



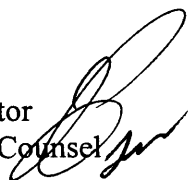
FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

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April 26, 2004

MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkon, Staff Director
Lawrence H. Norton, General Counsel 

FROM: Kevin R. Salley, Deputy Assistant Staff Director, Information ^{KRS}
Rosemary C. Smith, Associate General Counsel, Policy ^{RCS}

SUBJECT: Draft Legislative Recommendations 2004

AGENDA ITEM
For Meeting of: 04-29-04
SUBMITTED LATE

Attached for the Commission's consideration are 12 draft legislative recommendations for 2004 plus a draft transmittal letter. Seven of the draft recommendations are new recommendations, while five update recommendations that were transmitted by the Commission last year. Revisions to existing recommendations are shown using underlining and strikethroughs.

In order to categorize the recommendations according to the Commission's preferences, we informally canvassed the Commissioners' offices. The attached document reflects the results, as follows:

Part I (Priority)

This part contains the four recommendations identified as a priority recommendation by all six Commissioners.

- *Use of Contributed Amounts for Certain Purposes*
- *Increasing the Amount that Authorized Committees May Give to Authorized Committees of Other Candidates*
- *Modifying Terminology of "Reason to Believe" Finding*
- *Electronic Filing of Senate Reports (Revised 2004)*

Part II (Substantive or Technical)

This part contains all of the remaining draft recommendations.

Recommendation:

It is recommended that the Commission approve the attached package of legislative recommendations and cover letter for transmittal to Congress and the President. Should any recommendations included in this draft fail to garner support from a majority of Commissioners, we recommend that they be removed from the package.

1 **Legislative Recommendations – 2004**

2 ***PART I: Priority Legislative Recommendations***

3

4 **(Contributions/Expenditures) Use of Contributed Amounts For Certain Purposes**

5 **(NEW)**

6 *Section: 2 U.S.C. §439a*

7

8 *Recommendation:* The Commission recommends that Congress amend 2 U.S.C.
9 §439a(a) to allow, as a permissible use of Federal campaign funds, donations to State and
10 local candidates, subject to the limits and prohibitions of State law, and to allow the use
11 of Federal campaign funds for any other lawful purpose that does not violate subsection
12 (b) of section 439a.

13

14 *Explanation:* BCRA amended 2 U.S.C. §439a. In the floor debate on BCRA, Senator
15 Feingold stated that the intent of the revised section 439a was to codify the Commission's
16 then current regulations on the use of campaign funds. Section 439a, as amended by
17 BCRA, lists four explicitly permitted uses of campaign funds in paragraphs (a)(1)-(4) and
18 then, in subsection (b), states that campaign funds may not be converted to personal use.
19 However, unlike the pre-BCRA version of section 439a and unlike the pre-BCRA
20 regulations to which Senator Feingold referred, the use of campaign funds for "any other
21 lawful purpose" (so long as they are not converted to personal use) is no longer listed as a
22 statutorily permitted use. In post-BCRA rulemakings and advisory opinions, the

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1 Commission has had no choice but to interpret this statutory deletion as meaning that the
2 list of permissible uses in section 439a(a) is exhaustive.

3 Given Senator Feingold's assertion that the BCRA amendments were intended to
4 codify the pre-BCRA regulations, it appears that the narrowing of the statute may have
5 been inadvertent. The Commission suggests that the use of campaign funds for lawful
6 purposes that do not constitute personal use is consistent with purposes of FECA.
7 Therefore, the Commission recommends that section 439a(a) be amended to permit
8 explicitly the use of campaign funds for "any other lawful purpose" that does not
9 constitute personal use of those funds.

10 The question of whether section 439a still permits a donation of campaign funds
11 by an authorized committee to a non-Federal campaign has lately arisen with
12 considerable frequency. This was a common practice before the passage of BCRA. It is
13 not, however, clear under post-BCRA section 439a whether such a donation is an
14 "otherwise authorized expenditure" in connection with the Federal candidate's campaign
15 for Federal office. *See* 2 U.S.C. §439a(a)(1). The Commission believes that such use of
16 campaign funds is fully consistent with the purposes of FECA, and thus, that section
17 439a(a) be amended to permit explicitly donation of campaign funds by an authorized
18 committee to a non-Federal campaign to the extent allowed by applicable State law. This
19 statutory change would allow a Federal candidate or officeholder to donate his or her
20 campaign funds to State and local candidates, even if he or she is no longer a candidate
21 for Federal office. It would also permit Federal candidates and officeholders who decide
22 to run for non-Federal offices to donate their Federal campaign funds to their own
23 campaigns for State and local offices, if State law permits.

