Legislative Recommendations of the Federal Election Commission 2013

Chair Ellen L. Weintraub
Vice Chairman Lee E. Goodman
Commissioner Caroline C. Hunter
Commissioner Matthew S. Petersen
Commissioner Ann M. Ravel
Commissioner Steven T. Walther

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Authority to Create Senior Executive Service Positions

Sections: 5 U.S.C. § 3132(a)(1)
2 U.S.C. § 437c(f)(1)

Recommendation: Congress should delete the exclusion of the Federal Election Commission from eligibility for the Senior Executive Service (SES) under the *Civil Service Reform Act of 1978* (as amended by the *Federal Election Campaign Act Amendments of 1979*). *See* Public Law 96-187, § 203, 93 Stat. 1339, 1368 (1980), *codified at* 5 U.S.C. § 3132(a)(1)(C). Additionally, Congress should revise section 310 of the Federal Election Campaign Act to delink the salaries of the Staff Director and the General Counsel from Level IV and Level V of the Executive Schedule.

Explanation: The Commission believes that these statutory changes are needed to bring the Commission's personnel structure in line with that of other comparable federal agencies. This would ensure that the Commission is better able to compete with other government agencies in recruiting and retaining key management personnel.

Currently, the Commission is prohibited by law from creating Senior Executive Service positions within the agency. 5 U.S.C. § 3132(a)(1)(C). The Commission recommends that it be made eligible to create Senior Executive Service positions because: (1) the agency currently has several top management positions that the Commission believes would fully satisfy the criteria for SES positions set forth in 5 U.S.C. § 3132 (*e.g.*, directing the work of an organizational unit, monitoring progress toward organizational goals, etc.); and (2) the SES system would provide institutional benefits to the agency and agency employees.

As a result of the current prohibition, the Commission's senior managers (other than the Staff Director and the General Counsel) are employed in Senior Level positions. The current Senior Level positions (the Chief Financial Officer, four Deputy Staff Directors, two Deputy General Counsels, and three Associate General Counsels) oversee major programmatic areas and supervise not only staff, but other managers as well. Although these ten top management positions are designated as Senior Level, because supervisory and executive responsibilities occupy 100% of the time of the employees filling these positions, the positions would be more appropriately designated as SES.[1]

The Commission is also cognizant of a recently launched Senior Executive Service Initiative.[2] This initiative includes a collaborative, cross-agency reinvigoration in the training, development and qualification of SES-certified employees to meet the staffing needs of the

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[1] In fact, OPM's guidance on the Senior Level positions indicates that the Senior Level system is generally for positions in which supervisory duties occupy less than 25% of the employee's time. *See* http://www.opm.gov/policy-data-oversight/senior-executive-service/scientific-senior-level-positions/ (last visited Dec. 5, 2013). OPM's guidance does note, however, that "in a few agencies [such as the Federal Election Commission] that are statutorily exempt from inclusion in the Senior Executive Service (SES), executive positions are staffed with SL employees."

[2] *See* OMB/OPM *Memorandum for the Senior Executive Service* (Feb. 18, 2011) available at http://archive.opm.gov/ses/OMB_OPM_SESMemo.pdf (last visited Dec. 5, 2013).

government in view of the anticipated loss of SES qualified personnel due to attrition in the near future. This amendment, if enacted, would afford existing FEC staff and future staff the opportunity to participate in and benefit professionally from this initiative, and should allow the agency to develop an increasing level of competence in its labor force.

Additionally, recent legislation has put the salary ranges for Senior Executive Service employees and Senior Level employees in parity. *See Senior Professional Performance Act of 2008*, Public Law 110-372, 122 Stat. 4043 (2008). In addition, like SES employees, Senior Level employees may now carry over 720 hours of annual leave into the next year, rather than the previous Senior Level limit of 240. Nonetheless, the SES system would provide institutional benefits to the Commission and its employees by enhancing the quality and quantity of the pool of persons available to fill vacancies that may arise.

SES candidates must go through a competitive selection process in order to enter a Candidate Development Program ("CDP"). Completion of a CDP by candidates within the agency ensures that a cadre of SES-approved employees is available for selection and thereby assists in good succession planning. In addition, a fundamental concept underlying the SES system is enabling agencies to hire experienced and skilled leaders from a *government-wide*, not just intra-agency, pool with relative ease and with the assurance that all such employees have met the same standards of development and experience. For example, because SES-certified applicants from outside the agency will have met all of the Executive Core Qualifications, the Commission would be able to evaluate their applications with the assurance that fundamental competencies have already been developed.

