MEMORANDUM

TO: The Commission

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SUBJECT: Draft Final Rules for Political Committee Status

The Commission undertook this rulemaking to determine whether changes are appropriate in the regulations that bear on when an organization must register with the Commission as a political committee and when its activities are for the purpose of influencing Federal elections, and therefore constitute expenditures or contributions. In particular, the rulemaking sought to account for interpretations of the Federal Election

The attached draft Final Rules represent the Office of General Counsel’s recommendation as to how the Commission should amend its current regulations in four areas: first, what statements and activities should be considered in determining whether an organization’s major purpose is to influence Federal elections; second, when funds received in response to certain solicitations should be treated as contributions; third, when certain communications are expenditures for the purpose of influencing a Federal election; and finally, how separate segregated funds and nonconnected committees should allocate their administrative costs, generic voter drives, and public communications that refer to a political party.

In developing the draft Final Rules, this Office was guided by four main principles. First, the draft Final Rules are intended to give clear guidance to persons engaged in political activity so that they will know with a high degree of certainty whether their activities are subject to Commission regulation. Second, recognizing that no rule can be tailored with pinpoint precision, we designed the draft Final Rules to cover organizations that indisputably ought to be covered, but at the same time not to sweep too broadly. For example, the major purpose test concerning 527 organizations in draft section 100.5(a)(3) through (6) recognizes that while the primary purpose of 527 organizations is to engage in political activity, not all 527 organizations focus on Federal elections. In addition to exempting certain 527 organizations that concentrate mostly on non-Federal elections or selection or appointment to non-elected offices, the Commission
would look beyond the act of registering as a 527 organization and also examine certain activities of the 527 organization to determine whether its major purpose is to influence Federal elections. Third, the draft Final Rules reflect settled applications of law, as reflected in court decisions and the Commission's handling of enforcement matters. Finally, we sought to make existing regulations more straightforward so that they are easier to understand and administer.

With respect to the final principle, the draft Final Rules would, where possible, minimize administrative burdens, and avoid a number of problems raised by commenters. Unlike the rules proposed in the Notice of Proposed Rulemaking ("NPRM"),¹ the draft Final Rules do not include any look-back provision that would require an organization to document retroactively its prior compliance with FECA’s amount limits and source prohibitions as required by 11 CFR 102.5(b)(1). They do not apply the “promote, support, attack or oppose” standard to any organization that is not a political committee or has not already demonstrated that its major purpose is influencing Federal elections. They do not expand the scope of voter drives that qualify as expenditures based on the likely preferences of the potential voters. Nor do they employ fixed-dollar amounts in determining an organization’s purpose, which was a feature of the proposed rules that drew heavy criticism. Instead, they establish practical bright lines to ensure that organizations can predict with a high level of certainty how the Commission will view their various activities, while still providing for a measure of flexibility in appropriate circumstances.

I. Major Purpose Test

The Act defines "political committee" as any committee, club, association, or other group of persons that receives "contributions" or makes "expenditures" aggregating in excess of $1,000 during a calendar year. 2 U.S.C. 431(4)(A). In Buckley v. Valeo, 424 U.S. 1 (1976), the Supreme Court, in order to avoid vagueness, narrowed the Act's references to "political committee" to prevent their "reach [to] groups engaged purely in issue discussion." 424 U.S. at 79. The Court concluded that "[t]o fulfill the purpose of the Act [the words '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." 2 Id.

Although the Commission and courts have for years viewed the major purpose of an organization as a functional component of any determination of whether an organization is a political committee under the Act, this test has never been explicitly set out in Commission regulations. Also, there are relatively few closed enforcement matters from which the regulated community can gain understanding of the Commission's application of the major purpose test. This Office believes it is advisable for the Commission to promulgate a "major purpose" rule to address certain issues regarding the scope and application of this judicial construct. These issues include (1) which types of campaign activity counts toward a group's major purpose, and whether these are limited to only Federal activity or may include non-Federal activity; (2) whether and how "major

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2 In FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986) ("MCFL"), the Supreme Court noted that the "central organizational purpose" of MCFL, a non-profit advocacy corporation, was issue advocacy, and therefore it did not meet the Buckley definition of a political committee, i.e., it was not controlled by a candidate nor did it have as its major purpose the nomination or election of a candidate. 479 U.S. at 252 n.6. The MCFL Court also noted, however, that should the organization's "independent spending become so extensive that the organization's major purpose may be regarded as campaign activity, the corporation would be classified as a political committee." 479 U.S. at 262.
"purpose" may be demonstrated through an examination of the group’s fundraising and/or spending; (3) whether and how "major purpose" may be demonstrated through a group’s public statements; and (4) whether and how a group’s decision to file for a Federal tax exemption under section 501(c)(4) or 527 of the Internal Revenue Code affects its "major purpose" under FECA.

Draft paragraph (a)(1) of section 100.5 sets forth a two-part test to determine whether a committee, club, association, or other group of persons has formed a "political committee." The essence of the draft regulation, however, is contained in draft paragraphs (a)(2) through (a)(6). Paragraph (a)(2) presents three ways in which any organization would satisfy the "major purpose" test, and paragraphs (a)(3) through (a)(6) establish an additional way that 527 organizations may satisfy the "major purpose" test.

Draft paragraph (a)(6) addresses 527 organizations that have both Federal and non-Federal accounts.

A. Nomination or Election of Any Federal Candidate

The Buckley major purpose requirement—"the major purpose of which is the nomination or election of a candidate"—could be read literally to apply to all organizations that focus on nominating or electing either Federal or non-Federal candidates. Buckley, 424 U.S. at 79. This Office has drafted the Final Rules, however, to reflect a different interpretation of this language in Buckley. Because the Court was providing a narrowing gloss on a term of art, "expenditure," that by definition encompasses activity that is for the purpose of influencing Federal elections, we draw significant meaning from the context in which the word "candidate" was interpreted by the Court. The word "candidate" was defined in that statute construed by the Court in

The attached draft Final Rules at 11 CFR 100.5(a)(1)(i) therefore incorporate the Buckley test by requiring an organization to have “as its major purpose the nomination or election of one or more candidates for Federal office.” (Emphasis added). Consequently, the functional tests in paragraphs (a)(2), as well as the additional standard for 527 organizations in paragraphs (a)(3) through (a)(6), which are discussed below, are based on the Federal/non-Federal distinction.

Under the draft Final Rules prepared by this Office, a committee, club, association, or other group of persons will satisfy the major purpose test by either publicly declaring that the purpose of the group is to influence Federal elections or by spending or receiving money for certain specific purposes. This reflects the common sense notion that the way any group demonstrates its purpose is either through what it says or what it does. We conclude that these avowed purpose and monetary tests should apply in the same way to all committees, clubs, associations, or other groups of persons, regardless of how they are structured for tax purposes.

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3 The Supreme Court’s subsequent decisions in MCFL and McConnell shed little light on this distinction.
B. Public Statements of an Organization’s Purpose

In drafting the proposed final rules, this Office reasoned that it is eminently fair to impute the purpose of an organization, and therefore the purpose for which it gathers and uses funds, from how the organization describes itself to the public. To avoid concerns about the reliability of informal communications and misstatements by lower-level employees, the proposed rule focuses only on communications authorized by the organization’s decision-makers, such as statements of its officers and high-level employees, and its formal filings with government agencies. All of these communications are firmly within the group’s control. If an organization represents itself to its supporters, or to State or Federal agencies, or the general public, as being formed to elect or defeat candidates for Federal office, it makes little sense for the Commission to allow the group to avoid political committee status simply by asserting a different major purpose upon inquiry by the Commission.

