

**Federal  
Election  
Commission**

**Annual Report 1997**



# Federal Election Commission

## Annual Report 1997



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Scott E. Thomas, Vice Chairman  
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# Introduction

Alleged campaign finance violations from the 1996 elections made headlines during 1997. Congress held hearings, the Justice Department conducted criminal investigations and the Federal Election Commission grappled with an unprecedented number of civil enforcement cases.

The volume and complexity of the FEC's cases—combined with record-setting campaign spending in the 1996 election—strained the agency's limited resources. In response, the Commission requested supplemental funding from Congress and additional investigative support from the Department of Justice. However, Congress rejected the agency's funding request and, at year's end, the Justice Department had not detailed any of its staff to the FEC. As a result, the Commission had more enforcement cases awaiting assignment than under investigation, throughout 1997.

Though not a replacement for a much-needed increase in staff, technological improvements helped the Commission handle its burgeoning workload. During 1997, the agency upgraded its PC hardware and software; expanded access to its digital imaging system; unveiled a pool of modems, CD-ROMs and a shared computer faxing system; developed a groupware (e.g., intranet) strategy; and undertook case management and legal research initiatives to benefit the agency's legal staff. The Commission also implemented a voluntary electronic filing program and developed filing software to help committees submit reports in electronic form. Forty-three committees chose to file their reports electronically during 1997. Late in the year, the Commission began to make committee reports available on its internet web site.

The Commission's audit staff also benefited from technological improvements. Field auditors used laptop computers to access the FEC's in-house computer network and to conduct sampling and computerized analysis of data. This technology, along with streamlined audit procedures and experienced staff, helped the Commission complete more than half of the statutorily-mandated audits of committees that received public funding in connection with the 1996 Presidential elections.

In the midst of all this post-election activity, Congress enacted term limits for FEC Commissioners.

Those appointed after December 31, 1997—except those the President nominated or announced an intent to nominate prior to December 31, 1997—will be eligible for only one term in office. Even as Congress imposed these limits, one seat on the Commission remained vacant for a second consecutive year. As a result, every Commission action during 1997 required the near-unanimous consent of 4 out of the 5 sitting Commissioners.

The material that follows details the Commission's 1997 activities. Additional information concerning most matters may be found in the 1997 issues of the FEC newsletter, the *Record*.

# Chapter One

## Keeping the Public Informed

The FEC's disclosure and educational outreach programs work hand-in-hand to help educate the electorate and promote compliance with the campaign finance law. Public knowledge about who contributes and how candidates and committees spend their money helps to create an informed electorate. At the same time, public scrutiny of campaign finance records encourages the regulated community to comply with the law, while educational outreach to the regulated community helps promote compliance by fostering understanding of the law.

As detailed below, the Commission's continuing investment in computer technology paid substantial dividends in the disclosure and educational outreach programs during 1997.

### Public Disclosure

Public disclosure of campaign finance information is a fundamental responsibility of the Commission. To fulfill that obligation, the agency receives and processes committees' reports, reviews them for accuracy and compliance with the law, enters the data into the FEC's computer database and makes the reports and database available to the public.

### Data Imaging and Electronic Filing

The disclosure program continued to reap the benefits of improved computer technology. Using the FEC's computerized digital imaging system, the public could access digitized copies of the actual reports filed by House candidates, PACs and party committees. (Senate candidates continue to file with the Secretary of the Senate, so their reports are not available on the digital imaging system.<sup>1</sup>) Based on a Congressional directive included in its FY 1998 budget, the Commission began making imaged data available on the World Wide Web in December 1997.

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<sup>1</sup> Based on statutory amendments enacted in 1997, the Democratic Senatorial Campaign Committee and the National Republican Senatorial Committee also may file their reports with the Secretary of the Senate, rather than with the FEC.

In January 1997, the Commission launched an interim electronic filing program that allowed committees to file reports via computer disk. To assist electronic filers, the agency created and distributed free filing software—FECFile—to more than 200 interested users. By year's end, the agency had received more than 30 electronically-filed reports.

The second phase of the electronic filing program is scheduled to go on-line in February 1998. At that time, filers will be able to submit reports to the Commission by modem as well as on computer disk. Once reports are received, they will be validated and posted on the internet.

### Review of Reports

The Commission's reports analysts review all reports to ensure that the public record provides a full and accurate portrayal of campaign finance activity. If an analyst finds that a report contains errors or suggests violations of the law, he/she sends the reporting committee a request for additional information. The committee treasurer can then make additions or corrections to the report. Apparent violations, however, may lead to an enforcement action.

Faced with record-setting amounts of financial activity from the 1996 elections, reports analysts reviewed more campaign finance reports than ever, during 1997. The Commission's digital imaging system and the analysts' level of experience contributed to the record-setting review. Staff used the imaging system to view reports at their own desks and applied refined computer programming tools to help them identify possible compliance problems more quickly.

### Processing Campaign Finance Data

The Commission codes and enters information from campaign finance reports into the agency's disclosure database, which contains data from 1977 to the present.

Information is coded so that committees are identified consistently throughout the database. Consistency is crucial to maintaining records of which committees received contributions from individuals and which PACs made contributions to a specific candidate. For example, if a PAC's report states that it

made a contribution to the Smith for Congress committee with a Washington address, staff must determine which candidate committee, among those with the same name, the report referred to.

### CHART 1-1 Size of the Detailed Database

Election Cycle	No. of Detailed Entries*
1986	526,000
1987	262,000
1988	698,000
1989	308,000†
1990	767,000
1991	444,000‡
1992	1,400,000
1993	472,000
1994	1,364,000
1995	570,000
1996	1,887,160
1997	619,170

\* Numbers are cumulative for each two-year election cycle.

† The entry threshold for individual contributions was dropped from \$500 to \$200 in 1989.

‡ Nonfederal account data was first entered in 1991.

#### Public Access to Campaign Data

Visitors to [www.fec.gov](http://www.fec.gov) could examine digital images of campaign finance reports, plus a variety of statistical summaries. They could also download data to their own computers via the Commission's FTP site. The FEC home page continued to attract numerous visitors during 1997.

The Commission's disclosure database, which contains millions of transactions, enabled researchers to select information in a flexible way. For example, the database can instantly produce a profile of a committee's financial activity for each election cycle. As another example, researchers can customize their searches for information on contributions by using a variety of elements (e.g., donor's name, recipient's name, date, amount or geographic location).

During 1997, visitors to the Public Records Office used computer terminals to access the disclosure database and more than 25 different campaign fi-

nance indices that organize the data in different ways. Those outside Washington, DC, could order such information using the Commission's toll-free number.

Visitors could also inspect images of committee reports on the electronic imaging system installed on the personal computers in the Public Records Office. Electronic images of reports filed by House and Presidential candidates, party committees and PACs were available for viewing.

The Public Records Office continued to make available microfilmed copies of all campaign finance reports, paper copies of reports from Congressional candidates, and Commission documents such as press releases, audit reports, closed enforcement cases (MURs) and agenda documents.

The FEC also continued to offer on-line computer access to the disclosure database to 1,328 subscribers to the twelve-year-old Direct Access Program (DAP) for a small fee. Subscribers included journalists, political scientists, campaign workers and other interested citizens. DAP saved time and money for the Commission because providing information on line is more efficient than processing phone orders for data. During 1997, the Commission's State Access Program gave 34 state election offices free access to the database. In return, state offices helped the Commission track candidate committees that had failed to file copies of their FEC reports with the appropriate state, as required under federal law.

#### Educational Outreach

The Commission continued to promote voluntary compliance with the law by educating committees about the law's requirements.

#### Home Page ([www.fec.gov](http://www.fec.gov))

In its second year of operation, the Commission's web site offered visitors a variety of resources. In addition to reviewing the statistical data described above, visitors could access brochures on a variety of topics; read agency press releases; review national election results and voter registration and turnout statistics; look up reporting dates; and download reporting forms, copies of the *Record* newsletter, the

*Campaign Guides* for PACs, parties and candidates and other agency publications. The *Record* was placed on the Commission's home page the same day that copy was sent to the printer. This meant that the public could access the newsletter a full week before the printed copy was available.

### **Telephone Assistance**

A committee's first contact with the Commission is often a telephone call to the agency's toll-free information hotline. In answering questions about the law, staff will research relevant advisory opinions and litigation, as needed. Callers receive, at no charge, FEC documents, publications and forms. In 1997, the Information Division responded to 15,662 callers with compliance questions.

### **Faxline and Computer Faxing**

The Commission expanded its faxing capability in 1997 by introducing a computer faxing system that permits staff to fax documents directly from their desktop PCs. This innovation—combined with the agency's existing automated Faxline—made it possible for the public to obtain publications or other documents quickly and easily.

During 1997, 4,637 callers sought information from the 24-hour Faxline and received 6,351 documents.

### **Reporting Assistance**

During 1997, reports analysts, assigned to review committee reports, were also available to answer complex reporting and compliance-related questions from committees calling on the toll-free line.

The Commission continued to encourage timely compliance with the law by mailing committees reminders of upcoming reporting deadlines three weeks before the due dates. The *Record*, the Commission's newsletter, and the FEC's web site also listed reporting schedules and requirements.

### **Conferences**

In preparation for the 1998 elections, the agency launched a full program of conferences in 1997 to help candidates and committees understand and comply with the law. The Commission conducted

regional conferences in Seattle and Atlanta where participants attended workshops for candidate committees, party committees and corporate and labor PACs and their sponsoring organizations.

The agency also hosted two Washington, DC, conferences. These conferences were tailored to meet the needs of specific audiences. The first was geared toward corporations and labor organizations, and the second was designed for membership organizations and trade associations.<sup>2</sup>

Both the regional conferences and those held in Washington featured new workshops on the Commission's electronic filing program and on the impact recent court decisions have had on the federal election law.

After a budget-imposed, three-year hiatus, the agency resumed its informal outreach program whereby one or two staff members met with candidates, parties and PACs in different cities. During 1997, staff assisted committees in Cleveland, Trenton, Des Moines, Phoenix and Madison.

### **Tours and Visits**

Visitors to the FEC during 1997, including 29 student groups and 34 foreign delegations, listened to presentations about the campaign finance law and, in some cases, toured the agency's Public Records office.

### **Media Assistance**

The Commission's Press Office continued to field questions from the press and navigate reporters through the FEC's vast pool of information. Press Office staff responded to 18,444 calls and visits from media representatives and prepared 103 news releases. These releases alerted reporters to new campaign finance data, illustrating the statistics in tables and graphs.

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<sup>2</sup> The Commission also planned to conduct a DC conference for candidate committees in February 1998, a regional conference in Denver in March 1998 and a DC conference for nonconnected PACs in April 1998.

## Publications

During 1997, the Commission published several documents to help committees, the press and the general public understand the law and find information about campaign finance. All of the new publications were available both in print and on the FEC web site.

In December, the Commission released a new edition of its *Campaign Guide for Corporations and Labor Organizations* and two new brochures—“Partnerships” and “Special Notices on Political Ads and Solicitations.” In addition to explaining the law in clear English and illustrating how to fill out reports, the *Guide* incorporates recent advisory opinions by the Commission and decisions by the courts. One of the brochures, “Partnerships,” represents the Commission’s first attempt at focusing on the needs of partnerships. Pulling together material from the statute, FEC regulations and advisory opinions, the brochure explains the rules that are unique to partnerships. The “Special Notices” brochure summarizes the rules requiring notices on public communications.

The *Combined Federal/State Disclosure Directory 1997* directs researchers to federal and state offices that provide information on campaign finance, candidates’ personal finances, lobbying, corporate registration and election results. The Commission also published a new edition of *Pacronyms*, an alphabetical list of acronyms, abbreviations, common names and locations of federal PACs. The publication lists PACs’ connected, sponsoring or affiliated organizations and helps researchers identify PACs and locate their reports. Both the disclosure directory and PAC listing were available not only in print and on the web, but also on computer disks formatted for popular hardware and software.

The agency also published *Federal Elections 96*, the eighth edition of a biennial series designed to provide an historical record of federal election results. The compilation lists the primary, run-off and general election results for the 1996 Presidential and congressional elections. For each state, the publication lists the names of candidates on the ballot, write-in candidates, party affiliations and the number and percentage of votes each candidate received as provided by state election officials

The Commission also continued to provide 12,497 free subscriptions to its award-winning monthly newsletter, the *Record*. The newsletter summarizes recent advisory opinions, litigation, changes in regulations, audit reports and compliance cases. It also includes graphs and charts on campaign finance statistics.

## Office of Election Administration

During 1997, the FEC’s Office of Election Administration (OEA) completed its second report to Congress on the implementation of the National Voter Registration Act (NVRA), better known as the “Motor Voter” law. The report, entitled “The Impact of the National Voter Registration Act of 1993 on the Administration of Elections for Federal Office, 1994-1996,” contained an analysis of the NVRA’s impact and detailed information provided by states that have implemented the law. It also listed several recommendations for improving the administration of the NVRA.

Another 1997 OEA publication—*Developing a Statewide Voter Registration Database*—detailed how state election administrators could assist and support local election offices by developing an integrated statewide voter registration database. The OEA also released new editions of two series—*Election Case Law ‘97* and the *Journal of Election Administration*, Vol. 18. The case law update summarized court decisions on selected election administration topics through December 1996. The new volume of the *Journal* examined systems of representation, including Illinois’s experience with cumulative voting and a discussion of how alternative systems of representation can be used as voting rights remedies.

Finally, during 1997, the OEA began to update its standards for computerized vote tally systems. The OEA had addressed voting systems standards in its 1990 publication, *Performance and Test Standards for Punchcard, Marksense and Direct Recording Electronic Voting Systems*. In it, the OEA had suggested performance and test standards that states and voting system vendors could use to improve the accuracy,

integrity and reliability of computer-based voting systems. As a first step toward updating the voting systems standards, the OEA contracted with Management Technologies Corp. to do a requirements analysis. The analysis will address:

- The future role of the FEC, other federal agencies, state election officials and others;
- Options for long term funding of the voting systems standards program;
- Methods and alternatives to account for rapidly changing technology; and
- The costs and time required to accomplish various alternatives.

The requirements analysis should be completed in June 1998.

## Chapter Two Interpreting and Enforcing the Law

One of the ways the Commission promotes voluntary compliance with the campaign finance law is by clarifying the law through regulations and advisory opinions. FEC regulations flesh out the statute, often incorporating interpretations reached in previous advisory opinions. Advisory opinions, in turn, clarify how the statute and regulations apply to real-life situations.

The agency's enforcement actions also promote compliance by correcting past violations and demonstrating that violations can result in civil penalties and remedial action.

### Regulations

The FEC may initiate a rulemaking on its own or in response to a rulemaking petition. During 1997, the Commission received five such petitions on four topics. The rulemaking process generally begins when the Commission votes to seek public comment on proposed rules by publishing the rules in the Federal Register. During 1997, for the first time, the Commission also published rulemaking notices on its web site and invited comments via electronic mail. The agency may invite those making written comments to testify at a public hearing. The Commission considers all comments when deliberating on the final rules in open meetings. Once approved, the text of the final regulations and the explanation and justification are published in the Federal Register and sent to the U.S. House and Senate. The Commission publishes a notice of effective date after the final rules have been before Congress for 30 legislative days.

#### Rulemakings Completed in 1997

The following new and revised rules took effect in 1997:

- New regulations establishing a voluntary system of electronic filing for political committee reports took effect April 28. (See page 3.)
- Revised rules changing the "best efforts" statement that accompanies contribution solicitations and requiring PACs to disclose contributor information in the possession of their connected organizations took effect July 2. (See page 30.)

- New regulations that increased by 10 percent the amount of civil penalties that can be assessed in FEC enforcement matters took effect April 29. (See page 11.)

#### Other Rulemakings in Process

In addition to completing the above rules, the Commission also:

- Approved a Notice of Proposed Rulemaking (NPRM) suggesting changes to its regulatory definition of "member," in response to a petition for rulemaking and based on the court of appeals decision in *Chamber of Commerce v. FEC* (see page 28);
- Published an NPRM and held a public hearing on regulations to implement the Supreme Court's *Colorado Republicans v. FEC* opinion on independent expenditures by party committees (see page 25);
- Published an NPRM regarding recordkeeping and reporting requirements, and proposed revisions to Forms 3 and 3X;
- Published a Notice of Availability on two petitions that asked the FEC to curb or ban soft money (see page 24);
- Published a Notice of Availability on a petition that urged the FEC to revise its "express advocacy" definition to conform to the appeals court decision in *MRLC v. FEC* (see page 16);
- Held in abeyance a rulemaking on the major-purpose test, pending Supreme Court review of the appeals court decision in *FEC v. Akins* (see page 24); and
- Published a Notice of Availability on a petition that urged the FEC to conform its rules on "qualified non-profit corporations" to the decision in *MCCL v. FEC* (see page 15).

### Advisory Opinions

The Commission responds to questions about how the law applies to specific situations by issuing advisory opinions. When the Commission receives a valid request for an advisory opinion, it generally has 60 days to respond. The Office of General Counsel prepares a draft opinion, which the Commissioners dis-

cuss and vote upon during an open meeting. A draft opinion must receive at least four favorable votes to be approved.

The Commission issued 26 advisory opinions in 1997. Of that number, five addressed the status of party committees, four addressed application of personal use rules and two addressed limited liability companies. These and other 1997 advisory opinions are discussed in Chapter Three, “Legal Issues.”

## Enforcement

Allegations that the Federal Election Campaign Act had been violated on an unprecedented scale during the 1996 election cycle prompted the Commission to request additional funding for enforcement in 1997. (See Chapter 4.) The agency also asked for investigative assistance from the Department of Justice, as authorized under 2 U.S.C. §437c(f)(3).

Financial activity in the 1996 election cycle surged to more than \$2.7 billion, and the Commission received a third more complaints in the six months preceding the 1996 election than during the comparable period for the 1994 election cycle. Newspapers chronicled alleged campaign finance abuses from the '96 elections almost daily. It was alleged that committees raised funds from nonresident foreign nationals; used soft money to circumvent the limits on spending related to publicly funded presidential candidates; and made purportedly independent disbursements related to federal elections in coordination with candidates; and that labor and business interests made massive, but undisclosed, expenditures on advertisements that either contained an express advocacy message or involved coordination with a candidate.<sup>1</sup>

### The Enforcement Process

Possible violations of the law are usually brought to the Commission's attention in three ways. The first is the agency's monitoring process—potential violations are discovered through a review of a committee's

reports or through a Commission audit. The second is the complaint process—anyone may file a complaint, which alleges violations and explains the basis for the allegations. The third is the referral process—possible violations discovered by other agencies are referred to the Commission.

Each of these can lead to the opening of a Matter Under Review (MUR). Internally generated cases include those discovered through audits and reviews of reports and those referred to the Commission by other government agencies. Externally generated cases based on formal, written complaints receive MUR numbers once the Office of General Counsel determines they satisfy specific criteria for a proper complaint.

The General Counsel recommends whether there is “reason to believe” the respondents have committed a violation. If the Commission finds there is “reason to believe,” it sends letters of notification to the respondents and investigates the matter. The Commission has authority to subpoena information and can ask a federal court to enforce a subpoena. At the end of an investigation, the General Counsel prepares a brief which states the issues involved and recommends whether the Commission should find “probable cause to believe” a violation has occurred. Respondents may file briefs supporting their positions.

If the Commission finds “probable cause to believe” the respondents violated the law, the agency attempts to resolve the matter by entering into a conciliation agreement with them. (Some MURs, however, are conciliated before the “probable cause” stage.) If conciliation attempts fail, the agency may file suit in district court. A MUR remains confidential until the Commission closes the case and releases the information to the public.

### Prioritization

During 1997, the Commission continued to use a prioritization system to focus its limited resources on more significant enforcement cases.

Now in its fifth year of operation, the prioritization system has helped the Commission manage its heavy caseload involving thousands of respondents and complex financial transactions. The Commission insti-

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<sup>1</sup> See the testimony of FEC Finance Committee Chairman Joan D. Aikens before the Senate Committee on Rules and Administration (January 30, 1997).

tuted the system after recognizing that the agency did not have sufficient resources to pursue all of the enforcement matters that came before it. Under the system, the agency uses formal criteria to decide which cases to pursue. Among those criteria are: the presence of knowing and willful intent, the apparent impact the alleged violation had on the electoral process, the amount of money involved, the age and timing of the violation, and whether a particular legal area needs special attention. The Commission continually reviews the prioritization system to ensure that it uses its limited resources to best advantage.

In addition, the Office of General Counsel acquired a new computerized system to create a database and image documents. Developed in conjunction with a support contractor, the new system was designed to help streamline investigation of those cases that involve large collections of documents.

Despite the prioritization system, the number and complexity of the complaints filed in connection with the 1996 elections overwhelmed the Commission's enforcement staff. During 1997, the agency had more cases awaiting assignment than being actively pursued.