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Legislative Language:

Section 312a(a) of the Federal Election Campaign Act of 1971 (2 U.S.C. §439a(a)) is amended:

- (1) by striking the “or” at the end of paragraph (a)(3);
- (2) by striking the period, and adding a semi-colon at the end of paragraph (a)(4);
- (3) by adding a new paragraph (a)(5) to read as follows: “(5) for donations to State and local candidates subject to the provisions of State law; or”; and
- (4) by adding a new paragraph (a)(6) to read as follows: “(6) for any other lawful purpose unless prohibited by subsection (b) of this section.”.

(Contributions/Expenditures) Increasing the Amount That Authorized Committees May Give to Authorized Committees of Other Candidates (NEW)

Section: 2 U.S.C. §432(e)(3)(B)

Recommendation: The Commission recommends that Congress amend 2 U.S.C. §432(e)(3)(B) so that the term “support” will not include a contribution by any authorized committee in amounts of \$2,000 or less (rather than the current \$1,000 or less) to an authorized committee of any other candidate.

Explanation: Under the Act, with certain exceptions, no political committee which supports or has supported more than one candidate may be designated as an authorized committee. 2 U.S.C. §432(e)(3)(A). “Support” is defined to exclude a contribution by

1 any authorized committee in an amount of \$1,000 or less to an authorized committee of
2 any other candidate.

3 Prior to BCRA, the amount of this “support” limitation and the contribution
4 limitation for candidates and authorized committees with respect to any election for
5 Federal office were both \$1,000. 2 U.S.C. §§432(e)(3)(B) and former 441a(a)(1)(A). In
6 BCRA, Congress raised the section 441a(a)(1)(A) contribution limitation for candidates
7 and authorized committees to \$2,000, but did not change the 2 U.S.C. §432(e)(3)(B)
8 support limitation. To the extent the resulting variance between these sections of the Act
9 may have been an oversight, the Commission recommends that the section 432(e)(3)(B)
10 limit be increased to \$2,000, consistent with 2 U.S.C. §441a(a)(1)(A).

11

12 *Legislative Language:*

13 Section 302(e)(3)(B) of the Federal Election Campaign Act of 1971 (2 U.S.C.
14 §432(e)(3)(B)) is amended by striking “\$1,000” and inserting in its place “\$2,000”.

15

16

17 **(Compliance) Modifying Terminology of “Reason to Believe” Finding (NEW)**

18 *Section:* 2 U.S.C. §437g

19

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

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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 or referral 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. Note that the change in terminology recommended by the Commission would not change the standard that this finding simply represents that the Commission believes a violation may have occurred if the facts as described are accurate.

1 **(Disclosure) Electronic Filing of Senate Reports (2003 Revised 2004)**

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

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

- 4 • Mandatory electronic filing, at a date to be determined by Congress, for all Senate
5 candidates (or those candidates' authorized committees) and for those persons and
6 political committees filing designations, statements, reports or notifications pertaining
7 only to Senate elections if they have, or have reason to expect to have, aggregate
8 contributions or expenditures in excess of \$50,000 in a calendar year.

- 9 • Electronically filed designations, statements, reports or notifications pertaining only
10 to Senate elections to be forwarded to the Commission within 24 hours of receipt and
11 to be made accessible to the public on the Internet, if Congress does not change the
12 point of entry for filings pertaining only to Senate elections.

13

14 *Explanation:* Public Law 106-58 required, among other things, that the Commission
15 make electronic filing mandatory for political committees and other persons required to
16 file with the Commission who, in a calendar year, have, or have reason to expect to have,
17 total contributions or total expenditures exceeding a threshold set by the Commission
18 (\$50,000). The Commission set this threshold at \$50,000 and, in the Commission's
19 experience, that threshold has worked well. Extending electronic filing to political
20 committees and persons who file designations, statements, reports or notifications
21 pertaining only to Senate elections would standardize the information received, thereby
22 enhancing public disclosure of campaign finance information. The Bipartisan Campaign
23 Reform Act of 2002 (Public Law No. 107-155) required the Commission to develop
24 software and software standards that will allow information concerning reportable

1 receipts and disbursements to be “transmitted immediately” and posted on the
2 Commission’s web site “immediately upon receipt.” BCRA also expanded the class of
3 persons required to file electronically, mandating that “each candidate for Federal office
4 (or that candidate’s authorized committee) shall use software” that meets the new
5 standards once such software is made available to the candidate. 2 U.S.C. 434(a)(12)(C).
6 The plain language of this statutory revision does not appear to exempt Senate candidates
7 and their authorized committees from the electronic filing requirements, but it does not
8 specify where the electronic reports must be filed. Thus, a plain reading of these new
9 requirements indicates that all Senate candidates and their authorized committees must
10 use software, presumably to file electronically, with the Senate (or with the FEC). (The
11 Commission notes that legislation is currently pending (S.1874) in the Senate to mandate
12 electronic filing by Senate campaigns.)