The courts have made clear that an organization can satisfy the major purpose test through its public statements of purpose. In *FEC v. Malenick*, 310 F. Supp.2d at 234-35, the D.C. District Court reiterated its previous determination that an organization may evidence its “major purpose” through its own materials and statements. *See id.* (citing *FEC v. GOPAC*, 917 F. Supp. at 859 (“organization’s [major] purpose may be evidenced by its public statements of its purpose or by other means”).) In *Malenick*, the district court noted the organization’s announced “goal” of supporting the election of Republican Party candidates for Federal office and its efforts to get prospective donors to consider supporting Federal candidates. 310 F. Supp.2d at 235.
Paragraph (a)(2)(i) of the draft section 100.5 flows from this established case law, as well as past Commission experience. Because the documents or statements must be of sufficient weight to “demonstrate” the organization’s major purpose, the draft Final Rules would not capture stray assertions or “puffing” by organization officials. Thus, the draft Final Rules are more tailored than the rules proposed in the NPRM and rely on an organization’s statements of legal significance. At the same time, the Commission would retain discretion to assess the proper weight to be placed on particular statements and whether they in fact demonstrate the major purpose of the organization.

C. Percentage of Disbursements

In addition to the avowed purpose test discussed above, this Office believes that “major purpose” can and should be based on a percentage of an entity’s disbursements. Both the Supreme Court and lower courts recognize that an organization’s disbursement of its own funds is a meaningful indicator of the organization’s major purpose. See *MCFL*, 479 U.S. at 262 (“should MCFL’s independent spending become so extensive that the organization’s major purpose may be regarded as campaign activity, the corporation would be classified as a political committee”); *FEC v. GOPAC*, 917 F. Supp. at 859.

We conclude that an organization’s “major” purpose should be measured conservatively. Thus, the attached draft 11 CFR 100.5(a)(2)(ii) would require that the percentage of spending on certain Federal election-related activities must be greater than 50% of the organization’s annual non-administrative, non-overhead disbursements.

Under this approach, an organization may have only one major purpose that is greater than 50% of its overall purpose.
This Office is concerned that an alternative approach that would attempt to characterize “major purpose” as the activity that represents the greatest percentage of the overall disbursements, even if under 50%, would be complex and confusing. It would necessitate difficult line drawing and create debate about appropriate categories for specific activities and expenses. For example, an organization might theoretically have ten separate purposes, with 19% of its disbursements made for the purpose of influencing Federal elections. However, this organization’s major purpose could be influencing Federal elections if the other disbursements are classified for particular purposes (e.g., 9% influencing the election of State Candidate A, 9% influencing the election of State Candidate B, 9% influencing the election of Mayoral Candidate C, etc.), but the major purpose of the organization might be characterized as “influencing State and local elections” if those three classes of disbursements are grouped together.

There are two critical components of the 50% disbursement test in the attached draft Final Rules. The first component is a list of specific types of disbursements counting toward the 50% threshold. The second component is the period of time during which the percentage of disbursements would be measured.

1. Categories of Disbursements

The four categories of disbursements are contributions made by an organization, costs of soliciting contributions, independent expenditures, and electioneering communications. Proposed 11 CFR 100.5(a)(2)(ii)(A) through (D). This focuses on communications and direct payments to candidates, and each of these specific categories of Federal election spending is readily apparent and therefore not difficult to aggregate and track.
This Office believes that electioneering communications should be used as an indicator of a Federal major purpose and that such use would not be inconsistent with any statutory provisions. Electioneering communications affect Federal elections because of both their timing and their targeting to the relevant electorate. This impact provides a reasonable basis for the Commission to consider electioneering communications as an indicator of Federal major purpose.

In including electioneering communications in the list of measured disbursements, we have attempted to avoid any perceived inconsistency with the statutory provision that permits organizations to establish separate bank accounts to collect donations used to pay for electioneering communications. See 2 U.S.C. 434(f)(2)(E). We also recognize the unique characteristics of electioneering communications and believe that electioneering communications alone should not be the basis of finding major purpose. Thus, the draft Final Rules state that electioneering communications would not, without more, demonstrate the major purpose of an organization. Consequently, an organization that makes electioneering communications from a separate bank account established specifically to fund electioneering communications would not become a political committee without any other action. In addition, we recommends that the Commission consider the funds in the separate electioneering communications bank account as part of the organization’s overall spending in determining whether it has crossed the 50% threshold in the draft Final Rules.

By limiting the use of electioneering communications in the 50% major purpose test in the manner described above, the draft Final Rules address the argument that including electioneering communications would obviate the statutory provisions
permitting separate bank accounts to limit reporting. Organizations would remain free to
make electioneering communications without triggering political committee status as
long as they did not engage in other activities that, taken together with the electioneering
communications, evidence a purpose to influence a Federal election.

2. Time Period for Measuring 50% Test

The second critical component is the time period during which the aggregation of
the four types of payments is measured. The draft Final Rules would calculate the
percentage of disbursements based on any preceding twelve-month period. To minimize
the potential administrative burden of ongoing calculations, an organization would only
need to calculate its disbursement percentage once every quarter, rather than every week
or every month. Although this approach would require organizations to monitor their
disbursements on an ongoing basis, it would allow for a more accurate reflection of the
organization’s activities during election and non-election years than the much-criticized
four-year lookback proposal included in the NPRM. The four-year lookback proposal is
not included in the draft Final Rules.

D. Percentage of Contributions Received

Although established organizations may readily demonstrate their major purpose
through disbursements, the major purpose of some newly formed organizations may not
be clear from their disbursements or statements of purpose alone. Furthermore, some
organizations may spend the majority of a twelve-month period, particularly during a
non-election year, gathering money for Federal election purposes without making any
significant disbursements. Because the major purpose of such groups would nevertheless
be the nomination or election of candidates for Federal office, we have concluded that it
is appropriate for the rule to include the amount of contributions received as a percentage of all receipts as an indication of the organization’s purpose. See draft 11 CFR 100.5(a)(2)(iii). As with the disbursements test, the total amount of contributions received must exceed 50% of the organization’s total receipts during any twelve-month period to meet the major purpose test. Similar to the disbursements test, this twelve month period would also be measured quarterly to reduce potential administrative burdens.

E. Fixed Dollar Amount Test Not Included

The NPRM proposed one alternative in which an organization could satisfy the major purpose test by spending more than $50,000 on a combination of specified types of disbursements. See proposed 100.5(a)(1)(iii), 69 Fed. Reg. 11736, 11756-57 (Mar. 11, 2004). A similar $10,000 threshold was also proposed as a component of a public statements test. Id. at 11,756.

The draft Final Rules do not incorporate any test relying on a fixed dollar threshold. While a fixed dollar threshold might accurately measure whether a significant amount of resources are devoted to a particular purpose, it is not a clear indication of an organization’s major purpose because it offers no insight into the proportion of overall activity that such spending represents. As a number of commenters indicated, this test would be easily satisfied by large organizations for which $50,000 is a small percentage of disbursements, and for that reason it would not accurately reflect the purpose of the larger portion of disbursements. At the same time, this approach would be under-inclusive with respect to organizations that have budgets of under $50,000, but whose sole purpose is the nomination or election of candidates for Federal office.
F. 527 Organizations

By definition, 527 organizations are entities that have as their primary purpose the “influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization, or the election of Presidential or Vice-Presidential electors.” 26 U.S.C. 527(e). An entity organized as a tax-exempt 527 group can avoid taxes on its income that might otherwise apply to its election-related activities. While all current nonconnected political committees are 527 organizations, not all 527 organizations are registered as political committees with the Commission. A number of 527 organizations are focused on non-Federal elections or non-elected positions such as judgeships.