The current provision in *FECA* specifies that the Staff Director and General Counsel are to be paid at Level IV and Level V of the Executive Schedule, respectively. Both positions supervise personnel at the GS-15 and Senior Level pay scales, which often provide higher salaries than Levels IV and V of the Executive Schedule. The Staff Director and General Counsel have significant responsibilities and oversight duties with respect to both administrative and legal areas, as well as management over almost all agency personnel. According to recruiting specialists working with the Commission, the current limit makes attracting a strong pool of applicants to these positions more challenging. The appointment and retention of these key leaders has been identified as an ongoing challenge to the Commission by the Inspector General in recent Performance and Accountability Reports, and the General Counsel's position is currently vacant.

The Commission proposes to remove the statutory references to the Executive Schedule so that the Staff Director and General Counsel would be compensated under the same schedule as the Commission's other senior managers. This revision will address the current situation where the Commission's top managers are compensated at a lower rate than many of their direct reports, and will ensure that the Commission can retain highly qualified individuals to serve in those positions as well as enable it to remain competitive in the marketplace for Federal executives when filing the current vacancy or when further vacancies arise. This change will not require an increase in the Commission's appropriation request.

Accordingly, the Commission believes that the positions of Staff Director and General Counsel, as well as the current Senior Level positions within the agency, would be more appropriately categorized as SES positions and that any future Senior Level positions should be created in the SES. Because salary ranges for Senior Executive Service employees and Senior Level employees are in parity, as discussed above, permitting the Commission to convert its Senior Level positions into Senior Executive Service positions will affect the salary expenses for only two positions: the Staff Director and the General Counsel.

Legislative Language:

Section 310(f)(1) of the *Federal Election Campaign Act of 1971* (2 U.S.C. § 437c(f)(1)) is amended by striking the second and third sentences.

Section 3132(a)(1)(C) of Title 5, United States Code, is amended by striking "the Federal Election Commission, or".

Making Permanent the Administrative Fine Program for Reporting Violations

Section: 2 U.S.C. § 437g

Recommendation: Congress should make permanent the Commission's authority to assess administrative fines for straightforward violations of the law requiring timely reporting of receipts and disbursements. The Commission's current Administrative Fine Program only covers violations that relate to reporting periods through December 31, 2013.

Explanation: On October 16, 2008, President Bush signed legislation that extended the Administrative Fine Program to cover violations of 2 U.S.C. § 434(a) that relate to reporting periods through December 31, 2013. *See* Public Law 110-433, 122 Stat. 4971 (2008). Since the Administrative Fine program was implemented in 2000 through the end of fiscal year 2013, the Commission has processed and made public 2,623 cases, with $4.9 million in fines assessed. The Administrative Fine Program has been remarkably successful: over the course of the program, the number of late and nonfiled reports has dramatically decreased. For election cycles 1992 through 2000, an average of 21% of campaign finance reports were filed late. Since the inception of the Administrative Fine Program, the percentage of late reports has dropped to below 10%. As a result, the Administrative Fine Program has become an integral part of the Commission's mission to administer and enforce the Act. With fewer late reports and fewer challenges to administrative fines, the Commission has been able to reduce the number of employees who work on this program. By making the program permanent, Congress would ensure that the Commission would not lose one of the most cost-effective and successful programs in its history.

Under the Administrative Fine Program, the Commission considers reports to be filed late if they are received after the due date, but within 30 days of that due date. Election-sensitive reports are considered late if they are filed after their due date, but at least five days before the election. (Election sensitive reports are those filed immediately before an election and include pre-primary, pre-special, pre-general, October quarterly and October monthly reports.) Committees filing reports after these dates are considered nonfilers. Civil money penalties for late reports are determined by the amount of activity on the report, the number of days the report was late and any prior penalties for violations under the administrative fine regulations. Penalties for nonfiled reports are determined by the estimated amount of activity on the report and any prior violations. Committees have the option to either pay the civil penalty assessed or challenge the Commission's finding, proposed penalty or both.