13 Additionally, data Data from electronically filed reports is received, processed
14 and disseminated more easily and efficiently, resulting in better use of resources. Reports
15 that are filed electronically are normally available within five minutes and detailed data is
16 available in the Commission’s databases within 24 to 48 hours. In contrast, the time
17 between the receipt of a report filed through the paper filing system and its appearance on
18 the Commission’s web site is 48 hours. It can take as long as 30 days before some
19 detailed data filed on paper is available in the Commission’s databases.

20 Disclosure delays are likely to severely impede the effective implementation of
21 several requirements of the Act. For example, the “Millionaire’s Amendment” is
22 predicated on the timely availability of disclosure documents. 2 U.S.C. §§ 441a(i)(1)(E)
23 and 441a-1(a)(2)(B). In other cases, the Act requires the disclosure of specific
24 expenditures within 24 or 48 hours from the time they are made.

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1 Electronic filing (by means other than diskette) is also unaffected by disruptions
2 in the delivery of first class mail, such as those arising from the ~~terrorist attacks on the~~
3 presence of anthrax powder in the Senate buildings and U.S. Postal Service facilities in
4 2001 and the more recent discovery of Ricin in mail delivered to the Senate office
5 buildings. As a result of these In each case, the disruptions, ~~some~~ have significantly
6 delayed amendments to Senate campaign reports that were filed via regular mail, ~~in late~~
7 ~~2001~~ In 2001, reports submitted by regular mail took months to arrive at the Secretary of
8 the Senate (and the FEC), delaying disclosure. In contrast, amendments electronically
9 filed during the same time periods by other types of filers were received and processed in
10 a timely manner.

11

12 *Legislative Language:*

13 Section 304(a)(11)(D) of the Federal Election Campaign Act of 1971 (2 U.S.C.
14 434(a)(11)(D)) is amended to read as follows: “As used in this paragraph, the terms
15 “designation”, “statement”, or “report” mean a designation, statement or report,
16 respectively, which-- (i) is required by this Act to be filed with the Commission, or (ii) is
17 required under section 302(g) to be filed with the Secretary of the Senate and forwarded
18 by the Secretary to the Commission.”

19

20 Section 302(g)(2) of the Federal Election Campaign Act of 1971 (2 U.S.C. 432(g)(2)) is
21 amended by inserting “or 1 working day in the case of a designation, statement, or report
22 filed electronically” after “2 working days”.

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- 1 Section 304(a)(11)(B) of the Federal Election Campaign Act of 1971 (2 U.S.C.
- 2 434(a)(11)(B)) is amended by inserting “, or filed with the Secretary of the Senate under
- 3 section 302(g)(1) and forwarded to the Commission,” after “Act”.

1 **Legislative Recommendations – 2004**

2

3 ***PART II: Non-Priority/Substantive or Technical Legislative***

4 ***Recommendations***

5

6

7 **(Contributions/Expenditures) Multicandidate Political Committee Contribution**

8 **Limitations and Non-multicandidate Political Committee Contribution Limitations**

9 **(~~2003~~ Revised 2004)**

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

11

12 *Recommendation:* The Commission recommends that Congress consider indexing for
13 inflation the contribution limitations applicable to multicandidate political committees
14 and adjusting the amount such committees may contribute to national party committees to
15 harmonize these limits with the limits applicable to non-multicandidate political
16 committees.

17

18 *Explanation:* A political committee qualifies for multicandidate status if it has been
19 registered with the Commission for six months or more, has received contributions from
20 more than 50 persons, and has contributed to five or more Federal candidates. 2 U.S.C.
21 §441a(a)(4).

22 FECA, prior to BCRA, provided a significantly higher limit on contributions to
23 candidates for political committees with multicandidate status than for those without that
24 status (\$5,000 per election versus \$1,000 per election). BCRA raised and indexed for

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1 inflation the contribution limit on non-multicandidate committees (to \$2,000 per
2 election), and such limit eventually will become higher than the limit imposed on
3 multicandidate committees. ~~Thus, this contribution limit itself one day will create a~~
4 ~~substantial disincentive to achieve multicandidate committee status.~~ It is important to
5 note that a committee cannot opt out of multicandidate status. Instead, under section
6 441a(a)(4), a committee automatically triggers multicandidate status once it meets the
7 specific requirements listed above.

8 In addition, the limit for contributions to national party committees from
9 multicandidate committees is \$15,000 per year (as it was prior to BCRA), yet BCRA
10 increased the limit on contributions to the same national party committees from non-
11 multicandidate committees from \$20,000 to \$25,000 per year. 2 U.S.C. §441a(a)(2)(B),
12 (1)(B). Moreover, only the contribution limit for non-multicandidate committees is
13 indexed for inflation, which means that over time the current \$10,000 difference will only
14 increase.

15 Congress should consider revising the statute to give multicandidate committees
16 allowances at least as generous as those given to non-multicandidate committees.