The NPRM proposed an approach under which 527 organizations, not specifically exempt by the proposed rule, would satisfy the major purpose element of political committee status. See Alternatives 2-A and 2-B, 69 Fed. Reg. 11,736 at 11,757. Congress and the Commission have acknowledged tax status as an appropriate basis for line drawing in a number of different areas. For example, the Commission exempted 501(c)(3) organizations, as a class, from the definition of “electioneering communication” in 11 CFR 100.29. Congress has also drawn distinctions between 527 organizations and other organizations, including 501(c) organizations. In apparent recognition of the primary purpose of 527 organizations, Congress prohibited political party committees from soliciting funds or making or directing donations to any 527 organization. 2 U.S.C. 441i(d)(2). However, when Congress addressed solicitations for and donations to 501(c) organizations it only applied the restrictions with respect to a narrower group of 501(c) organizations “that make expenditures or disbursements in
connection with an election for Federal office (including expenditures or disbursements for Federal election activity)." 2 U.S.C. 441i(d)(1).

A number of commenters argued that 527 status should not be a basis for determining major purpose, observing that these organizations also engage in activities that are not intended to influence elections. The draft Final Rules respond to this concern in two ways: by requiring evidence of Federal activity in addition to 527 status in 11 CFR 100.5(a)(3) and (a)(4) and by exempting groups whose activities are unrelated to Federal elections in 11 CFR 100.5(a)(5). Furthermore, the mere fact that 527 organizations engage in activities that, while permissible, are tangential to the exempt purpose of the organization does not reveal a different major purpose for the organization.

This Office believes that it is advisable to clarify when 527 organizations are required to register as political committees for two reasons. First, because all existing nonconnected political committees are 527 organizations, focusing on these organizations ensures that this rulemaking will have a predictable effect on existing organizations and will not cause committees that currently register and report to the Commission as political committees to cease doing so. Such a result would be contrary to the purposes of the Act. Second, an organization’s decision to avail itself of 527 status is inherently indicative of its choice to engage principally in electoral activity. It remains for the Commission to determine whether the organization’s predominant focus is on Federal elections or some other election, selection, nomination or appointment.

We do not, however, recommend that status as a 527 organization, by itself, should satisfy the major purpose test. Rather, the draft Final Rules reflect an approach
whereby status as a 527 organization, only when coupled with evidence demonstrating a
focus on Federal candidates, would satisfy this test. Draft 11 CFR 100.5(a)(3) would
establish a separate 50% disbursement test for 527 organizations in existence for longer
than one year, while draft paragraph (a)(4) provides a nearly identical test that differs
only in that it applies a different time period for measuring the disbursements of 527
organizations in existence for less than one year. In addition, draft 11 CFR 100.5(a)(5)
exempts specific categories of 527 organizations from the additional 527 organization
rules.

Thus, while the draft Final Rules would capture organizations whose activities are
unquestionably Federal in nature, they are tailored to leave outside the scope of the rule
those groups that may engage in a small amount of activity focused on Federal elections.
This represents a distinct departure from the per se rule proposed in the NPRM that
would have determined that all 527 organizations satisfied the major purpose test by
virtue of their tax status, unless specifically excepted. See Alternatives 2-A and 2-B, 69
Fed. Reg. 11,736 at 11,757. Finally, in addition to the major purpose test specifically for
527 organizations, those organizations could satisfy the avowed purpose, percentage of
disbursements, or percentage of contributions tests in draft section 100.5(a)(2) as an
alternative means of satisfying the major purpose test.

1. **Rationale for a 50% test for 527 organizations.**

This Office views an organization’s disbursement of funds as one reliable and
Supreme Court-approved measure of that organization’s purpose. The draft Final Rules
therefore include a test that employs clear lines to establish a nexus between a group’s
disbursements and Federal candidates to warrant the conclusion that the purpose of the
527 organization is to influence *Federal* elections. For the same reasons explained above in reference to the generally applicable 50% test, this Office recommends a 50% test to ensure that influencing *Federal* elections is an organization’s *major* purpose, rather than simply a substantial or significant purpose. Once a 527 organization directs more than 50% of its non-overhead, non-administrative disbursements to activities related to Federal candidates, the major purpose of that group is clearly more focused on Federal elections than other elections.

The proposed 50% test for 527 organizations is different than the 50% test applicable to all organizations in 11 CFR 100.5(a)(2)(ii). While both tests focus on terms that are already clearly defined, the 527 test focuses on a broader set of activities in light of the implicit purpose of 527 organizations to influence elections or nominations.

2. **Components of the 50% test for 527 organizations.**

The 50% test for 527 organizations looks at five types of disbursements, which overlap with the categories of disbursements used by the 50% test for all organizations. The first two are contributions made to Federal candidates and solicitations for contributions, which provide two obvious indications of involvement in *Federal* elections. Therefore, the draft Final Rules include contributions made and direct solicitation costs as components of the 50% test for 527 organizations. Both of these components are also included in the separate 50% test for all organizations. *See* draft 11 CFR 100.5(a)(2)(ii).

The 50% test for 527 organizations would also include expenditures as its third component indicating activity intended to influence a Federal election. *Draft* 11 CFR 100.5(a)(3)(iii). Expenditures are, by definition, payments or gifts of money or anything of value “made for the purpose of influencing any election for Federal office.” *2 U.S.C.*
431(9); 11 CFR 100.111(a). As such, a 527 organization’s expenditures reflect its attempt to influence Federal elections and such activity is an appropriate measure of the organization’s purpose.

The fourth type of disbursement in the 50% test for 527 organizations is payments for communications that refer to a clearly identified candidate for Federal office. Given the election-influencing purpose of 527 organizations, it is reasonable to view communications that reference a clearly identified Federal candidate as one indication that the elections the organization intends to influence are Federal elections. As a bright line standard, it gives clear notice to 527 groups that are not currently registered as political committees.

The fifth and final component of the 50% test focuses on payments for voter mobilization activities commonly referred to as types I and II Federal election activities ("FEA"): Voter registration activity (11 CFR 100.24(b)(1)), voter identification (11 CFR 100.24(b)(2)(i)), generic campaign activity (11 CFR 100.24(b)(2)(i)), and get-out-the-vote efforts (11 CFR 100.24(b)(2)(iii)). However, this category of disbursement would not include payments for activities that qualify as non-partisan voter drives under 11 CFR 100.133. BCRA included circumstances whereby Federal election activities are subject to regulation and thus deemed to have some influence on Federal elections under certain circumstances. Including FEA in the 50% test is consistent with the FEA provisions in BCRA that apply to party committees. By exempting non-partisan voter drives from the scope of FEA, the draft Final Rules would tailor the FEA concepts to activities that are related to Federal elections for purposes of determining Federal major purpose. Furthermore, this draft rule is narrowly tailored to ensure that it would not capture groups
whose voter identification, voter registration and get-out-the-vote efforts are aimed at
elections in which no Federal candidates are on the ballot.

3. **Time Measurements for 50% test for 527 organizations.**

   The draft rules for 527 organizations require new organizations that have not yet
existed for a full twelve-month period to measure the applicable disbursements as a
percentage of quarterly spending, rather than annual spending. The general 50% test for
all organizations does not include a quarterly disbursement test in order to avoid broadly
sweeping in activity by 501(c) organizations or other non-527 groups where one or two
quarters might not accurately reflect the major purpose of the organization. Any
examination of the election-focused 527 organizations, however, warrants closer
attention. The quarterly test for the group’s first year will ensure that 527 organizations
do not avoid political committee status by dissolving without consequence after a full
year of political activity related to Federal elections, or simply delaying the consequence
of political committee status during an entire election year.