On November 18, 2013, the House of Representatives passed H.R. 3487, which would extend the authority for the Commission's Administrative Fines Program to reporting periods through the end of 2018. That bill is pending in the Senate. In the absence of permanent authority, the Commission supports this extension of the Administrative Fines Program.

Legislative Language:

Section 309(a)(4)(C) of the *Federal Election Campaign Act of 1971* (2 U.S.C. § 437g(a)(4)(C)) is amended to read as follows: "(iv) This subparagraph shall apply with respect to violations that relate to reporting periods that begin on or after January 1, 2000.".

Authority to Accept Gifts

Section: 2 U.S.C. § 437d

Recommendation: Congress should authorize the Commission to accept gifts that will assist the Commission in carrying out its functions.

Explanation: Congress has provided authority to numerous Federal departments and agencies to accept gifts that will assist that department or agency in carrying out its duties. *See, e.g.*, 5 U.S.C. app. § 403(b)(1) (Office of Government Ethics); 28 U.S.C. § 524(d) (Department of Justice); 40 U.S.C. § 3175 (General Services Administration). In the absence of specific statutory authority, a government agency may not accept donations of goods or services from private sources. *See* U.S. Gov't Accountability Office, GAO B-289903, *Gifts of Goods and Services to the Government* (2002). The Commission is currently without such authority, but wishes to be able to accept gifts, should any offers be received.

State disclosure agencies have received donated services and products for information technology projects to promote and enhance the transparency of data disclosed to the government. Such donations have come from individuals or organizations that support the agencies' mission of enhancing transparency.

The Federal Election Commission would like to be authorized to accept similar gifts and would use those gifts to continue its efforts to facilitate transparency in the federal campaign finance system through a state-of-the-art, web-based public disclosure system, ensuring that the vast quantity of campaign finance data is available to the public quickly and in a manner that is easy for the general public to sort and search. Such gifts are an example of the gifts the Commission would be authorized to accept under the proposal, and all accepted gifts would be used to assist the Commission in carrying out its mission.

The Commission recognizes that vigilant review would be required to limit conflicts of interest and would promulgate a regulation to disclose any gifts prior to acceptance.

Legislative Language:

Section 311 of the *Federal Election Campaign Act of 1971* (2 U.S.C.§ 437d) is amended by adding at the end the following new subsection:

"(f) *Authority to accept gifts*.

"(1) The Commission is authorized to accept and utilize on behalf of the United States, any gift, donation, bequest, or devise of money, use of facilities, personal property, or services for the purpose of aiding or facilitating the work of the Federal Election Commission.

“(2) No gift may be accepted—

“(A) that attaches conditions inconsistent with applicable laws or regulations; or

“(B) that is conditioned upon or will require the expenditure of appropriated funds that are not available to the Federal Election Commission.

“(3) Prior to accepting any gift pursuant to the authority provided by this subsection, the Commission shall promulgate a regulation that requires the public disclosure of the donor of the gift, the date of the gift, and a description of the nature, value and intended use of the gift.”

Electronic Filing of Senate Reports

Sections: 2 U.S.C. §§ 432(g) and 434(a)(11)

Recommendation: Congress should require electronic filing for all Senate candidates and their authorized committees (and for those persons and political committees filing designations, statements, reports or notifications pertaining only to Senate elections) if they have, or have reason to expect to have, aggregate contributions or expenditures in excess of the threshold amount determined by the Commission.

Explanation: The *Treasury and General Government Appropriations Act, 2000*, Public Law 106-58, § 639, 113 Stat. 430, 476 (1999), required that the Commission make electronic filing mandatory for political committees and other persons required to file with the Commission who, in a calendar year, have, or have reason to expect to have, total contributions or total expenditures exceeding a threshold amount set by the Commission (which is currently $50,000). However, because Senate candidates file with the Secretary of the Senate, the mandatory electronic filing provisions do not apply to Senate candidates and their committees. The Commission notes that legislation to require Senate campaigns to file reports with the Federal Election Commission, rather than the Secretary of the Senate, has been referred out of committee and is pending before the Senate. *See Senate Campaign Disclosure Parity Act*, S. 375, 113th Cong. (2013). This legislation, if passed, would make those committees subject to mandatory electronic filing at the Federal Election Commission.