17

18 *Legislative Language:*

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

21 (1) in subparagraph (a)(2)(B), by striking “\$15,000” and inserting in lieu thereof
22 “\$25,000”;

23 (2) in clause (i) of subparagraph (c)(1)(B), by inserting “(a)(2)(A), (a)(2)(B),” after
24 “(a)(1)(B),”;

- 1 (3) in subparagraph (c)(1)(C), by inserting “(a)(2)(A), (a)(2)(B),” after “(a)(1)(B),”;
- 2 (4) in clause (ii) of subparagraph (c)(2)(B), by inserting “(a)(2)(A), (a)(2)(B),” after
- 3 “(a)(1)(B),”.

4

5

6 **(Compliance) Fraudulent Misrepresentation of Campaign Authority (NEW)**

7 *Section:* 2 U.S.C. §441h

8

9 *Recommendation:* The Commission recommends that Congress revise the prohibitions

10 on fraudulent misrepresentation of campaign authority to encompass all persons

11 purporting to act on behalf of candidates and real or fictitious political committees and

12 political organizations. In addition, the Commission recommends that Congress remove

13 the requirement that the fraudulent misrepresentation must pertain to a matter that is

14 “damaging” to another candidate or political party.

15

16 *Explanation:* 2 U.S.C. §441h(a) prohibits a Federal candidate or his or her agent or

17 employee from fraudulent misrepresentation such as speaking, writing, or otherwise

18 acting on behalf of a candidate or political party committee on a “matter which is

19 damaging to such other candidate or political party” or an employee or agent of either.

20 The Commission recommends that this prohibition be extended to any person who would

21 disrupt a campaign by such unlawful means, rather than being limited to candidates and

22 their agents and employees. Proving damages as a threshold matter is often difficult and

23 unnecessarily impedes the Commission’s ability to pursue persons who employ fraud and

24 deceit to undermine campaigns. Fraudulent solicitations of funds on behalf a candidate

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1 or political party committee were recently prohibited in BCRA without any required
2 showing of damage to the misrepresented candidate or political party committee. *See*
3 §441h(b).

4 In addition, while both §§441h(a) and (b) directly address fraudulent actions “on
5 behalf of any other candidate or political party,” they do not address situations where a
6 person falsely claims to represent another type of political committee or claims to be
7 acting on behalf of a fictitious political organization, rather than an actual political party
8 or a candidate. For example, the narrow scope of the existing language does not bar
9 fraudulent misrepresentation or solicitation on behalf of a corporate or union separate
10 segregated fund or a non-connected political committee.

11 Congress should consider revising the statute to strengthen these important
12 prohibitions on fraudulent activity.

13

14 *Legislative Language:*

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

- 16 (1) in subsection (a), by striking “who is a candidate for Federal office or an
17 employee or agent of such a candidate”;
- 18 (2) in paragraph (a)(1), by striking “or political party or employee or agent
19 thereof on a matter which is damaging to such other candidate or political
20 party or employee or agent thereof” and inserting in lieu thereof “, political
21 party, other real or fictitious political committee or organization, or employee
22 or agent of any of the foregoing,”;

1 (3) in paragraph (b)(1), by striking “or political party” and inserting in lieu
2 thereof “, political party, other real or fictitious political committee or
3 organization, or employee or agent of any of the foregoing,”.
4
5

6 **(Public Financing) ~~Averting Impending Shortfall in~~ Stabilizing the Presidential**
7 **Public Funding Program (revised 2003 2004)**

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

9 *Recommendation:* The Commission strongly recommends that Congress take immediate
10 action to ~~avert a projected impending shortfall in~~ stabilize the Presidential public funding
11 program ~~in the 2004~~ for upcoming election years.

12 *Explanation:* The Presidential public funding program has experienced ~~temporary~~
13 ~~funding shortfalls for the election of 2000~~ during each of the last three Presidential
14 elections. The shortfalls are a result of ~~because declining~~ participation in the check-off
15 program ~~is declining~~ and the fact that the checkoff is not indexed to inflation while
16 payouts are indexed. ~~This~~ To date, the shortfalls impacted foremost upon have
17 principally affected primary candidates, whose funding is given lowest priority under the
18 law. In ~~January 2000~~ February 2004, when the U.S. Treasury made its ~~first~~ second
19 payment for the ~~2000~~ 2004 elections, it was only able to provide approximately ~~50~~ 46
20 percent of the public funds that qualified Presidential candidates were entitled to receive.

21 Specifically, only ~~\$16.9~~ a little over \$2.3 million was available for distribution to
22 qualified primary candidates on ~~January 1, 2000~~ February 1, 2004, after the Treasury paid

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1 the convention grants and set aside the general election grants.¹ However, the entitlement
2 (i.e., the amount that the qualified candidates were entitled to receive) on that date was
3 \$34.5 million, twice as much as the amount of available public funds. By ~~January 2001,~~
4 February 2004, total payments made to primary candidates ~~was in excess of \$61~~
5 exceeded \$20.4 million.

