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Washington, DC 20463

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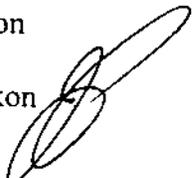
AGENDA ITEM
For Meeting of: 12-12-02

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DEC 11 2002

MEMORANDUM

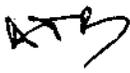
TO: The Commission

THROUGH: James A. Pehrkon 
Staff Director

FROM: Lawrence H. Norton 
General Counsel

Rosemary C. Smith 
Acting Associate General Counsel

Mai T. Dinh 
Acting Assistant General Counsel

Anthony T. Buckley 
Attorney

SUBJECT: Draft Notice of Proposed Rulemaking on Leadership PACs

Attached is a draft Notice of Proposed Rulemaking ("NPRM") addressing issues relating to leadership PACs. This draft reflects discussion on these issues during the Regulations Committee meetings on November 6 and December 10, 2002.

Recommendation

The Office of General Counsel recommends that the Commission approve the attached Notice of Proposed Rulemaking for publication in the *Federal Register*.

Attachment

1 **FEDERAL ELECTION COMMISSION**

2 **11 CFR Parts 100 and 110**

3 **[NOTICE 2002->]**

4 **LEADERSHIP PACS**

5
6 **AGENCY:** Federal Election Commission.

7 **ACTION:** Notice of Proposed Rulemaking.

8 **SUMMARY:** The Federal Election Commission is seeking comment on
9 proposed rules to address leadership PACs, which are
10 unauthorized committees that are associated with a Federal
11 candidate or officeholder. Please note that the draft rules that
12 follow do not represent a final decision by the Commission on
13 the issues presented by this rulemaking. Further information is
14 provided in the supplementary information that follows.

15 **DATES:** Comments must be received on or before [insert date 30 days
16 after the date of publication in the Federal Register, but no
17 earlier than January 31, 2003]. If there are sufficient requests to
18 testify, the Commission may hold a hearing on these proposed
19 rules on [date TBD], at 9:30 a.m. Commenters wishing to
20 testify at the hearing must so indicate in their written or
21 electronic comments.

22 **ADDRESSES:** All comments should be addressed to Ms. Mai T. Dinh, Acting
23 Assistant General Counsel, and must be submitted in either

1 electronic or written form. Electronic mail comments should be
2 sent to LeadershipPAC@fec.gov and must include the full
3 name, electronic mail address, and postal service address of the
4 commenter. Electronic mail comments that do not contain the
5 full name, electronic mail address, and the postal service
6 address of the commenter will not be considered. If the
7 electronic mail comments include an attachment, the attachment
8 must be in the Adobe Acrobat (.pdf) or Microsoft Word (.doc)
9 format. Faxed comments should be sent to (202) 219-3923,
10 with printed copy follow-up to ensure legibility. Written
11 comments and printed copies of faxed comments should be sent
12 to Federal Election Commission, 999 E Street, NW,
13 Washington, DC 20463. Commenters are strongly encouraged
14 to submit comments electronically to ensure timely receipt and
15 consideration. The Commission will make every effort to post
16 public comments on its Web site within ten business days of the
17 close of the comment period. The hearing will be held in the
18 Commission's ninth floor meeting room, 999 E. St. N.W.,
19 Washington, D.C.

20 **FOR FURTHER**
21 **INFORMATION**
22 **CONTACT:**

Ms. Mai T. Dinh, Acting Assistant General Counsel,
Mr. J. Duane Pugh, Jr., Acting Special Assistant General
Counsel, or Mr. Anthony T. Buckley, Attorney, 999 E Street,

1 NW, Washington, DC 20463, (202) 694-1650 or (800)

2 424-9530.

3 **SUPPLEMENTARY**

4 **INFORMATION:** The Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155, 116

5 Stat. 81 (March 27, 2002) ("BCRA"), contains extensive and detailed amendments to the

6 Federal Election Campaign Act of 1971, as amended, 2 U.S.C. 431 et seq. This Notice of

7 Proposed Rulemaking (NPRM) arises primarily from 2 U.S.C. 441i(e)(1), which prohibits

8 Federal candidates and holders of Federal office, their agents, or any entity directly or

9 indirectly established, financed, maintained, controlled by, or acting on behalf of, the

10 candidate or officeholder, from soliciting, receiving, directing, transferring or spending

11 funds that are not subject to the limitations, prohibitions, and reporting requirements of

12 the Act in connection with Federal or non-Federal elections. In determining whether an

13 entity is directly or indirectly established, financed, maintained, or controlled by a

14 candidate or Federal officeholder, the Commission has stated that it would look to the

15 affiliation factors in 11 CFR 100.5(g). See Explanation and Justification for Final Rules

16 on Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed.

17 Reg. 49,063, 49,084 (July 29, 2002). Thus, this rulemaking principally addresses when

18 and under what circumstances so-called "leadership PACs" are affiliated with the

19 authorized committees of Federal candidates or officeholders under BCRA and the

20 ramifications of any such affiliation.

21

22

1 **I. Background**

2 Generally speaking, leadership PACs are formed by individuals who are Federal
3 officeholders and/or Federal candidates. The monies these committees receive are given
4 to other Federal candidates to gain support when the officeholder seeks a leadership
5 position in Congress, or are used to subsidize the officeholder's travel when campaigning
6 for other Federal candidates. The monies may also be used to make contributions to party
7 committees, including State party committees in key states, or donated to candidates for
8 State and local office.