4. **Application of 50% Test to 527 Organizations With Multiple
   Accounts.**

   In some instances, one 527 organization might make disbursements from several
separate accounts. Draft 11 CFR 100.5(a)(6) clarifies how the 50% tests set forth in draft
11 CFR 100.5(a)(3) and (a)(4) would apply to these organizations. Under the draft Final
Rules, a 527 organization with multiple accounts satisfies the major purpose test if any
one of its accounts satisfies the applicable 50% test. This clarification prevents 527
organizations from circumventing the 50% tests by manipulating or creating various
accounts simply to avoid the 50% threshold and thereby avoid political committee status.
For example, assume that 527 Organization X operates with $20,000 in disbursements from its Federal Account A and $5,000 in disbursements from its Non-Federal Account B. If Organization X disburses $12,000 of the $20,000 from Account A for contributions and independent expenditures, and disburses all $5,000 from Account B for non-Federal purposes, the result would be that Organization X has as its major purpose the nomination or election of a candidate for Federal election regardless of the disbursements made from Account B. Organization X may continue to use its Non-Federal Account for non-Federal election purposes. All disbursements, contributions, expenditures, and transfers by the 527 organization in connection with any Federal election shall be made from its Federal account. See 11 CFR 102.5(a)(1)(i).

II. Expenditures

In addition to adding a “major purpose” test to the definition of “political committee,” the NPRM also proposed several additions to the definition of a fundamental term in FECA, “expenditure.” Here, in the draft Final Rules, this Office recommends one carefully crafted amendment to the definition of “expenditure.” As the discussion below illustrates, this change proposed to the rules defining “expenditure” depends on the adoption of the changes proposed for the “major purpose” standard.

Section 100.115 – Certain PASO Communications

As noted above, FECA defines “expenditure” to include a payment for a communication that is “made . . . for the purpose of influencing any election for Federal office.” 2 U.S.C. 431(9)(A)(i). We propose to include in the definition of “expenditure” payments for communications that promote, support, attack or oppose (“PASO”) a

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4 “PASO” has emerged as a convenient acronym for “promote, support, attack or oppose.” While “PSAO” would mirror the order of the words in the statute, it is not as easy to pronounce.
clearly identified candidate for Federal office, but only when made by Federal political
commitees and unregistered groups that meet the major purpose test. If a Federal
political committee—which major purpose, by definition, is influencing elections—pays
for a communication that PASOs a clearly identified Federal candidate, then it is logical
to conclude that the payments for that communication were made for the purpose of
influencing the election of that candidate, and therefore are "expenditures." In order for
this conclusion to apply to Federal political committees' first $1,000 of expenditures,
draft section 100.115 would also apply to nascent political committees, which are
unregistered groups that meet Buckley's "major purpose" test as incorporated into draft
11 CFR 100.5(a)(1)(ii).

The PASO standard is found in BCRA, and is applied primarily to political party
But Congress also applied the PASO standard to the activity of nonprofits and other
organizations. For example, BCRA bars party committees from soliciting funds for, or
making or directing donations to, nonprofits that make expenditures or disbursements for
FEA, which includes public communications that PASO a Federal candidate. 2 U.S.C.
431(20)(A)(iii) and 441i(d)(1). BCRA also directed the Commission not to exempt any
communications that PASO a clearly identified Federal candidate from the electioneering
communication provisions. 2 U.S.C. 434(f)(3)(B)(iv). Finally, BCRA also included the
PASO standard in the "back-up" definition of "electioneering communications," which,
had the primary definition been invalidated, would have applied to persons other than
political committees. 2 U.S.C. 434(f)(3)(A)(ii). Although the Supreme Court upheld the
primary definition of "electioneering communications" in McConnell, the back-up
definition reflects Congress’ view of PASO as a workable, constitutionally sufficient
standard for persons other than political party committees and candidates. In sum, BCRA
did not confine its use of the PASO standard to political parties.

Nonetheless, the proposed use of the PASO standard has caused some to question
the clarity of the phrase and whether it provides sufficient guidance to the public on
which communications may be subject to regulation. Ideally, any regulation
implementing the statutory definition of “expenditure” as applied in the vital area of
communications would avoid any such concerns as it accomplishes two objectives:
giving effect to the full scope of the statute, and providing a clear line between
communications that are expenditures and those that are not.

The PASO standard withstood constitutional vagueness challenges. *McConnell*,
124 S.Ct. at 675 n.64. While the outer limits of the standard will be addressed by the
Commission and the courts, sharpening understanding of the term’s application, the
Commission has already begun the process of providing contours to the PASO standard
as it is used in the statute’s definition of the third type of FEA. The Commission has
provided examples of communications that PASO and others that do not in two Advisory
Opinions (AOs 2003-25 (Weinzapfel) and 2003-37 (ABC)). The Commission’s
resolution of other pending advisory opinion requests may well shed additional light on
this subject.

Confining the PASO standard to Federal political committees and unregistered
groups with the major purpose of nominating or electing Federal candidates would
address concerns about the clarity of the PASO standard. Federal political committees
“by their very nature . . . are focused on the influencing of Federal elections,” as the
Commission recently observed in an advisory opinion. AO 2003-37 at 3. There, the
Commission expressly relied on political committees' "major purpose" as their crucial
feature in defeating any vagueness concerns that might arise from using PASO as the
content standard for expenditures in the context of communications. See AO 2003-37 at
3 (stating: "[a]s organizations whose 'major purpose is the nomination or election of a
candidate,' political committees do not raise the same concerns about vagueness that may
arise in other contexts when interpreting the definition of 'expenditure' "). Draft section
100.115 follows from these conclusions by applying the standard to both Federal political
committees and to unregistered organizations so long as they satisfy the major purpose
test. In both cases, the organizations—the registered political committee and the group
that satisfies the "major purpose" test proposed here—are "in the business" of influencing
Federal elections and their communications demonstrably have that purpose and effect.

Confining the PASO standard to Federal political committees and unregistered
groups with the major purpose of nominating or electing candidates would also protect
social welfare groups from concerns about whether their communications meet the PASO
standard. Because such groups, if operating appropriately, would not satisfy any of the
"major purpose" tests we propose in draft 11 CFR 100.5(a), the PASO standard would
not apply to such groups under draft section 100.115.

Specifying in a regulation that payments for a Federal political committee's
communications that PASO a clearly identified Federal candidate are expenditures will
provide political committees with the certainty inherent to a codified regulation. That

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5 Because ABC was already a Federal political committee, this issue was not before the
certainty will only increase as the Commission continues to flesh out the meaning of
PASO.

III. Contributions

As noted above, this Office recommends one addition to the regulatory definition of "contribution" in 11 CFR part 100, subpart B. We believe the addition would be consistent with the statutory standard in reaching payments made for the purpose of influencing Federal elections. This addition has several exceptions to avoid sweeping too broadly.

Section 100.57-- Funds Received in Response to Solicitations

Draft section 100.57 would be a new rule that explains when funds received in response to solicitations must be treated as "contributions" under FECA. Draft section 100.57 would classify all funds provided in response to a communication as Federal contributions if the communication indicates that any portion of the funds received will be used to support or oppose the election of a clearly identified Federal candidate.

The draft rule's focus on the planned use of funds leaves the group issuing the communication with complete control over whether its communications would trigger draft section 100.57. For example, a group might issue a solicitation that could be summarized as conveying the following:

"The President wants to cut taxes again, but his opponent, Senator Hamilton, wants to raise them. Our group has been fighting for lower taxes since 1960, and we will fight for the President's tax cuts. Send us money for our important work."