### **Civil Penalties**

In March 1997, the FEC issued regulations that increased by 10 percent the amount of civil penalties that can be assessed in cases involving violations of the Act. (See 62 FR 11316.) The increases were mandated by the 1996 amendments to the Federal Civil Penalties Inflation Adjustment Act.

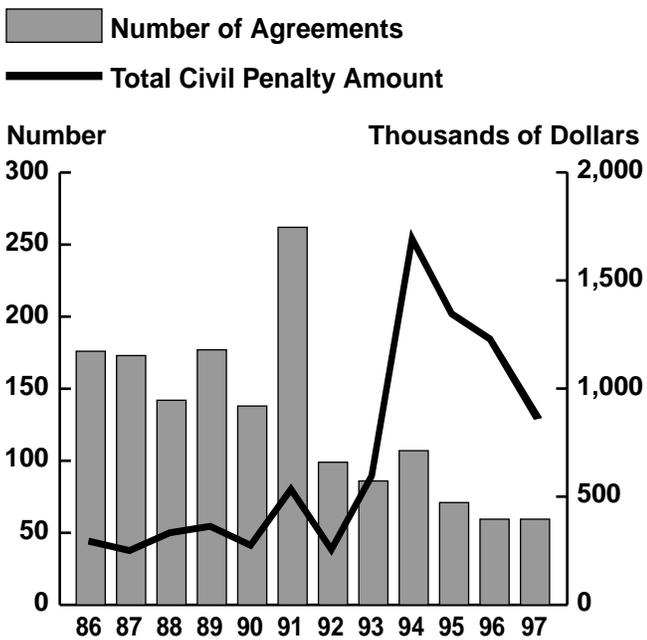
As a result of the change, the general provisions found at 2 U.S.C. 437g(a)(5) and (6) now provide for a maximum penalty of \$5,500— up from \$5,000—or the amount of the contribution or expenditure involved in the violation, whichever is greater. For knowing and willful violations, the penalty doubles: \$11,000 or twice the amount of the contribution or expenditure involved in the violation, whichever is greater.

Penalties for violating the Act's confidentiality provisions (i.e., for making public any enforcement-related Commission notification or investigation) increased from \$2,000 to \$2,200; and, for knowing and willful violations of this provision, from \$5,000 to \$5,500. 2 U.S.C. 437g(a)(12).

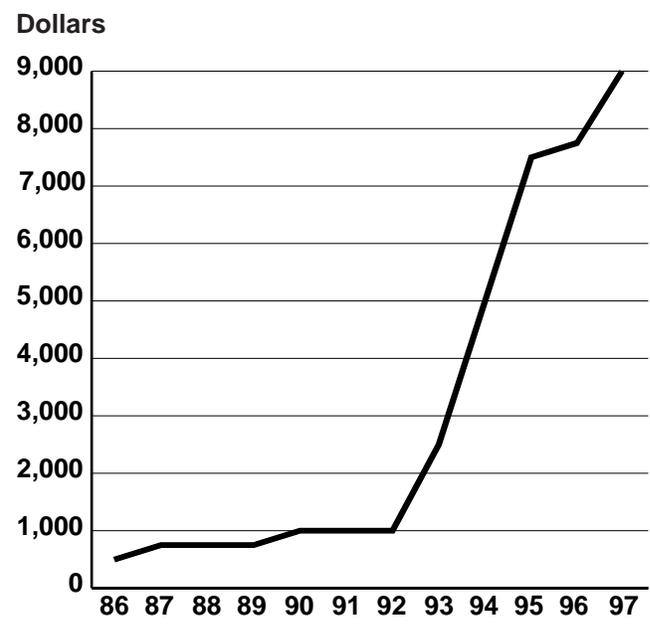
It should be noted that the increase applies only to violations that occurred after the new penalty provisions took effect on April 29. In most FEC enforcement matters, however, the civil penalty reflects the amounts involved in the violation, rather than the fixed statutory penalty. As a result, the 10 percent increase may have little effect on the Commission's total civil penalties. For the year, penalties from conciliation agreements totaled \$863,250.

Chart 2-1 (next page) compares civil penalties negotiated in 1997 conciliation agreements with those of previous years. In Chart 2-2, the median civil penalty negotiated in 1997 is compared with the median civil penalty of previous years. Chart 2-3 tracks the ratio of active to inactive enforcement cases over the last three years. Chart 2-4 illustrates the marked increase in the number of respondents per enforcement action during 1997.

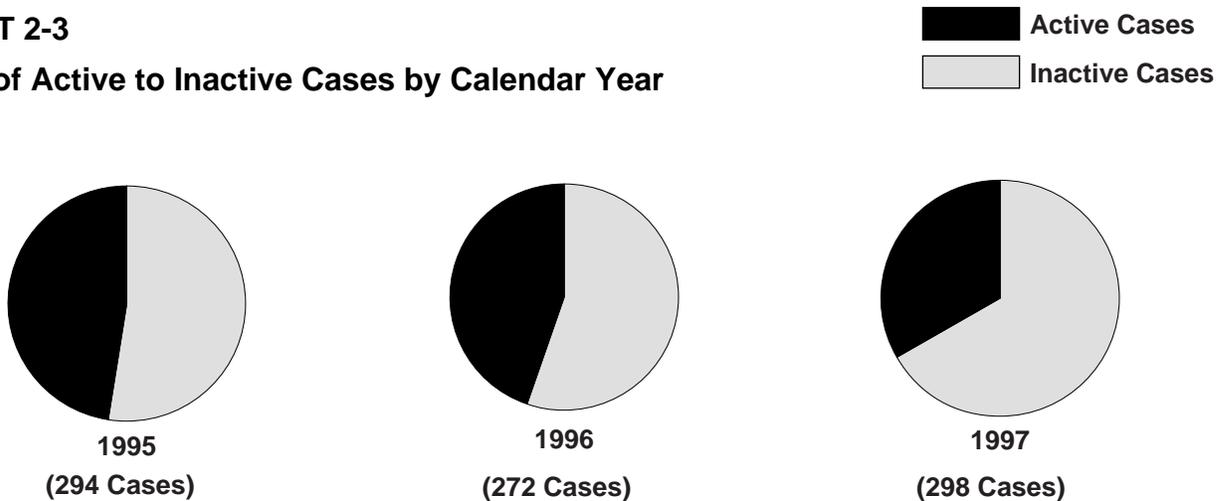
**CHART 2-1**  
**Conciliation Agreements**  
**by Calendar Year**



**CHART 2-2**  
**Median Civil Penalty**  
**by Calendar Year**



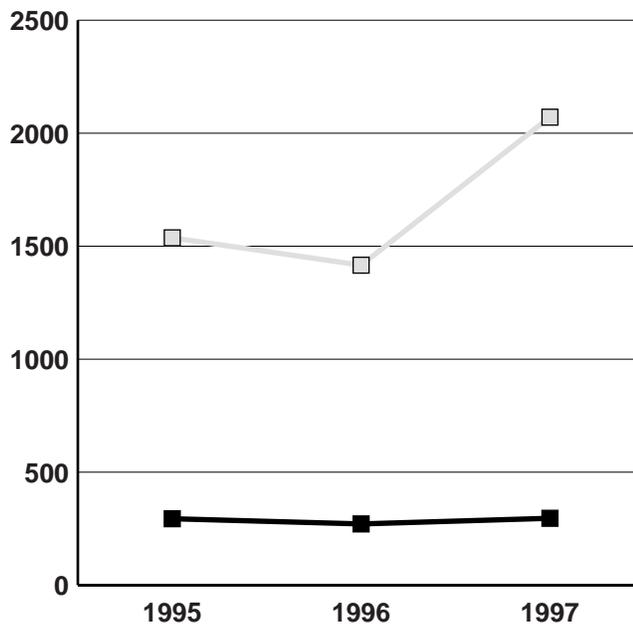
**CHART 2-3**  
**Ratio of Active to Inactive Cases**  
**by Calendar Year**



**CHART 2-4**

**Average Number of Respondents and Enforcement Cases by Calendar Year**

- Monthly Average Number of Total Respondents in Pending Cases
- Monthly Average Number of Total Cases Pending



## Chapter 3 Legal Issues

As the independent regulatory agency responsible for administering and enforcing the Federal Election Campaign Act (the Act), the Federal Election Commission promulgates regulations explaining the Act's requirements and issues advisory opinions that apply the law to specific situations. The Commission also has jurisdiction over the civil enforcement of the Act. This chapter examines major legal issues confronting the Commission during 1997 as it considered regulations, advisory opinions, litigation and enforcement actions.

### Corporate/Labor Communications

The Act prohibits corporations and labor organizations from using their treasury funds to make contributions or expenditures in connection with federal elections. 2 U.S.C. §441b. However, the statute and FEC regulations contain several exceptions that permit corporations and unions to form PACs and, under certain circumstances, to communicate their views on matters related to federal elections. Several 1997 court decisions and FEC advisory opinions explored the parameters of the corporate/labor prohibition and the Commission's regulations on corporate and labor communications.

#### MCFL Nonprofits

During 1997, the U.S. Court of Appeals for the Eighth Circuit ruled that the Commission's regulations governing independent expenditures by certain types of corporations were unconstitutional. The issue first arose more than ten years ago when the Supreme Court, in its 1986 *FEC v. Massachusetts Citizens for Life* (MCFL) decision, concluded that §441b could not constitutionally prohibit certain types of nonprofit corporations from making independent expenditures using their corporate treasury funds. Subsequently, the Commission promulgated new regulations that attempted to codify the *MCFL* exemption. 11 CFR 114.10. Under the regulations, in order for a nonprofit corporation to qualify for the exemption, it must have certain characteristics:

- The corporation's express purpose is to promote political ideas, and it cannot engage in business activities (11 CFR 114.10(c)(1), (2));

- The corporation must not have shareholders or other persons who have a claim on its assets or earnings, or for whom there are disincentives to disassociate themselves from the organization on the basis of its political positions (11 CFR 114.10(c)(3));
- The corporation must not have been established by a business corporation or labor union and must not directly or indirectly accept donations or anything of value from such entities. If the corporation cannot demonstrate this, it must have a policy not to accept donations from business corporations or labor unions (11 CFR 114.10(c)(4)(i), (ii), (iii)); and
- The corporation is described in 26 U.S.C. §501(c)(4) (11 CFR 114.10(c)(5)).

Soon after the Commission promulgated these regulations, Minnesota Citizens Concerned for Life (MCCL), a nonprofit corporation, filed a lawsuit challenging their constitutionality. MCCL alleged that it did not have all of the characteristics described in the FEC rules but, nonetheless, considered itself eligible to make independent expenditures from its general treasury funds and planned to do so.

In April 1996, the U.S. District Court for the District of Minnesota ruled that the FEC's regulations defining and governing qualified nonprofit corporations were unconstitutional on First Amendment grounds. The court based its ruling on a decision by the U.S. Court of Appeals for the Eighth Circuit that addressed a similar Minnesota state law. In that opinion, the appeals court rejected the argument that the three features cited in *MCFL* serve as a bright-line test for determining which corporations are entitled to make independent expenditures. *Day v. Holahan* (34 F.3d 1356 (8th Cir., 1994)). The *Day* decision concluded that Minnesota's regulations were too restrictive and not narrowly tailored to serve a compelling governmental interest because they disqualified from the independent-expenditure exemption those nonprofit, membership corporations that engaged in some business activities and/or accepted some corporate donations, but in insignificant amounts.

The district court in the *MCCL* case also found that the FEC's definition of a qualified nonprofit corporation at 114.10(c) was not severable from the rest of

114.10; consequently, the court rejected the entire provision.<sup>1</sup>

On May 7, 1997, a three-judge panel of the U.S. Court of Appeals for the Eighth Circuit affirmed the district court decision. The appellate court agreed that *Day* required voiding 11 CFR 114.10 (c)(2) and (c)(4). Only the court of appeals sitting *en banc*, the court noted, could overturn *Day's* interpretation of the Supreme Court's *MCFL* decision. Furthermore, because the district court concluded that the remainder of 11 CFR 114.10 was not severable from the invalid portions—a ruling the Commission had not appealed—11 CFR 114.10 as a whole was properly declared void. The FEC asked the appeals court to rehear the case and suggested a rehearing *en banc*, but the court denied the request.

On November 17, 1997, the James Madison Center for Free Speech filed a rulemaking petition asking the Commission to revise its rules on qualified nonprofit corporations in light of the appeals court decision in *MCCL*. On December 10, the Commission published a Notice of Availability inviting comments on the petition.

### Express Advocacy

The FEC's regulatory definition of express advocacy continued to receive attention in the courts and at the Commission during 1997. The regulations, adopted in 1995, resulted from the Supreme Court's *MCFL* decision. That decision limited the scope of the §441b prohibition on independent political spending by corporations and labor organizations. In response to this decision, the Commission prescribed a new regulatory definition of express advocacy. The definition was based largely on two court opinions: the Supreme Court's opinion in *Buckley v. Valeo* and the Ninth Circuit Court of Appeals opinion in *Furgatch*.

The *MCFL* Court, citing First Amendment concerns, had held that the ban on corporate and labor organization independent expenditures could only be constitutionally applied in instances where the money was used to expressly advocate the election or defeat of a clearly identified candidate for federal office. The Court's landmark *Buckley v. Valeo* decision listed examples of phrases that constitute express advocacy: "vote for," "elect," "support," "cast your ballot for," "vote against," "defeat," "reject." The FEC incorporated this list into its definition of express advocacy at 11 CFR 100.22(a).

Subpart (b) of 11 CFR 100.22 is based, *inter alia*, on the *Furgatch* decision. The court of appeals had held that language may be said to expressly advocate a candidate's election or defeat if, when taken in context and with limited reference to external events, it can have no other reasonable interpretation.

### *Maine Right to Life v. FEC*

A nonprofit corporation immediately challenged the new definition, and the courts responded quickly. In October 1996, the U.S. Court of Appeals for the First Circuit summarily upheld a district court ruling in *Maine Right to Life v. FEC (MRLC)* that subpart (b) of the regulatory definition exceeded the FEC's statutory authority because it broadened the definition of express advocacy beyond the Supreme Court's interpretation in the *Buckley v. Valeo* opinion. On October 6, 1997, the Supreme Court denied the Solicitor General's request to hear this case.

### *FEC v. Christian Action Network*

One of the cases the appeals court cited in its *MRLC* decision was *FEC v. Christian Action Network (CAN)*. In that case, a district court had ruled that CAN's television and newspaper ads purchased with corporate funds were not prohibited by §441b because they contained no express advocacy. The ads, which only ran during the weeks leading up to the 1992 Presidential general election, pertained to Bill Clinton and Al Gore's asserted views on homosexual rights issues. The Court of Appeals for the Fourth Circuit summarily affirmed the district court decision last year, in an unpublished opinion. The Solicitor General declined to ask the Supreme Court to review

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<sup>1</sup> A regulation that contains unconstitutional provisions must be stricken in its entirety unless that which remains after the unconstitutional provisions are excised is fully operative as law and the body enacting the regulation would have enacted the constitutional provisions even in the absence of those which are unconstitutional.

the case because the appeals court decision was unpublished and, under court rules, could not be cited as precedent. On April 7, 1997, the court of appeals granted CAN's request that the FEC pay its attorney fees and other costs associated with the case. Later in the year, the appeals court denied the Commission's petition for a rehearing of the case and its suggestion for a rehearing *en banc*. After the Supreme Court denied *certiorari* in *MRLC*, the Solicitor General declined to seek Supreme Court review of the attorney fees decision in *CAN*.

#### ***Right to Life of Dutchess County, Inc. v. FEC***

On April 11, 1997, Right to Life of Dutchess County, Inc. (RLDC), a nonprofit membership corporation based in New York, launched its own challenge to the Commission's express advocacy definition. RLDC asked the U.S. District Court for the Southern District of New York to find that the FEC has been acting contrary to law in enforcing subpart (b) of the express advocacy definition. RLDC cited the appeals court decision in *MRLC* as the basis for its suit.

In its suit, which was pending at year's end, RLDC said it intends to make communications to its members and the general public—using newsletters, voter guides, columns, press conferences, fliers and other methods—about the stances of federal candidates on abortion. RLDC would pay for such communications from its general treasury, and would accept donations—even from corporations—in order to fund such endeavors. RLDC maintained that, under subsection (b) of the Commission's regulations, their expenditures would be classified as express advocacy, but that, under the *Buckley* decision, they would not.

The RLDC asked the court to find that the First Circuit decision in *MRLC* bars the Commission from adhering to subsection (b) even in other jurisdictions (i.e., outside the First Circuit) or, in the alternative, to find that subsection (b) of the regulation is void and unenforceable and to enjoin the FEC from enforcing it. The RLDC claimed that 11 CFR 100.22(b):

- Exceeds the statutory authority granted the FEC because it regulates speech that does not constitute express advocacy;
- Contains vague language—such as “when taken as a whole,” “limited reference,” “external events” and

“proximity”—and provides inadequate notice of what conduct is actually prohibited; and

- Violates the Fifth Amendment's due process clause by vesting the FEC with excessive discretion in enforcing the Act.

#### ***Circuit Court Decisions***

Various opinions concerning express advocacy have been issued by several different circuit courts of appeal. The *MRLC* and *CAN* decisions were handed down by courts in the First and Fourth Circuits, respectively. The *Furgatch* decision—on which the challenged subsection (b) of the FEC's express advocacy definition is based—was issued by the Ninth Circuit Court of Appeals. The Supreme Court has declined to review both the First Circuit and Ninth Circuit decisions. The pending *RLDC* case will be heard by a district court in the Second Circuit.

#### ***Petition for Rulemaking***

On October 20, 1997, the James Madison Center for Free Speech filed a rulemaking petition urging the Commission to repeal subsection (b) of its regulation on express advocacy to conform with the appeals court decision in *MRLC*. On November 6, the Commission published a Notice of Availability seeking comments on the petition.<sup>2</sup>

#### ***Coordination with Candidate***

Under a statutory exception to §441b, implemented through FEC regulations, corporations and labor organizations may make certain types of communications related to federal elections. Generally, corporations and unions may direct to their restricted class<sup>3</sup> communications that expressly advocate the election or defeat of candidates. Communications that go beyond this “restricted class” may not contain an express advocacy message, and cannot be coordinated with the candidate (beyond the types of coordination spe-

<sup>2</sup> On February 12, 1998, the Commission declined to open a rulemaking on express advocacy.

<sup>3</sup> The restricted class of a corporation includes its executive and administrative personnel, stockholders and the families of both groups. For labor organizations, the restricted class comprises its executive and administrative personnel, members and the families of both groups.

cifically permitted in FEC regulations). The regulations make clear that such coordination generally results in prohibited in-kind contributions to the candidates. These regulations are based on *Buckley* and later opinions, which held that “controlled or coordinated expenditures are treated as contributions rather than expenditures under the Act.”

The regulations, in certain instances, clarify what constitutes impermissible coordination with candidates. For example, specific regulations at 11 CFR 114.4(c)(4) and (5) make it illegal for a corporation or labor organization to distribute voting records or voter guides to the general public if, among other things, the organization consults or coordinates with candidates concerning the content or distribution of such materials. At 11 CFR 114.4(c)(5)(ii), the FEC lists specific restrictions for voter guides produced with corporate or union treasury funds for distribution to the public. For example, in the case of guides that are based on candidates’ written responses to specific questions, the regulations prohibit a corporate or labor organization from contacting a candidate about the guide (other than through the exchange of written questions and answers) and require the guide to give all candidates for a particular office equal space and prominence.

### ***Clifton v. FEC***

On June 6, 1997, the U.S. Court of Appeals for the First Circuit in *Clifton v. FEC* declared the voting records regulations (11 CFR 114.4(c)(4)) invalid only insofar as they purport to prohibit mere inquiries to candidates. Similarly, the court found the voter guide regulation at 11 CFR 114.4(c)(5) invalid only insofar as it limits contact with candidates to written inquiries and replies and imposes an equal space and prominence restriction.<sup>4</sup> The appeals court found that, to avoid First Amendment concerns, it would construe §441b narrowly. Under this construction, both the Commission’s restriction on oral contact between

MRLC and candidates and its requirement that voter guides provide equal space to candidates were unlawful. The appeals court found that the FEC’s requirement of equal space was a “content-based” restriction because it would affect the content of the MRLC’s voting guides. The court said that “[T]here is a strong First Amendment presumption against content-affecting government regulation of private citizen speech, even where the government does not dictate the viewpoint.”

With regard to the Commission’s requirement that contact between corporations and candidates be limited to written communications when such corporations are preparing voter guides, the court said that the regulation treads “heavily upon the right of citizens, individual or corporate, to confer and discuss public matters with their legislative representatives or candidates for such office.” The court said that such a ban on communications served as a “handicap” for discourse between legislators—and would-be legislators—and those they wish to represent.

With respect to both regulations, the court rejected the FEC’s argument that such restrictions were justified to prevent illegal corporate contributions to candidates. While the court acknowledged the Commission’s legitimate concern with uncovering prohibited contributions, it said that the agency should be able to investigate such impermissible actions through its normal enforcement procedures.