9 FECA does not specifically define "leadership PAC," but does define the terms
10 "political committee" (2 U.S.C. 431(4)); "principal campaign committee" (2 U.S.C.
11 431(5)); and "authorized committee" (2 U.S.C. 431(6)). Effective January 1, 2003,
12 principal campaign committees and authorized committees may receive contributions of
13 up to \$2000 per election from individuals and other persons who are not multicandidate
14 committees. See 2 U.S.C. 441a(a)(1)(A); 11 CFR 110.1(b). They may make
15 contributions of up to \$1,000 to other Federal candidates under 2 U.S.C. 432(e)(3).
16 Unauthorized committees—that is, political committees whose purpose is to support
17 more than one Federal candidate—may receive up to \$5000 per year from individuals,
18 other persons, and multicandidate committees, and once they qualify as multicandidate
19 committees, may contribute up to \$5000 per candidate per election. See 2 U.S.C.
20 441a(a)(1)(C) and 441a(a)(2)(A); 11 CFR 110.1(d) and 110.2. Nothing in the
21 Commission's regulations prohibits an unauthorized committee that is not a party
22 committee from establishing a non-Federal account that accepts funds that are not subject
23 to the prohibitions, limitations and reporting requirements of the Act.

1 In BCRA, Congress addressed organizations “directly or indirectly established,
2 financed, maintained, or controlled” by other persons or organizations. The term appears
3 in BCRA in the context of national party committees, (see 2 U.S.C. 441i(a)(2)), of State,
4 district, and local political party committees (see, e.g., 2 U.S.C. 441i(b)(2)(B)(iii)), and of
5 Federal candidates and Federal officeholders (see, e.g., 441i(e)(1)). In addressing federal
6 candidates and officeholders, Congress added the phrase “acting on behalf of.” BCRA
7 places limits on the amounts and types of funds that may be solicited, received, directed,
8 transferred, or spent by Federal candidates and officeholders, their agents, and entities
9 directly or indirectly established, financed, maintained, or controlled by, or acting on
10 behalf of, any such candidate(s) or officeholder(s), in connection with either Federal or
11 non-Federal elections, or both. See 2 U.S.C. 441i(e)(1); see also 11 CFR 300.60, 300.61.

12 The Commission first addressed “leadership PACs” in Advisory Opinion (“AO”)
13 1978-12. In this AO, the Commission concluded that a “political action committee”
14 formed in part by a Congressman was not considered an authorized committee of the
15 Congressman as long as the Congressman did not authorize it in writing. As a result,
16 contributors to the leadership PAC were not regarded as making contributions with
17 respect to the Congressman’s campaign. The Commission further noted that,
18 “[a]ssuming the [c]ommittee is not affiliated with [the Congressman’s] principal
19 campaign committee, . . . persons may contribute up to \$5000 per calendar year to the
20 Committee although contributions from individuals would be counted against their
21 \$25,000 aggregate individual limit. . . .” Several years after AO 1978-12 was issued, a
22 complaint was filed with the Commission, alleging that the same committee and the same
23 Congressman’s principal campaign committee were affiliated, and that as a result of their

1 affiliation they had made and received excessive contributions. The complainant cited
2 several factors to conclude that the two committees were affiliated: (1) the unauthorized
3 committee was identified with the officeholder; (2) some of the candidate's
4 then-Congressional staffers received expense reimbursements for "travel" and
5 "consulting" from both committees; (3) several persons performed services for both
6 committees; and (4) parallel contributions to candidates were made by both committees
7 on the same day. In that Matter Under Review (MUR 1870), the Commission found no
8 reason to believe that violations stemming from an affiliated relationship had occurred.

9 In subsequent MURs involving similar issues, the Commission relied on its
10 prior conclusions in AO 1978-12 and MUR 1870 to find certain leadership PACs were
11 not affiliated with certain authorized committees. For example, in MUR 2897 the
12 Commission declined to pursue a complaint that a Federal officeholder's authorized
13 committee was affiliated with a leadership PAC, resulting in excessive contributions
14 being made and received. The complainant argued that affiliation between the authorized
15 committee and a certain leadership PAC should result from several facts: (1) the
16 officeholder's spouse was the leadership PAC's treasurer; (2) one of the leadership
17 PAC's disclosure reports was faxed from the officeholder's Congressional office; and
18 (3) both committees made disbursements to one particular consulting firm. In addition,
19 the officeholder was listed as chairman of the leadership PAC on its stationery, and
20 responded on behalf of the leadership PAC to the complaint. Similarly, in MUR 3740,
21 the Commission declined to pursue a complaint alleging violations as a result of an
22 affiliated relationship. In that matter, the leadership PAC's checks were signed by the
23 Federal officeholder.

1 In other AOs, the Commission has found two entities associated with an
2 individual to be affiliated where the entities had a similar purpose. For example, in
3 AO 1990-16, the Commission found that a committee organized under State law and
4 devoted to supporting candidates for election to state and local office, that had previously
5 been the campaign committee of the State's then-governor, was affiliated with a Federal
6 political committee that had been organized by the governor and that had as its purpose
7 supporting candidates for Federal office. Further, in AO 1991-12, the Commission found
8 that the authorized committee of a Member of Congress was affiliated with another
9 committee, when that other committee, which had originally been formed to test the
10 waters for a Presidential run by the Member, changed its focus to support the Member's
11 efforts to speak on national issues, and subsequently changed its focus again to support
12 the Member's re-election activities.

13 In 1986, the Commission began a rulemaking to address affiliation in general,
14 including leadership PACs. See Notice of Proposed Rulemaking; Contribution and
15 Expenditure Limitations and Prohibitions, 51 Fed. Reg. 27183 (July 30, 1986). After the
16 hearing during this rulemaking, the Office of General Counsel drafted final rules that
17 addressed "affiliation between a candidate's authorized committees and other political
18 committees closely associated with that candidate." FEC Agenda Document 88-1, Draft
19 Revisions to the Affiliation and Earmarking Regulations (11 C.F.R. 110.3-110.6) (Dec.
20 23, 1987), at 3. This document indicated that under the proposed revisions to the
21 Commission rules, "[p]roposed § 110.3(a)(4)(i) would provide that a candidate's
22 authorized committees are affiliated with any other unauthorized committees established,

1 financed, maintained or controlled by the same person or group of persons, including the
2 candidate.” Id. at 4.