Compared to data from paper reports, data from electronically filed reports is received, processed and disseminated more easily and efficiently, resulting in better use of resources. In fact, the Commission estimates at least $430,000 per year in costs directly attributable to current Senate filing procedures would be saved by requiring electronic filing. In addition to these savings for the Commission, the Secretary of the Senate would also realize savings, and committees that file reports could substantially reduce their processing costs. Reports that are filed electronically are normally available, and may be downloaded, within minutes. In contrast, the time between the receipt of a report filed through the paper filing system and its initial appearance on the Commission's web site is 48 hours. Moreover, a Senate campaign filing often consists of thousands of pages, and data from the filings themselves take up to 30 days to be integrated into the Commission's searchable databases. If such reports were electronically filed, the data could be integrated within a few days.

Electronic filing is generally unaffected by disruptions in the delivery of mail, such as those arising from security measures put in place after the discovery of anthrax powder and ricin in mail in 2001, 2004 and very recently in 2013. Electronic filings are not subject to these delays.

Legislative Language:

Section 302(g) of the *Federal Election Campaign Act of 1971* (2 U.S.C. § 432(g)) is amended to read as follows:

"(g). *Filing With the Commission.*—All designations, statements, and reports required to be filed under this Act shall be filed with the Commission."

Electronic Filing of Electioneering Communication Reports

Section: 2 U.S.C. § 434(a)(11)(A)(i)

Recommendation: Congress should require reports of electioneering communications to be filed electronically with the Commission, rather than on paper.

Explanation: The *Treasury and General Government Appropriations Act, 2000,* Public Law 106-58, § 639, 113 Stat. 430, 476 (1999), required that the Commission make electronic filing mandatory for political committees and other persons required to file with the Commission who, in a calendar year, have, or have reason to expect to have, total contributions or total expenditures exceeding a threshold amount set by the Commission (which is currently $50,000). In addition, many independent expenditure reports are already subject to mandatory electronic filing under 2 U.S.C. § 434(a)(11)(A)(i). However, because electioneering communication reports are not filed by political committees, and because funds spent for electioneering communications are reported as "disbursements," and not as "expenditures," the mandatory electronic filing provisions generally do not apply to electioneering communication reports.

Compared to data from paper reports, data from electronically filed reports is received, processed and disseminated more easily and efficiently, resulting in better use of resources. Reports that are filed electronically are normally available, and may be downloaded, within minutes. In contrast, the time between the receipt of a report filed through the paper filing system and its initial appearance on the Commission's web site is 48 hours.

Electronic filing is generally unaffected by disruptions in the delivery of mail, such as those arising from security measures put in place after the discovery of anthrax powder and ricin in mail in 2001 and 2004. Because of these security measures, the Commission's receipt of mailed paper filings is delayed. In contrast, electronic filings are not subject to these delays.

More and more, electioneering communications comprise a significant part of the overall election-related communications during an election. In the 2011-2012 election cycle, reports were filed with the Commission documenting more than $15 million in electioneering communications.

Only entities that report more than $50,000 of electioneering communications would be subject to mandatory electronic filing under the proposal. The current threshold selected by the Commission ensures that entities with limited financial resources can file reports on paper, which avoids the limited cost of internet access and a computer sufficient to file reports. In the 2011-2012 period, only 24 filers of electioneering communication reports disclosed financial activity in excess of the current $50,000 threshold, and thus would have been subject to mandatory electronic filing under the proposal. Of these 24 filers, 22 (or 92%) reported electioneering communications in excess of $100,000, which certainly suggests the organizations likely affected by the proposal have more than sufficient resources to meet the low costs of electronic filing.

Legislative Language:

Section 304(a)(11)(A)(i) of the *Federal Election Campaign Act of 1971* (2 U.S.C. § 434(a)(11)(A)(i)) is amended by inserting “or makes or has reason to expect to make electioneering communications” after “expenditures”.

Conversion of Campaign Funds

Section: 2 U.S.C. § 439a

Recommendation: Congress should amend the *Federal Election Campaign Act's* prohibition of the personal use of campaign funds to extend its reach to all political committees.