The court did not take up MRLC’s challenge to the regulation concerning an “electioneering message” and instead referred the matter back to the district court. MRLC’s challenge concerned the FEC’s regulations at 11 CFR 114.4(c)(5)(ii)(D) and (E), which state that certain kinds of voter guides—those that are prepared after receiving written responses from candidates—must not include an “electioneering message” or “score or rate the candidates’ responses in such a way as to convey an electioneering message.” MRLC had argued that these regulations were unconstitutionally vague. The court concluded that it would not decide this matter because, at the district court level, there had been inadequate briefing as to the content, purpose and severability of these regulations.

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<sup>4</sup> One judge dissented, finding that the regulatory restriction on contact with the candidate about the voter guide was valid.

The plaintiffs, Robin Clifton and the Maine Right to Life Committee, Inc. (MRLC), petitioned the appeals court for a rehearing in this case, but that petition was denied, as was the FEC's petition for rehearing and suggestion for rehearing *en banc*.

In November 1997, the Solicitor General decided not to seek Supreme Court review of the appeals court decision. However, the plaintiffs have sought Supreme Court review.<sup>5</sup>

#### ***FEC v. Christian Coalition***

Also during 1997, the Commission continued to pursue another significant case concerning issues of coordination—*FEC v. Christian Coalition*. The Commission filed suit against the Christian Coalition in July 1996 alleging that the organization, among other things, used its corporate treasury funds to make coordinated expenditures for voter guides, “scorecards,” get-out-the-vote drives and other public communications in support of or in opposition to various federal candidates. This suit came after the Democratic Party of Virginia and the Democratic National Committee had filed administrative complaints with the FEC in 1992 concerning the Christian Coalition's activities. The complaints were combined and, after a review and investigation of Christian Coalition activities, the Commission found probable cause to believe a violation of the Act had occurred. Attempts at conciliation between the FEC and the Christian Coalition failed, leading to the filing of the suit.

The Christian Coalition sought dismissal of those portions of the FEC's suit that concerned prohibited activities that had occurred more than five years before the suit was filed—essentially the activities that related to the 1990 election cycle.

On May 13, 1997, the U.S. District Court for the District of Columbia denied the Christian Coalition's motion for partial dismissal of the case. The court said the FEC could seek declaratory and injunctive relief for all of the alleged violations of the Act, but would not be able to obtain civil penalties for any of the violations that occurred more than five years before the

lawsuit was filed. (For additional information regarding the statute of limitations, see “Enforcement Process,” on page 20.)

#### ***FEC v. Public Citizen***

In another 1997 case involving coordination between a candidate and a nonprofit corporation, the FEC asked the U.S. District Court for the Northern District of Georgia to find that Public Citizen, Inc., and its separate segregated fund (SSF) violated several sections of the FECA.

Before the 1992 primary election, the SSF contacted the Friends of Herman Clark for Congress committee. Mr. Clark was Congressman Newt Gingrich's only challenger in the Republican primary. Representatives from the SSF and the Clark committee communicated several times, discussing the campaign's intent, plans and needs and reviewing suggestions about how to defeat Mr. Gingrich.

The Commission determined that, as a result of that coordination, a series of SSF expenditures made in opposition to Mr. Gingrich's campaign were, in fact, contributions to the Clark campaign. The SSF spent \$59,200, resulting in excessive contributions of \$58,200 to the Clark campaign.

In addition, the SSF failed to report the \$59,200 as contributions to Clark for Congress; failed to include appropriate disclaimers on the materials it distributed; and improperly solicited contributions to the SSF. See 2 U.S.C. §§434(b), 441d(a)(2) and (3) and 441b(b)(3)(B).

The FEC asked the court to assess civil penalties against Public Citizen and its SSF, and to order the SSF to amend its reports and to refund any contributions it received as a result of the improper solicitations.

The case was pending at year's end.

#### **Corporate Communications to Restricted Class**

The Commission addressed the statutory exemption for corporate/labor communications to the restricted class in two 1997 advisory opinions. As noted above, the exception allows corporations and unions to send their “restricted class” communications that expressly advocate the election or defeat of a clearly identified candidate and that solicit contributions for

<sup>5</sup> On February 23, 1998, the Supreme Court denied the plaintiffs' petition for *certiorari*.

the candidate. The regulations, however, prohibit sending such communications to people outside the restricted class.

In AO 1997-16, the Commission ruled that Oregon Natural Resources Council Action (ONRC Action), a 501(c)(4) tax-exempt corporation, could not put its endorsements of federal candidates on its web site; nor was a telephone caller's self-identification as a member sufficient evidence to mail that person a printed list of ONRC Action's endorsements. The group also could not record its endorsements to a voice mail box system. All of these forms of communications could result in sending express advocacy communications to nonmembers—people who were outside the restricted class.

In AO 1997-22, the Commission approved the Business Council of Alabama's plan to distribute candidate endorsements to the one or two representatives of each institutional member (corporate and noncorporate) with whom the Council normally had contact, and to ask those member organizations to forward the endorsements to their own restricted class personnel. The Commission rejected, however, BCA's plan to supply the materials for redistribution by the member organizations, concluding it would transform BCA's activity into an unlawful distribution of election advocacy communications to the restricted classes of its institutional members, which was a larger group than BCA's own restricted class.

## Enforcement Process

During 1997, the Commission faced several court challenges regarding its enforcement activity. Most concerned the timeliness of FEC actions.

### Court Review of Administrative Delays

Under 2 U.S.C. §437g(a)(8)(A), anyone who files a complaint with the FEC may seek court intervention if the FEC fails to complete action on the complaint within 120 days. The standard for evaluating administrative delay is whether the agency has acted "contrary to law." To measure this, the courts use several

criteria described in *Rose v. FEC* and *Telecommunications Research & Action Center (TRAC) v. FCC*; they are:

- The credibility of the allegation;
- The nature of the threat posed;
- The resources and information available to the agency;
- The novelty of the issues involved;
- The time it takes for the agency to make decisions;
- Whether Congress mandated a timetable for the agency to take action on such matters as the one at hand;
- The nature of the matter (for instance, delayed agency action on matters affecting human health and welfare are less tolerable than those in the sphere of economic regulation);
- The effect that court-ordered expedited action on the matter would have on agency activities of a higher or competing priority;
- The nature and extent of the interest prejudiced by the agency's delay in acting on the matter; and
- The fact that the court need not "find any impropriety lurking behind agency lassitude in order to hold that agency action is 'unreasonably delayed.'"

The Democratic Senatorial Campaign Committee (DSCC) was among those who sought court review in 1997. The DSCC's litigation concerned an administrative complaint it had filed in 1993 against the National Republican Senatorial Committee (NRSC). In April 1996, the district court of the District of Columbia—applying the *Rose* and *TRAC* criteria—had found that the FEC's initial delay in proceeding on the complaint was contrary to law, but declined to order any action by the Commission beyond what it was already doing. Dissatisfied with the Commission's progress, the DSCC filed a second suit in November 1996, asking the court to order the FEC to conclude its consideration of the complaint within 30 days or give the DSCC the authority to file a civil action against the NRSC. Acknowledging the FEC's considerable work load, lack of resources and competing priorities, the court denied the DSCC's request, but ordered the Commission to file monthly status reports

on its progress in the investigation. On May 30, 1997, however, the court found that the Commission's failure to reach a probable cause determination by then was "contrary to law," and ordered the FEC to conform to that declaration within 30 days. When the Commission stated it was unable to do so, the DSCC filed suit on its own against the NRSC.<sup>6</sup>

The DSCC's suit is the first contested case in which a private party has sued another private party for violations of the Act, pursuant to 2 U.S.C. §437g(a)(8)(C). That section of the Act states that if the FEC fails to take action on a complaint within 30 days after it has been ordered to do so by the U.S. District Court for the District of Columbia, then the complainant may file suit in his or her own name against the alleged offender of the Act.

On August 27, the court granted a stay requested by the NRSC in the suit brought against it by the DSCC. The court based the stay primarily on the fact that the FEC was appealing the earlier determination that it had acted contrary to law.

### Statute of Limitations

Another factor at work in FEC enforcement cases (including the DSCC case detailed above) is the statute of limitations. There is a general statute of limitations requiring that any federal government attempt to enforce a civil fine or penalty be initiated within five years from the date when the claim arose. 28 U.S.C. §2462.

In two recent cases, courts ruled that the five-year limit had expired; but the two courts involved reached conflicting conclusions regarding application of the limit to injunctive relief. In *FEC v. Larry Williams*, the U.S. Court of Appeals for the Ninth Circuit reversed a district court decision by ruling that the FEC waited too long—approximately nine months after the five-year statute of limitations on filing a lawsuit had expired—before filing suit against Mr. Williams. In its 2-1 split decision, the court ruled that the time limit started running at the time the alleged offenses occurred—not at the time the administrative complaint was filed

with the Commission. The appeals court held that the general five-year statute of limitations applied to the FEC's action seeking to assess civil penalties against Mr. Williams. The court also found that §2462 barred the FEC from seeking injunctive relief because the "claim for injunctive relief is connected to the claim for legal relief." The court denied an FEC petition for a rehearing of the case en banc. On December 8, 1997, the U.S. Supreme Court denied the U.S. Solicitor General's petition for a writ of certiorari in the case.

In another significant statute-of-limitations case, the U.S. District Court for the District of Columbia denied the Christian Coalition's motion for dismissal of those portions of an FEC lawsuit that concerned allegedly unlawful activities that had occurred more than five years before the suit was filed—essentially the activities that related to the 1990 election cycle. In its May 13 opinion, the district court concurred with the appeals court's decision in *Williams*, finding that the five-year limit started running at the time the alleged offenses occurred—not at the time they were brought to the Commission's attention. The district court, however, agreed with the FEC that, contrary to the conclusion in *Williams*, §2462 provides no shield for the Christian Coalition against declaratory or injunctive relief. At 2 U.S.C. §437g(a)(6), the FEC has the authority to seek injunctive relief separate from its authority to seek legal remedies (e.g., civil fines, penalties and forfeitures). The court concluded that the FEC could seek declaratory and injunctive relief for all of the alleged violations of the Act. However, the Commission would not be able to obtain civil penalties for any of the violations that occurred more than five years before the lawsuit was filed.

### Legal Standing

Another enforcement-related issue before the courts in 1997 involved the legal standing of those seeking court review of FEC enforcement actions. On March 21, the U.S. Court of Appeals for the District of Columbia Circuit found that Common Cause lacked standing to challenge the Commission's actions regarding an administrative complaint Common Cause had filed. The lawsuit concerned Montana's 1988 senatorial race. Common Cause had alleged that the

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<sup>6</sup> The Commission's appeal of the district court's decision was pending at year's end.

National Republican Senatorial Committee (NRSC) and the Montana Republican Party (MRP) had violated the Act by making contributions and expenditures in excess of the legal contribution limits for Republican candidate Conrad Burns. Common Cause had also alleged that the national and state parties had failed to accurately report these contributions and expenditures to the FEC. Common Cause and James K. Addy, a Montana Democrat, had filed administrative complaints with the FEC. After investigating those allegations, the FEC's Office of General Counsel recommended that the Commission find probable cause to believe that the NRSC and the MRP had violated the Act. However, because none of the proposed probable cause findings garnered the required four affirmative votes, the Commission voted 5-0 to dismiss the complaints and close the matter.

Common Cause and Mr. Addy challenged the FEC's dismissal in U.S. District Court for the District of Columbia. The district court ruled in the FEC's favor on most of these issues, finding "that deference is owed to the views of the 'declining-to-go-ahead' Commissioners when reviewing a Commission decision to dismiss a complaint based on a deadlock." It granted partial summary judgment to the FEC and remanded one reporting violation to the Commission for review.

Common Cause, alone, appealed the decision (except for the portion that was favorable to it), claiming that deference is not owed to the "declining-to-go-ahead" Commissioners when its members decide to dismiss a complaint based on a previous deadlock. The appeals court did not address this argument because it found that Common Cause lacked standing.

In order to show standing, a plaintiff must have suffered an injury in fact, or an actual wrong against a legally protected interest, that is traceable to the defendant's challenged actions and is likely to be redressed by a favorable decision from the court. An organization may have standing to sue in order to vindicate its own interests or, under certain conditions, on behalf of its members. Because Common Cause did not demonstrate an injury to itself or its members as a result of the alleged violations of the Act, it could not assert standing.

In a decision based on *Common Cause*, the U.S. District Court for the District of Columbia granted the FEC's motion to dismiss a case in which Alan Gottlieb and others had asked the court to order the FEC to take action on an administrative complaint on which the Commission had deadlocked. The complaint dated back to March 1995. The plaintiffs originally filed the administrative complaint with the Commission alleging that President Clinton's 1992 campaign received more than \$3 million in excess of the entitlement allowed under the Presidential Primary Matching Payment Account Act. 2 U.S.C. §§9034 and 9037. The complaint alleged that Clinton's primary committee—the Clinton for President Committee—unlawfully treated some contributions received after the nomination as matchable primary contributions and others as contributions to the Clinton/Gore '92 General Election Legal and Compliance fund, or GELAC fund. In August 1995, the Commission dismissed the case—after deadlocking in a 3-3 vote. The plaintiffs then filed suit, asking the court to find that the FEC's action was contrary to law and to order the FEC to take action on the complaint. In its May 8 order dismissing *Gottlieb v. FEC*, the court agreed with the FEC that the plaintiffs did not have standing because they were not personally harmed by the Commission's action. On May 14, plaintiffs appealed the decision to the DC Circuit.

## Contributions in the Name of Another

Under the Act and Commission regulations, it is illegal for one person to make a contribution in the name of another person. 2 U.S.C. §441f. Violations of this provision often involve attempts to mask other transgressions. During 1997, the Commission concluded a number of enforcement actions involving §441f in which respondents had attempted to conceal excessive contributions, corporate/labor contributions and contributions by foreign nationals by laundering money through lawful contributors. One of the cases produced a record-setting civil penalty.

**MUR 4398**

In Matter Under Review (MUR) 4398, Thomas Kramer, a German national, paid a record \$323,000 civil penalty for making prohibited foreign contributions, some of which were made in the names of others.<sup>7</sup> Mr. Kramer made a total of \$322,600 in impermissible contributions to federal, state and local political committees in his own name (\$13,000), through 17 companies that he owned and controlled (\$287,600), by reimbursing his secretary (\$21,000) and through unknown intermediaries (\$1,000).

Mr. Kramer's secretary paid a \$21,000 penalty for her part in the contributions scheme. In addition, the Republican Party of Florida paid an \$82,000 civil penalty for accepting \$110,000 in impermissible foreign contributions from Mr. Kramer and one of the corporations he owns.

Mr. Kramer's own civil penalty was the largest ever paid by an individual to the Commission, and the total sum of civil penalties attached to this case—\$426,000—was among the largest in the FEC's history.

**MUR 4090**

MUR 4090 also involved a reimbursement scheme and a substantial civil penalty. Firearms Training Systems, Inc., its former president and its former chief operating officer agreed to pay a total of \$91,000 to the FEC after making six contributions with corporate funds during elections in the early 1990s and using bonus payments to mask reimbursements for two of the contributions.

Between 1991 and 1993, the company's former president Jody D. Scheckter made \$7,500 in contributions from his personal checking account to various Democratic and Republican congressional candidates, as well as to the Democratic Congressional Campaign Committee. He received reimbursement

from the company for four of the contributions and bonus payments for the other two.

Prior to disclosure to the Commission, Mr. Scheckter repaid Firearms Systems for the contributions for which he was initially reimbursed. The company also instituted procedures to insure that future political activity would not violate the Act or FEC regulations.

**MUR 4286**

In another corporate reimbursement case (MUR 4286), General Cigar Co., Inc. (GCC), and its president, Austin T. McNamara, paid an \$80,000 civil penalty for making corporate contributions and contributions in the name of another. Mr. McNamara solicited four employees at GCC for contributions of \$1,000 each to Congressman Newt Gingrich's 1994 campaign. He later solicited four employees for contributions of \$1,000 each to former Senator Bob Dole's 1996 presidential campaign. GCC then reimbursed the employees and Mr. McNamara, who also contributed \$1,000 to each of those campaigns and an additional \$1,000 in 1995 to the Committee for Sam Gibbons. The reimbursements totaled \$11,000. Each of the committees involved refunded the contributions to the respective contributors. In addition to paying the civil penalty, GCC and Mr. McNamara had to provide the FEC with evidence that all of the contributions that were refunded were either disgorged to the U.S. Treasury or reimbursed to GCC.

**MUR 4399**

MUR 4399 also involved a reimbursement scheme. The State Universities Retirement System of Illinois (SURS) and its former executive director, Dennis Spice, paid \$10,500 in civil penalties to the FEC for making contributions in the names of others. Of that amount, Mr. Spice paid \$7,500 for knowingly permitting his name to be used, and knowingly assisting others, to effect contributions in the names of others.

SURS is an executive agency of the state of Illinois. During the 1994 election cycle, SURS reimbursed Mr. Spice and three of its other officers for \$4,345 in contributions they had made to political parties and candidate fundraisers in order to advance

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<sup>7</sup> In a related matter, MUR 4638, the law firm that advised Mr. Kramer agreed to pay a \$77,000 civil penalty for soliciting foreign contributions, in violation of 2 U.S.C. §441e. During 1993 and 1994, the law firm participated in conversations with Mr. Kramer and his agents that resulted in his prohibited contributions.

SURS's funding agenda. The employees submitted vouchers generically labeled with such statements as "Legislative Conference" and "Legislative Meeting" without also disclosing that the events were sponsored by political committees. SURS was not revealed as the true source of the contributions.

## Major Purpose Test

In 1997, the Supreme Court agreed to review *Akins v. FEC*, a case involving the definition of "political committee." The Act defines a political committee as any group of persons that either receives contributions or makes expenditures exceeding \$1,000 per year for the purpose of influencing a federal election. 2 U.S.C. §431(4). In applying this definition, the Commission has considered an additional factor—whether a group's major purpose is the nomination or election of candidates.

This "major-purpose test" dates back to the Supreme Court's *Buckley v. Valeo* decision in which the Court ruled that, in order to avoid difficult constitutional questions, 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." The Court reiterated this restriction in *FEC v. Massachusetts Citizens for Life*.

In December 1996, the U.S. Court of Appeals for the District of Columbia Circuit, sitting en banc (i.e., with all active judges present), ordered the Commission to reconsider its dismissal of a complaint alleging that the American Israel Public Affairs Committee (AIPAC) had violated the Act by failing to register as a political committee. The court said that the Commission should have reviewed the complaint based solely on the Act's definition of political committee and that the major-purpose test is inapplicable when an organization makes coordinated expenditures or contributions.

In 1997, the U.S. Supreme Court granted the Solicitor General's petition for *certiorari* in this case.<sup>8</sup>

Pending the Court's review, the Commission held in abeyance a Notice of Proposed Rulemaking on the major-purpose test.

## Soft Money

The role of soft money—funds raised and/or spent outside the limitations and prohibitions of the Act—continued to receive considerable attention during 1997.

### Petitions for Rulemaking

On June 18, the Commission published a Notice of Availability concerning two rulemaking petitions on soft money. 62 FR 33040. The petitions asked that the Commission examine its rules governing soft money in light of the influence it had on political campaigns during the 1996 election cycle.

The first petition, filed on May 20 by five members of the U.S. House of Representatives—Democrats Marty Meehan and James P. Moran and Republicans Marge Roukema, Christopher Shays and Zach Wamp—urged the Commission to modify its rules "to help end or at least significantly lessen the influence of soft money." The second petition, submitted on June 5 by President Bill Clinton, asked the Commission to ban soft money and to require candidates for federal office and national party committees to raise and spend only federally-permissible funds, or hard dollars.

The Commission received 188 timely comments in response to the petitions. At year's end, the rulemaking was ongoing.

### Enforcement and Litigation

While the Commission considered its regulatory response, it and the two major parties pursued other legal actions concerning soft money during 1997.

#### **MUR 3637**

The Commission completed action on an enforcement matter (MUR 3637) in which the Kentucky State Democratic Central Executive Committee agreed to pay a \$75,000 civil penalty for numerous violations, most of which involved the FEC's soft money allocation rules. Those rules specify—among other things—

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<sup>8</sup> The Court heard oral argument on January 14, 1998

the minimum amount of federally-permissible funds that committees must use to defray shared federal/nonfederal expenses. Several of the Kentucky party's violations involved the committee's failure to pay for the federal portion of such shared expenses with permissible funds.

### ***FEC v. California Democratic Party***

The FEC also initiated a lawsuit asking the U.S. District Court for the Eastern District of California to find that the California Democratic Party (CDP) violated the allocation rules by using only funds from its nonfederal account to pay for a voter registration drive instead of allocating the costs of the drive between its federal and nonfederal committee accounts. The CDP had made payments from its nonfederal account to a nonfederal committee that had been formed to conduct voter registration drives and get-out-the-vote activities aimed at defeating a California ballot initiative. The Commission alleged that the CDP knew that the registration drive was designed and conducted to increase the number of Democratic voters—voters who would support Democratic candidates for state and federal offices. Accordingly, the FEC contended that part of the payments should have come from the CDP's federal committee account to avoid the use of prohibited contributions for federal election purposes.