Because this solicitation does not indicate that any funds received will be used to support or oppose the election of any candidates, any funds received in response would not be
“contributions” under draft section 100.57. In contrast, a solicitation that would trigger
the draft rule might read as follows:

“The President wants to cut taxes again, but his opponent, Senator
Hamilton, wants to raise them. Our group has been fighting for lower
taxes since 1960, and we will fight to give the President four more years
to work on these tax cuts. Send us money for our important work.”

Because this solicitation would indicate that the funds received would be used to support
the election of a Federal candidate, any funds received in response to this solicitation
would be “contributions” under the proposed rule.

Most organizations devote careful attention to the content of their
communications with potential donors. These communications are commonly the
cornerstone of the relationship between a group and its donors, and their effectiveness is
vital to almost all organizations. Many groups’ solicitations will say nothing of an
electoral objective (i.e., that any funds provided in response to the solicitation will be
used to support or oppose the election of Federal candidates). Communications that do
so, however, plainly seek funds “for the purpose of influencing Federal elections.” Thus,
the draft rule appropriately concludes that such funds meet the definition of
“contributions” under FECA.

The standard in draft section 100.57 is based on the Commission’s recent
conclusion in the ABC Advisory Opinion, see AO 2003-37 at 15 and 20, and it draws
support from a 1995 decision of the United States Court of Appeals for the Second
Circuit. FEC v. Survival Education Fund, Inc., 65 F.3d 285 (2d Cir. 1995). In that case,
the court found that a July 1984 letter from nonprofit issue advocacy groups solicited
“contributions” under FECA because it included a statement “That . . . leaves no doubt
that the funds contributed would be used to advocate President Reagan’s defeat at the
polls, not simply to criticize his policies during the election year.” *Id.* at 295. According
to the court, the critical statement from the mailing was the following: “your special
election-year contribution today will help us communicate your views to hundreds of
thousands of members of the *voting public*, letting them know why Ronald Reagan and
his anti-people policies *must* be stopped.” *Id.* at 289 and 295 (first emphasis added by
court, second in original). The Second Circuit reached this conclusion despite the
inclusion in the letter of a suggestion that the funds would be used for issue advocacy.
The mailing included the following statement: “Here is my contribution . . . to help bring
the message of nuclear disarmament, nonintervention, and economic justice to the voting
public between now and November 1.” *Id.* at 289. The mailing described in *FEC v.*
*Survival Education Fund* would trigger section 100.57(a), if promulgated, and would
require the group issuing the mailing to treat all the funds received in response to the
mailing as “contributions” under FECA.

Draft section 100.57 includes two exceptions to ensure that this new rule would
not sweep beyond its intended scope. The first would exclude any solicitations from
joint fundraisers operated under current 11 CFR 102.17. *See* draft 11 CFR 100.57(a).
The second would provide that if the costs of a solicitation are allocable under 11 CFR
106.1, 106.6 or 106.7 because the solicitation also refers to at least one clearly identified
non-Federal candidate, only 50% of the proceeds of the solicitation need to be considered
Federal contributions. *See* draft 11 CFR 100.57(b)(2). For clarity, the draft rule would
also state that a solicitation that meets draft section 100.57(a) and refers to a political
party so that its costs are allocable under 11 CFR 106.6 or 106.7 is nonetheless subject to
the rule that all of its proceeds are “contributions” under FECA. See draft 11 CFR
100.57(b)(1).

IV. Allocation of Expenses Between Federal and Non-Federal Activities by Separate Segregated Funds and Nonconnected Committees

Over the past ninety days, this Office has examined information regarding how the current allocation system under current 11 CFR 106.6 has worked in the past ten years by reviewing past FEC filings from separate segregated funds (“SSFs”) and nonconnected committees. We have also considered the public comments received in response to the allocation proposals in the NPRM. Based on a review of this information, and a consideration of the policy rationales for various proposed changes to the allocation regime in section 106.6, we present the attached draft Final Rules with the following key features:

- The draft Final Rules would remove the “funds expended” ratio from 11 CFR 106.6(c) and replace it with a 50% flat minimum percentage;

- The draft Final Rules would apply the flat 50% ratio to administrative and generic voter drive expenses as well as to a newly added category of allocable expenses – public communications that refer to a political party but do not refer to any clearly identified Federal or non-Federal candidates; and

- The draft Final Rules would provide for allocation of certain public communications that refer to both political parties and clearly identified candidates based upon whether the candidates are Federal, non-Federal, or both.

A. Allocation Ratios for Administrative Expenses and Generic Voter Drives (11 CFR 106.6(c))
Under current section 106.6, SSFs and nonconnected committees that allocate administrative expenses and the costs of generic voter drives must do so using the “funds expended” method: a ratio of “Federal expenditures” to “total Federal and non-Federal disbursements” made during the two-year election cycle. These committees are required to estimate and report this ratio at the beginning of each Federal election cycle (on Schedule H1 of FEC Form 3X) based on either their Federal and non-Federal disbursements in a prior comparable election cycle or on their reasonable prediction of their disbursements for the current election cycle. 11 CFR 106.6(c)(1). The ratio must be adjusted and reported during the election cycle to reflect the committees’ actual disbursements. 11 CFR 106.6(c)(2).

Based on a review of past FEC filings by SSFs and nonconnected committees, and the public comments received on the NPRM, this Office recommends fundamentally changing these allocation rules by removing the funds expended method for calculating the allocation ratios for administrative and generic voter drive expenses. Instead, the draft Final Rules would establish a flat minimum 50% percentage for allocation of these costs for reasons stated below.

1. Replacing the “funds expended” ratio method with a flat percentage

In examining public disclosure reports filed by SSFs and nonconnected committees, we discovered that very few committees choose to allocate their

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6 The “Federal expenditures” in the numerator of the allocation ratio is limited to amounts contributed to or otherwise spent on behalf of specific Federal candidates. See 11 CFR 106.6(c)(1). Similarly, the “total Federal and non-Federal disbursements” in the denominator is limited to amounts contributed to or otherwise spent on behalf of specific Federal and non-Federal candidates. Id. In AO 2003-37, the Commission stated that both the numerator and the denominator must include PASO communications.
administrative and generic voter drive expenses under section 106.6. Anecdotal evidence suggests that some committees, including those that allocate, are confused as to how the funds expended ratio should be calculated and adjusted throughout the cycle. In addition, calculating and adjusting the funds expended ratio may pose an administrative burden to some committees, particularly those with limited resources, because compliance requires committees to monitor continually their Federal expenditures and non-Federal disbursements, compare their current spending to the ratio reported at the start of the election cycle, and then adjust the ratio to reflect their real-world behavior. Adding to that burden is the requirement that committees must transfer funds within 60 days whenever they adjust their funds expended ratio. The confusion and administrative burden associated with the funds expended method may explain why, historically, committees have not adjusted their allocation ratios during an election cycle, or from election cycle to election cycle.

Approximately 10 commenters addressed the specific allocation proposals in the NPRM. Generally speaking, these commenters were not supportive of the allocation system in current section 106.6 and agreed that some change to the current system is needed. In fact, two commenters recommended completely revamping the allocation scheme by removing the funds expended method.

In the NPRM, the Commission proposed to use a “funds expended method plus a minimum percentage” approach in calculating the allocation ratio. One commenter argued that this approach would be very burdensome for political committees. Given the complexity of current section 106.6 and the confusion regarding the proper application of this rule exhibited by some SSFs and nonconnected committees, and the administrative
burden of compliance, the Commission should strive to simplify, not further complicate, the allocation system. Thus, this Office does not recommend that the Commission retain the funds expended method in any form.

Instead, a flat minimum percentage would make the allocation scheme easier to understand and apply, while preserving the overall rationale underlying allocation. The flat minimum percentage would eliminate the requirement—and, thus, the accompanying burdens—of calculating the ratio and monitoring it continuously for accuracy.