Explanation: In 2007, the Department of Justice noted, "[r]ecent years have seen a dramatic rise in the number of cases in which candidates and campaign fiduciaries steal money that has been contributed to a candidate or political committee for the purpose of electing the candidate or the candidates supported by the political committee." *See* U.S. Department of Justice, *Federal Prosecution of Election Offenses*, 194-95 (7th ed. May 2007). In fact, the Commission has seen a substantial number of instances where individuals with access to the funds received by political committees have used such funds to make unauthorized disbursements to pay for their own personal expenses.

The *Federal Election Campaign Act* makes it illegal for an individual to use contributions accepted by a candidate or a candidate's committee for his or her own personal use, *i.e.* to fulfill any commitment, obligation, or expense that would exist irrespective of the candidate's election campaign or duties as a holder of Federal office. *See* 2 U.S.C. § 439a(b). However, no corresponding provision covers individuals who convert contributions received by party committees, separate segregated funds, leadership PACs, and other political committees to their own personal use, including through theft or embezzlement. While other provisions of FECA are sometimes adequate to address these types of unauthorized disbursements, sometimes they are not.

Leadership PACs present a particularly compelling case for this amendment. The close relationships of leadership PACs to the officeholders who sponsor them make leadership PACs very similar to authorized committees, which are already covered by the personal use prohibition. Because leadership PACs were not expressly recognized in *FECA* until a 2007 amendment, Congress might not have considered the application of the personal use prohibition to this particular type of political committee.

The Commission proposes to revise 2 U.S.C. § 439a(b) to address this growing problem by prohibiting the use by any person of any political committee's receipts for expenses that would exist irrespective of the political committee's political activities. Political activities would include activities in connection with a Federal election, as well as activities in furtherance of a political committee's policy or educational objectives and other legitimate committee functions and related administrative expenses. Such an amendment would provide for coherent and consistent application of FECA.

Legislative Language:

Section 313 of the *Federal Election Campaign Act of 1971* (2 U.S.C. § 439a) is amended:

(1) in paragraph (b)(1), by inserting "or a receipt accepted by any other political committee" after "subsection (a)";

(2) in paragraph (b)(2), by striking "contribution or donation" and replacing with "contribution, donation, or receipt";

(3) in paragraph (b)(2), by striking "campaign or individual's duties as a holder of Federal office," and inserting "campaign, individual's duties as a holder of Federal office, or political committee's political activities,".

Increase and Index for Inflation Registration and Reporting Thresholds

Sections: 2 U.S.C. §§ 431 and 434

Recommendation: Congress should increase and index for inflation certain registration and reporting thresholds in the *Federal Election Campaign Act* that have not been changed since the 1970s.

Explanation: Most of the *Federal Election Campaign Act's ("FECA's")* contribution limits and registration and reporting thresholds were set in the 1970s. Because over twenty years of inflation had effectively reduced *FECA's* contribution limits in real dollars, the *Bipartisan Campaign Reform Act of 2002 ("BCRA")* increased most of the *Act's* contribution limits to adjust for some of the effects of inflation. Furthermore, *BCRA* indexed these limits for inflation to address inflation in future. The Commission proposes extending this approach to registration and reporting thresholds, which have been effectively reduced by inflation since those thresholds were established in 1971 or 1979.

Since 1971, *FECA* has provided that any group of persons that receives contributions or makes expenditures in excess of $1,000 in a calendar year must register and report as a political committee. 2 U.S.C. § 431(4)(A). *FECA* also requires political committees to abide by the contributions limits and source prohibitions specified in *FECA*. Since 1979, *FECA* has provided that local political party organizations are also subject to a $1,000 threshold for (federal) political committee status. 2 U.S.C. § 431(4)(C). The Commission recommends that Congress increase these thresholds to amounts determined appropriate by Congress, and then index those amounts for inflation to prevent erosion in the future.

Raising this threshold would be particularly beneficial for local and Congressional district committees of political parties. These organizations frequently breach the $1,000 threshold. An increased threshold would permit limited spending on federal elections without triggering federal political committee status for local and Congressional district committees of political parties.

Since 1979, *FECA* has required persons (other than political committees) who make independent expenditures in excess of $250 in a calendar year to report such expenditures to the Commission. 2 U.S.C. § 434(c)(1). The Commission recommends that Congress increase this threshold to an amount determined by Congress, and index this amount for inflation.