The FEC asked the court to assess civil penalties against the CDP and its treasurer and against the party's federal and nonfederal committees. It also asked the court to order the CDP's federal committee to transfer to the nonfederal committee the amount that should have been allocated for these expenditures, and to require the federal committee to amend its 1992 October quarterly, Pre-General and Post-General reports.

The case was pending at year's end.

### ***DSCC v. NRSC; RNC v. FEC***

The Democratic and Republican parties both sought judicial intervention concerning alleged impermissible use of soft money. In August 1997, the Democratic Senatorial Campaign Committee (DSCC) filed suit against the National Republican Senatorial Committee (NRSC) charging that it made at least \$187,000 in illegal "soft money" expenditures to influence a 1992 Senate election in Georgia. The DSCC

had filed an administrative complaint on the subject with the FEC in 1993 and had followed it with a supplemental complaint in 1995. Dissatisfied with the pace of the Commission's consideration of the matter, the DSCC sought judicial relief, culminating in its 1997 suit against the NRSC. (For more information, see "Enforcement Process," on page 20.)

The Republican Party's lawsuit challenged the FEC's dismissal of a soft money complaint it had filed in August 1995. The Republican National Committee (RNC) asked the U.S. District Court for the District of Columbia to find that the FEC's dismissal of its administrative complaint against the Democratic National Committee (DNC) was contrary to law and to order the FEC to bring itself into compliance within 30 days.

In the original administrative complaint (MUR 4246), the RNC had alleged that the DNC had impermissibly used soft money to pay for a nationwide media campaign in 1993 and 1994 to rally support for President Bill Clinton and other Democratic candidates in connection with Democratic legislative proposals for health care reform. The RNC had charged that the DNC should have paid for the campaign with a combination of federal and nonfederal funds, based on the FEC's allocation rules.

The Commission deadlocked on whether to approve the General Counsel's recommendation to accept a proposed conciliation agreement under which the DNC would have admitted violating the Act and paid an undisclosed penalty. Three Commissioners voted to accept the General Counsel's recommendation, one voted against the recommendation and one was recused. Given the deadlock, the Commission voted unanimously to close the case.

Both *DSCC v. NRSC* and *RNC v. FEC* were pending at year's end.

## **Independent Expenditures by Party Committees**

During 1997, the Commission continued to explore the ramifications of the Supreme Court's 1996 ruling in *Colorado Republican Federal Campaign Committee v. FEC*. In that case, the court concluded that the coordinated party expenditure limits at 2 U.S.C. §441a(d) could not be applied to expenditures by a

party committee that were made independently of the candidate.<sup>9</sup> This ruling recognized that the First Amendment bans dollar limits on the amounts party committees may spend to make independent expenditures to support or oppose candidates in congressional races. Prior to the ruling, FEC rules presumed that parties could not make independent expenditures on behalf of their candidates because of the close, on-going coordination party committees generally maintain with candidates.

In light of the *Colorado* decision, the Democratic Senatorial Campaign Committee (DSCC) and the Democratic Congressional Campaign Committee (DCCC) filed a rulemaking petition with the FEC. On May 5, 1997, the Commission published proposed rules governing independent and coordinated expenditures by party committees (11 CFR 109.1 and 110.7). The proposed rules addressed a number of different issues, including possible alternatives for defining coordination and determining whether and how party committees could make independent expenditures in light of the ways in which they usually coordinate election campaigns with their candidates.<sup>10</sup>

At a June 18 public hearing, attorneys from national party committees and other interested organizations offered suggestions and comments that ranged from making minor adjustments to the existing regulations to making wholesale changes in the way political committees make expenditures.

Attorneys for the DSCC, DCCC and the Democratic National Committee (DNC) urged the FEC to prohibit party committees from making virtually any independent expenditures on behalf of their candidates once they have made coordinated expenditures for those same candidates. Coordination, they contended, occurs when there is any general or specific understanding or arrangement between the person making the expenditure and the candidate.

The Republican committees had different views on the *Colorado* decision and on how the FEC should

craft its revised rules. They argued that independence should not hinge on previous coordinated expenditures made by the party on behalf of the candidate. Instead, coordination should be viewed as a “meeting of the minds” between a candidate and political committee with regard to a specific expenditure.

Common Cause, an incorporated membership organization, suggested that all expenditures by political parties on behalf of congressional candidates should be subject to a “rebuttable presumption” that the expenditures are coordinated. And, similar to the Democrats’ proposals, Common Cause urged that party committees be prohibited from making either coordinated or independent expenditures on behalf of the same candidate.

The National Right to Life Committee, Inc. (NRLC), another incorporated membership organization, denounced the entire NPRM and charged the FEC with trying to regulate issue advocacy. The NRLC felt that the proposals took too broad a view of coordination and failed to provide any clear guidance to nonprofit corporations that plan to make independent expenditures.

In addition to receiving written testimony from those who spoke at the public hearing, the FEC received written comments from the Internal Revenue Service, the U.S. Chamber of Commerce and the National Republican Congressional Committee (the DCCC’s and DSCC’s comments were combined).

The rulemaking was pending at year’s end.

## State/Local Party Status

The Commission issued three advisory opinions in 1997 that addressed “state party committee” status and one that addressed “local party committee” status. These designations are important because the Act grants qualified state and local party committees certain spending rights not available to other types of committees. A state party, for example, may make coordinated party expenditures in support of its general election nominees, and may authorize qualified local party committees to spend against its coordinated expenditure limit. 2 U.S.C. §441a(d). In addition, both state and local party committees may spend unlimited amounts for certain activities that benefit

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<sup>9</sup> The Court deferred consideration of a constitutional challenge to §441a(d) pending further lower court proceedings consistent with its ruling.

<sup>10</sup> To review the numerous alternatives, please consult the Notice of Proposed Rulemaking (62 FR 24367).

federal candidates but are not considered contributions or expenditures. These “exempt activities” include preparing and distributing slate cards, sample ballots and campaign materials, and conducting voter drives on behalf of the party’s Presidential and Vice Presidential nominees.

### **State Party Status**

Under the Act and Commission regulations, a “state committee” is defined as an organization which, by virtue of the bylaws of a political party, is responsible for the day-to-day operations of the party at the state level, as determined by the Commission.

In AO 1992-30, the Commission established two criteria necessary to qualify as a state committee of a political party. First, the organization must engage in activities that “are commensurate with” the day-to-day operations of a party at a state level. Second, the state organization must gain ballot access for its federal candidates.

During 1997, the Commission applied these criteria to determine that the Reform Party of Arkansas (AO 1996-51), the Constitutional Party of Pennsylvania (AO 1997-3) and the Virginia Reform Party (AO 1997-7) satisfied the requirements for state party status.

### **Local Party Status**

The Act and Commission regulations do not explicitly define “local party committee,” but it can be viewed as a “subordinate committee.” A subordinate committee is “any organization which is responsible for the day-to-day operation of the political party at the level of city, county, neighborhood, ward, district, precinct, or any other subdivision of a State or any organization under the control or direction of the State committee.” 11 CFR 100.14(b).

In AO 1997-18, the Commission determined that the California Reform Party Congressional Committee did not qualify as a local party committee because it met neither of the two regulatory requirements of “subordinate committee”: (1) responsibility for the day-to-day operations of the party on the local level; or (2) being under the control or direction of a state committee. Since the Congressional Committee was active in districts throughout the state (not just one local area)

and since it indicated that it was independent of any state committee and had no relationship with the National Reform Party, it could not qualify as a local party committee.

## **Personal Use of Campaign Funds**

Under the Act, excess campaign funds cannot be used to pay for personal expenses. 2 U.S.C. §439a. The Commission revised its rules (11 CFR 113.1(g)) in 1995 to clarify what is meant by “personal use” of campaign funds. The regulations differentiate campaign and officeholder expenses from unlawful personal use expenses. During 1997, the Commission received a number of advisory opinion requests seeking guidance on how the “personal use” rules would apply to specific situations.

Under 11 CFR 113.1(g), the personal use ban applies to expenses that would exist irrespective of the campaign or officeholder duties. The regulations list specific expenses that are considered per se (or automatic) personal use expenses, which cannot be defrayed with campaign funds. The rules state that the Commission will consider payments for legal services, meals, travel, vehicles and mixed-used expenses on a case-by-case basis. The requests for advisory opinions pertained to those case-by-case categories.

### **Advisory Opinions**

In response to these requests, the Commission issued the following four advisory opinions:

- In AO 1997-1, the Commission determined that a former member of Congress could donate the remaining cash balance of his campaign committee to a charitable foundation provided the foundation did not use the funds to compensate the candidate, his family or former campaign staff.
- In AO 1997-2, the Commission concluded that members of the U.S. House of Representatives could use campaign funds to pay travel expenses and attendance for themselves, their spouses and their children in connection with a Bipartisan Congressional Retreat.

- In AO 1997-11, the Commission ruled that a Member of Congress who was a candidate could use campaign funds for tuition, travel and other related expenses to participate in a Spanish language immersion program intended to improve her communication with Spanish speaking constituents.
- In AO 1997-12, the Commission decided that a Member of Congress who was a candidate could use campaign funds to pay some of the fees charged by a law firm to help him refute allegations reported by the media that he was involved in illegal activities during his tenure as a federal officeholder.

## Limited Liability Company

Neither the Act nor FEC regulations specifically address the status of limited liability companies (LLCs), which bear some resemblance to both corporations and partnerships. Not surprisingly, then, LLCs have requested advisory opinions about their status under the election law. The Commission responded to two such requests in 1997, and had responded to two similar requests in previous years.

In the advisory opinions, the Commission determined that LLCs in three states and the District of Columbia should not be considered either partnerships or corporations. Instead, the Commission concluded that the LLC would be considered “any other organization or group of persons” for purposes of the Act. As such, it could use its treasury funds to influence federal elections without also attributing its contributions to its individual members.

In determining that LLCs formed under the laws of Missouri, Virginia, Pennsylvania and the District of Columbia were eligible to make contributions, the Commission noted:

- The state’s recognition of the LLC as a distinct form of business, separate from a corporation or partnership, with its own statutory framework;
- The state’s requirements for naming the LLC;
- The corporate attribute of limitation of liability for all members; and
- The lack of the general corporate attributes of free transferability of interests and continuity of life.

The Commission also noted that, in order to make contributions, the LLC could not be a federal contractor; nor could any of its members be a corporation, federal contractor or foreign national because direct or indirect contributions by those entities would be prohibited under the Act. See AOs 1995-11, 1996-13, 1997-4 and 1997-17.

## Definition of Member

During 1997, the Commission issued an advisory opinion and considered a rulemaking petition concerning its judicially-invalidated definition of “member.” The definition is important because, under the Act, only “members” of an incorporated membership organization (and the organization’s executive and administrative personnel and the families of both groups) may be solicited for contributions to the organization’s separate segregated fund, commonly called a political action committee or PAC. Additionally, only members are allowed to receive the organization’s communications that expressly advocate the election or defeat of candidates.

To qualify as a member of a membership association under current FEC rules, a member must:

- Pay regular dues and be entitled to vote for at least one member of the association’s “highest governing body” or for those who choose at least one member of that body; or
- Have a significant financial attachment to the association, not merely the payment of dues; or
- Have the right to vote directly for all those on the association’s highest governing board; or
- Have an organizational and financial attachment to the association that is significant enough to confer membership status, as determined by the Commission on a case-by-case basis. 11 CFR 114.1(e)(2), 100.8(b)(4)(iv)(B).

## Rulemaking

On December 15, 1997, the Commission approved for public comment a Notice of Proposed Rulemaking (NPRM) outlining possible revisions to its definition of “member.” The action came in response to a

rulemaking petition filed by James Bopp, Jr., on behalf of the National Right to Life Committee, Inc. The petition cited the 1995 decision by the U.S. Court of Appeals for the District of Columbia Circuit in *Chamber of Commerce of the United States v. FEC*, which found a portion of the FEC's membership rules unconstitutional.

In its decision, the court of appeals concluded that the FEC's regulatory definition of "member" did not square with the Supreme Court's definition in *FEC v. National Right to Work Committee (NRWC)*. 459 U.S. 197 (1982). In that case, the Supreme Court had ruled that "members of nonstock corporations were to be defined . . . by analogy to stockholders of business corporations and members of labor unions. . . . [which] suggest[ed] that some relatively enduring and independently significant financial or organizational attachment is required . . . ." According to the court of appeals, the Commission's rules interpreted the disjunctive "or" between "financial" and "organizational" as if the Supreme Court had used the conjunctive "and." The court also concluded that the voting requirements in the FEC's membership rules "ignored other indications of organizational attachment." There were not four Commission votes to appeal the court of appeals' decision.

In response to the court's decision, the Commission's NPRM sought comments on three alternative definitions of member.

**Alternative A.** This alternative would set out three sets of criteria for membership: (1) annual dues of at least \$50; (2) a major organizational attachment to the membership association (possible attachments are suggested); or (3) a combination of annual dues of less than \$50 and some lesser organizational attachment to the association. Under this alternative a person who satisfied any one of these criteria would qualify as a member.

**Alternative B.** This alternative would set the amount of annual dues required for membership at \$200—the same amount that triggers itemized disclosures for political committees—for membership organizations formed to further an ideological, social welfare or political philosophy. Persons affiliated with these types of groups who paid less than \$200 per year in dues still would be considered members for FECA pur-

poses if they had some right to participate in the governance of the organization. Suggested examples were described in the NPRM.

However, members of organizations formed to further business or economic interests would be treated as members if they paid any set amount of regular dues. Those individuals and entities generally join membership organizations to foster their business or economic interests, thus creating an attachment that is independent of any political attachment, unlike the previous category where political support may be the only reason for joining the organization. The business category would include business leagues, trade associations, labor organizations and self-regulating professional associations.

**Alternative C.** This alternative would allow any amount of annual dues set by a membership association to be sufficient to confer membership status. This alternative treats ideological organizations the same as economic or business associations for purposes of the rules.

In addition to the alternatives described above, the proposed rules would provide that direct membership in any level of a multitiered association be construed as membership in all tiers of the association for purposes of the regulations.

Comments on the NPRM were due by January 21, 1998.

### Advisory Opinion

In AO 1997-5, the Commission relied upon the *NRWC* and *Chamber of Commerce* decisions to determine that the Chicago Mercantile Exchange (CME) could solicit PAC contributions from its noncorporate member-lessees who leased seats from its full members. Specifically, the Commission noted that "the rights and duties of member-lessees were similar to those cited with approval by the court in *Chamber*." For example:

- Member-lessees could serve on policy formulating committees.
- They were subject to sanctions within CME that would affect their professions.
- They assumed significant financial obligations associated with CME that were comparable to those mentioned in the *Chamber* case.

Consequently, the Commission concluded that member-lessees qualified as members for purposes of the Act, and that those who were individuals could be solicited for contributions to CME's PAC.<sup>11</sup>

## Best Efforts

On July 2, 1997, the Commission promulgated revised "best efforts" regulations. The rules establish procedures to ensure that political committees meet the statutory requirement to use their best efforts to obtain, maintain and report the required contributor information—name, address, occupation and employer—of individuals who contribute \$200 or more during a calendar year. The changes enacted in July came in response to the court decision in *Republican National Committee v. FEC*,<sup>12</sup> in which the U.S. Court of Appeals for the District of Columbia Circuit upheld the Commission's "best efforts" regulations, but ruled that the solicitation notice, required by former FEC regulations, was inaccurate and misleading. For a summary of that case, see *Annual Report 1996*.

The revised rules abandon the former requirement that committees use specific language to request contributor information. Now, the rules simply require that all solicitations include an accurate and clear statement of the law's requirements for the collection and reporting of contributor information. The rules offer the following examples of acceptable wording that may be included in solicitations, but these are not the only allowable statements:

- "Federal law requires us to use our best efforts to collect and report the name, mailing address, occupation and name of employer of individuals whose contributions exceed \$200 in a calendar year."

- "To comply with Federal law, we must use best efforts to obtain, maintain, and submit the name, mailing address, occupation and name of employer of individuals whose contributions exceed \$200 per calendar year."

This request, or one of similar meaning, must be displayed in a clear and conspicuous manner on any response materials included in a solicitation.

104.7(b)(1).

The revised rules also clarify that separate segregated funds (PACs) must report contributor information in the possession of their connected (sponsoring) organizations. 104.7(b)(3).

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<sup>11</sup> The conclusion that member-lessees qualified as members and that a single seat on the Exchange could have two members—the full-member owner and the member lessee—superseded portions of AOs 1987-31, 1988-38, 1988-39 and 1994-34.

<sup>12</sup> *Republican National Committee v. FEC*, 76 F.3d 400 (D.C. Cir, 1996), cert. denied, 117 S. Ct. 682 (1997).

## Chapter Four The Commission

### Commissioners

As part of the Treasury and General Government Appropriations Act of 1998, Congress enacted term limits for FEC Commissioners. Those nominated after December 31, 1997 (unless an intent to nominate was announced prior to that date), will be eligible to serve only one term on the Commission. President Clinton announced three nominations, and his intention to nominate a fourth Commissioner, prior to the December 31 deadline, including the renomination of Commissioners Scott E. Thomas and John Warren McGarry. If the Senate confirms these nominees, they will be eligible for one additional term in office.

During 1997, Commissioner McGarry served as Chairman of the Commission, and Joan D. Aikens served as Vice Chairman.

One seat on the Commission remained vacant throughout the year, and two other Commissioners whose terms expired in April 1995—Chairman McGarry and Vice Chairman Aikens—continued to serve.<sup>1</sup> Under the law, Commissioners may continue to hold office until new appointments are made by the President and confirmed by the Senate. Commissioners Aikens and McGarry continued to sit on the Commission, awaiting Senate confirmation of President Clinton's appointees.

On December 11, 1997, the Commission elected Mrs. Aikens to be its 1998 Chairman and Mr. Thomas to be its 1998 Vice Chairman. For biographies of the Commissioners and statutory officers, see Appendix 1.

### The FEC's Budget

Faced with an unprecedented number of complaints, filed in the aftermath of the 1996 election, the FEC asked the Congress and the Office of Management and Budget (OMB) to provide \$1.7 million in

supplemental funding for fiscal year (FY) 1997 and an additional \$4.9 million for FY 1998. Both requests were denied.

Arguing in support of the supplemental funding, Commission Vice Chairman Joan D. Aikens, who chaired the agency's finance committee in 1997, told the Senate Committee on Rules and Administration that the additional money was needed to investigate allegations that the Act had been violated on an unprecedented scale during the 1996 election cycle. Financial activity in that cycle surged to more than \$2.7 billion, and the Commission received a third more complaints than during the 1994 election cycle.

Mrs. Aikens cited a laundry list of alleged campaign finance abuses from the 1996 elections that had been chronicled almost daily in the nation's newspapers. "The alleged abuses involve fundraising from nonresident foreign nationals, the use of soft money possibly spent to circumvent the party spending limits on behalf of publicly funded presidential candidates, coordination in assertedly independent expenditures, and massive, but undisclosed, expenditures on issue advertisements with an electioneering message by labor and business interests," she said.

### Fiscal Year 1997

The Commission had intended to use the 1997 supplemental to hire by the end of the year a task force of full-time employees—including investigators, attorneys, auditors, systems analysts and clerical support—to investigate the alleged violations of the Act that occurred during the 1996 election cycle. The supplement also would have helped cover the administrative costs associated with the investigations.

The Commission's existing FY 1997 appropriation of \$28.165 million was \$1.2 million less than the President's proposed budget for the agency and \$2.7 million below the Commission's original request. The agency had asked for \$30.877 million and 331.5 FTE, which would have maintained the Commission's "standard performance level," avoided backlogs caused by surges in workload and funded the FEC's ongoing computerization initiatives. The President's request would have represented a "reduced performance level" of funding and 313.5 FTE. The actual

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<sup>1</sup> The vacant seat had been occupied by Trevor Potter, who resigned in October 1995 to return to his law firm.

appropriation forced the Commission to reduce its FY 1997 operations even more than had been planned in either proposal.

Despite the increased use of new technology, the reduced budget hampered the Commission's performance. Informational and educational programs suffered staffing cuts and reductions in outreach efforts, and informational publications were cut back. The Office of Election Administration reduced its research projects designed to assist state and local election officials in the performance of their oversight and administrative functions in federal elections. Although the Commission maintained the timeliness of its data entry of itemized information, the review of reports was delayed and Title 2 audits were reduced below desired levels. Finally, the Commission had to dismiss more enforcement cases without findings in order to focus its limited resources on more significant compliance actions; and it put a larger percentage of complaints on hold because of insufficient staff.

