of \$100 to political committees other than
15 authorized committees of a candidate.

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

21 While the Commission, in its regulations at 11 CFR 110.4(c)(2), has included a
22 provision requiring a committee receiving such a cash contribution to promptly
23 return the excess over \$100, the statute does not explicitly make acceptance of
24 these cash contributions a violation. The other sections of the Act dealing with
25 prohibited contributions (i.e., §§ 441b on corporate and labor union contributions,
26 441c on contributions by government contractors, 441e on contributions by
27 foreign nationals, and 441f on contributions in the name of another) all prohibit
28 both the making and accepting of such contributions.

29 Secondly, the statutory text seems to suggest that the prohibition contained in
30 §441g applies only to those contributions given to candidate committees. This
31 language is at apparent odds with the Commission's understanding of the
32 Congressional purpose to prohibit any cash contributions which exceed \$100 in
33 federal elections.

34 **Compliance**

35 **Modifying Terminology of "Reason to Believe" Finding**

36 *Section:* 2 U.S.C. §437g

37 *Recommendation:* The Commission recommends that Congress modify the
38 language pertaining to "reason to believe," contained at 2 U.S.C. §437g, so as to
39 allow the Commission to open an investigation with a sworn complaint, or after

1 obtaining evidence in the normal course of its supervisory responsibilities.
2 Essentially, this would change the "reason to believe" terminology to "reason to
3 open an investigation."

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

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

1 **Public Financing**

2 **Fundraising Limitation for Publicly Financed Presidential Primary**
3 **Campaigns**

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

5 *Recommendation:* The Commission recommends that the separate fundraising
6 limitation provided to publicly financed Presidential primary campaigns be
7 combined with the overall limit. Thus, instead of a candidate's having a \$10
8 million (plus COLA³) limit for campaign expenditures and a \$2 million (plus
9 COLA) limit for fundraising (20 percent of overall limit), each candidate would
10 have one \$12 million (plus COLA) limit for all campaign expenditures.

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

28 **Enforcement of Nonwillful Violations**

29 *Section:* 26 U.S.C. §§9012 and 9042

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

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

1 *Explanation:* Section 9012 of the Presidential Election Campaign Fund Act and
2 §9042 of the Presidential Primary Matching Payment Account Act provide only
3 for "criminal penalties" for knowing and willful violations of the spending and
4 contribution provisions and the failure of publicly funded candidates to furnish all
5 records requested by the Commission. The lack of a specific reference to
6 nonwillful violations of these provisions has raised questions regarding the
7 Commission's ability to enforce these provisions through the civil enforcement
8 process.

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

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

23 Alternatively, Congress may wish to clarify whether the unlawful use of payments
24 by a convention committee under section 9012(c)(2) is a criminal violation. This
25 is unclear because the language of section 9012(c)(2) does not contemplate a
26 "knowing and willful" violation. This contrasts with other violations of section
27 9012. Also, as noted above, the penalties specified in paragraph (c)(3) apply to
28 other violations of the section, but not to violations by convention committees.

29 **Deposit of Repayments**

30 *Section:* 26 U.S.C. §9007(d)

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

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

39

1 **Miscellaneous**

2 **Ex Officio Members of Federal Election Commission**

3 *Section:* 2 U.S.C. §437c(a)(1)

4 *Recommendation:* The Commission recommends that Congress amend section
5 437c by removing the Secretary of the Senate, the Clerk of the House, and their
6 designees from the list of the members of the Federal Election Commission.

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

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

LEGISLATIVE RECOMMENDATIONS 2002 STATUS SURVEY RESULTS

RECOMMENDATION	P ¹	S ²	T ³	D ⁴	NV ⁵
Electronic Filing of Senate Reports (<i>Suggested New Recommendation</i>)	4	2			
Enhancing Disclosure by Including Violations of Incomplete Contributor Information in the Administrative Fine Program	2			3	1
Filing Reports Using Overnight Delivery, Priority Mail and Express Mail (<i>Suggested New Recommendation</i>)	4	1	1		
Increasing Registration and Reporting Thresholds (<i>Suggested New Recommendation</i>)	3	1		2	
Release of Investigatory Files at the Close of an Investigation (<i>Suggested New Recommendation</i>)	2			3	1
Repayment of Primary Election Funds (<i>Suggested New Recommendation</i>)	<i>1</i>	3	2		
Republication of Campaign-Prepared Materials (<i>Suggested New Recommendation</i>)	<i>1</i>		3	2	
Duties of the Office of Election Administration (<i>Revised</i>)	4			2	
Waiver Authority	2	2		2	
Commission as Sole Point of Entry for Disclosure Documents (<i>Revised</i>)	4	1		1	

¹ Priority. Note that Vice Chairman Sandstrom is not ready to distinguish between top priority and second priority items at this time. Therefore his votes in this column, which are italicized, are used only to indicate his preference for these items.

² Substantive

³ Technical

⁴ Deleted

⁵ No Vote

RECOMMENDATION	P	S	T	D	NV
Draft Committees				5	1
Registration of Candidates and Principal Campaign Committees	1	1		4	
Reporting Deadlines for Semiannual, Year-End and Monthly Filers	1	2	2	1	
Election Period Limitations for Contributions to Candidates	1	2		3	
Distinguishing Official Travel from Campaign Travel			1	5	
Broader Prohibition Against Force and Reprisals		1		4	1

RECOMENDATION	P	S	T	D	NV
Ensuring Independent Authority of FEC in Supreme Court Litigation	2	1		3	
Addition of Commission to the List of Agencies Authorized to Issue Immunity Orders According to the Provisions of Title 18	3	3			
Referral of Criminal Violations		3		3	
Audits for Cause	1	1		4	
Averting Impending Shortfall in Presidential Public Funding Program (<i>Revised</i>)	3	3			
Qualifying Threshold for Eligibility for Primary Matching Funds	1	2	1	2	
State Expenditure Limits for Publicly Financed Presidential Primary Campaigns (<i>Revised</i>)	2	2	1	1	
Eligibility for Public Funding Following Violations of the Public Finance Laws	1	1	1	3	

RECOMMENDATION	P	S	T	D	NV
Election Cycle Reporting of Operating Expenditures and Other Disbursement			5	1	
Point of Entry for Pseudonym Lists			5	1	
Certification of Voting Age Population Figures and Cost-of-Living Adjustment			5	1	
Honorarium			5	1	
Acceptance of Cash Contributions			4	2	
Modifying Terminology of "Reason to Believe" Finding			4	1	1
Fundraising Limitation for Publicly Financed Presidential Primary Campaigns			4	2	
Enforcement of Nonwillful Violations			5	1	
Deposit of Repayments			5	1	
Contributions to Presidential Nominees Who Receive Public Funds in the General Election			3	3	
Ex Officio Members of Federal Election Commission			5	1	