3 After receiving public comments and holding a hearing, however, the
4 Commission maintained its existing policy: committees formed or used by a candidate or
5 officeholder to further his or her campaign are affiliated; those formed or used for other
6 purposes are not. The Commission explained: “Although the Commission considered
7 including in the revised regulations language that would focus specifically on affiliation
8 between authorized committees and candidate PACs or leadership committees, the
9 Commission has decided instead to continue to rely on the factors set out at 11 CFR
10 110.3(a)(3)(ii). After evaluating the comments and testimony on this issue, as well as the
11 situations presented in the previous advisory opinions and compliance matters, the
12 Commission has concluded that this complex area is better addressed on a case-by-case
13 basis. Thus, in an appropriate case, the Commission will examine the relationship
14 between the authorized and unauthorized committees to determine whether they are
15 commonly established, financed, maintained or controlled.” *Affiliated Committees,*
16 *Transfers, Prohibited Contributions, Annual Contribution Limitations and Earmarked*
17 *Contributions; Final Rule, 54 Fed. Reg. 34,101 (Aug. 17, 1989) (emphasis added).*

18 Most recently, in the Explanation and Justification for the new Soft Money
19 regulations, the Commission noted that new 11 CFR 300.61 and 300.62 permit “Federal
20 candidates and officeholders to solicit, receive, direct, transfer, spend, or disburse funds
21 in connection with Federal and non-Federal elections only from sources permitted under
22 the Act and only when the combined amounts solicited and received from any particular
23 person or entity do not exceed the amounts permitted under the Act’s contribution limits

1 and are not from prohibited sources. In other words, a Leadership PAC that comes within
2 the definition of 11 CFR 300.2(c) can raise up to a total of \$5,000 from any particular
3 person or entity, regardless of whether the funds are contributed to the PAC's Federal
4 account, donated to its non-Federal account, or allocated between the two." Explanation
5 and Justification for Final Rules on Prohibited and Excessive Contributions: Non-Federal
6 Funds or Soft Money, 67 Fed. Reg. 49,063, 49,107 (July 29, 2002). The Commission
7 also concluded, in promulgating 11 CFR 300.2(c), that "the affiliation factors laid out in
8 11 CFR 100.5(g) properly define 'directly or indirectly established, financed, maintained,
9 or controlled' for purposes of BCRA." Id. at 49,084. Thus, the Commission has already
10 acknowledged that BCRA's limitations on the sources and amounts of funds that Federal
11 candidates and officeholders can raise applies to leadership PACs. "Although candidate
12 PACs and leadership PACs are not specifically mentioned, the legislative history
13 indicates that 2 U.S.C. 441i(e)(1) is intended to prohibit Federal officeholders and
14 candidates from soliciting any funds for these committees that do not comply with
15 FECA's source and amount limitations." Id. at 49,107.

16 The Commission now seeks comment on whether it needs to clarify its approach
17 and whether BCRA's inclusion of the phrases "directly or indirectly" and "acting on
18 behalf of" in 2 U.S.C. 441i(e)(1) requires the Commission to consider, or permits the
19 Commission to disregard, the authorized or unauthorized status of political committees in
20 determining whether they are affiliated. See 2 U.S.C. 432(e)(1) (candidate shall designate
21 in writing a principal campaign committee and may designate additional authorized
22 committees); 2 U.S.C. 432(e)(3) (no political committee that supports more than one
23 candidate may be an authorized committee); 2 U.S.C. 441a(a)(5) (FECA affiliation

1 provisions). The Commission seeks comment as to whether its current approach
2 regarding leadership PACs, including the limitations imposed by BCRA already
3 implemented by the Commission in other regulations, adequately addresses the real or
4 perceived potential for abuse regarding them, and whether BCRA requires or permits the
5 Commission to change the way it has proceeded in this area. Specifically, the
6 Commission seeks comment on whether there are circumstances in which an
7 unauthorized committee should be considered affiliated per se with a candidate's
8 authorized committee. If so, should those committees share a contribution limit, as to
9 both contributions received and made, and should that contribution limit be that of an
10 authorized committee or an unauthorized committee?

11 Alternatively, the Commission seeks comment on whether there should be a
12 rebuttable presumption that such committees are affiliated under such circumstances, and,
13 if so, what factors could be used to rebut the presumption. The Commission also seeks
14 comment on what criteria should be used in determining affiliation between leadership
15 PACs and authorized committees; the affiliation criteria listed at 11 CFR 100.5(g)(4) and
16 110.3(a), or some other or additional criteria. The Commission also seeks comment as to
17 how it should treat organizations that do not participate in election campaigns but work
18 closely with authorized committees, federal officeholders or candidates. See Advisory
19 Opinion 1977-54 (approving candidate involvement in state-wide petition drive absent
20 express advocacy or solicitation for officeholder's campaign by unauthorized committee
21 sponsoring petition drive).

22

23

1 **II. Proposed Rules**

2 1. Definition of "leadership PAC"

3 Although the proposed rules do not include a definition of leadership PAC, the
4 Commission seeks comment on whether a definition of "leadership PAC" is appropriate.
5 If so, the Commission welcomes suggestions on appropriate definitions. Additionally,
6 the Commission seeks comment on whether the definition should be an independent
7 definition, or should be tied to affiliation.

8 2. Affiliation

9 The proposed rules include three alternative amendments to current 11 CFR
10 100.5(g) that would specifically address affiliation of leadership PACs. Alternatives A
11 and B focus on the relationships between the committees involved and the candidate or
12 officeholder with whom the committees are closely associated. If the factors establishing
13 a certain close association are met, then a candidate's authorized committees and
14 unauthorized committees (such as leadership PACs) would be affiliated, and would then
15 have to conform themselves to the strictures of affiliated committees.

16 Alternative C focuses on the actions of the committees involved to determine
17 whether an unauthorized committee is in fact an authorized committee of the Federal
18 candidate or officeholder with whom it is associated. To the extent the activities of an
19 unauthorized committee mirror or supplement the activities of an authorized committee,
20 i.e. to the extent the unauthorized committee undertakes certain activities to assist in the
21 election efforts of the candidate with whom it is associated, the committee would be
22 considered an authorized committee of the candidate. Thus, Alternative C frames the
23 issue in terms of whether a leadership PAC is an authorized committee of the candidate

1 or officeholder rather than whether it is affiliated with that person's authorized
2 committee.

