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FEDERAL ELECTION COMMISSION  
Washington, DC 20463

May 4 2 04 PM '00

## AGENDA ITEM

For Meeting of: 5-18-00

### MEMORANDUM

TO: The Commission  
FROM: Commissioner Karl Sandstrom *KS*  
DATE: May 4, 2000  
SUBJECT: Notice of Proposed Rulemaking on Political Committee Definition

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#### I. Introduction

I propose that the Commission issue a Notice of Proposed Rulemaking ("NPRM") regarding an amendment to 11 CFR 100.5, which defines "political committee" under the FECA, to include certain objective activities which can be considered hallmarks of a political committee. I believe an amendment is necessary to prevent wholesale circumvention of the reporting and registration provisions of the Act. Below you will find the proposed changed to 11 CFR 100.5.

The FECA defines a political committee as "any committee, club association, or other group of persons which receives contributions aggregating in excess of \$1,000 during a calendar year or which makes expenditures aggregating in excess of \$1,000 during a calendar year." 2 U.S.C. § 431(4)(A). Commission regulations mirror this provision, codified at 11 CFR 100.5(a). A "contribution" is "anything of value... given by any person for the purpose of influencing an election for federal office." 2 U.S.C. § 431(8)(a)(i). Similarly, an "expenditure" is "any purchase... or anything of value made by any person for the purpose of influencing an election for federal office." 2 U.S.C. § 431(9)(a)(i).

In brief, under the proposed amendment "contribution" would include money received by groups which meet certain relatively objective criteria, including "527" tax-exempt organizations which do not limit their activities to state and local elections, groups controlled by a federal officeholder or candidate, and groups whose constitution or by-laws calls for activity with the express purpose of influencing federal elections. "Expenditures" would include disbursements meeting certain criteria, such as advertisements which are tested to determine the candidate preference of viewers, and the cost of solicitations which state that funds received will be used to influence federal elections. This proposal thus seeks to avoid vague or ambiguous situations while at the same time bolstering the registration and reporting provisions of the Act and making

clear that organizations seeking to influence federal elections need to establish a political committee to do so.

1 **11 CFR 100.5 Political Committee**

2 (a) Except as provided in 11 CFR 100.5(b), (c) and (d) any committee, club, association, or  
3 other group of persons which receives contributions aggregating in excess of \$1,000, or which  
4 makes expenditures aggregating in excess of \$1,000 during a calendar year is a political  
5 committee.

6 1) The term "contribution" has the same meaning as at 11 CFR 100.7(a), and  
7 includes:

8 a) money, services or any other thing of value received as the result of a  
9 solicitation the express purpose of which was to raise money to influence federal  
0 elections;

1 b) money, services or anything of value received from a political committee  
2 organized pursuant to 11 CFR 100.5(b), (c), or (d) except money, services or anything of  
3 value received by an organization qualifying for tax exempt status pursuant to 26 USC  
4 501(c)(3);

5 c) money, services or anything of value received by an organization which is  
6 expressly authorized by its charter, constitution, bylaws, articles of incorporation or other  
7 organizational document to engage in activities for the purpose of influencing federal  
8 elections;

9 d) money, services or anything of value received by an organization which is  
0 controlled by a federal candidate, his or her principal campaign committee, or any other  
1 committee authorized by a federal candidate pursuant to 11 CFR 100.5(f)(1), other than

1 an organization qualifying for tax exempt status pursuant to 26 USC 501(c)(3) or (c)(4) or  
2 an organization whose exclusive purpose is the election or nomination of that candidate  
3 for state or local office;

4 e) money, services, or anything of value received by an organization which  
5 claims tax exempt status pursuant to 26 USC 527 and does not restrict its activities to  
6 influencing or attempting to influence elections to state or local public office or office in a  
7 political organization.

8 2) The term "expenditure" has the same meaning as at 11 CFR 100.8, and includes:

9 a) payments or costs associated with the organization's solicitation of money  
10 or any other thing of value, where the solicitation appeals to donors by stating that  
11 donations will be used to influence a federal election;

12 b) payments or costs associated with general public political advertisements  
13 coordinated with a federal candidate or political party, political committee, or the  
14 committee of a federal candidate or political party, pursuant to 11 CFR § 100.22;

15 c) payments or costs associated with any communication to the public which  
16 refers to a candidate for federal office and has been tested to determine its probable  
17 impact on the candidate preference of voters;

18 d) payments or costs associated with any communication to the public which  
19 refers to a candidate for federal office where the intended audience has been selected  
20 based on its voting behavior;

1 e) payments made to a commercial vendor for a service or product with the  
2 express understanding that the service or product be designed to influence federal  
3 elections.

4 3. Notwithstanding any other provision of this section, a business entity exclusively  
5 engaged in providing goods or services to others shall not be considered a political  
6 committee.

## II. This Amendment is Necessary to Preserve the Reporting Goals of the Act

Developments in the political world clearly necessitate Commission action to clarify when an organization becomes a political committee subject to registration and reporting. More and more, candidates are setting up ostensibly independent organizations, often under IRS code section 527, to engage in "issue advocacy" without having to disclose their sources of funding or their spending. Other organizations are accepting money from political party committees to engage in "grassroots" education and distribute "issue ads" all the while supposedly maintaining independence from their funding sources and evading disclosure.

Without any information on these groups it becomes impossible for the public to make informed decisions about the real interests of these groups; it is also nearly impossible for the Commission to investigate these groups' claims to be independent. Meanwhile, the public and the press become increasingly disillusioned and cynical, often blaming the Commission for the lack of disclosure. More importantly, apart from the reaction that these groups generate, many of their activities seem to fall squarely within the statutory definition of "contribution" or "expenditures" for the purpose of influencing federal elections: the advertisements disparage candidates currently running for office; polling is conducted by organizations controlled by candidates and officeholders to assist fellow federal candidates; the organizations are registered under § 527 but do not confine themselves to participation in state or local elections.