#### Fiscal Year 1998

The Commission initially presented two funding levels in its budget request for FY 1998. One—\$32.6 million and 331.5 FTE—would have supported a standard level of performance; the other—\$29.3 and 313.5 FTE—provided a reduced or minimally acceptable level of performance. The OMB concurred with the latter.

As noted above, the Commission then augmented its request with a supplemental request of \$4.9 million. As with its supplemental request for FY 1997, the Commission intended to devote the additional funds for FY 1998 to enforcement, including the hiring of an additional 47 full-time employees (reduced to 37 when the FY 1997 supplemental request was denied).

Congress appropriated \$31.65 million to fund the FEC's operations in FY 1998, of which \$750,000 was earmarked for an external audit of the Commission's operations. More than \$4 million of the remaining \$30.9 million was set aside for specific nonpersonnel uses, yielding an operational budget of roughly \$26.8 million. The bulk of the \$4 million set-aside was devoted to computer enhancements, including \$1.3 mil-

lion for computerized litigation and enforcement document support. Although the appropriation fell short of the Commission's "standard performance level" request, the 313.5 FTE staffing authorization was an improvement over the actual FY 1997 staffing level of 297 FTE.

#### Budget Allocation: FYs 1997 and 1998

Budget allocation comparisons for FYs 1997 and 1998 appear in the table and charts that follow.

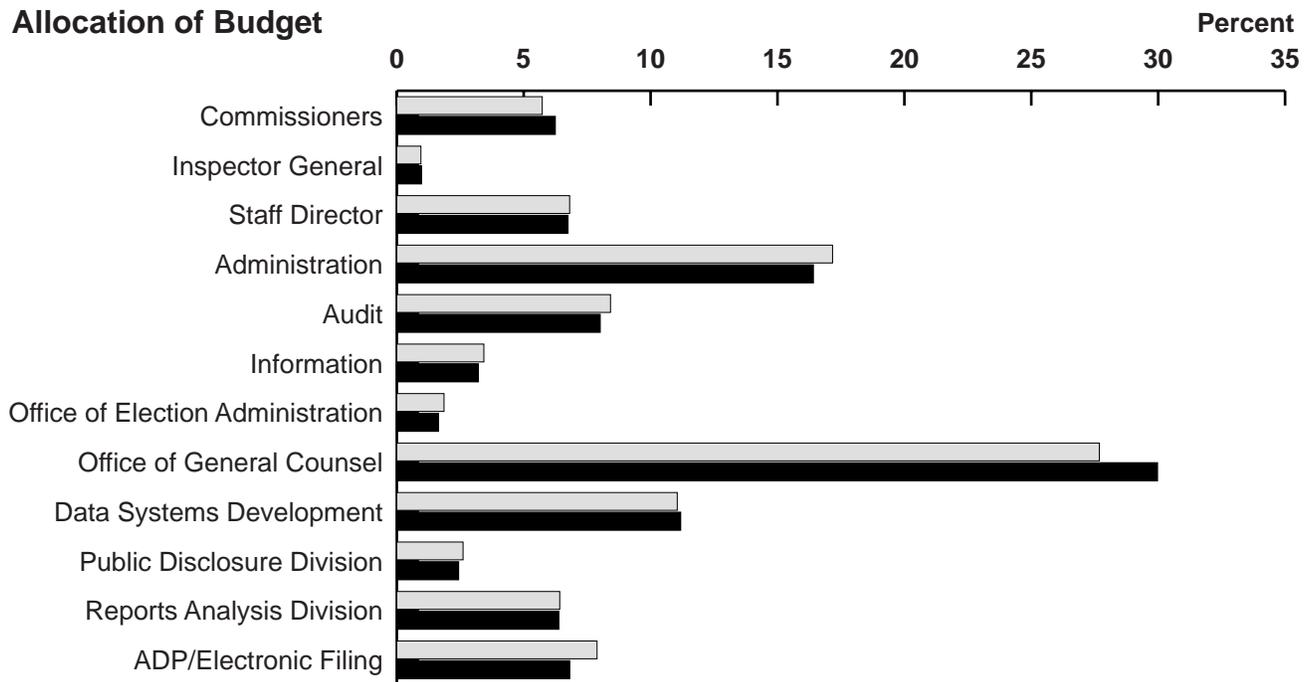
#### CHART 4-1 Functional Allocation of Budget

	FY 1997	FY 1998
Personnel	\$19,435,411	\$21,361,722
Travel/Transportation	271,386	277,545
Space Rental	2,538,448	2,711,000
Phones/Postage	457,790	490,501
Printing	259,753	287,320
Training/Tuition	61,871	84,444
Contracts/Services	2,533,236	1,349,060
Maintenance/Repairs	438,109	337,618
Software/Hardware	351,948	1,111,356
Federal Agency Service	523,216	1,500,994
Supplies	307,364	287,762
Publications	254,225	254,731
Equipment Purchases	710,637	845,947
<b>Total</b>	<b>\$28,143,394</b>	<b>\$30,900,000</b>

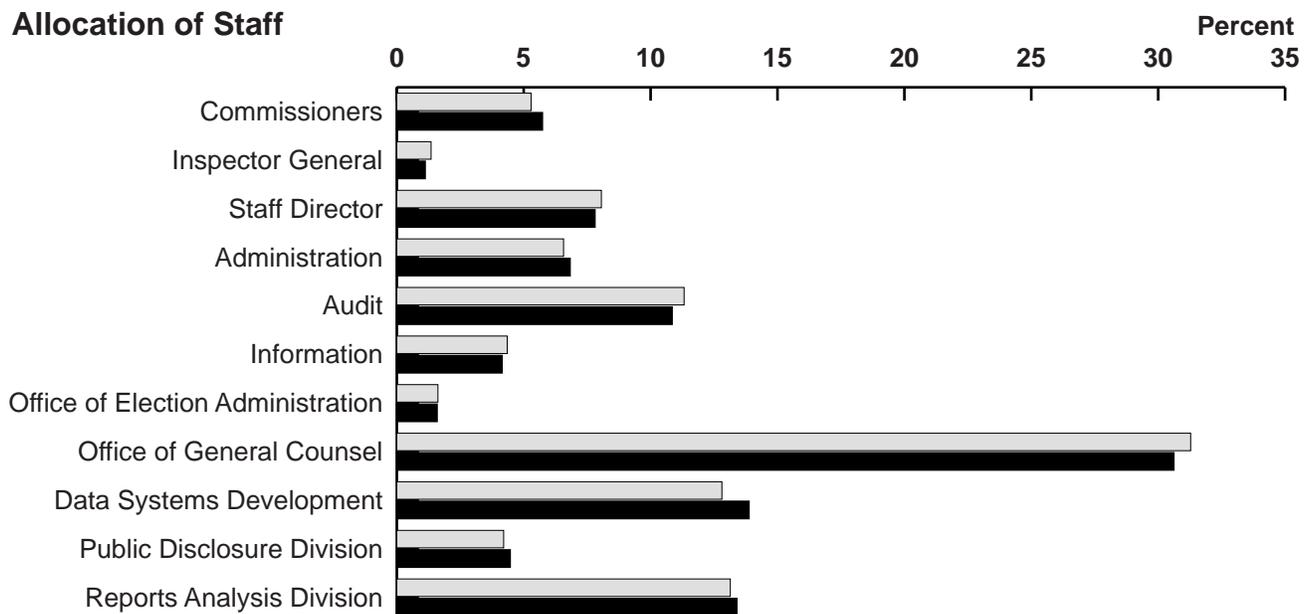
**CHART 4-2**  
**Divisional Allocation**

FY 1997 Actual  
 FY 1998 Projected

**Allocation of Budget**



**Allocation of Staff**



## Computer Upgrades

During 1997, the Commission continued to enhance its computer capabilities in several areas. As noted in Chapter 1, the agency implemented a voluntary electronic filing program and developed filing software to help committees submit reports in electronic form. The Commission also upgraded its PC hardware and software; expanded access to its digital imaging system; unveiled a pool of modems, CD-ROMs and a shared computer faxing system; developed a groupware (e.g., intranet) strategy; and undertook case management and legal research initiatives to benefit the Office of General Counsel (OGC).

## EEO and Special Programs

The FEC's Office of Equal Employment Opportunity and Special Programs fulfilled its duties so successfully during 1997 that the internet web site "cyberFEDS" cited it as a model program. The office's duties involve administering the agency's EEO complaint and special emphasis programs, and offering additional programs designed to improve employees' professional and personal lives.

During 1997, the office's Career Advancement Program helped an FEC employee obtain the necessary education and on-the-job training to advance from a clerical position to auditor. Other programs included cultural diversity training, luncheon meetings for managerial women and support staff, guest speakers and panel discussions on a variety of topics, "Knowledge at Noon" education sessions and a Thanksgiving food drive for needy employees. The EEO Director also briefed agency staff on the EEO complaint process and early intervention program, and conducted training on sexual harassment.

As part of a reciprocal arrangement, the EEO Director spoke and conducted EEO training at other government agencies and provided counseling services to employees at the U.S. Soldiers and Airmen's Home, the Smithsonian, the National Capitol Planning Commission and Federal Maritime Commission.

The EEO office also handles the FEC's annual Combined Federal Campaign and U.S. Savings Bond Drive.

## Ethics

The ethics staff provided ethics orientation to all new employees and published an intraagency newsletter to further advise all staff on the standards of ethical conduct. Staff also administered the Commission's public and confidential financial disclosure report system, which helps ensure that employees remain impartial in the performance of their official duties. The staff also trained all employees required to file public and confidential financial disclosure reports. Finally, the ethics staff submitted required reports with the Office of Government Ethics, including the annual agency ethics report, the financial disclosure reports filed by Presidential and Vice Presidential candidates and semiannual travel payment reports.

## Inspector General

Under the Inspector General Act, the Commission's Office of the Inspector General (OIG) is authorized to conduct audits and investigations of FEC programs to find waste, fraud and abuse. The OIG audited several facets of Commission operations in 1997, including the agency's accounts payable. The OIG also completed two follow-up reports on audits released in prior years. A follow-up report is done to ensure that the recommendations made in the reports have been implemented by management. In both cases, all recommendations had been implemented and the OIG considered these audit reports closed.

## Chapter Five Presidential Public Funding

Public funding has been a key part of our Presidential election system since 1976. Using funds from the \$3 tax checkoff, the federal government provides matching funds to qualified candidates for their primary campaigns, funding to major parties for Presidential nominating conventions, and grants to Presidential nominees for their general election campaigns.

### Shortfall Predicted for 2000

According to a 1997 FEC staff projection, the Presidential Election Campaign Fund may experience a shortfall during the primary campaign in the year 2000.

The Commission began predicting a funding shortfall in 1988. The Commission noted that a shortfall was inevitable because of a fatal flaw in the public funding program: payments from the Fund were indexed to inflation, but the \$1 tax checkoff that financed the system was not. The Fund was also affected by a gradual decline in taxpayer participation in the checkoff program.

In an effort to avert a shortfall, Congress increased the checkoff from \$1 to \$3, beginning in 1994. The change had the effect of adjusting the checkoff amount for inflation since 1973, when the checkoff was first implemented. It did not, however, index the checkoff to inflation.

Despite the increase in the checkoff amount, the long-predicted shortfall materialized during the first five months of 1996, resulting in partial matching fund payments to Presidential primary candidates during the first half of the election year.

Now, it appears that the Fund may face an even greater deficit during the Presidential primaries in the year 2000. FEC staff project that the shortfall could be so severe that participating candidates might not receive their full entitlements until after the nominating conventions. If that forecast holds, some candidates might opt out of the public funding program entirely.

The staff projection was based on certain assumptions. First, it anticipated that three parties would participate in the election process—the two major parties and one minor party, Ross Perot's Reform Party.

Second, it assumed that Treasury rules would continue to require that Treasury set aside funds for the conventions and general election before calculating the amount available for primary matching payments. Third, the projection assumed that Fund receipts, based on taxpayer participation in the \$3 checkoff, would remain constant at \$67 million a year. Fourth, the estimate assumed a 2.5 percent inflation rate over the next three years. Finally, the projection assumed that, since no incumbent would be seeking nomination, the Presidential race would be wide open, encouraging the participation of a significant number of primary candidates.

### Update on Presidential Debate Lawsuits

On May 12, 1997, the Supreme Court declined to review an appeals court's dismissal of lawsuits filed against the FEC and the Commission on Presidential Debates (CPD). The suits had been filed by two 1996 Presidential hopefuls—Reform Party candidate Ross Perot and Natural Law Party nominee John Hagelin—who felt they had been unfairly excluded from the Presidential debates and that the CPD had violated the Federal Election Campaign Act (the Act).

The U.S. Court of Appeals for the District of Columbia Circuit had upheld a lower court ruling dismissing the lawsuits for lack of jurisdiction. The courts had ruled that the two candidates had no private right of action against the CPD. As to the alleged violations of the Act, the courts had noted that the FEC has exclusive civil enforcement jurisdiction and that the law grants the Commission 120 days to act on a complaint before a court can become involved. 2 U.S.C. §437g.

### Audits of 1996 Presidential Campaigns

During 1997, the Audit Division presented, for Commission approval, final audit reports for six of the eleven publicly-funded primary candidates who ran in 1996, one convention committee, a host committee and one general election candidate. By year's end,

the Commission had approved all these reports except those for one of the primary candidates, the host committee and the convention committee. The pace of the 1996 work was considerably faster than in 1992 when, by the end of the year after the election, the Commission had completed reports on only one primary candidate and one convention host committee. The agency's progress was far better than in 1988 when the last of the presidential audits was not released until nearly four years after the election.

The accelerated pace was due, in large part, to the experience that many of the FEC's auditors gained in 1992. Moreover, these experienced employees were aided by improved technology—such as the introduction of laptop computers. The laptops gave field auditors full access to the Commission's in-house computer network, and permitted more sampling and computerized analyses to speed some processes along. In addition, audit procedures were streamlined in 1996 and 1997. For the first time, the audit staff issued the preliminary results of the audits without formal review by the Office of General Counsel (OGC) or the Commission. This change eliminated nearly one complete level of processing while preserving the opportunities for campaigns to answer and comment on the conclusions reached in the audit reports. Simplified regulations also paid dividends in the form of fewer campaign errors and more straight forward analysis by auditors. Audit staff also made greater use of its subpoena authority to obtain records and other information needed to complete its work.

### CHART 5-1 Audit Reports Approved During 1997

Committee	Report Date
Specter for President	June 12
Alexander for President	June 19
Gramm for President	June 26
LaRouche for President	July 17
Wilson for President	August 27
Perot '96 General	December 4

## Repayments

### Bush-Quayle '92 Primary Committee v. FEC

On January 14, 1997, the U.S. Court of Appeals for the District of Columbia Circuit remanded this case to the FEC and asked it to explain why the Commission departed from precedent—or reconsider its repayment determination—when it required the Bush-Quayle '92 Primary Committee to repay \$323,832 of the federal matching funds it received.

The dispute involved the Commission's August 17, 1995, determination that the Bush primary committee had to make a pro rata repayment of \$106,979 for nonqualified campaign expenses related to the general election totaling \$409,123 and a repayment of \$216,853 for matching funds received in excess of its entitlement.

The Bush-Quayle committee contended that the Commission should have used a "bright-line" rule and allocated expenses based solely on whether they were incurred before or after the Presidential nomination. The committee also charged that the FEC had acted "arbitrarily and capriciously" because it had treated expenditures of the Bush-Quayle campaign differently than similar expenditures of the 1984 Reagan-Bush campaign. In the 1984 election, the committee said, the FEC had concluded that certain pre-nomination expenditures by the Reagan-Bush Primary Committee were primary expenses despite the fact that some benefited the general election campaign.

The FEC rejected both of the committee's challenges. The Commission countered the first by arguing that its determination concerning qualified primary expenditures depended upon both the timing and nature of the expenditure. As to the second challenge, the Commission explained that it treated the Bush-Quayle and Reagan-Bush cases differently because they were factually distinguishable from each other.

The court agreed that the Commission has discretion to consider both the timing and the nature of the expenditure, as it did here. However, the court found the FEC's explanation of its apparently conflicting precedent in Reagan-Bush inadequate and remanded

the matter to the Commission either to justify its approach or to reconsider the repayment determination. U.S. Court of Appeals for the District of Columbia Circuit, 95-1430, consolidated with 95-1431 and 95-1432. The Commission decided not to appeal the court's decision and, on June 23, 1997, determined that the Bush-Quayle committee did not owe a repayment.

#### **Fulani Presidential Committee**

On March 6, 1997, the Commission released a final repayment determination for the Lenora B. Fulani for President committee and Dr. Lenora B. Fulani, instructing them to repay to the U.S. Treasury \$117,269 of the public funds they received during the 1992 election cycle.

The repayment includes: \$18,768 for nonqualified campaign expenses that the Committee disbursed to a vendor; \$73,750 for nonqualified campaign expenses to individuals that cannot be traced; \$1,394 in lost money orders.<sup>1</sup> The Commission also determined that the Committee had to repay \$23,357 in public funds received in excess of the candidate's entitlement.

In response, the Fulani committee petitioned the FEC for a rehearing of the final determination. On July 8, the Commission denied the petition for all but one of the committee's claims, and, upon rehearing that one claim, the Commission adhered to its repayment determination. Dr. Fulani and her campaign committee then petitioned the U.S. Court of Appeals for the District of Columbia Circuit to review the FEC's repayment determination. 97-1466, August 5, 1997. On December 5, the Commission granted Dr. Fulani's request for a stay of the repayment, pending the appeals court's decision. The case was pending at year's end.

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<sup>1</sup> This last part of the repayment was made in January 1994.

## Chapter Six Legislative Recommendations

### 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 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 Com-

mission 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 occurring the month before the primary would not be disclosed until after the election. To remedy this, Congress should specify that Congressional committees continue to be required to file a 12-day Pre-Primary, regardless of whether a campaign has opted to file quarterly or monthly. However, where the timing of a primary will cause an overlap of reporting due dates between a regular monthly report and the Pre-Primary report, Congress should grant the Commis-

sion the authority to waive one of the reports or adjust the reporting requirements. (See the recommendation entitled "Waiver Authority.") Congress should also clarify that campaigns must still file 48-hour notices disclosing large last-minute contributions of \$1,000 or more during the period immediately before the primary, regardless of their reporting schedule.

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

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

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

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

### **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 transmission 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 autho-

alized 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) machine. (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 commit-

tee," 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 contribu-

tions 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 441a(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 con-

cern 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.<sup>1</sup>

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 candi-

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<sup>1</sup> 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.

date 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.

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.<sup>2</sup>

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<sup>2</sup> 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.

*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 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.<sup>3</sup> 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.

### **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, evenhanded 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.

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

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

### **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,<sup>4</sup> 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 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

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<sup>4</sup> 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.

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<sup>5</sup>) 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 viola-

tion 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 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.

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<sup>5</sup>Spending limits are increased by the cost-of-living adjustment (COLA), which the Department of Labor calculates annually.

### **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 requirements of Title VI of the Civil Rights Act of 1964, as amended.

*Explanation:* This proposed amendment was prompted by the decision of the U.S. District Court for the District of Columbia in *Freedom Republicans, Inc., and Lugenia Gordon v. FEC*, 788 F. Supp. 600 (1992), *vacated*, 13 F.3d 412 (D.C. Cir 1994). The Freedom Republicans' complaint asked the district court to declare that the Commission has jurisdiction to regulate the national parties' delegate selection process under Title VI. It also requested the court to order the Commission to adopt such regulations, direct the Republican Party to spend no more of the funds already received for its 1992 national nominating convention, and seek refunds of moneys already

disbursed if the Republican Party did not amend its delegate selection and apportionment process to comply with Title VI. The district court found that the Commission "does have an obligation to promulgate rules and regulations to insure the enforcement of Title VI. The language of Title VI is necessarily broad, and applies on its face to the FEC as well as to both major political parties and other recipients of federal funds." 788 F. Supp. at 601.