3 The Commission currently has set out, at 11 CFR 100.5(g)(4), factors to be
4 considered in determining whether certain committees are affiliated. It would be the
5 Commission's intention, under Alternatives A and B, that any proposed rules that it
6 adopts at 11 CFR 100.5(g)(5) would be solely applicable to committees associated with
7 candidates, and that the factors at 11 CFR 100.5(g)(4) would not apply. The Commission
8 seeks comment on whether such an approach is appropriate.

9 The Commission seeks comment on which alternative, if any, is preferable and on
10 the additional issues described below.

11 A. Alternative A

12 Alternative A would set out individual factors in proposed section 100.5(g)(5)(i),
13 the presence of any one of which would result in affiliation. The factors are: (1) the
14 candidate or officeholder, or their agent has signature authority on the unauthorized
15 committee's checks; (2) funds contributed or disbursed by the unauthorized committee
16 are authorized or approved by the candidate or officeholder or their agent; (3) the
17 candidate or officeholder is clearly identified as described in 11 CFR 100.17 on either the
18 stationery or letterhead of the unauthorized committee; (4) the candidate, officeholder or
19 his campaign staff, office staff, or immediate family members, or any other agent, has the
20 authority to approve, alter or veto the unauthorized committee's solicitations,
21 contributions, donations, disbursements or contracts to make disbursements; and (5) the
22 unauthorized committee pays for travel by the candidate, his campaign staff or office staff
23 in excess of \$10,000 per calendar year. The second criterion applies whether or not all

1 disbursements are authorized or approved by the officeholder or candidate or agent or
2 whether only some disbursements are so authorized or approved. The Commission also
3 seeks comment on an individual factor not presented in the proposed rules where an
4 unauthorized committee's communications and promotional materials frequently or
5 predominantly identify the candidate or individual holding Federal office, as described in
6 11 CFR 100.17. Should such a focus by an unauthorized committee on a single candidate
7 have any bearing on its affiliation with the candidate's authorized committee?

8 Alternative A would also include a transition period provision in proposed section
9 100.5(g)(5)(ii) to allow unauthorized committees that would otherwise be affiliated to
10 come into compliance with the Commission's new regulations by severing their
11 connection to the candidate or officeholder, by disgorging any funds that would make
12 them affiliated, or by taking any other necessary actions by the proposed date.
13 Section 100.5(g)(5)(iii) would also allow entities to seek an advisory opinion from the
14 Commission regarding their status.

15 B. Alternative B

16 Alternative B would provide two separate tests under which affiliation would be
17 found. Under proposed section 100.5(g)(5)(i)(A), affiliation would exist if any one of the
18 following factors are present: (1) the candidate or officeholder has signature authority on
19 the entity's checks; (2) the candidate or officeholder must authorize or approve
20 disbursements over a certain minimum amount; (3) the candidate or officeholder signs
21 solicitation letters and other correspondence on behalf of the entity; (4) the candidate or
22 officeholder has the authority to approve, alter or veto the entity's solicitations; (5) the
23 candidate or officeholder has the authority to approve, alter, or veto the entity's

1 contributions, donations, or disbursements; or (6) the candidate or officeholder has the
2 authority to approve the entity's contracts. Under this alternative, any one of these factors
3 would indicate that the candidate or officeholder has substantial influence and control
4 over the entity, and that the entity should be considered to be established, financed,
5 maintained, or controlled by, or acting on behalf of, the candidate or officeholder.

6 If none of the above factors are present, affiliation could still be found under
7 proposed section 100.5(g)(5)(i)(B) if any three of the following factors are present: (1) the
8 campaign staff or immediate family members of the candidate or officeholder have the
9 authority to approve, alter or veto the entity's solicitations; (2) the campaign staff or
10 immediate family members of the candidate or officeholder have the authority to approve,
11 alter, or veto the entity's contributions, donations, or disbursements; (3) the campaign
12 staff or immediate family members of the candidate or officeholder have the authority to
13 approve the entity's contracts; (4) the entity and the candidate or officeholder's
14 authorized committees share, exchange, or sell contributor lists, voter lists, or other
15 mailing lists directly to one another, or indirectly through the candidate or officeholder to
16 one another; (5) the entity pays for the candidate or officeholder's travel anywhere except
17 to or from the candidate or officeholder's home State or district; (6) the entity and the
18 candidate or officeholder's authorized committees share office space, staff, a post office
19 box, or equipment; (7) the candidate or officeholder's authorized committee(s) and the
20 entity share common vendors; and (8) the name or nickname of the candidate or the
21 officeholder, or other unambiguous reference to the candidate or officeholder appears on
22 either the entity's stationery or letterhead. Under this approach, these factors, each taken
23 individually, do not provide sufficient evidence of the candidate or officeholder's control

1 and influence over the entity for that entity to be considered to be established, financed,
2 maintained, or controlled by, or acting on behalf of, the candidate or officeholder.

3 However, the existence of three or more of these factors would meet that standard.

4 The Commission seeks comment on whether any specific factors in section
5 100.5(g)(4) that are not repeated in some form in the proposed alternatives below, should
6 be repeated in any new leadership PAC affiliation rule, such as current paragraph
7 (g)(4)(ii)(B) (authority or ability to participate in the governance of the organization);
8 current paragraph (g)(4)(ii)(C) (authority or ability to hire or fire officers or
9 decisionmakers); current paragraph (g)(4)(ii)(E) (current common or overlapping officers
10 or employees); current paragraph (g)(4)(ii)(F) (officers or employees who previously
11 worked for the other committee); current paragraph (g)(4)(ii)(G) (provision of funds in a
12 significant amount from one committee to the other); current paragraph (g)(4)(ii)(H) (one
13 committee causing or arranging for the other committee to receive funds in a significant
14 amount); and especially current paragraph (g)(4)(ii)(J) (whether the committees have
15 similar patterns of contributions or contributors).