6 ~~The Commission projects the temporary shortfall in matching funds that has~~
7 ~~occurred in the past two presidential elections may recur in 2004. Under the most~~
8 ~~realistic assumptions, it appears that the January 2004 payout may be only about 53 cents~~
9 ~~on the dollar. The funds considered 'available' by the Department of Treasury will be~~
10 ~~about \$19.3 million, the funds to which candidates will be entitled will be about \$36.6~~
11 ~~million, and the payouts therefore will have to be reduced accordingly. February and~~
12 ~~March payouts also will be less than 100%, but by the April 2004 payouts, the temporary~~
13 ~~shortfall will have been cured under this projection. This is because the check-off~~
14 ~~proceeds flowing into Treasury Department accounts will be adequate to make up the~~
15 ~~earlier deficiencies.~~

16 The 2004 shortfall could have been considerably more severe had three major
17 party candidates not opted out of public funding for the primary. While this left more
18 money for candidates who chose to participate in the program, the candidates who opted
19 out appeared to do so out of a desire to spend beyond the spending limits. Their ability to
20 operate outside the restrictions of the public funding program may encourage more
21 candidates to opt out in future election years.

22 The Commission recommends several specific legislative changes. First, to
23 alleviate future shortfalls, the statute should be revised so that Treasury will be able to

¹ The Commission certified a total of ~~\$28.9~~ \$29.18 million in convention grants, and ~~\$147.2~~ \$149.2 million was set aside for use by general election candidates.

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1 rely on ~~expected available~~ proceeds from the voluntary checkoff, rather than relying
2 solely on actual proceeds *on hand* as of the dates of the matching fund payments. Since
3 large infusions of voluntary checkoff proceeds predictably occur in the first few months
4 of the election year, including such estimated proceeds in the calculation of funds
5 available for matching fund payouts would virtually eliminate the shortfall in the near
6 future. Because estimates for expected payouts are an acceptable part of the calculations
7 (e.g., setting aside sufficient funds to cover general election payouts), estimates of the
8 checkoff proceeds could be incorporated, as well. A very simple change in the wording
9 of 26 U.S.C. §9037 would accomplish this: changing “are available” to “will be
10 available.” Expected payments should be based on sound statistical methods to produce a
11 cautious, conservative estimate of the funds that will be available to cover convention and
12 general election payments.

13 A second revision in the statute would further the long-term stability of the
14 presidential public funding program: indexing the voluntary checkoff amount to inflation.
15 Although the checkoff amount was increased from \$1 to \$3 beginning with 1993 returns,
16 there was no indexing built in to account for further inflation thereafter. Although other
17 factors influence the fund’s balance, including the number of candidates participating, the
18 number of contributions they can have matched, the taxpayer participation rate and
19 deposits of repayments, Since the payments are indexed to inflation, the statute all but
20 assures a permanent shortfall. an indexing of the checkoff amount for inflation would
21 help guarantee some money coming in to replenish the public funding program.

22

23

1 **(Miscellaneous) Pay Level for the General Counsel and Creation of Senior**
2 **Executive Service Positions (NEW)**

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

4
5 *Recommendation:* The Commission recommends that Congress revise section 437c(f)(1)
6 to state that the General Counsel shall be paid at a rate not to exceed the rate of basic pay
7 in effect for level IV of the Executive Schedule (5 U.S.C. §5315), and that Congress
8 amend 5 U.S.C. §3132(a)(1) by deleting subsection (C), which specifically excludes the
9 Federal Election Commission from eligibility for the creation of Senior Executive
10 Service positions.

11
12 *Explanation:* The Commission believes that two statutory changes are needed to bring
13 the Commission's personnel structure in line with that of other comparable federal
14 agencies. This would ensure that the Commission is able to compete with other
15 government agencies and the private sector in recruiting and retaining key management
16 personnel, including the General Counsel. These changes would also enable the
17 Commission, like other agencies, to move to merit-based pay systems for top executives.

18 First, the FECA creates the statutory office of General Counsel and provides that
19 the compensation of the General Counsel shall not exceed the rate of basic pay in effect
20 for level V of the Executive Schedule (currently \$128,200). The Commission believes
21 that this rate of pay is too low in light of the significant responsibilities entrusted to this
22 statutory officer and in comparison to the salary rates of General Counsels of other
23 agencies who have equivalent responsibilities. The FEC's General Counsel manages and
24 directs a law office of approximately 125 persons. The General Counsel is also

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1 responsible for overseeing the Commission's enforcement program, federal litigation in
2 district and appellate courts, public financing matters, conducting rulemakings, drafting
3 advisory opinions, and providing general guidance on other legal matters.