Increasing these thresholds would take into account many years of inflation and the general increase in campaign cost and ease the compliance burdens on smaller organizations and individuals. Additionally, by increasing the thresholds, Congress would exempt some individuals and small organizations that engage in only minimal spending from the *Act's* registration and reporting requirements. Increasing the registration and reporting thresholds to compensate for inflation would leave significant financial activity subject to regulation as intended by Congress when it enacted the *FECA*.

Legislative language:

Section 301 of the *Federal Election Campaign Act of 1971* (2 U.S.C. § 431) is amended:

(1) in paragraph (4)(A), by striking both references to "$1,000" and by inserting a dollar amount determined by Congress; and

(2) in paragraph (4)(C), by striking both references to "$5,000" and both references to "$1,000" and by inserting dollar amounts determined by Congress.

Section 304 of the *Federal Election Campaign Act of 1971* (2 U.S.C. § 434) is amended, in paragraph (c)(1) by striking "$250" and inserting a dollar amount determined by Congress.

Section 315(c) of the *Federal Election Campaign Act of 1971* (2 U.S.C. § 441a(c)) is amended—

(1) in paragraph (1), by inserting after subparagraph (C) the following:

"(D) In any calendar year after 2013—

(i) a threshold established by section 301(4)(A) or (4)(C), or section 304(c)(1) shall be increased by the percent difference determined under subparagraph (A);

(ii) each amount so increased shall remain in effect for the calendar year; and

(iii) if any amount after adjustment under clause (i) is not a multiple of $100, such amount shall be rounded to the nearest multiple of $100.";

(2) in paragraph (2)(B)(i), by deleting "and" at the end;

(3) in paragraph (2)(B)(ii), by replacing the period at the end with "; and"; and

(4) by inserting after paragraph (2)(B)(ii) the following:

"(iii) for purposes of section 301(4)(A) or (4)(C), or section 304(c)(1), calendar year 2013.".

Fraudulent Misrepresentation of Campaign Authority

Section: 2 U.S.C. § 441h

Recommendation: Congress should revise the prohibitions on fraudulent misrepresentation of campaign authority to encompass all persons purporting to act on behalf of candidates and real or fictitious political committees and political organizations. In addition, Congress should remove the requirement that the fraudulent misrepresentation must pertain to a matter that is "damaging" to another candidate or political party.

Explanation: The Federal Election Campaign Act of 1971, Public Law 92-225, 86 Stat. 3 (1972), as amended ("FECA"), prohibits a Federal candidate or his or her agents or employees from fraudulent misrepresentation such as speaking, writing or otherwise acting on behalf of a candidate or political party committee on a "matter which is damaging to such other candidate or political party" or an employee or agent of either. *See* 2 U.S.C. § 441h(a). The Commission recommends that this prohibition be extended to any person who would disrupt a campaign by such unlawful means, rather than being limited to candidates and their agents and employees. Proving damages as a threshold matter is often difficult and unnecessarily impedes the Commission's ability to pursue persons who employ fraud and deceit to undermine campaigns. Fraudulent solicitations of funds on behalf of a candidate or political party committee have been prohibited without any required showing of damage to the misrepresented candidate or political party committee. *See* Bipartisan Campaign Reform Act of 2002, § 309, Public Law 107-155, 116 Stat. 81, 104 (2002), *codified at* 2 U.S.C. § 441h(b).

In addition, while both subsections (a) and (b) of 2 U.S.C. § 441h directly address fraudulent actions "on behalf of any other candidate or political party," they do not address situations where a person falsely claims to represent another type of political committee or claims to be acting on behalf of a fictitious political organization, rather than an actual political party or a candidate. For example, the current statute does not bar fraudulent misrepresentation or solicitation on behalf of a corporate or union separate segregated fund or a non-connected political committee.

Legislative Language:

Section 322 of the Federal Election Campaign Act of 1971 (2 U.S.C. § 441h) is amended:

(1) in subsection (a), by striking "who is a candidate for Federal office or an employee or agent of such a candidate";

(2) in paragraph (a)(1), by striking "candidate or political party or employee or agent thereof on a matter which is damaging to such other candidate or political party or employee or agent thereof" and inserting "candidate, political party, other real or fictitious political committee or organization, or employee or agent of any of the foregoing,"; and

(3) in paragraph (b)(1), by striking “candidate or political party or employee or agent thereof” and inserting “candidate, political party, other real or fictitious political committee or organization, or employee or agent of any of the foregoing,”.