16 With respect to the per se factor regarding approval or authorization of
17 disbursements (proposed paragraph 110.5(g)(5)(i)(A)(2)), the Commission seeks
18 comment as to whether the minimum amount to be approved should be stated in the rule
19 and, if so, what that amount should be. Should the Commission look to other factors,
20 such as the entity's established policy, to determine the amount on a case-by-case basis?

21 Unlike Alternative A, Alternative B does not include a transition period provision.
22 Rather, if the Commission decides to adopt Alternative B as its final rule, proposed
23 section 100.5(g)(5) would be effective thirty days after the final rules are published in the

1 Federal Register. Thus, the Commission would examine the relationship between an
2 authorized committee with a leadership PAC from that day forward in applying the
3 affiliation factors in proposed section 100.5(g)(5).

4 Alternative B is similar to Alternative A in another respect. Proposed section
5 100.5(g)(5)(ii) would allow, but not require, committees to seek an advisory opinion to
6 determine whether affiliation exists. See proposed section 100.5(g)(5)(iii) in
7 Alternative A.

8 C. Alternative C

9 As noted above, Alternative C would largely continue the Commission's current
10 treatment of leadership PACs by not treating a leadership PAC as affiliated with a
11 candidate or officeholder's authorized committees unless the leadership PAC undertook
12 activities that would indicate its primary purpose is to influence the nomination or
13 election of the candidate or officeholder involved. This approach is similar to the
14 approach contemplated by the earlier 1986-1987 rulemaking but the final rules did not
15 include provisions directly addressing leadership PACs. See Affiliated Committees,
16 Transfers, Prohibited Contributions, Annual Contribution Limitations and Earmarked
17 Contributions; Final Rule, 54 Fed. Reg. 34,101 (Aug. 17, 1989).

18 At one point during this earlier rulemaking process, the Commission considered a
19 staff draft providing that an unauthorized committee established, financed, maintained or
20 controlled by a candidate would not be deemed affiliated with the candidate's authorized
21 committee if it could demonstrate that: "(A) A substantial proportion of the unauthorized
22 committee's disbursements are contributions to or expenditures on behalf of other federal
23 candidates; (B) The unauthorized committee has not solicited contributions for the

1 candidate's campaign for Federal office and has not solicited funds that would become
2 contributions under 11 CFR 101.3 once the individual becomes a candidate; and (C) The
3 unauthorized committee has not made expenditures for communications, or engaged in
4 other activities, for the purpose of influencing the candidate's or future candidate's
5 nomination or election to Federal office." FEC Agenda Document 88-1, pp. 3, 4 and pp.
6 5, 6 of draft regulation. In 1989, however, the Commission decided not to adopt specific
7 final rules concerning this issue. See above for discussion of the Commission's statement
8 about leadership PACs in the Explanation to the Affiliated Committees, Transfers,
9 Prohibited Contributions, Annual Contribution Limitations and Earmarked Contributions
10 Final Rule.

11 At this point, under Alternative C, 11 CFR 100.5(g) would be revised to add new
12 paragraph (g)(5) indicating that an unauthorized committee established, financed,
13 maintained or controlled by, or acting on behalf of, a candidate or officeholder, would be
14 deemed an authorized committee, unless it could meet four conditions. Any committee
15 that could not meet all four conditions would be automatically subject to the contribution
16 limits of 2 U.S.C. 441a(a)(1)(A) and (2)(A).

17 Paragraph (g)(5)(i) would require the committee to only make outlays to raise
18 funds for party committees or to influence the nomination or election of persons other
19 than the candidate or officeholder involved.

20 Paragraph (g)(5)(ii) would require that any solicitations, communications or other
21 materials of the unauthorized committee would have to avoid references to the candidacy
22 or potential candidacy of the sponsoring candidate or officeholder.

1 At paragraph (g)(5)(iii) the Commission would require that at speeches or
2 appearances by the candidate or officeholder no reference be made to such person's
3 candidacy or potential candidacy. The only exception would be a brief reference made in
4 response to a question where there was no pre-planning or control by the candidate or
5 officeholder.

6 Finally, to address the problems encountered by the Commission in dealing with
7 leadership PACs defraying expenses that appear to be in preparation for a possible
8 presidential run, paragraph (g)(5)(iv) would require that specified expenses would have to
9 be reimbursed by a presidential campaign committee if the candidate or officeholder does
10 become a presidential candidate. This requirement would apply to expenses to assist
11 persons seeking to become delegates in the presidential caucus or convention process and
12 expenses to set up staffed operations in states that hold primaries or caucuses in the first
13 three months of a presidential election year. The reimbursement to the unauthorized
14 committee would have to be made by the 60th day after the expense involved, or by the
15 60th day after the person becomes a presidential candidate, if later.

16 Because similar regulatory language regarding affiliation appears at section 110.3
17 of the regulations, identical text would be placed there at new paragraph 110.3(a)(4).

18 With respect to Alternative C, the Commission seeks comment on any aspect of
19 the proposed rule that should be considered before its adoption. The Commission
20 particularly would like comment on the policy ramifications of permitting candidates or
21 officeholders to establish, finance, maintain, or control separate committees that do not
22 have to share the same contribution limits that would apply to an authorized committee of
23 such candidate or officeholder. Further, the Commission would like comment on the

1 actual practices of leadership PACs. Are they undertaking activities that the Commission
2 should consider in drawing lines between those that should be treated as authorized
3 committees and those that should not?

4 Unlike the BCRA provisions at 2 U.S.C. 441i(e) that only deal with entities
5 sponsored by Federal officeholders, the proposed rule in Alternative C would cover
6 leadership PACs created by any officeholder. Is this a proper approach? Is there a need
7 for further explanation of how this would apply?