4 Under the present compensation structure, the General Counsel is paid *less than*
5 *the highest paid GS-15* in the Washington, D.C. area, and less than the overwhelming
6 majority of SES employees. Congress recently restructured the SES compensation
7 system into a performance-based, payband system. National Defense Authorization Act
8 for Fiscal Year 2004 (Pub. L 108-136, Nov. 24, 2003). For 2004, individuals serving in
9 SES positions are compensated in a payband between \$104,927 and \$145,600 (or
10 \$158,100 in agencies with a certified SES performance appraisal system). Increasing the
11 General Counsel's pay will ensure that the Commission can retain highly qualified
12 individuals to serve as General Counsel as well as enable it to remain competitive in the
13 marketplace for federal executives when a vacancy arises.

14 Second, the current pay and benefits structure hinders the Commission's ability to
15 recruit talented executives from other agencies and retain high-performing senior
16 managers, while conversion to SES would enhance this ability. The Commission is
17 prohibited by law from creating Senior Executive Service positions within the agency. 5
18 U.S.C. § 3132(a)(1)(C). Consequently, unlike other agencies, the Commission's senior
19 managers are employed in Senior Level positions. These executives, consisting of two
20 Deputy Staff Directors, a Deputy General Counsel, and four Associate General Counsels,
21 oversee major programmatic areas and supervise not only staff, but other managers as
22 well. However, OPM's Guide to the Senior Executive Service indicates that the Senior
23 Level system is for non-executive positions. In fact, the OPM Guide provides that
24 supervisory duties should occupy less than 25% of a Senior Level employee's time. At

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1 the Commission, by contrast, supervisory and executive responsibilities occupy 100% of
2 the time of SL employees.

3 In terms of total compensation and benefits, individuals serving in Senior Level
4 positions are under-compensated for the responsibilities and duties required by these
5 positions, and under-compensated when compared to individuals serving in similar
6 capacities at virtually all other Federal agencies. Conversion to SES would also allow
7 higher pay ranges for these positions and enable the Commission's senior managers to
8 receive performance awards and other benefits not available to Senior Level employees.
9 Perhaps most significantly, this includes the ability to carry over many more days of
10 annual leave than Senior Level employees. Given that high-level managers frequently
11 work extended periods in which they cannot use much leave, especially in the aftermath
12 of BCRA, an executive's ability to accumulate and defer leave is not only an important
13 benefit to him or her, but is also a valuable tool for the agency to ensure that executives
14 are available to accomplish agency priorities.

15 Accordingly, the Commission believes that current Senior Level positions within
16 the agency should be converted to SES positions and that any future Senior Level
17 positions be created in the SES. There is a trend toward performance-based pay for
18 executives throughout the government; converting the current Senior Level positions into
19 SES positions would ensure performance-based pay is similarly emphasized for the
20 Commission's senior executive positions. The Commission is confident that conversion
21 of Senior Level positions to SES positions will assist in retaining highly qualified
22 individuals and will attract superior candidates when vacancies arise, thus permitting the
23 Commission to remain competitive in the marketplace for federal executives.

24

1 *Legislative Language:*

2 Section 310(f)(1) of the Federal Election Campaign Act of 1971 (2 U.S.C. §437c(f)(1)) is
3 amended by striking “V” and inserting in lieu thereof “IV”.

4

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

7

8

9 **(Contributions/Expenditures) Modifying the Definition of Federal Election Activity**
10 **to Simplify Compliance for State, District and Local Party Committees Where**
11 **Certain Employees Spend More than 25 Percent of Their Time In Connection with**
12 **a Federal Election (NEW)**

13 *Section:* 2 U.S.C. §431(20)(A)(iv)

14

15 *Recommendation:* The Commission recommends that Congress amend 2 U.S.C.
16 §431(20)(A)(iv) to allow State, district and local political party committees to comply
17 with that provision of the Act in biweekly, semimonthly or monthly periods, in
18 conformity with the period of time a party committee selects for payroll purposes.
19 Currently, section 431(20)(A)(iv) requires compliance in monthly periods.

20

21 *Explanation:* Under BCRA, “services provided during any month by an employee of a
22 State, district or local committee of a political party who spends more than 25 percent of
23 that individual’s compensated time during that month on activities in connection with a
24 Federal election” are Federal election activity. 2 U.S.C. §431(20)(A)(iv). Several party
25 committees have informed Commission staff that this provision imposes a difficult
26 compliance burden because the committees’ payroll periods frequently are different than

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1 monthly periods. The compliance burden for party committees will be lessened if such
2 committees can elect a section 431(20)(A)(iv) compliance period that is the same as the
3 payroll period used by the committees (e.g., biweekly, semimonthly or monthly payroll
4 period).