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

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

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

### **Enforcement of Nonwillful Violations**

*Section:* 26 U.S.C. §§9012 and 9042

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

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

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

### **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)

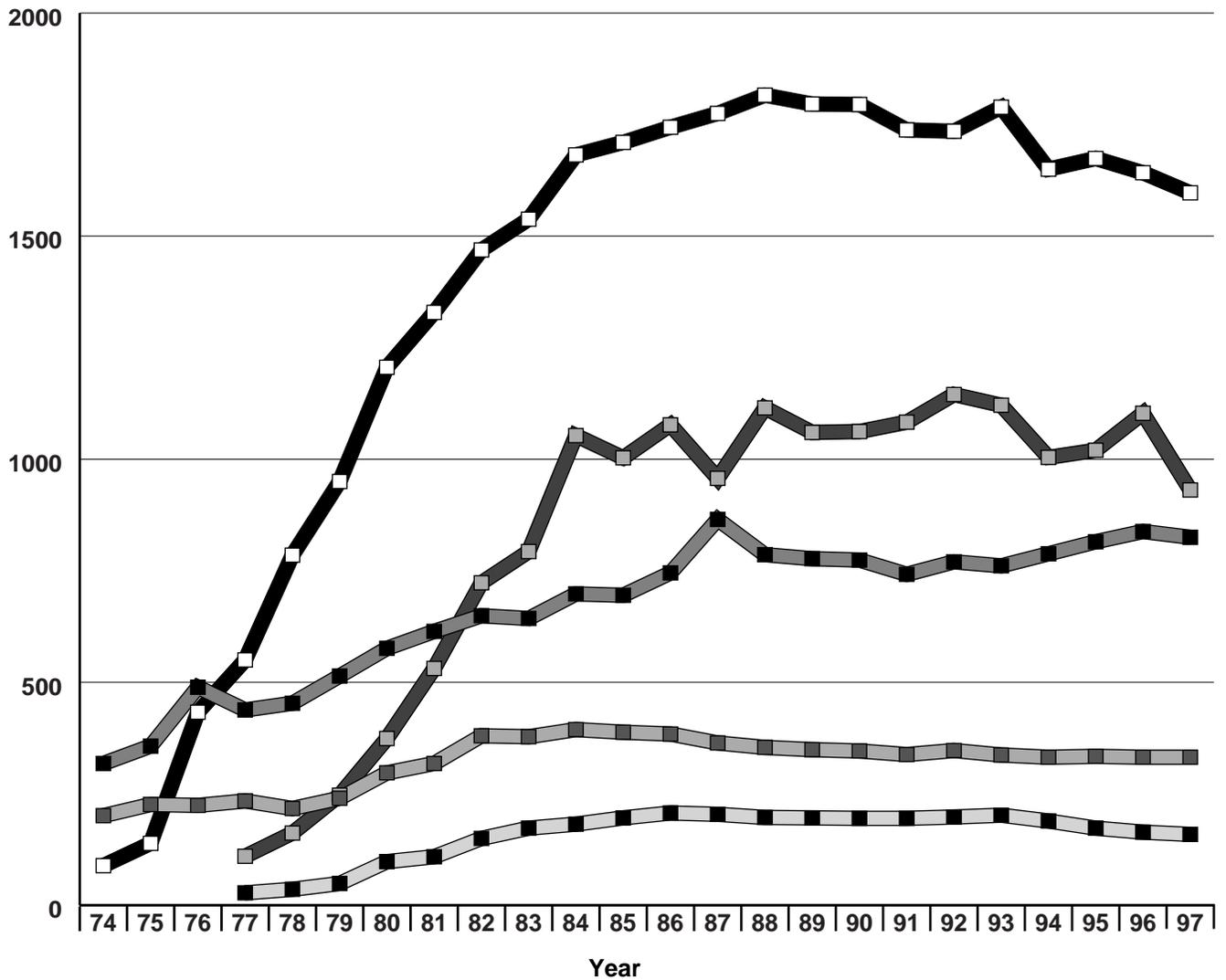
*Recommendation:* The Commission recommends that Congress amend section 437c by removing the Secretary of the Senate, the Clerk of the House, and their designees from the list of the members of the Federal Election Commission.

*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.

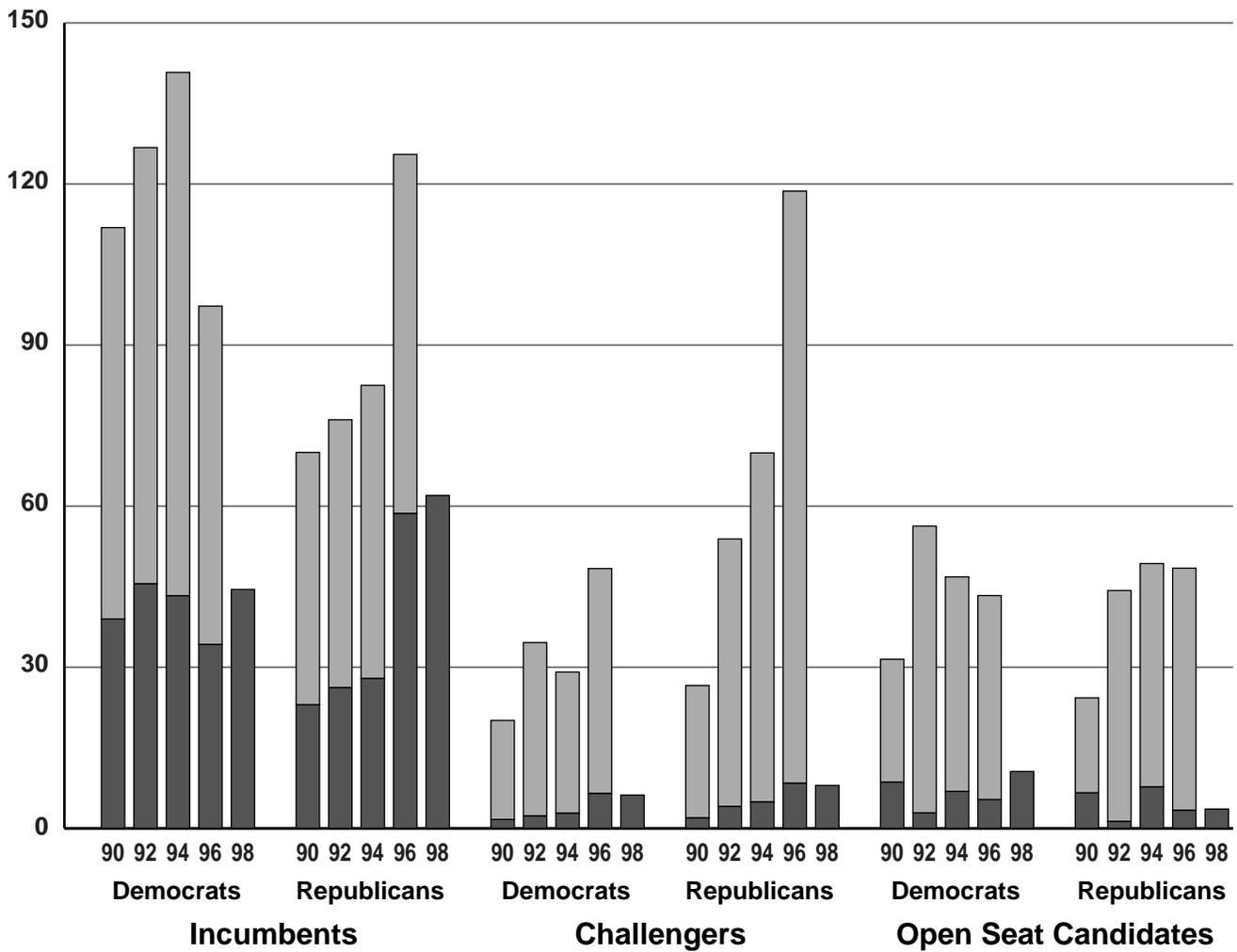
# Chapter 7 Campaign Finance Statistics

**CHART 7-1**  
**Number of PACs, 1974-1997**

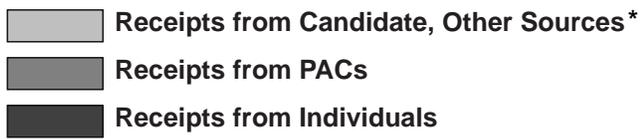


**CHART 7-2**  
**Receipts of House Candidates for**  
**Each Year of Election Cycle, 1990-1998**

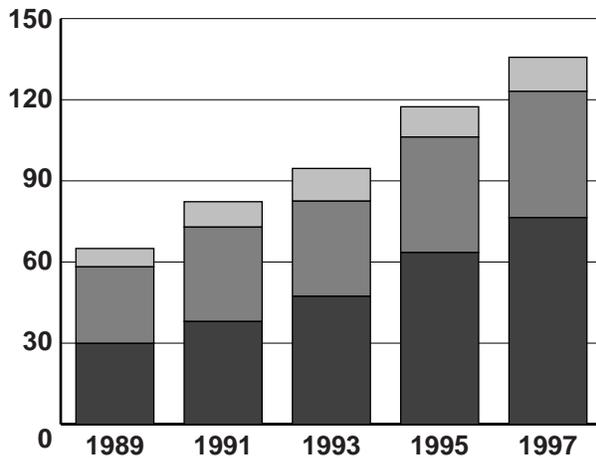
■ Election Year  
 ■ Nonelection Year



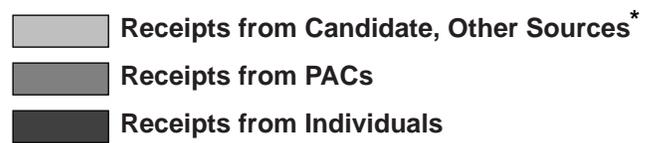
**CHART 7-3**  
**House Campaign Fundraising**  
**in Nonelection Years**



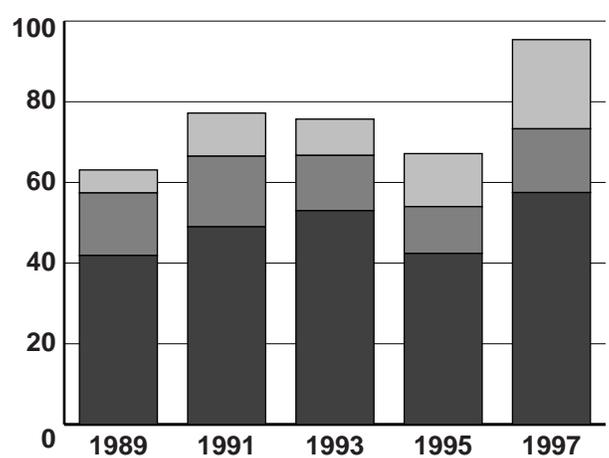
Millions of Dollars



**CHART 7-4**  
**Senate Campaign Fundraising**  
**in Nonelection Years**



Millions of Dollars

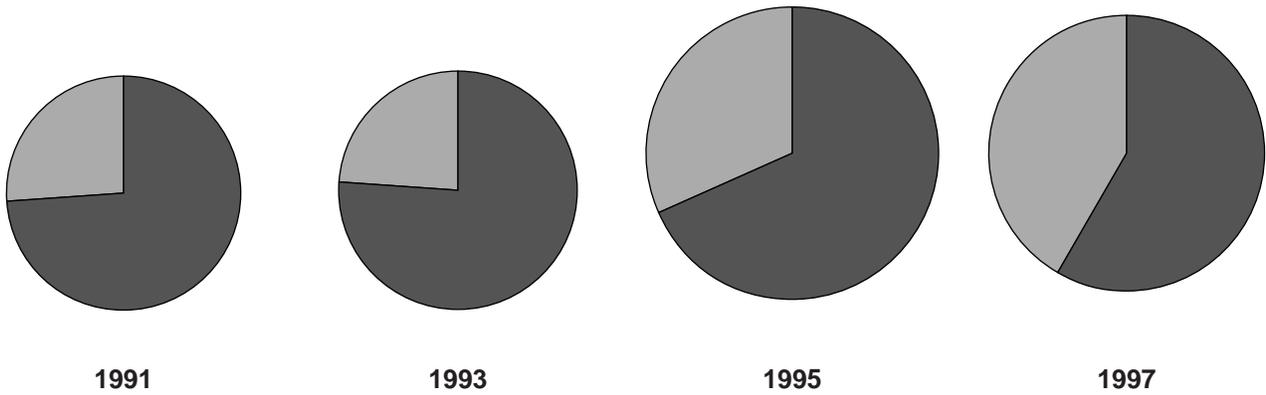


\* Includes contributions from party committees, loans, interest earnings and offsets to expenditures.

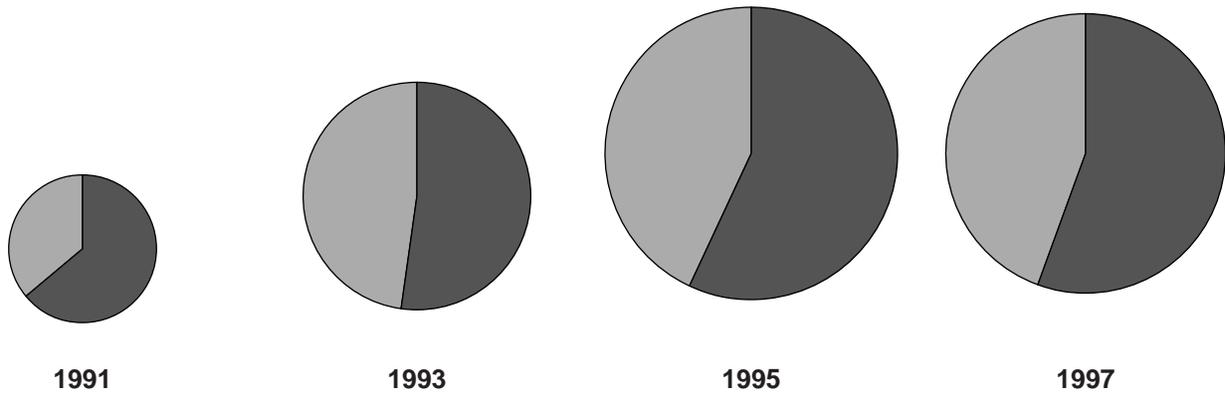
**CHART 7-5**  
**Nonelection Year Fundraising by National**  
**Committees: Federal and Nonfederal Accounts**

 Federal Dollars  
 Nonfederal Dollars

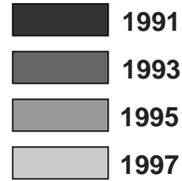
**Republican National Committee**



**Democratic National Committee**

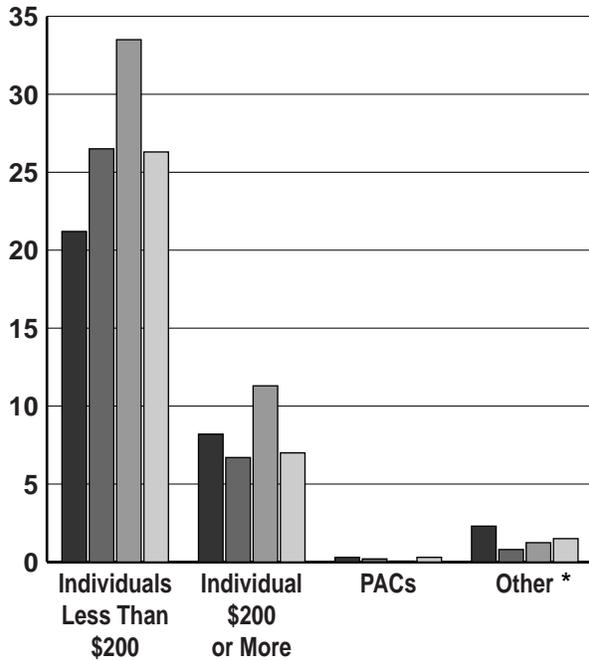


**CHART 7-6**  
**Sources of National Committee:**  
**Federal Account Receipts**  
**in Nonelection Years**



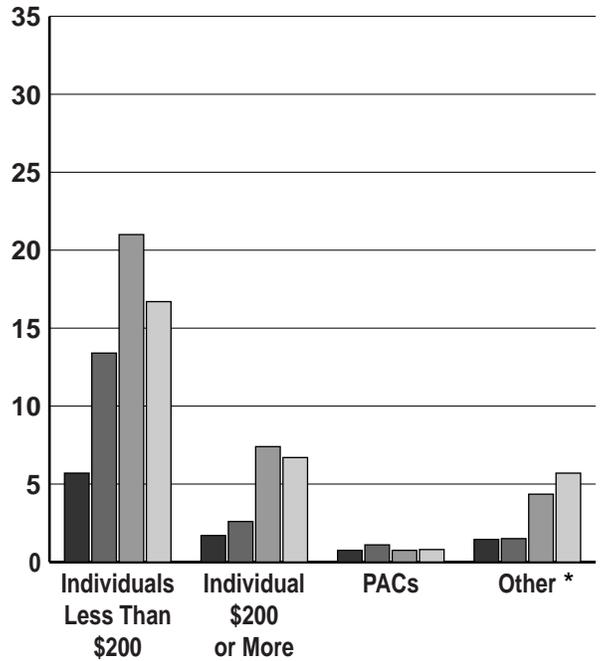
**Republican National Committee**

Millions of Dollars



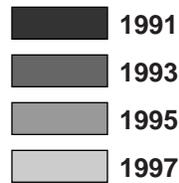
**Democratic National Committee**

Millions of Dollars



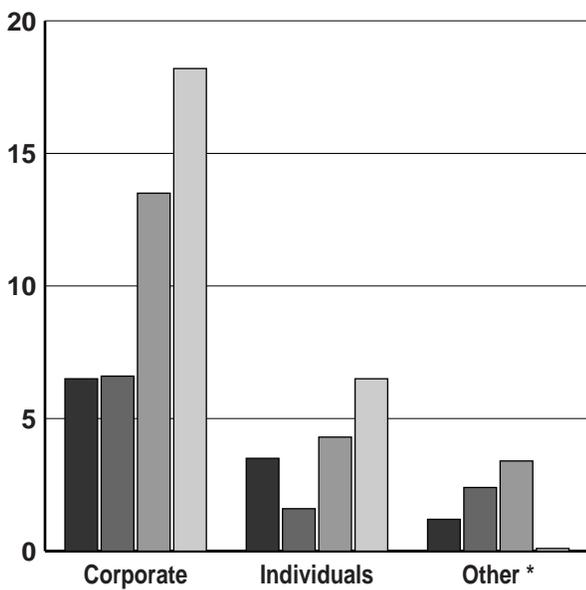
\* Includes loans, receipts from local and state party committees and offsets to expenditures.

**CHART 7-7**  
**Sources of National Committee:**  
**Nonfederal Account Receipts**  
**in Nonelection Years**



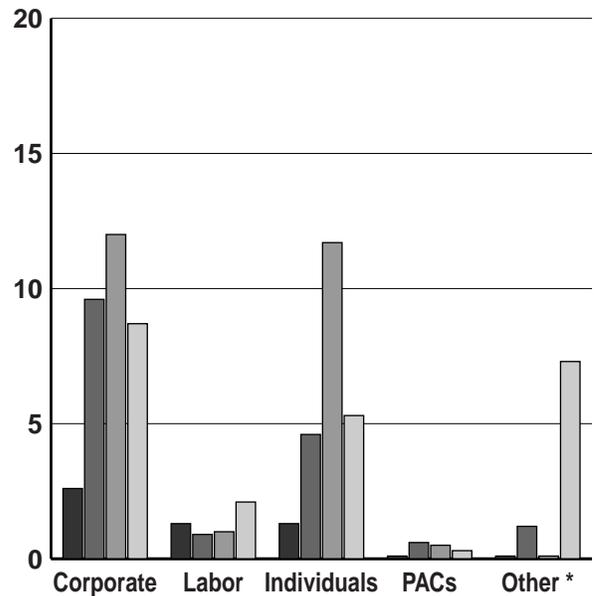
**Republican National Committee**

Millions of Dollars



**Democratic National Committee**

Millions of Dollars

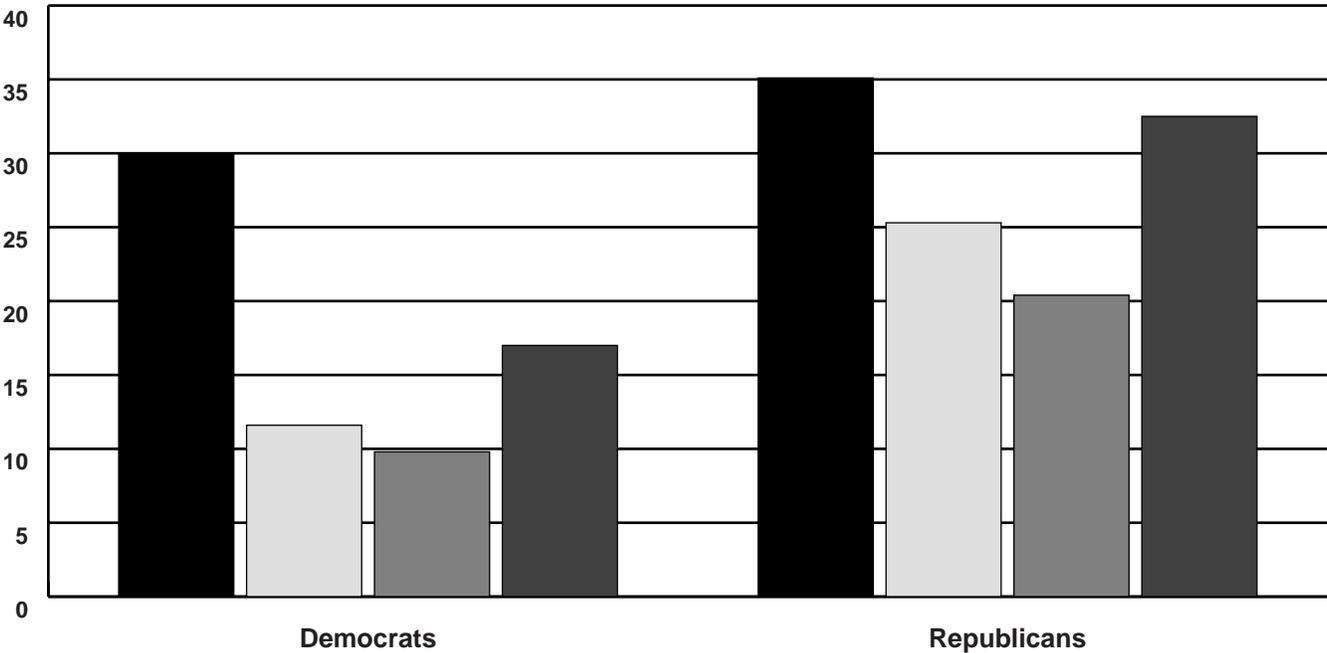


\* Includes any unitemized receipts, bank loans, transfers from other party organizations, interest earnings and offsets to expenditures.