8 This proposed rule uses terms of art contained in the current law, such as
9 “authorized committee” (defined at 2 U.S.C. 431(6) and 11 CFR 100.5(f)(1)) and
10 “unauthorized committee” (defined at 11 CFR 100.5(f)(2)). Since these terms themselves
11 use the term of art “political committee,” is there a problem with using them? Is there a
12 need to address in this rulemaking what is meant by the latter term? Note that at one
13 point the Commission had a pending rulemaking regarding the definition of “political
14 committee,” but it has been held in abeyance pending completion of other projects.
15 Should the Commission use even broader terms in the area of leadership PACs to try to
16 address “entities,” as used in BCRA’s language at 2 U.S.C. 441i(e)?

17 Finally, Alternative C would include a conforming amendment to 11 CFR
18 110.3(a) to address the issue of contribution limits of leadership PACs that are deemed to
19 be authorized committees. Under Alternative C, such committees would be subject to the
20 provisions of current 11 CFR 110.3(a)(1)(i) by operation of proposed section 110.3(a)(4)
21 with the factors listed in proposed section 100.5(g)(5) of Alternative C.

22

1 D. Additional Issues

2 In addition to the alternative amendments to 11 CFR 100.5(g), the Commission
3 seeks comment on the following issues. First, should the factors in Alternatives A and B
4 establish a rebuttable presumption of affiliation rather than per se affiliation? If so, how
5 should the presumption be rebutted? Secondly, does the Commission's position in the
6 Soft Money Explanation and Justification, as reiterated in the Contribution Prohibitions
7 and Limitations Explanation and Justification, have any bearing on its analysis
8 concerning affiliation between leadership PACs and authorized committees? Assuming
9 that the Commission wishes to address leadership PACs in some fashion, would it be less
10 confusing if the Commission were to create a new section solely addressing issues
11 regarding leadership PACs, rather than amending the affiliation rules? Do the proposed
12 factors at 11 CFR 100.5(g)(5) in Alternatives A and B cover all of the necessary activities
13 that should be considered in an affiliation analysis? If not, what else needs to be
14 addressed? Alternative A references actions by an "agent" acting on behalf of a candidate
15 or officeholder to be sufficient for affiliation to be found. The Commission seeks
16 comment as to whether this is appropriate. If so, should the Commission rely on the
17 definition of agent at 11 CFR 300.2(b), or some other definition, or should it create a new
18 definition for this purpose? The Commission welcomes comments on any of the
19 questions listed above.

20 3. Ramifications of Finding Affiliation

21 A. Federal Funds ("Hard Money")

22 Under the Commission's regulations, committees that are affiliated, that is,
23 committees that are established, financed, maintained, or controlled by the same

1 corporation, labor organization, person or group of persons, et al., share a single
2 limitation on the dollar amount they may receive from any one contributor. See 11 CFR
3 100.5(g)(3). Political committees of all types may participate in joint fundraising efforts,
4 however, which are not intended to be affected by these proposed rules. See 2 U.S.C.
5 432(e)(3)(A)(i) and 441a(a)(5)(A); 11 CFR 102.17 and 9034.8. Under FECA and the
6 Commission's regulations, the Commission has treated leadership PACs as unauthorized
7 political committees, and thus it has not treated them as affiliated with authorized
8 committees, with the result that the unauthorized committee would not share a
9 contribution limit with the authorized committees. See 11 CFR 100.5(g), 110.3(a)(1),
10 110.3(a)(3)(ii). The Commission seeks comment on what limit should apply to
11 leadership PACs and authorized committees that are deemed to be affiliated under
12 Alternatives A and B. Should these committees be required to share a contribution limit
13 just as other affiliated committees, and if so, what should the shared contribution
14 limitation be between an authorized committee and an affiliated leadership PAC? Should
15 that contribution limit be that of an authorized committee or an unauthorized committee?
16 Can the Commission permit authorized and unauthorized committees to operate within
17 separately applicable contribution limits notwithstanding common control by the same
18 candidate? If so, should it? Does the fact of affiliation mean that minors are barred from
19 making contributions to leadership PACs? See 2 U.S.C. 441k (which, inter alia, prohibits
20 individuals who are 17 years old and younger from making contributions to candidates).
21 The Commission also seeks comment on whether the contribution limits promulgated at
22 11 CFR 300.62 would need to be harmonized with the proposed rules, if adopted.

1 The above discussion addresses contributions received by the leadership PAC.
2 Another question the Commission seeks comment on is whether the leadership PAC and
3 the authorized committee share a common limit as to contributions made to other
4 candidates. If so, does this limit have to be the limit at 2 U.S.C. 432(e)?

5 As noted above, Alternative C would address this issue by finding certain
6 committees to be authorized committees subject to the limitations appropriate to
7 authorized committees.

8 B. Non-Federal Funds ("Soft Money")

9 The final rules promulgated pursuant to BCRA already prohibit Federal
10 candidates and officeholders, their agents, and entities directly or indirectly established,
11 financed, maintained, or controlled by, or acting on behalf of, them, from accepting funds
12 in connection with any election, Federal or non-Federal, if such funds do not comply with
13 the limits, prohibitions, and, with respect to funds in connection with any Federal election
14 only, the reporting requirements, of FECA. See 2 U.S.C. 441i(e)(1)(A) and (B); see also
15 11 CFR 300.61 and 300.62. Thus, leadership PACs that support Federal and non-Federal
16 candidates would be similarly banned from soliciting, receiving, directing, transferring, or
17 spending funds that do not comply with FECA (i.e., non-Federal funds). Would such a
18 restriction also exist for an organization created to support efforts to discuss national
19 issues, where the organization provides no direct support to Federal candidates or
20 political committees, makes no independent expenditures, and does not engage in what
21 would be Federal election activity if done by a party committee? If so, what would be the
22 legal basis for such a restriction?

23

1 C. Transfers

2 If affiliation is found under Alternative A or B, then pursuant to 2 U.S.C.
3 441a(a)(5)(C) and 11 CFR 110.3(c)(1) the affiliated leadership PAC would be able to
4 make unlimited transfers to a candidate or officeholder's authorized committees,
5 consistent with the limitations of the Act. See also 11 CFR 102.6. The proposed rules do
6 not include any amendments that would change these rules. Is it appropriate for the
7 Commission to continue this policy on transfers?