Furthermore, the Commission’s experience with State and local party allocation ratios in 11 CFR 106.7 and 300.33 indicates that flat minimum allocation ratios are easier for committees to comprehend and for the Commission to administer. A flat minimum Federal percentage will also result in less complex, less intrusive, and speedier enforcement actions, thereby enhancing compliance with the law. Finally, committees would retain the flexibility to allocate more than the flat minimum percentage of these expenses to their Federal account if that is in the best interests of their organization.

Consequently, this Office recommends that the Commission replace the funds expended method of allocation with a flat minimum allocation percentage.

2. The new 50% Federal funds requirement

Neither FECA nor any court decision dictates how the Commission should determine appropriate allocation ratios. In fact, at least one court has recognized that the Commission has the authority to establish the Federal funds percentage for administrative and generic voter drive expenses it deems best. See Common Cause v. FEC, 692 F. Supp. 1391, 1396 (D.D.C. 1987). For the reasons stated below, we recommend that the Commission establish the flat minimum percentage at 50%.
A 50% allocation ratio recognizes that SSFs and nonconnected committees are 
"dual purpose" in that they engage in both Federal and non-Federal election activities. 
These committees have registered as Federal political committees with the FEC, 
therefore, this Office believes that these dual purpose committees should not pay for 
administrative expenses, generic voter drives and public communications that refer to a 
political party with more non-Federal funds than Federal funds. However, the 50% 
figure also recognizes that some Federal SSFs and nonconnected committees conduct a 
significant amount of non-Federal activity in addition to the committees' Federal 
spending. This Office believes this approach is preferable to importing percentages used 
in other contexts for other dissimilar entities, such as the old national party committee 
ratios repealed by BCRA or the current ratios applicable to State and local party 
committees, as suggested in the NPRM.

3. Impact of these changes on SSFs and nonconnected committees

The past decade of FEC filings indicate that most SSFs and nonconnected 
committees do not allocate under section 106.6(c). In fact, fewer than 2% of all 
registered non-party political committees have filed H1 and H4 schedules allocating 
administrative and generic voter drive expenses under section 106.6(c) in each election 
cycle since these regulations were made effective in 1991. Any SSF or nonconnected 
committee that is not allocating under section 106.6 is presumably already using 100% 
Federal funds for these expenses, except where those expenses are paid by other entities 
in accordance with the Act and Commission regulations, such as an SSF's connected 
organization paying its administrative expenses. Thus, only a small fraction of SSFs and
nonconnected committees would be affected by removing the funds expended method
and replacing it with a flat percentage in section 106.6.

Even for those SSFs and nonconnected committees that are currently allocating,
the impact of the draft Final Rules will not be substantial. Our review of past FEC filings
shows that currently almost half of these committees are already paying for these
expenses with at least 50% Federal funds under the current system. These committees
would not need to adjust their payments under the 50% flat percentage method in the
draft Final Rules. Moreover, the actual dollar amounts of non-Federal funds that were
spent in past cycles on administrative and generic voter drive expenses under section
106.6(c), and which would have to be partially replaced with Federal funds under the
draft Final Rules, is relatively low. With the exception of one or two committees per
cycle whose spending is out of line with other SSFs and nonconnected committees, the
draft Final Rules would affect each committee by requiring only a minimal increase in
Federal funds expended. Additionally, these amounts are not high compared to total
disbursements from these committees’ Federal accounts in an election cycle (and would
be even smaller if disbursements from non-Federal accounts are taken into
consideration). Thus, the draft Final Rules would not impose a significant fundraising
burden on these committees.

Most commenters on the NPRM argued that any changes made effective before
the general election on November 2, 2004 would cause great disruption to committees
and other organizations. Responding to these concerns, the draft Final Rules amending
section 106.6 would not take effect until January 1, 2005. This delayed effective date
would significantly lessen the burden on SSFs and nonconnected committees and would
allow for an orderly phase-in of the new rules in two ways. First, the committees may “close out” the 2003-2004 election cycle by making final adjustments to their section 106.6(c) ratios and any final transfers of money between Federal, non-Federal, and allocation accounts. Then, committees may start fresh in January 2005 with the new rules requiring at least 50% Federal funds for these expenses. Second, this delayed effective date provides over four months for the affected committees to make whatever internal changes are necessary to comply with the new rules.

B. Allocation of Public Communications that Refer to Political Parties, or Both Political Parties and Candidates (11 CFR 106.6(f))

In addition to applying a flat 50% minimum allocation percentage for administrative expenses and generic voter drives, the draft Final Rules specifically address three types of communications by SSFs and nonconnected committees, as described in draft section 106.6(b)(4) through (6). The draft Final Rules would apply to public communications, as defined in 11 CFR 100.26, that refer to:

- A political party, but do not refer to a clearly identified Federal or non-Federal candidate (106.6(b)(4));
- A political party and one or more clearly identified Federal candidates, but do not refer to any clearly identified non-Federal candidates (106.6(b)(5)); and
- A political party and one or more clearly identified non-Federal candidates, but do not refer to any clearly identified Federal candidates (106.6(b)(6)).

In a further effort to simply the allocation rules, the draft Final Rules collapse the two sets of the costs to be allocated in section 106.6(b)(1) and (2) into a single list applicable to both SSFs and nonconnected committees. The revised list still makes clear that SSFs may have the costs of administrative expenses and fundraising programs paid by their connected organization.
The draft Final Rules would also direct SSFs and nonconnected committees to use the time/space allocation method in section 106.1 for public communications that refer to a political party, to at least one clearly identified Federal candidate, and to at least one clearly identified non-Federal candidate. See draft section 106.6(f)(3). These sections differ from the approach in Advisory Opinion 2003-37, which requires political committees to allocate public communications that promote, support, attack, or oppose political parties and Federal candidates. The draft Final Rules, instead, incorporate the "refer to a clearly identified candidate" standard, which should be easy for SSFs and nonconnected committees to understand and comply with. Given the Federal election-influencing purpose of SSFs and nonconnected committees, it is reasonable to view their communications referring to a political party and/or a clearly identified Federal candidate as an indication that the elections these Federal committees intend to influence are Federal elections.

First, public communications that refer to a political party without referring to any clearly identified Federal or non-Federal candidates would be subject to the new 50% flat minimum percentage in draft 11 CFR 106.6(c). Similar to the administrative expenses and generic voter drives (which may refer to a party) also allocated under section 106.6(c), these references solely to a political party are inherently influencing both Federal and non-Federal elections. Therefore, the 50% Federal funds requirement reflects the dual nature of the communication. As with other expenses under draft section 106.6(c), an SSF or nonconnected committee could choose to allocate more than 50% of the costs of any such public communication to its Federal account, if it wished to do so.
Second, where the public communications refer to a political party, and either a Federal or non-Federal candidate, but not both, this Office views these communications as "candidate-driven:" the Federal or non-Federal nature of the political party reference is determined by whether the clearly identified candidates in the communication are Federal or non-Federal. Thus, public communications that refer to a political party and only clearly identified Federal candidate(s) would be required to be paid for with 100% Federal funds. See draft section 106.6(f)(1). Permitting these communications to be paid for with some non-Federal funds based on a cursory reference to a political party would invite circumvention of the intent of the allocation scheme.

In contrast, public communications that refer to a political party and only clearly identified non-Federal candidate(s) could be paid for with 100% non-Federal funds. See draft section 106.6(f)(2). SSFs and nonconnected committees would again be free to pay for these communications referring to non-Federal candidates partly or entirely with Federal funds, but would not be required to do so. Finally, public communications that refer to a political party and to both Federal and non-Federal candidates would be subject to time/space allocation under current 11 CFR 106.1 without regard to the portion referring to the party. See draft section 106.6(f)(3).