The Commission has been careful, and wisely so, about interpreting the statutory language "for the purpose of influencing" through enforcement proceedings. We should be extremely sensitive to vague, overbroad attempts to regulate in this sensitive area. However, through the regulatory process the Commission could establish more objective criteria, even bright line rules, that would give Constitutionally-required notice to organizations that if they want to influence federal elections -- even if not through express advocacy -- they need to set up a political committee for that purpose.

### III. Discussion of the Proposed Amendments to 100.5

The proposed amendment adds language to subsection (a) of 11 CFR 100.5. Sub-section (a) reads: "Except as provided in 11 CFR 100.5(b), (c) and (d) any committee, club, association, or other group of persons which receives contributions aggregating in excess of \$1000, or which makes expenditures aggregating in excess of \$1000 during a calendar year is a political committee." The proposed amendment would add sub-clauses (1) and (2) to (a). Sub-clause (1) of the proposed amendment states that the definition of "contribution" at 11 CFR 100.7(a) includes five types of receipts:

1) **"money, services or any other thing of value received as the result of a solicitation the express purpose of which was to raised money to influence federal elections"** This provision would codify existing Commission practice. Under this provision, a solicitation that in express terms states that money given as a result of the solicitation will be used to support or defeat a candidate for federal office would make monies received as a result "contributions." Political committee status would follow regardless of how the money received was ultimately spent.

2) **"money, services or anything of value received from a political committee organized pursuant to 11 CFR 100.5(b), (c), or (d) except money, services or anything of value received by an organization qualifying for tax exempt status pursuant to 26 USC 501(c)(3)"** This would prevent national party committees from funneling money into groups that do not now report their disbursements and receipts. Again, an examination of how the money was ultimately spent would be unnecessary in determining political committee status.

3) **"money, services or anything of value received by an organization which is expressly authorized by its charter, constitution, bylaws, articles of incorporation or other organizational document to engage in activities for the purpose of influencing federal elections"** This would allow for an objective inquiry into the purposes of an organization without having to assess its "major purpose" through examination of the proportion of its activities devoted to federal elections; if the organization wants to influence federal elections, it must register a separate political committee to do so.

4) **"money, services or anything of value received by an organization which is controlled by a federal candidate, his or her principal campaign committee, or any other committee authorized by a federal candidate pursuant to 11 CFR 100.5(f)(1), other than an organization qualifying for tax exempt status pursuant to 26 USC 501(c)(3) or (c)(4) or an organization whose exclusive purpose is the election or nomination of that candidate for state or local office"** This would remove the guise of independence from those groups set up by candidates or their supporters in the candidates' names to assist the candidates' aims, and would focus the Commission's inquiry into the issue of "control" by the candidate.

5) **"money, services, or anything of value received by an organization which claims tax exempt status pursuant to 26 USC 527 and does not restrict its activities to influencing or attempting to influence elections to state or local public office or office in a political organization"** This provision would correct the present situation at present whereby some groups are taking advantage of the tax-code provision designed for political committees but

avoiding registering and reporting with the Commission. Section 527 of the tax code allows "political organizations" to avoid paying income tax on "exempt function" income. An "exempt function means the function of 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..." 26 USC 527 (e)(2). Therefore, if an organization claims 527 status and does not confine its activities to state, local or intra-party elections, it is by definition an organization that is "influencing or attempting to influence the selection... of any individual to any Federal... office."

Sub-clause (2) of the proposed amendment states that the definition of "expenditure" at 11 CFR 100.8(a) includes five types of disbursements:

1) **"payments or costs associated with the organization's solicitation of money or any other thing of value, where the solicitation appeals to donors by stating that donations will be used to influence a federal election"** This provision would mimic the first sub-clause of the "contribution" section.

2) **"payments or costs associated with general public political advertisements coordinated with a federal candidate or political party, political committee, or the committee of a federal candidate or political party, pursuant to 11 CFR § 100.22"** This provision will dovetail with the Commission's ongoing rulemaking on this issue, and will make the common-sense point that any in-kind contribution through coordinated general public political advertising is an expenditure.

3) **"payments or costs associated with any communication to the public which refers to a candidate for federal office and has been tested to determine its probable impact on the candidate preference of voters"** This provision would provide an objective basis on which to determine if an otherwise independent "issue ad" was in reality undertaken for the purpose of influencing voters' choice of federal candidates.

4) **"payments or costs associated with any communication to the public which refers to a candidate for federal office where the intended audience has been selected based on its voting behavior"** Like the prior sub-clause, this would provide an objective basis for determining that a communication distributed to a specific group of people or area had the purpose of influencing the voters' preferences, as distinguished from true issue advertising mentioning a candidate; under this scenario, a link would have been established between the advertisement and voting, rather than issue discussion.

5) **"payments made to a commercial vendor for a service or product with the express understanding that the service or product be designed to influence federal elections"** This provision would rely an organization's objective representations of purpose in the acquisition of goods or services to establish political committee status.

The proposed amendment also includes a sub-clause (3) to (a) which states that **"[n]otwithstanding any other provision of this section, a business entity exclusively engaged in providing goods or services to others shall not be considered a political committee."** This savings clause would prevent political consultants and vendors from becoming a political committee if the vendor or consultant, for example, provides money up front to another vendor as

an agent of a political committee with the express instruction that the service provided is for the purpose of influencing a federal election. Also, since vendors receive money from political committees organized under 11 CFR 100.5(b), (c) and (d) and are not non-profit organizations, without this exemption they would be subject to proposed (a)(1)(ii).