8 D. Reporting

9 Under 11 CFR 104.3(f), affiliated entities are required to consolidate their
10 disclosure reports. Accordingly, should the leadership PAC be required to consolidate
11 disclosure reports with the principal campaign committee of the candidate with whom
12 they are affiliated? Or should reporting be handled in a different manner and, if so, how?
13

14 **Certification of No Effect Pursuant to 5 U.S.C. 605(b) (Regulatory Flexibility Act)**

15 These proposed rules if promulgated would not have a significant economic
16 impact on a substantial number of small entities. The basis of this certification is that
17 these rules only limit the sources and amounts of contributions that certain political
18 committees can accept, and that these rules do not impose any additional costs on the
19 contributors or the committees. Further, the primary purpose of the proposed revisions is
20 to clarify the Commission's rules regarding affiliation; directly or indirectly establish,
21 finance, maintain or control; and limits on contributions. This does not impose a
22

1 significant economic burden because entities affected are already required to comply with
2 the Act's requirements in these areas.

3

4 **List of Subjects**

5 11 CFR Part 100

6 Elections

7 11 CFR Part 110

8 Campaign funds, Political committees and parties

9

1 For the reasons set out in the preamble, the Federal Election Commission is
2 proposing to amend subchapter A, of chapter 1 of title 11 of the Code of Federal
3 Regulations as follows:

4 **PART 100—SCOPE AND DEFINITIONS**

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

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

7 2. In § 100.5, paragraph (g)(5) is added to read as follows:

8 **§ 100.5 Political Committee (2 U.S.C. 431(4), (5), (6)).**

9 * * * * *

10 (g) * * *

11 Alternative A

12 (5) Notwithstanding paragraph (g)(4) of this section, the Commission may examine
13 the relationship between an entity associated with an individual holding Federal
14 office or a candidate for Federal office and the authorized committees of that
15 candidate or individual holding Federal office in accordance with the provisions
16 of this paragraph (g)(5).

17 (i) An unauthorized committee(s) shall be deemed to be directly or indirectly
18 established, financed, maintained, or controlled by a candidate or
19 individual holding Federal office if any of the following are applicable:

20 (A) The candidate or individual holding Federal office, or an
21 agent of either, has signature authority on the unauthorized
22 committee's checks;

- 1 (B) Funds contributed or disbursed by the unauthorized
2 committee are authorized or approved by the candidate or
3 individual holding Federal office, or an agent of either;
- 4 (C) The candidate or individual holding Federal office is clearly
5 identified as described in 11 CFR 100.17 on either the
6 stationery or letterhead of the unauthorized committee;
- 7 (D) The candidate, individual holding Federal office or his
8 campaign staff, office staff, or immediate family members,
9 or any other agent of either, has the authority to approve,
10 alter or veto the unauthorized committee's solicitations,
11 contributions, donations, disbursements or contracts to
12 make disbursements; or
- 13 (E) The unauthorized committee pays for travel by the
14 candidate, his campaign staff or office staff, or any other
15 agent of the candidate, in excess of \$10,000 per calendar
16 year.

17 (ii) Transition Period. On or after [insert date 90 days after publication of the
18 final rule in the Federal Register], an unauthorized committee shall not be
19 deemed to be affiliated with an authorized committee unless, based on
20 actions taken by those committees solely after [insert date 90 days after
21 publication of the final rule in the Federal Register], they satisfy the
22 requirements of paragraph (g)(5)(i). If an entity receives funds from
23 another entity prior to [insert date 90 days after publication of the final rule

1 in the Federal Register], and the recipient entity disposes of the funds prior
2 to [insert date 90 days after publication of the final rule in the Federal
3 Register], the receipt of such funds prior to [insert date 90 days after
4 publication of the final rule in the Federal Register], 2003, shall have no
5 bearing on determining whether the recipient entity is financed by the
6 contributing entity within the meaning of this section. Actions taken by a
7 Federal candidate or individual holding Federal office, or an agent of
8 either, before [insert date 90 days after publication of the final rule in the
9 Federal Register], shall have no bearing on whether affiliation exists.

10 (iii) Determinations by the Commission.

11 (A) An entity may request an advisory opinion of the Commission to
12 determine whether it is affiliated with the authorized committees of
13 any Federal candidate or individual holding Federal office. The
14 request for such an advisory opinion must meet the requirements of
15 11 CFR part 112 and must demonstrate that the entity is not
16 directly or indirectly financed, maintained or controlled by the
17 sponsor.

18 (B) Nothing in this section shall require entities that are unaffiliated as
19 of the effective date of these rules to obtain an advisory opinion to
20 confirm that they are not affiliated.

21 Alternative B

22 (5) Notwithstanding paragraph (g)(4) of this section, the Commission may examine
23 the relationship between an entity associated with an individual holding Federal

1 office or a candidate for Federal office and the authorized committees of that
2 candidate or individual holding Federal office in accordance with the provisions
3 of this paragraph (g)(5).

4 (i) An entity associated with an individual holding Federal office or a
5 candidate for Federal office is affiliated with the authorized committees of
6 that candidate or individual holding Federal office if the conditions set
7 forth in either paragraph (g)(5)(i)(A) or (g)(5)(i)(B) of this section are
8 satisfied.