5 For example, a party committee that conducts payroll operations on a biweekly
6 basis can also determine on a biweekly basis whether or not an employee meets the 25
7 percent test, and thus whether the employee must be compensated from the committee's
8 Federal account.

9

10 *Legislative Language:*

11 Section 301(20)(A)(iv) of the Federal Election Campaign Act of 1971 (2 U.S.C.

12 §431(20)(A)(iv)) is amended:

13 (1) by striking “any month” and inserting in lieu thereof “a payroll period of a State,
14 district or local committee of a political party”;

15 (2) by striking “a State, district or local committee of a political party” and inserting
16 in lieu thereof “that party committee”;

17 (3) by striking “that month” and inserting in lieu thereof “that payroll period”;

18 (4) by inserting at the end the following: “For purposes of this subparagraph, a
19 payroll period may be a biweekly, semimonthly or monthly period.”.

20

21

1 **(Disclosure) Increasing and Indexing all pre-BCRA Registration and Reporting**
2 **Thresholds for Inflation (~~2003~~ Revised 2004)**

3 *Sections:* 2 U.S.C. §§431 and 434

4
5 *Recommendation:* The Commission recommends that Congress increase and index for
6 inflation all pre-BCRA registration and reporting thresholds.

7
8 *Explanation:* Most of the Act's registration and reporting thresholds were set in 1974 and
9 1979. Because over twenty years of inflation had effectively reduced the Act's
10 contribution limits in real dollars, the BCRA increased some contribution limits to
11 partially adjust for inflation, and then indexed those limits: contributions to candidates
12 and national party committees by individuals and non-multicandidate committees, the
13 biennial aggregate contribution limit for individuals and the limit on contributions to
14 Senate candidates by certain national party committees. The Commission proposes
15 extending this approach to all pre-BCRA registration and reporting thresholds, which
16 have similarly been effectively reduced as a result of inflation.

17 Increasing and then indexing these thresholds would ease the registration and
18 reporting burdens on smaller political committees who, in some cases, are unaware of the
19 Act's registration and reporting provisions. Moreover, by increasing and then indexing
20 the thresholds for inflation, Congress would help to ensure that some committees and
21 persons who lack the resources and technical expertise to comply with the Act's
22 registration and reporting requirements would not have to do so. Finally, because of the
23 effect of inflation, increasing and then indexing the registration and reporting thresholds

1 would continue to capture the significant financial activity envisioned when Congress
2 enacted the FECA.

3
4
5 **(Disclosure) Making Permanent the Administrative Fine Program for Reporting**
6 **Violations (2003-Revised 2004)**

7 *Section:* 2 U.S.C. §437g

8 *Recommendation:* The Commission recommends that Congress make permanent the
9 Commission's authority to assess administrative fines for straightforward violations of
10 the law requiring timely reporting of receipts and disbursements. The Commission's
11 current Administrative Fine Program only covers violations that relate to reporting
12 periods through December 31, ~~2003~~ 2005.

13
14 *Explanation:* ~~On November 12, 2001, President Bush signed the Fiscal Year 2002~~
15 ~~Treasury and General Government Appropriations Act, which extended the~~
16 ~~Administrative Fine Program to cover violations of 2 U.S.C. § 434(a) that relate to~~
17 ~~reporting periods through December 31, 2003. On January 23, 2004, President Bush~~
18 ~~signed the Consolidated Appropriations Act, 2004, which extended the Administrative~~
19 ~~Fine Program to cover violations of 2 U.S.C. §434(a) that relate to reporting periods~~
20 ~~through December 31, 2005.~~ Since the Administrative Fine program was implemented
21 with the 2000 July Quarterly report, the Commission has processed and made public ~~519~~
22 932 cases, with ~~\$722,221~~ \$1,228,144 in fines collected. The Administrative Fine
23 Program has been remarkably successful: over the course of the program, the number of
24 late and nonfiled reports has generally decreased. As a result, the Administrative Fine

1 Program has become an integral part of the Commission's mission to administer and
2 enforce the Act. By making the program permanent, Congress would ensure that the
3 Commission would not lose one of the most cost-effective and successful programs in its
4 history.

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

17

18

19 **(Contributions/Expenditures) Federal Candidates Soliciting, Receiving Or Spending**
20 **Funds (NEW)**

21 *Section:* 2 U.S.C. §441i(e)(1) and (e)(2)

22

23 *Recommendations:* The Commission recommends that Congress amend 2 U.S.C.

24 §441i(e)(1) to clarify the circumstances in which recall elections, referenda and

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1 initiatives, recounts, redistricting, legal defense funds, and related activities fall within
2 the scope of activities that are “in connection with a Federal election” and are thus
3 subject to the §441i(e)(1) restrictions. The Commission also recommends that Congress
4 clarify whether under §441i(e)(1)(A) a candidate or officeholder may solicit, direct, or
5 transfer funds to entities not required to file reports with the Commission.