The draft Final Rules are simpler than the approach taken in Advisory Opinion 2003-37, which required a combined application of the time/space allocation method under 11 CFR 106.1 and the funds expended method under 11 CFR 106.6 for most of these mixed public communications. Instead of this complicated two-step methodology, draft section 106.6(f) would be easier for SSFs and nonconnected committees to apply to their communications. The candidate-driven approach for these public communications,
coupled with the removal of the funds expended method in favor of a flat percentage
method, reduces the amount of recordkeeping, tracking, and calculations that SSFs and
nonconnected committees would be required to do to properly allocate administrative,
generic voter drive, and public communication expenses under 11 CFR 106.6.

The revised 11 CFR 106.6 allocation regulations would reduce the burden of
compliance on SSFs and nonconnected committees and better serve the original intent of
the allocation system. Incorporation of certain public communications into the allocation
regulation provides guidance to committees that make such communications. This Office
believes that these draft Final Rules best resolve the problems with the current allocation
scheme revealed through reviewing past FEC filings when considering the issues raised
by the commenters on the NPRM.

V. Severability of the draft Final Rules

This Office recommends that the Commission adopt the draft Final Rules as a
whole because they would operate most effectively that way. Should the Commission
decide to approve only some of the draft Final Rules, we have identified two draft
sections that could operate independently and therefore could be adopted separately, even
if the Commission does not adopt all of the draft final regulations.

First, draft section 100.57, concerning funds received in response to solicitations
that indicate the funds received will be used to support a Federal candidate’s election,
could operate independently of the other changes in the draft Final Rules. Those other
changes would not directly affect what funds a recipient must consider contributions.

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8 Should the Commission adopt the draft Final Rules, we request authority to prepare the necessary
substantive and conforming changes in 11 CFR Parts 102, 104 and 106, including 11 CFR 102.5.
Second, the proposed changes to the allocation system in draft section 106.6 could stand alone. With or without the proposed changes to the major purpose test or to the definitions of “expenditure” or “contribution,” the allocation scheme in section 106.6 will continue to operate, and the recommended changes to the allocation regulations in section 106.6 do not depend on adoption of the other draft Final Rules.

Unlike the draft Final Rules pertaining to solicitation and allocation, the draft Final Rules on major purpose and PASO communications are dependent on each other. Whether a PASO communication is an expenditure depends on whether the person making the PASO communication is a political committee or meets one of the major purpose tests. This also affects whether PASO communications count towards the $1,000 expenditure threshold for political committee status. Consequently, the draft Final Rules on major purpose and PASO communications should be considered together.

Furthermore, the various components of the major purpose rule are inter-dependent and their separation could lead to inconsistent or anomalous results.

**RECOMMENDATION**

The Office of General Counsel recommends that the Commission approve the attached draft Final Rules and direct the Office of General Counsel to draft the Explanation and Justification for Commission approval.
PART 100 – SCOPE AND DEFINITIONS (2 U.S.C. 431)

1. The authority citation for part 100 continues to read as follows:

   Authority: 2 U.S.C. 431, 434, and 438(a)(8).

2. In section 100.5, paragraph (a) is revised to read as follows:

§ 100.5 Political committee (2 U.S.C. 431(4), (5), (6)).

   Political Committee means any group meeting one of the following conditions:

   described in paragraphs (a), (b), (c), (d) or (e) of this section.

   (a) (1) Non-connected committees. Except as provided in 11 CFR

   paragraphs (b), (c), and (d) of this section, political committee means

   any committee, club, association, or other group of persons which that:

   (i) During one calendar year, receives contributions aggregating in

   excess of $1,000 or which makes expenditures aggregating in

   excess of $1,000; and during a calendar year is a political

   committee.

   (ii) Has as its major purpose the nomination or election of one or more

   candidates for Federal office.

   (2) Major purpose. A committee, club, association or other group of persons,

   including 527 organizations, has the nomination or election of one or more

   candidates for Federal office as its major purpose if it satisfies any of the

   following conditions:

   (i) Statements of the committee, club, association or other group of

   persons, demonstrate that its major purpose is to nominate, elect,
or defeat, one or more candidates for Federal office so long as the statements are:

(A) Contained in organizational documents, which include but are not limited to charters and bylaws;

(B) On the official website of the committee, club, association or other group of persons;

(C) Contained in a filing with a government agency;

(D) Contained in fundraising solicitations;

(E) Contained in public communications, as defined in 11 CFR 100.26; or

(F) Public statements made by or on behalf of any officer, director, executive director, or partner, or the equivalent of any of these positions, of the committee, club, association or other group of persons;

(ii) During any twelve-month period, as calculated on a quarterly basis, more than fifty percent [50\%] of the total disbursements of the committee, club, association or other group of persons, excluding disbursements for administrative and overhead expenses, is composed of any combination of the following funds, but not entirely from funds in paragraph (a)(2)(ii)(D) of this section:

(A) Contributions (including coordinated expenditures and other in-kind contributions):
(B) Direct costs of soliciting contributions;

(C) Independent expenditures, as defined in 11 CFR 100.16; and

(D) Payment for an electioneering communication, as defined in 11 CFR 100.29; or

(iii) During any twelve-month period, as calculated on a quarterly basis, more than fifty percent [50%] of the total receipts of the committee, club, association or other group of persons is composed of contributions.

(3) Additional rule for 527 organizations existing for one year or longer.

Except as provided in paragraph (a)(5) of this section, a committee, club, association or other group of persons organized under Section 527 of the Internal Revenue Code, 26 U.S.C. 527, has the nomination or election of one or more candidates for Federal office as its major purpose if, during any twelve-month period as calculated on a quarterly basis, more than fifty percent [50%] of its total disbursements, excluding disbursements for administrative and overhead expenses, is composed of any combination of the following funds:

(i) Contributions (including coordinated expenditures and other in-kind contributions);

(ii) Direct costs of soliciting contributions;

(iii) Expenditures;

(iv) Payments for communications that clearly identify one or more candidates for Federal office:
(v) Payments for the Federal election activities described in 11 CFR 100.24(b)(1) and (2), that are not exempt under 11 CFR 100.133.

(4) Additional rule for 527 organizations existing for less than one year.

Except as provided in paragraph (a)(5) of this section, a committee, club, association or other group of persons organized under Section 527 of the Internal Revenue Code, 26 U.S.C. 527, has the nomination or election of one or more candidates for Federal office as its major purpose if, during any calendar quarter, more than fifty percent (50%) of its total disbursements, excluding disbursements for administrative and overhead expenses, is composed of any combination of the funds described in paragraphs (a)(3)(i) through (v) of this section.

(5) Exceptions to 527 rules. Paragraphs (a)(3) and (a)(4) of this section do not apply where the committee, club, association or other group of persons is any of the following:

(i) A campaign organization of an individual seeking nomination, election, appointment or selection to a non-Federal office;

(ii) A committee, club, association or other group of persons whose election or nomination activities relate solely to elections where no candidate for Federal office appears on the ballot; or

(iii) A committee, club, association or other group of persons that is organized and operated exclusively for any of the following purposes:
(A) Influencing the nomination or election of one or more candidates to non-Federal offices;

(B) Influencing one or more state ballot initiatives, referenda, constitutional amendments, or bond issues; or

(C) Influencing the selection or appointment of one or more individuals to non-elected offices, or the nomination, election, selection, or appointment of one or more individuals to leadership positions within a political party.