9 (A) Any one of the following statements is true:

- 10 (1) The candidate or individual holding Federal office, or an
11 agent of the candidate or individual holding Federal office,
12 has signature authority on the entity's checks;
- 13 (2) The candidate or individual holding Federal office, or an
14 agent of the candidate or individual holding Federal office,
15 must approve or authorize disbursements over a certain
16 minimum amount;
- 17 (3) The candidate or the individual holding Federal office signs
18 solicitation letters or other correspondence on behalf of the
19 entity;
- 20 (4) The candidate or individual holding Federal office has the
21 authority to approve, alter or veto the entity's solicitations;

1 (5) The candidate or individual holding Federal office has the
2 authority to approve, alter or veto the entity's contributions,
3 donations, or disbursements; or

4 (6) The candidate or individual holding Federal office has the
5 authority to approve the entity's contracts;

6 (B) Any three of the following statements are true:

7 (1) The campaign staff or immediate family members of the
8 candidate or individual holding Federal office, or any other
9 agent of the candidate or individual holding Federal office,
10 has the authority to approve, alter or veto the entity's
11 solicitations;

12 (2) The campaign staff or immediate family members of the
13 candidate or individual holding Federal office, or any other
14 agent of the candidate or individual holding Federal office,
15 has the authority to approve, alter or veto the entity's
16 contributions, donations, or disbursements;

17 (3) The campaign staff or immediate family members of the
18 candidate or individual holding Federal office, or any other
19 agent of the candidate or individual holding Federal office,
20 has the authority to approve the entity's contracts;

21 (4) The entity and the authorized committees of the candidate
22 or of the individual holding Federal office, share, exchange
23 or sell contributor lists, voter lists, or other mailing lists

1 directly to or with each other, or indirectly through the
2 candidate or individual holding Federal office to or with
3 each other;

4 (5) The entity pays for the travel of the candidate or of the
5 individual holding Federal office anywhere except to or
6 from the State or district of the candidate or individual
7 holding Federal office;

8 (6) The entity and the authorized committees of the candidate
9 or of the individual holding Federal office's share office
10 space, staff, a post office box, or equipment;

11 (7) The entity and the authorized committees of the candidate
12 or of the individual holding Federal office share common
13 vendors; or

14 (8) The name or nickname of the candidate or of the individual
15 holding Federal office, or other unambiguous reference to
16 the candidate or individual holding Federal office, appears
17 on either the entity's stationery or letterhead;

18 (ii) Determinations by the Commission.

19 (A) An entity may request an advisory opinion of the Commission to
20 determine whether it is affiliated with the authorized committees of
21 any Federal candidate or individual holding Federal office. The
22 request for such an advisory opinion must meet the requirements of
23 11 CFR part 112 and must demonstrate that the entity is not

1 directly or indirectly established, financed, maintained, controlled
2 by, or acting on behalf of, the sponsor.

3 (B) Nothing in this section shall require entities that are unaffiliated to
4 obtain an advisory opinion to confirm that they are not affiliated.

5 Alternative C

6 (5) An unauthorized committee established, financed, maintained, or controlled by, or
7 acting on behalf of, a candidate or individual holding Federal office will be
8 deemed to be an authorized committee of such candidate or individual holding
9 Federal office unless it can demonstrate:

10 (i) It only has made contributions, expenditures, donations, or other
11 disbursements for the direct purpose of funding party committees or
12 influencing the nomination or election of persons other than the candidate
13 or individual holding Federal office;

14 (ii) It has not made reference to the candidacy or potential candidacy of the
15 candidate or individual holding Federal office in solicitations,
16 communications, or other materials;

17 (iii) In any speeches or public appearances by the candidate or individual
18 holding Federal office which have been financed by the unauthorized
19 committee, no reference is made to the candidacy or potential candidacy of
20 the candidate or individual holding Federal office, unless such reference is
21 brief, not planned or controlled by the candidate or individual holding
22 Federal office, and in response to a question from an attendee; and

1 (iv) If such candidate or individual holding Federal office becomes a
2 presidential candidate, any disbursements the unauthorized committee has
3 made for the purpose of paying expenses of particular persons seeking to
4 become caucus or convention delegates in the presidential nomination
5 process or for the purpose of establishing staffed operations in states
6 holding presidential primaries or caucuses in the first three months of the
7 presidential election year are reimbursed by the presidential authorized
8 committee of the candidate or individual holding Federal office within
9 60 days of being made, or within 60 days of such person becoming a
10 candidate, if later.

11
12 **PART 110—CONTRIBUTION AND EXPENDITURE LIMITATIONS AND**
13 **PROHIBITIONS**

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

15 Authority: 2 U.S.C. 431(8), 431(9), 432(c)(2), 437d(a)(8), 438(a)(8), 441a, 441b,
16 441d, 441e, 441f, 441g, 441h, 441k.

17 4. In § 110.3, paragraph (a)(4) is added to read as follows:

18 **§ 110.3 Contribution limitations for affiliated committees and political party committees;**
19 **Transfers (2 U.S.C. 441a(a)(5), 441a(a)(4)).**

20 (a) * * *

21 (4) For purposes of paragraph (a)(1)(i) of this section, an unauthorized committee
22 established, financed, maintained, or controlled by, or acting on behalf of, a
23 candidate or individual holding Federal office will be deemed to be an authorized

1 committee of such candidate or individual holding Federal office unless it can
2 demonstrate:

- 3 (i) It only has made contributions, expenditures, donations, electioneering
4 communications, or other disbursements for the direct purpose of funding
5 party committees or influencing the nomination or election of persons
6 other than the candidate or individual holding Federal office;
- 7 (ii) It has not made reference to the candidacy or potential candidacy of the
8 candidate or individual holding Federal office in solicitations,
9 communications, or other materials;
- 10 (iii) In any speeches or public appearances by the candidate or individual
11 holding Federal office which have been financed by the unauthorized
12 committee, no reference is made to the candidacy or potential candidacy of
13 the candidate or individual holding Federal office, unless such reference is
14 brief, not planned or controlled by the candidate or individual holding
15 Federal office, and in response to a question from an attendee; and
- 16 (iv) If such candidate or individual holding Federal office becomes a
17 presidential candidate, any disbursements the unauthorized committee has
18 made for the purpose of paying expenses of particular persons seeking to
19 become caucus or convention delegates in the presidential nomination
20 process or for the purpose of establishing staffed operations in states
21 holding presidential primaries or caucuses in the first three months of the
22 presidential election year are reimbursed by the presidential authorized
23 committee of the candidate or individual holding Federal office within