**CHART 7-8**  
**Major Party Federal**  
**Account Receipts: 1997**

- National Committee
- National Senatorial Committee
- National Congressional Committee
- State/Local Committees

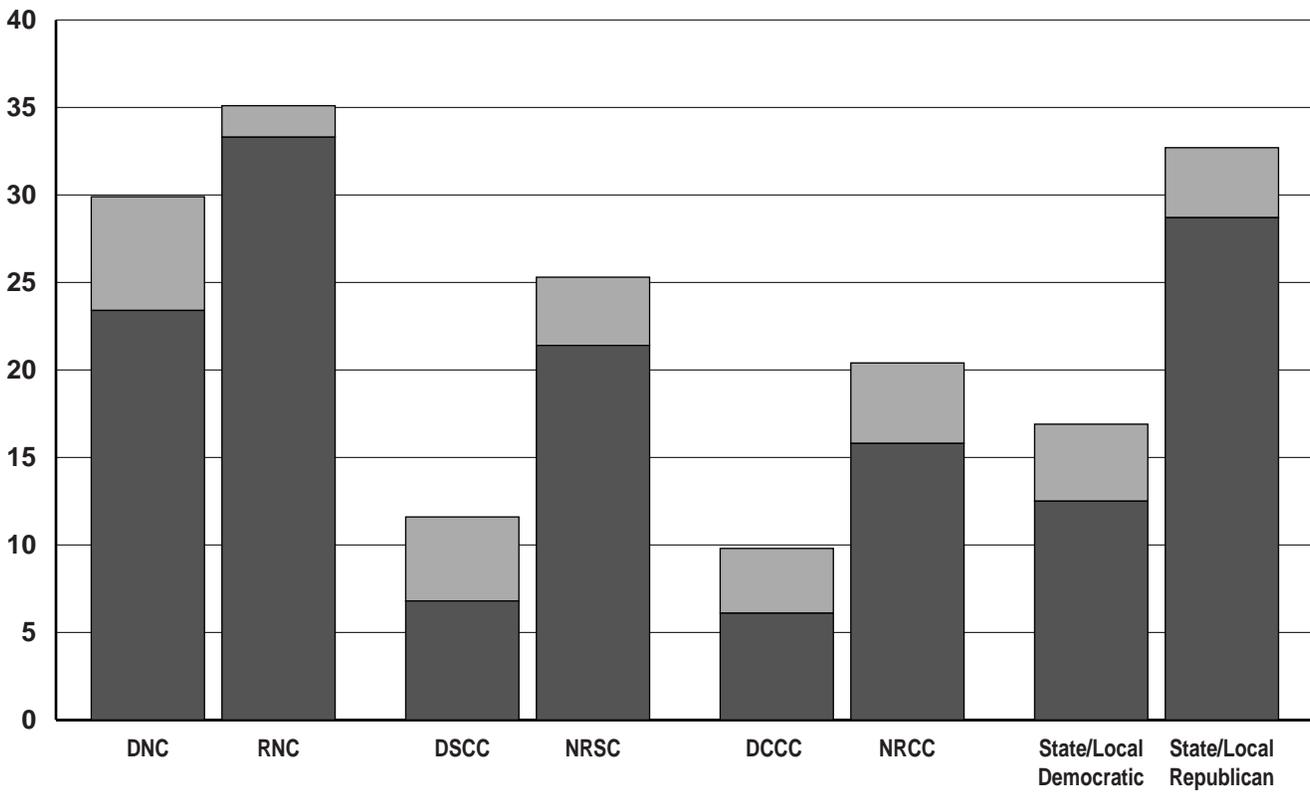
Millions of Dollars



**CHART 7-9**  
**Major Party Federal Receipts Broken Down**  
**by Committee and by Source: 1997**

■ Individuals  
 ■ Other \*

Millions of Dollars

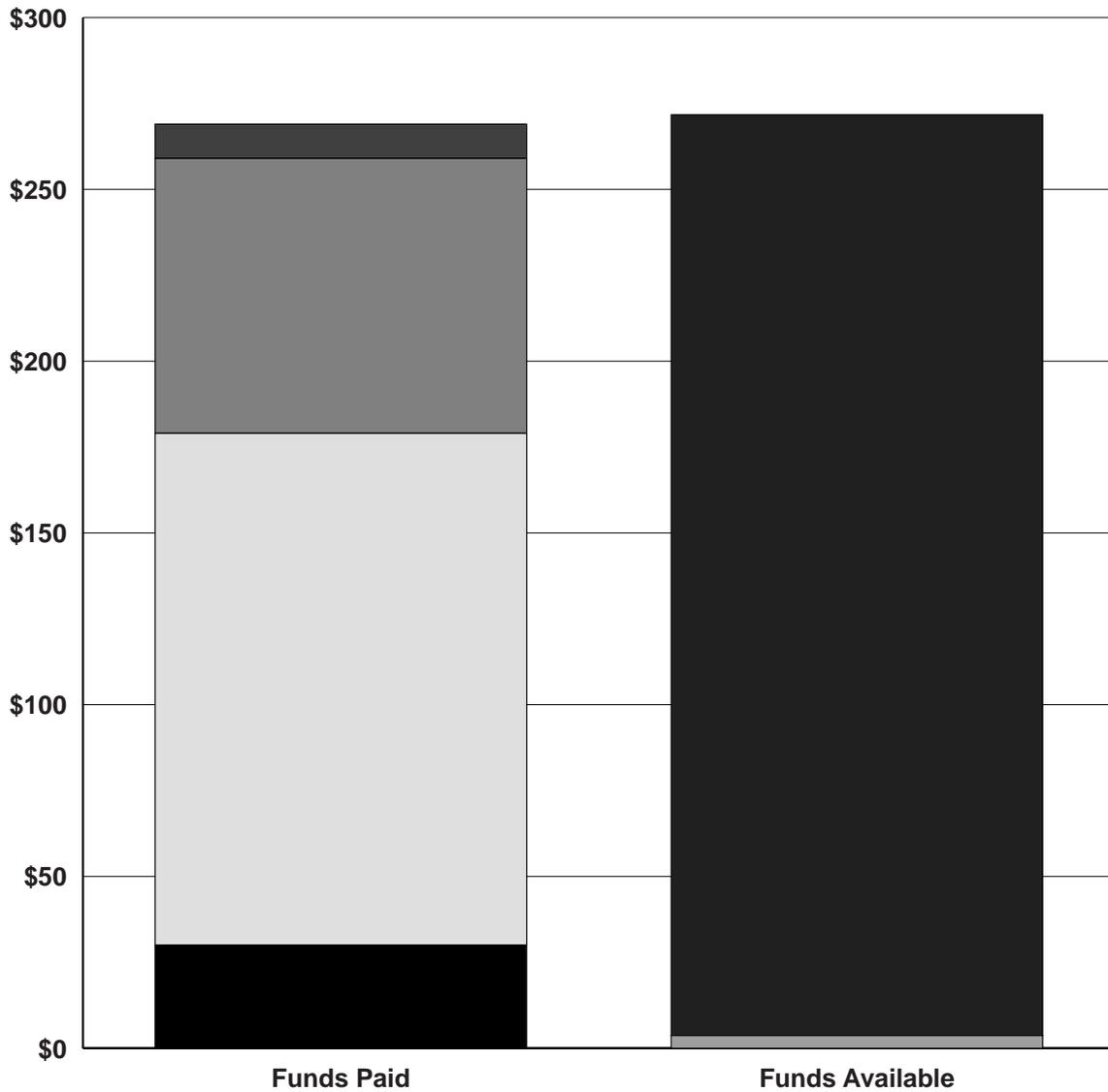


\* Includes contributions from PACs and other party committees, loans, refunds and rebates

**CHART 7-10**  
**Presidential Election Campaign Fund:**  
**Projected Payments and Funds Available**  
**for 2000 Election**

- 1997-2000 Receipts
- 1996 Ending Balance
- Primary Matching High Estimate
- Primary Matching Low Estimate
- General Election Grants
- Conventions

Millions of Dollars



# Appendix 1

## Biographies of Commissioners and Officers

### Commissioners

#### **John Warren McGarry, Chairman** **April 30, 1995**

First appointed to the Commission in 1978, Chairman McGarry was reappointed in 1983 and 1989 and was nominated for reappointment by President Clinton in 1997. He previously served as FEC Chairman in 1981, 1985 and 1991. Before his 1978 Commission appointment, Commissioner McGarry served as special counsel on elections to the House Administration Committee. He previously combined private law practice with service as chief counsel to the House Special Committee to Investigate Campaign Expenditures, a special committee established by Congress every election year through 1972. Before his work with Congress, Commissioner McGarry was the Massachusetts assistant attorney general.

After graduating *cum laude* from Holy Cross College, Commissioner McGarry did graduate work at Boston University and earned a J.D. degree from Georgetown University Law School.

#### **Joan D. Aikens, Vice Chairman** **April 30, 1995**

One of the original members of the Commission, Commissioner Aikens was first appointed in 1975. Following the reconstitution of the FEC that resulted from the Supreme Court's *Buckley v. Valeo* decision, President Ford reappointed her to a five-year term. In 1981, President Reagan named Commissioner Aikens to complete a term left open because of a resignation and, in 1983, once again reappointed her to a full six-year term. Most recently, Commissioner Aikens was reappointed by President Bush in 1989. She served as FEC Chairman in 1978, 1986 and 1992.

Before her 1975 appointment, Commissioner Aikens was an executive with Lew Hodges Communications, a public relations firm in Valley Forge, Pennsylvania. She was also a member of the Pennsylvania

Republican State Committee, president of the Pennsylvania Council of Republican Women and on the board of directors of the National Federation of Republican Women. A native of Delaware County, Pennsylvania, Commissioner Aikens has been active in a variety of volunteer organizations and was a member of the Commonwealth Board of the Medical College of Pennsylvania and a past president of Executive Women in Government. She is currently a member of the board of directors of Ursinus College, where she received her B.A. degree and an honorary Doctor of Law degree.

#### **Lee Ann Elliott, Commissioner** **April 30, 1999**

Commissioner Elliott was first appointed in 1981 and reappointed in 1987 and 1994. She served as Chairman in 1984, 1990 and 1996. Before her first appointment, Commissioner Elliott was vice president of a political consulting firm, Bishop, Bryant & Associates, Inc. From 1961 to 1979, she was an executive of the American Medical Political Action Committee. Commissioner Elliott was on the board of directors of the American Association of Political Consultants and on the board of the Chicago Area Public Affairs Group, of which she is a past president. She was also a member of the Public Affairs Committee of the U.S. Chamber of Commerce. In 1979, she received the Award for Excellence in Serving Corporate Public Affairs from the National Association of Manufacturers.

A native of St. Louis, Commissioner Elliott graduated from the University of Illinois. She also completed Northwestern University's Medical Association Management Executive Program and is a Certified Association Executive.

#### **Danny L. McDonald** **April 30, 1999**

Now serving his third term as Commissioner, Mr. McDonald was first appointed to the Commission in 1981 and was reappointed in 1987 and 1994. Before his original appointment, he managed 10 regulatory divisions as the general administrator of the Oklahoma Corporation Commission. He had previously served as secretary of the Tulsa County Election

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<sup>1</sup> Term expiration date.

Board and as chief clerk of the board. He was also a member of the Advisory Panel to the FEC's National Clearinghouse on Election Administration.

A native of Sand Springs, Oklahoma, Mr. McDonald graduated from Oklahoma State University and attended the John F. Kennedy School of Government at Harvard University. He served as FEC Chairman in 1983 and 1989.

**Scott E. Thomas**  
**April 30, 1997**

Scott Thomas was appointed to the Commission in 1986, reappointed in 1991 and nominated for reappointment by President Clinton on September 2, 1997. He was Chairman in 1987 and 1993. Prior to serving as a Commissioner, Mr. Thomas was the executive assistant to former Commissioner Thomas E. Harris. He originally joined the FEC as a legal intern in 1975 and later became an Assistant General Counsel for Enforcement.

A Wyoming native, Mr. Thomas graduated from Stanford University and holds a J.D. degree from Georgetown University Law Center. He is a member of the District of Columbia and U.S. Supreme Court bars.

## Statutory Officers

**John C. Surina, Staff Director**

Before joining the Commission in 1983, John Surina was assistant managing director of the Interstate Commerce Commission, where he was detailed to the "Reform 88" program at the Office of Management and Budget. In that role, he worked on projects to reform administrative management within the federal government. He was also an expert-consultant to the Office of Control and Operations, EOP-Cost of Living Council-Pay Board and on the technical staff of the Computer Sciences Corporation. During his Army service, Mr. Surina was executive officer of the Special Security Office, where he supported senior U.S. delegates to NATO's civil headquarters in Brussels. Mr. Surina served as 1991 chairman of the Council on Government and Ethics Laws (COGEL).

A native of Alexandria, Virginia, Mr. Surina holds a degree in Foreign Service from Georgetown University. He also attended East Carolina University and American University.

**Lawrence M. Noble, General Counsel**

Lawrence Noble became General Counsel in 1987, after serving as Acting General Counsel. He joined the Commission in 1977, becoming the Deputy General Counsel in 1983. He previously served as Assistant General Counsel for Litigation and as a litigation attorney. Before his FEC service, he was an attorney with the Aviation Consumers Action Project.

A native of New York, Mr. Noble holds a degree in Political Science from Syracuse University and a J.D. degree from the National Law Center at George Washington University. He is a member of the bars for the U.S. Supreme Court, the U.S. Court of Appeals for the D.C. Circuit and the District of Columbia. He is also a member of the American and District of Columbia Bar Associations.

Mr. Noble served as chairman of COGEL during 1998.

**Lynne McFarland, Inspector General**

Lynne McFarland became the FEC's first permanent Inspector General in February 1990. She came to the Commission in 1976, first as a reports analyst and then as a program analyst in the Office of Planning and Management.

A Maryland native, Ms. McFarland holds a sociology degree from Frostburg State College and is a member of the Institute of Internal Auditors.

## Appendix 2

# Chronology of Events

### January

- 1 — Chairman John Warren McGarry and Vice Chairman Joan D. Aikens begin their one-year terms of office.
  - FEC launches interim electronic filing program.
- 24 — FEC releases 1996 year-end PAC count.
  - FEC releases audit report on Mississippi Democratic Party PAC.
- 30 — Vice Chairman Joan D. Aikens testifies before Senate Committee on Rules and Administration on FY 1997 supplemental and FY 1998 amended budget request.
- 31 — 1996 year-end report due.

### February

- 15 — FEC publishes *Combined Federal/State Disclosure Directory 1997*.
- 19 — FEC submits 57 legislative recommendations to the President and Congress.

### March

- 5 — Commission releases final repayment determination for Fulani for President committee.
- 13 — Vice Chairman Joan D. Aikens testifies before House Appropriations Subcommittee on FY 1997 supplemental and FY 1998 amended budget request.
- 15 — Texas holds special general election in 28th Congressional District.
- 21 — Appeals court concludes Common Cause lacked standing to challenge FEC's dismissal of complaint (*Common Cause v. FEC* (96-5160)).
- 27 — FEC releases audit report on New Hampshire Democratic State Committee.

### April

- 2-4 — FEC conducts state outreach workshops in Cleveland, OH.
- 7 — Appeals court orders FEC to pay Christian Action Network's legal fees in case involving express advocacy and corporate communications (*FEC v. Christian Action Network*).

- 12 — Texas holds special runoff election in 28th Congressional District.
- 16-18 — FEC conducts state outreach workshops in Trenton, NJ.
- 25 — Revised "best efforts" regulations sent to Congress.
- 28 — Electronic filing regulations take effect.
- 29 — Increase in amount of civil penalties takes effect.
- 30-2 — FEC conducts state outreach workshops in Des Moines, IA.

### May

- 7 — Appeals court affirms district court decision declaring qualified nonprofit corporation regulations unconstitutional (*Minnesota Citizens Concerned for Life v. FEC*).
- 13 — District court denies Christian Coalition's motion for partial dismissal based on statute of limitations (*FEC v. Christian Coalition*).
  - FEC submits to President and Congress 22nd annual report.
  - New Mexico holds special general election in 3rd Congressional District.
- 30 — District court imposes \$20,000 civil penalty on Legi-Tech for violating sale and use ban (*FEC v. Legi-Tech*).
  - District court orders FEC to act on DSCC complaint within 30 days; authorizes DSCC to file suit directly against NRSC if FEC fails to act (*DSCC v. FEC* (96-2184)).

### June

- 6 — Appeals court declares voter guide/voting records regulations invalid (*Clifton v. FEC*).
- 11-12 — FEC conducts state outreach workshops in Phoenix, AZ.
- 12 — FEC approves audit report on Arlen Specter '96 committee.
- 18 — Commission holds public hearing on proposed rules governing independent expenditures by party committees.
- 19 — FEC approves audit report on Alexander for President committee.

- 25-26 — FEC conducts state outreach workshops in Madison, WI.
- 26 — FEC approves audit report on Phil Gramm for President committee.
- 30 — Commission submits to President and Congress report on impact of National Voter Registration Act.

### July

- 2 — Revised “best efforts” regulations take effect.
- 8 — FEC releases audit report on New Jersey Democratic State Committee.
- 11 — Office of Election Administration publishes *Federal Elections 96*.
- 17 — FEC approves audit report on LaRouche Presidential committee.
- 25 — FEC releases semiannual federal PAC count.
- 31 — Mid-year report due.

### August

- 27 — FEC approves audit report on Pete Wilson for President committee.

### September

- 15 — Disclosure Division publishes updated *Pacronyms*.
- 24-26 — FEC holds regional conference in Seattle, WA.
- 25 — FEC releases audit report on Democratic, Republican, Independent Voter Education (DRIVE).

### October

- 1 — FEC releases FECFile electronic filing software.
- 6 — Supreme Court declines to hear *Maine Right to Life v. FEC*.
- 10 — Act amended to include term limits for Commissioners and to establish Secretary of Senate as point-of-entry for DSCC and NRSC reports.
- 15-17 — FEC holds regional conference in Atlanta, GA.

- 21 — FEC releases audit report on Kevin Quigley for Congress committee.
- 30 — FEC publishes fourteenth edition of *Selected Court Case Abstracts*.