(6) 527 organizations with multiple accounts. Any committee, club, association or other group of persons that is organized under Section 527 of the Internal Revenue Code, 26 U.S.C. 527, and has more than one account has the nomination or election of one or more candidates for Federal office as its major purpose if the disbursements from any one account, by itself, satisfy either of the tests in paragraphs (a)(3) or (a)(4) of this section.

*   *   *   *

3. Section 100.57 is added to subpart B to read as follows:

§ 100.57 Funds received in response to solicitations.

(a) Treatment as contributions. Except as provided in 11 CFR 102.17, a gift, subscription, loan, advance, or deposit of money or anything of value made by any person in response to any communication is a contribution to the person making the communication if the communication indicates that any portion of the funds received will be used to support or oppose the election of a clearly identified Federal candidate.
(b) Certain allocable solicitations. If the costs of a solicitation described in paragraph (a) of this section are allocable under 11 CFR 106.1, 106.6 or 106.7 (consistent with 11 CFR 300.33(c)(3)) as a direct cost of fundraising, the funds received in response to the solicitation shall be contributions as follows:

(1) If the solicitation does not refer to any clearly identified non-Federal candidates, but does refer to a political party, in addition to the clearly identified Federal candidate described in paragraph (a) of this section, one hundred percent (100%) of the total funds received are contributions.

(2) If the solicitation refers to one or more clearly identified non-Federal candidates, in addition to the clearly identified Federal candidate described in paragraph (a) of this section, at least fifty percent (50%) of the total funds received are contributions, whether or not the solicitation refers to a political party.

4. Section 100.115 is added to subpart D to read as follows:

§ 100.115 Certain PASO communications.

A purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made for any communication that promotes, supports, attacks, or opposes a clearly identified candidate for Federal office is an expenditure when made by, or on behalf of:

(a) A political committee, as defined in 11 CFR 100.5; or

(b) A committee, club, association, or other group of persons for which the nomination or election of one or more Federal candidates is its major purpose. See 11 CFR 100.5(a)(1)(ii).
1 PART 106 – ALLOCATIONS OF CANDIDATE AND COMMITTEE
2 ACTIVITIES
3
4 5. The authority citation for part 106 continues to read as follows:

5 Authority: 2 U.S.C. 438(a)(8), 441a(b), 441a(g).

6 6. Section 106.6 is amended by:

7 a. Removing the words “(c) and (d)” from paragraph (a) and adding in their
8 place the words “(c), (d), and (f)”;

9 b. Removing the words “or (b)(1)(i)” from paragraphs (a) and (e);

10 c. Removing the citation “102.5(b)(1)(ii)” from paragraph (a) and adding in its
11 place the citation “102.5(a)(1)(ii)”; and

12 d. Revising paragraphs (b), (c), and (e)(2)(ii)(B) and adding paragraph (f) to read
13 as follows:

14 § 106.6 Allocation of expenses between federal and non-federal activities by
15 separate segregated funds and nonconnected committees.

16 * * * * *

17 (b) Costs to be allocated—(1) Separate segregated funds. Separate segregated funds
18 and nonconnected committees that make disbursements in connection with Federal and
19 non-Federal elections shall allocate expenses for the following categories of activity:

20 (1)(i) Administrative expenses including rent, utilities, office supplies, and
21 salaries not attributable to a clearly identified candidate, if such expenses
22 are not paid by the separate segregated fund’s connected organization;
23 except that for a separate segregated fund such expenses may be paid
24 instead by its connected organization:

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The direct costs of a fundraising program or event including

disbursements for solicitation of funds and for planning and administration

of actual fundraising events, where Federal and non-Federal funds are

collected through such program or event, if such expenses are not paid by

the separate segregated fund’s connected organization; and except that for

a separate segregated fund such expenses may be paid instead by its

connected organization;

Generic voter drives including voter identification, voter registration, and

get-out-the-vote drives, or any other activities that urge the general public

to register, vote or support candidates of a particular party or associated

with a particular issue, without mentioning a specific candidate;

Public communications that refer to a political party, but do not refer to

any clearly identified Federal or non-Federal candidate;

Public communications that refer to a political party, and refer to one or

more clearly identified Federal candidates, but do not refer to any clearly

identified non-Federal candidates; and

Public communications that refer to a political party, and refer to one or

more clearly identified non-Federal candidates, but do not refer to any

clearly identified Federal candidates.

Nonconnected committees. Nonconnected committees that make

disbursements in connection with federal and non-federal elections shall

allocate expenses for the following categories of activity:
(i) Administrative expenses including rent, utilities, office supplies, and salaries, except for such expenses directly attributable to a clearly identified candidate;

(ii) The direct costs of a fundraising program or event including disbursements for solicitation of funds and for planning and administration of actual fundraising events, where Federal and non-Federal funds are collected through such program or event; and

(iii) Generic voter drives including voter identification, voter registration, and get-out-the-vote drives, or any other activities that urge the general public to register, vote or support candidates of a particular party or associated with a particular issue, without mentioning a specific candidate.

(c) Method for allocating administrative expenses, and costs of generic voter drives, and certain public communications. Nonconnected committees and separate segregated funds shall allocate pay their administrative expenses, and costs of generic voter drives, as described in paragraph (b) of this section, and costs of public communications that refer to any political party, as described in paragraphs (b)(1), (b)(3), or (b)(4) of this section, according to the funds expended method, described in paragraphs (c)(1) and (2) as follows: with at least 50 percent Federal funds, as defined in 11 CFR 300.2(g).

(1) Under this method, expenses shall be allocated based on the ratio of Federal expenditures to total Federal and non-Federal disbursements made by the committee during the two-year Federal election cycle. This ratio shall be estimated and reported at the beginning of each Federal election cycle, based upon the committee's Federal and non-Federal disbursements in a prior comparable Federal election cycle or upon the committee's reasonable prediction of its disbursements for the coming two years. In
calculating its Federal expenditures, the committee shall include only
amounts contributed to or otherwise spent on behalf of specific Federal
candidates. Calculation of total Federal and non-Federal disbursements
shall also be limited to disbursements for specific candidates, and shall not
include overhead or other generic costs.

(2) On each of its periodic reports, the committee shall adjust its allocation
actual Federal and non-Federal disbursements made, to date. If the non-
Federal account has paid more than its allocable share, the committee shall
transfer funds from its Federal to its non-Federal account, as necessary, to
reflect the adjusted allocation ratio. The committee shall make note of any
such adjustments and transfers on its periodic reports, submitted pursuant
to 11 CFR 104.5.

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(e) * * *

(2) * * *

(ii) * * *

(B) Except as provided in paragraph (d)(2) of this section or in
11 CFR part 102, such funds may not be transferred more
than 10 days before or more than 60 days after the
payments for which they are designated are made.

* * * *

(f) Payments for public communications that refer to a political party and one or
more clearly identified Federal or non-Federal candidates. Nonconnected committees
and separate segregated funds shall pay for the costs of all public communications that
refer to a political party, except those described in paragraph (b)(4) of this section as
follows:
(1) Public communications that refer to a political party and one or more clearly identified Federal candidates, but do not refer to any clearly identified non-Federal candidates, as described in paragraph (b)(5) of this section, shall be paid 100 percent from the Federal account of the nonconnected committee or separate segregated fund.

(2) Public communications that refer to a political party and one or more clearly identified non-Federal candidates, but do not refer to any clearly identified Federal candidates, as described in paragraph (b)(6) of this section, may be paid 100 percent from the non-Federal account of the nonconnected committee or separate segregated fund.

(3) Public communications that refer to a political party, one or more clearly identified Federal candidates, and also refer to one or more clearly identified non-Federal candidates shall be allocated under 11 CFR 106.1 as expenditures or disbursements on behalf of the clearly identified candidates, without regard to the portion of the communication that refers to a political party.