6 In addition, the Commission recommends that Congress amend 2 U.S.C.
7 §441i(e)(1)(B) to make clear that this provision does not prohibit a Federal candidate or
8 officeholder from spending his or her own personal funds in connection with an election
9 other than an election for Federal office, and recommends that Congress amend 2 U.S.C.
10 §441i(e)(2) to clarify that the phrase, “refers only to such State or local candidate,” does
11 not apply to non-communicative activity.

12

13 *Explanation:* Section 441i(e)(1)(A) prohibits a Federal candidate or officeholder and
14 certain entities from soliciting, receiving, directing, transferring, spending, or disbursing,
15 in connection with a Federal election funds that are outside the limitations, prohibitions,
16 and reporting requirements of the Act. Because these prohibitions are limited in scope to
17 specific activities conducted “in connection with an election for Federal office,” the
18 Commission requests additional guidance from Congress as to the meaning of this phrase
19 in this context. Specifically, Congress should consider amending the statute to clarify the
20 circumstances in which it intends recall elections, referenda and initiatives, recounts,
21 redistricting, candidate litigation costs and legal defense funds to be encompassed and
22 thus subject to the restrictions in §441i(e).

23 In addition, because this prohibition extends to the solicitation of funds not
24 “subject to the ... reporting requirements of the Act,” Congress should consider resolving

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1 the potential ambiguity that might arise in situations where a candidate wishes to solicit
2 funds on behalf of an entity in connection with a Federal election, including Federal
3 election activity, when that entity is not yet (or may not ever be) required to file reports
4 with the Commission. Even though such an organization's funds are not subject to the
5 reporting requirements of the Act, they may be subject to the limitations and prohibitions
6 of the Act.

7 Section 441i(e)(1)(B) similarly prohibits a Federal candidate or officeholder and
8 certain entities from soliciting, receiving, directing, transferring, spending, or disbursing,
9 in connection with a non-Federal election, funds that are outside the limitations and
10 prohibitions of the Act. As written, the verbs "spend" and "disburse" in section
11 441i(e)(1)(B) arguably apply to a Federal candidate's or officeholder's donation of his or
12 her personal funds in connection with a State or local candidate or ballot measure
13 election. This provision is meant to prevent corruption or the appearance of corruption of
14 Federal candidates and officeholders resulting from large soft money donations made at
15 their behest. However, there is little or no chance of such corruption in the context of a
16 Federal candidate or officeholder donating his or her own funds. Thus, to the extent
17 section 441i(e)(1)(B) can be read to prevent such individual donations, the Commission
18 recommends that Congress amend this provision to remove the ambiguity.

19 Section 441i(e)(2) is an exception to the general rule at 2 U.S.C. §441i(e)(1)(B);
20 the latter provision prohibits a Federal candidate or officeholder from soliciting,
21 receiving, or spending funds in connection with a non-Federal election that are outside
22 the amount limitations and source prohibitions of the Act. In order to qualify for the
23 section 441i(e)(2) exception, a Federal candidate or officeholder must meet two
24 requirements: (1) any solicitation, receipt, or spending of funds by the Federal candidate

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1 or officeholder must be permitted under State law; (2) such solicitation, receipt, or
2 spending must “refer only to such State or local candidate, or to any other candidate for
3 the State or local office sought by such candidate, or both.” The second condition is
4 unclear insofar as how non-communicative activity, such as receiving funds, can “refer
5 to” any candidate. The Commission recommends that Congress clarify this language to
6 make clear that the second condition refers to public communications, as defined in 2
7 U.S.C. §431(22).

8

9 *Legislative Language:*

10 Section 323(e)(1)(B) of the Federal Election Campaign Act of 1971 (2 U.S.C.
11 §441i(e)(1)(B)) is amended by inserting “(except for the candidate’s personal funds)”
12 after “spend funds” and after “disburse funds”.

13

14 Section 323(e)(2) of the Federal Election Campaign Act of 1971 (2 U.S.C. §441i(e)(2)) is
15 amended by inserting “, in the case of a public communication,” prior to the phrase
16 “refers only to”.

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[insert date], 2004

The Honorable George W. Bush
President
The White House
Washington, D.C. 20500

Dear Mr. President:

In accordance with 2 U.S.C. § 438(a)(9), the Federal Election Commission is pleased to submit for your consideration [insert number] recommendations for legislative action.

The Commission is including only recommendations with broad Commission support. Each recommendation is followed by an explanation of the need for and expected benefits from the recommended change and, in some cases, proposed statutory language to implement the change.

We hope these recommendations can assist Congress in bringing to fruition some necessary changes in campaign finance law. With almost 30 years of experience and accomplishments in these areas, the FEC stands ready to work with the President and Congress to implement the legislative package.

Sincerely,

Bradley A. Smith
Chairman