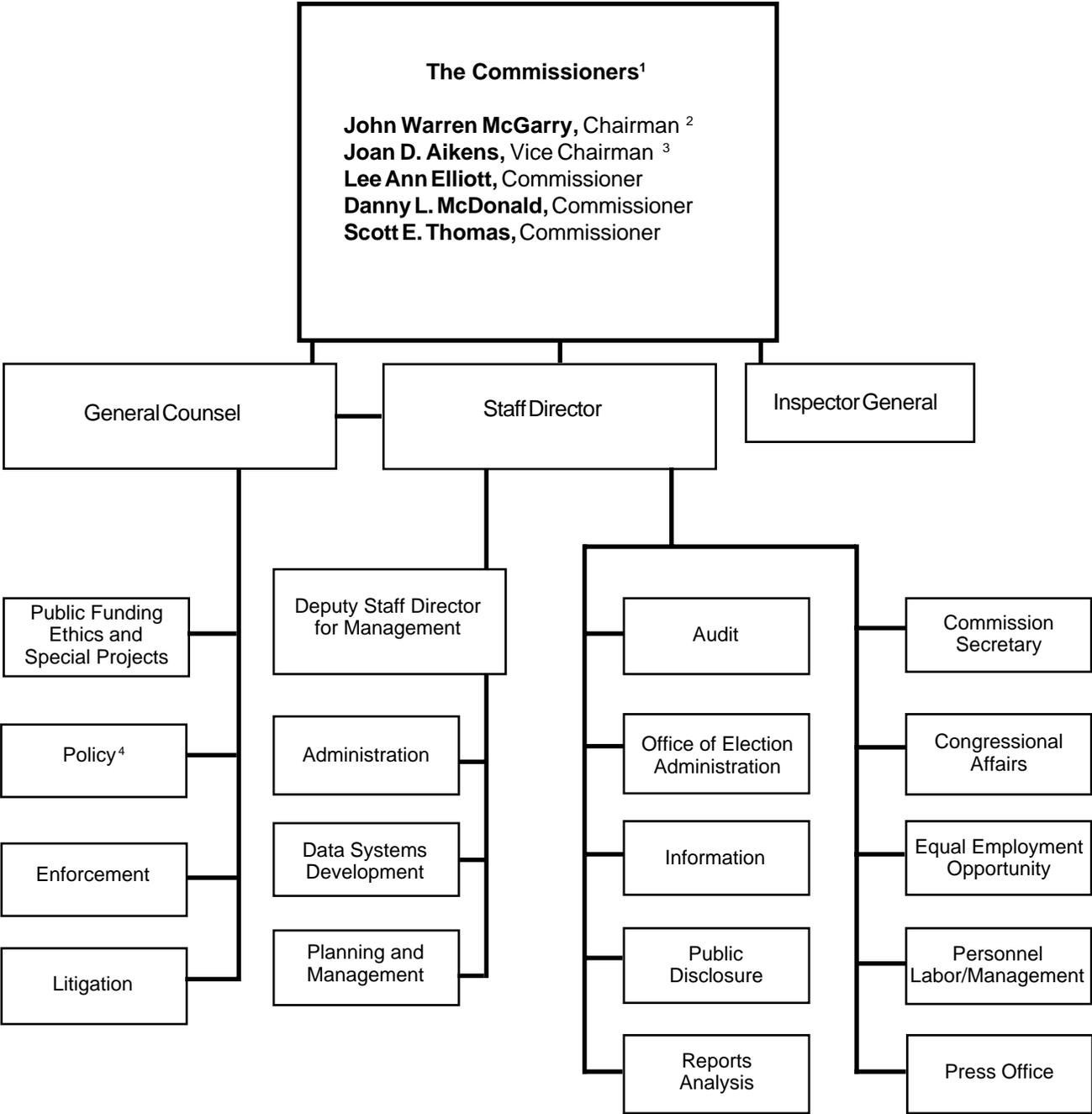
### November

- 4 — New York holds special general election in 13th Congressional District.
- 6-7 — FEC holds corporate/labor conference in Washington, DC.

### December

- 1 — Commission publishes new “Partnerships” and “Special Notices on Political Ads and Solicitations” brochures.
- 4 — FEC approves audit report on Perot ‘96 General committee.
- 11 — FEC elects Joan D. Aikens and Scott E. Thomas as 1998 Chairman and Vice Chairman.
- 11-12 — FEC holds membership/trade conference in Washington, DC.
- 15 — Commission publishes new edition of *Campaign Guide for Corporations and Labor Organizations*.

# Appendix 3 FEC Organization Chart



<sup>1</sup> One seat on the Commission remained vacant throughout 1997.  
<sup>2</sup> Joan D. Aikens was elected 1998 Chairman.  
<sup>3</sup> Scott E. Thomas was elected 1998 Vice Chairman.  
<sup>4</sup> Policy covers regulations, advisory opinions, legal review and administrative law.

## Appendix 4 FEC Offices

This appendix briefly describes the offices within the Commission, located at 999 E Street, NW, Washington, D.C. 20463. The offices are listed alphabetically, with local telephone numbers given for offices that provide services to the public. Commission offices can also be reached toll-free on 800-424-9530 and locally on 202-694-1100.

### Administration

The Administration Division is the Commission's "housekeeping" unit and is responsible for accounting, procurement and contracting, space management, payroll, travel and supplies. In addition, several support functions are centralized in the office such as printing, document reproduction and mail services. The division also handles records management, telecommunications, inventory control and building security and maintenance.

### Audit

Many of the Audit Division's responsibilities concern the Presidential public funding program. The division evaluates the matching fund submissions of Presidential primary candidates and determines the amount of contributions that may be matched with federal funds. As required by law, the division audits all public funding recipients.

In addition, the division audits those committees which, according to FEC determinations, have not met the threshold requirements for substantial compliance with the law. Audit Division resources are also used in the Commission's investigations of complaints.

### Commission Secretary

The Secretary to the Commission handles all administrative matters relating to Commission meetings, including agenda documents, Sunshine Act notices, minutes and certification of Commission votes. The office also circulates and tracks numerous materials not related to meetings, and records the Commissioners' tally votes on these matters.

### Commissioners

The six Commissioners—no more than three of whom may represent the same political party—are appointed by the President and confirmed by the Senate.<sup>1</sup>

The Commissioners serve full time and are responsible for administering and enforcing the Federal Election Campaign Act. They generally meet twice a week, once in closed session to discuss matters that, by law, must remain confidential, and once in a meeting open to the public. At these meetings, they formulate policy and vote on significant legal and administrative matters.

### Congressional, Legislative and Intergovernmental Affairs

This office serves as primary liaison with Congress and Executive Branch agencies. The office is responsible for keeping Members of Congress informed about Commission decisions and, in turn, for keeping the agency up to date on legislative developments. Local phone: 202-694-1006; toll-free 800-424-9530.

### Data Systems Development

This division provides computer support for the entire Commission. Its responsibilities are divided into two general areas.

In the area of campaign finance disclosure, the Data Systems Development Division enters information into the FEC database from all reports filed by political committees and other entities. The division is also responsible for the computer programs that sort and organize campaign finance data into indexes

These indexes permit a detailed analysis of campaign finance activity and, additionally, provide a tool for monitoring contribution limits. The indexes are available online through the Data Access Program (DAP), a subscriber service managed by the division.

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<sup>1</sup> As noted earlier, one seat on the Commission has been vacant since October 1995.

The division also publishes the *Reports on Financial Activity* series of periodic studies on campaign finance and generates statistics for other publications.

Among its duties related to internal operations, the division provides computer support for the agency's automation systems and for administrative functions such as management information, document tracking, personnel and payroll systems as well as the MUR prioritization system.

Local phone: 202-694-1250; toll-free phone: 800-424-9530.

## Equal Employment Opportunity (EEO) and Special Programs

The EEO Office advises the Commission on the prevention of discriminatory practices and manages the agency's EEO Program.

The office is also responsible for: developing a Special Emphasis Program tailored to the training and advancement needs of women, minorities, veterans, special populations and disabled employees; and recommending affirmative action recruitment, hiring, and career advancement. The office encourages the informal resolution of complaints during the counseling stage.

Additionally, the office develops and manages a variety of agency-wide special projects. These include the Combined Federal Campaign, the U.S. Savings Bonds Drive and workshops intended to improve employees' personal and professional lives.

## General Counsel

The General Counsel directs the agency's enforcement activities, represents and advises the Commission in any legal actions brought before it and serves as the Designated Agency Ethics Official. The Office of General Counsel handles all civil litigation, including Title 26 cases that come before the Supreme Court. The office also drafts, for Commission consideration, advisory opinions and regulations as well as other legal memoranda interpreting the federal campaign finance law.

## Information

In an effort to promote voluntary compliance with the law, the Information Division provides technical assistance to candidates, committees and others involved in elections through the world wide web, letters, phone conversations, publications and conferences. Responding to phone and written inquiries, members of the staff provide information on the statute, FEC regulations, advisory opinions and court cases. Staff also lead workshops on the law and produce guides, pamphlets and videos on how to comply with the law. Located on the second floor, the division is open to the public. Local phone: 202-694-1100; toll-free phone: 800-424-9530 (press 1 on a touch-tone phone).

## Inspector General

The FEC's Inspector General (IG) has two major responsibilities: to conduct internal audits and investigations to detect fraud, waste and abuse within the agency and to improve the economy and effectiveness of agency operations. The IG files reports notifying Congress of any serious problems or deficiencies in agency operations and of any corrective steps taken by the agency.

## Law Library

The Commission law library, part of the Office of General Counsel, is located on the eighth floor and is open to the public. The collection includes materials on campaign finance reform, election law and current political activity. Visitors to the law library can use its computers to access the Internet. The librarian and legal staff also maintain computer indices of enforcement proceedings (MURs) and advisory opinions, which may be searched in the Law Library or the Public Disclosure Division. Local phone: 202-694-1600; toll-free: 800-424-9530.

## Office of Election Administration

The Office of Election Administration (OEA), located on the second floor, assists state and local election officials by responding to inquiries, publishing research and conducting workshops on all matters related to election administration. Additionally, the OEA answers questions from the public and briefs foreign delegations on the U.S. election process, including voter registration and voting statistics.

Local phone: 202-694-1095; toll-free phone: 800-424-9530 (press 4 on a touch-tone phone).

## Personnel and Labor/Management Relations

This office provides policy guidance and operational support to managers and staff in a variety of human resource management areas. These include position classification, training, job advertising, recruitment and employment. The office also processes personnel actions such as step increases, promotions, leave administration, awards and discipline, performs personnel records maintenance and offers employee assistance program counseling. Additionally, Personnel administers the Commission's labor-management relations program and a comprehensive package of employee benefits, wellness and family-friendly programs.

## Planning and Management

This office develops the Commission's budget and, each fiscal year, prepares a management plan determining the allocation and use of resources throughout the agency. Planning and Management monitors adherence to the plan, providing monthly reports measuring the progress of each division in achieving the plan's objectives.

## Press Office

Staff of the Press Office are the Commission's official media spokespersons. In addition to publicizing Commission actions and releasing statistics on

campaign finance, they respond to all questions from representatives of the print and broadcast media. Located on the first floor, the office also handles requests under the Freedom of Information Act. Local phone: 202-694-1220; toll-free 800-424-9530.

## Public Disclosure

The Public Disclosure Division processes incoming campaign finance reports from political committees and candidates involved in federal elections and makes the reports available to the public. Located on the first floor, the division's Public Records Office has a library with ample work space and knowledgeable staff to help researchers locate documents and computer data. The FEC encourages the public to review the many resources available, which also include computer indexes, advisory opinions and closed MURs.

The division's Processing Office receives incoming reports and processes them into formats which can be easily retrieved. These formats include paper, microfilm and digital computer images that can be easily accessed from terminals in the Public Records Office and those of agency staff.

The Public Disclosure Division also manages Faxline, an automated faxing service for ordering FEC documents, forms and publications, available 24 hours a day, 7 days a week.

Local phone: 202-694-1120; toll-free phone: 800-424-9530 (press 3 on a touch-tone phone); Faxline: 202-501-3413.

## Reports Analysis

Reports analysts assist committee officials in complying with reporting requirements and conduct detailed examinations of the campaign finance reports filed by political committees. If an error, omission or prohibited activity (e.g., an excessive contribution) is discovered in the course of reviewing a report, the analyst sends the committee a letter which requests that the committee either amend its reports or provide further information concerning a particular problem. By sending these letters (RFAs), the Commission

seeks to ensure full disclosure and to encourage the committee's voluntary compliance with the law. Analysts also provide frequent telephone assistance to committee officials and encourage them to call the division with reporting questions or compliance problems. Local phone: 202-694-1130; toll-free phone 800-424-9530 (press 2 on a touch-tone phone).

## **Staff Director and Deputy Staff Director**

The Staff Director carries the responsibilities of appointing staff, with the approval of the Commission, and implementing Commission policy. The Staff Director oversees the Commission's public disclosure activities, outreach efforts, review of reports and the audit program, as well as the administration of the agency.

The Deputy Staff Director has broad responsibility for assisting in this supervision, particularly in the areas of budget, administration and computer systems.

## Appendix 5 Statistics on Commission Operations

### Summary of Disclosure Files

	Total Filers Existing in 1997	Filers Terminated as of 12/31/97	Continuing Filers as of 12/31/97	Number of Reports and Statements in 1997	Gross Receipts in 1997	Gross Expenditures in 1997
<b>Presidential Candidate Committees</b>	387	40	347	422	11,885,310	20,891,234
<b>Senate Candidate Committees</b>	588	94	494	1,156	132,843,790	68,242,606
<b>House Candidate Committees</b>	2,683	372	2,311	4,571	146,360,518	91,519,017
<b>Party Committees</b>	628	60	568	2,113	301,358,738	284,799,482
Federal Party Committees	532	60	472	1,751	213,664,797	202,269,492
Reported Nonfederal Party Activity	96	0	96	362	87,693,941	82,529,990
<b>Delegate Committees</b>	10	2	8	2	0	3,089
<b>Nonparty Committees</b>	4,128	284	3,844	18,265	223,052,817	164,033,084
Labor Committees	347	15	332	1,727	51,451,687	33,744,126
Corporate Committees	1,705	108	1,597	8,766	69,392,457	54,480,518
Membership, Trade and Other Committees	2,076	161	1,915	7,772	102,208,673	75,808,440
<b>Communication Cost Filers</b>	224	0	224	35	N/A	173,887
<b>Independent Expenditures by Persons Other Than Political Committees</b>	358	17	341	27	N/A	44,071

### Divisional Statistics for Calendar Year 1997

	Total
<b>Reports Analysis Division</b>	
Documents processed	39,198
Reports reviewed	51,170
Telephone assistance and meetings	9,949
Requests for additional information (RFAls)	9,714
Second RFAls	4,474
Data coding and entry of RFAls and miscellaneous documents	20,098
Compliance matters referred to Office of General Counsel or Audit Division	61
<b>Data Systems Development Division *</b>	
Documents receiving Pass I coding	37,034
Documents receiving Pass III coding	37,946
Documents receiving Pass I entry	39,696
Documents receiving Pass III entry	38,008
Transactions receiving Pass III entry	
• In-house	152,799
• Contract	445,955
<b>Public Records Office</b>	
Campaign finance material processed (total pages)	847,773
Requests for campaign finance reports	7,417
Visitors	12,605
Total people served	20,022
Information telephone calls	17,440
Computer printouts provided	57,513
Total income (transmitted to U.S. Treasury)	\$48,614
Cumulative total pages of documents available for review	14,707,783
Contacts with state election offices	3,915
Notices of failure to file with state election offices	330
Faxline requests	4,637

\* Computer coding and entry of campaign finance information occur in two phases. In the first phase, Pass I, summary information is coded and entered into the computer within 48 hours of the Commission's receipt of the report. During the second phase, Pass III, itemized information is coded and entered.

	Total
<b>Administrative Division</b>	
Contracting and procurement transactions	2,094
Publications prepared for print	35
Pages of photocopying	9,842,600
<b>Information Division</b>	
Telephone inquiries	53,857
Information letters	99
Distribution of FEC materials	5,240
Prior notices (sent to inform filers of reporting deadlines)	14,355
Other mailings	46,318
Visitors	136
Public appearances by Commissioners and staff	165
State workshops	5
Publications	31
<b>Press Office</b>	
News releases	103
Telephone inquiries from press	17,144
Visitors	1,300
Freedom of Information Act (FOIA) requests	460
Fees for materials requested under FOIA (transmitted to U.S. Treasury)	\$51,177
<b>Office of Election Administration</b>	
Telephone inquiries	4,712
National surveys conducted	6
Individual research requests	201
Materials distributed *	12,144
Election presentations/conferences	15
Foreign briefings	76
Publications	5

\* Figure includes National Voter Registration Act materials.

	Total
Office of General Counsel	
Advisory opinions	
Requests pending at beginning of 1997	6
Requests received	29
Issued	26
Not Issued*	3
Pending at end of 1997	6
Compliance cases <sup>†</sup>	
Pending at beginning of 1997	361
Opened	147
Closed	301
Pending at end of 1997	207
Litigation	
Cases pending at beginning of 1997	44
Cases opened	22
Cases closed	31
Cases pending at end of 1997	35
Cases won	21
Cases lost	4
Cases settled	6
Law Library	
Telephone inquiries	829
Visitors	1,341

\* Two advisory opinion requests were withdrawn and one was dismissed due to incomplete facts.

<sup>†</sup> In annual reports previous to 1994, the category "compliance cases" included only Matters Under Review (MURs). As a result of the enforcement prioritization system, the category has been expanded to include internally-generated matters in which the Commission has not yet made reason to believe findings.

### Audit Reports Publicly Released

Year	Title 2*	Title 26 <sup>†</sup>	Total
1976	3	1	4
1977	6	6	12
1978	98 <sup>‡</sup>	10	108
1979	75 <sup>‡</sup>	9	84
1980	48 <sup>‡</sup>	11	59
1981	27 <sup>‡</sup>	13	40
1982	19	1	20
1983	22	0	22
1984	15	2	17
1985	4	9	13
1986	10	4	14
1987	12	4	16
1988	8	0	8
1989	2	7	9
1990	1	6	7
1991	5	8	13
1992	9	3	12
1993	10	2	12
1994	5	17	22
1995	12	0	12
1996	23	0	23
1997	6	6	12
<b>Total</b>	<b>420</b>	<b>119</b>	<b>539</b>

### Audits Completed by Audit Division, 1975 – 1997

	Total
Presidential	99
Presidential Joint Fundraising	11
Senate	22
House	149
Party (National)	46
Party (Other)	134
Nonparty (PACs)	78
<b>Total</b>	<b>539</b>

\* **Audits for cause:** The FEC may audit any registered political committee: 1) whose reports do not substantially comply with the law; or 2) if the FEC has found reason to believe that the committee has committed a violation. 2 U.S.C. §§438(b) and 437g(a)(2).

<sup>†</sup> **Title 26 audits:** The Commission must give priority to these mandatory audits of publicly funded committees.

<sup>‡</sup> **Random audits:** Most of these audits were performed under the Commission's random audit policy (pursuant to the former 2 U.S.C. §438(a)(8)). The authorization for random audits was repealed by Congress in 1979.

**Status of Audits, 1997**

	<b>Pending at Beginning of Year</b>	<b>Opened</b>	<b>Closed</b>	<b>Pending at End of Year</b>
Presidential	10	7	6	11
Presidential Joint Fundraising	0	0	0	0
Senate	0	1	0	1
House	0	6	3	3
Party (National)	0	1	0	1
Party (Other)	4	0	2	2
Nonparty (PACs)	1	0	1	0
<b>Total</b>	<b>15</b>	<b>15</b>	<b>12</b>	<b>18</b>

## Appendix 6

# 1997 Federal Register Notices

### 1997-1

Filing Dates for Texas Special Elections (62 FR 8449, February 25, 1997)

### 1997-2

Filing Dates for New Mexico Special Elections (62 FR 10562, March 7, 1997)

### 1997-3

Adjustment to Civil Monetary Penalty Amounts; Final Rule (62 FR 11316, March 12, 1997)

### 1997-3 Correction

Adjustments to Civil Monetary Penalty Amounts; Final Rule (62 FR 18167, April 14, 1997)

### 1997-4

Definition of Member of Membership Association: Rulemaking Petition; Notice of Availability (62 FR 13355, March 20, 1997)

### 1997-5

Filing Dates for Texas Special Elections (62 FR 15482, April 1, 1997)

### 1997-6

Electronic Filing of Reports by Political Committees: Final Rules; Announcement of Effective Date (62 FR 22880, April 28, 1997)

### 1997-7

Recordkeeping and Reporting by Political Committees; Best Efforts: Final Rule; Transmittal of Regulations to Congress (62 FR 23335, April 30, 1997)

### 1997-8

Independent Expenditures and Party Committee Expenditure Limitations: Notice of Proposed Rulemaking (62 FR 24367, May 5, 1997)

### 1997-9

Adjustments to Civil Monetary Penalty Amounts: Final Rule; Correction of Effective Date (62 FR 32021, June 12, 1997)

### 1997-10

Prohibited and Excessive Contributions; Soft Money: Rulemaking Petition; Notice of Availability (62 FR 33040, June 18, 1997)

### 1997-11

Recordkeeping and Reporting by Political Committees: Best Efforts; Final Rule and Announcement of Effective Date (62 FR 35670, July 2, 1997)

### 1997-12

Definition of Member of a Membership Association: Advance Notice of Proposed Rulemaking (62 FR 40982, July 31, 1997)

### 1997-13

Filing Dates for New York Special Election (62 FR 43733, August 15, 1997)

### 1997-14

Recordkeeping and Reporting: Notice of Proposed Rulemaking (62 FR 50708, September 26, 1997)

### 1997-15

Definition of Express Advocacy: Rulemaking Petition; Notice of Availability (62 FR 60047, November 6, 1997)

### 1997-16

Filing Dates for California Special Election (62 FR 63715, December 2, 1997)

### 1997-17

Qualified Nonprofit Corporations: Rulemaking Petition; Notice of Availability (62 FR 65040, December 10, 1997)

### 1997-18

Filing Dates for Pennsylvania Special Election (62 FR 65704, December 15, 1997)

### 1997-19

Privacy Act: Republication and Notice of New Routine Uses for Disclosure (62 FR 65694, December 15, 1997)

**1997-20**

Definition of Member of a Membership Association:  
Notice of Proposed Rulemaking (62 FR 66832, December 22, 1997)

**1997-21**

Recordkeeping and Reporting: Notice of Public Hearing (62 FR 67300, December 24, 1997)