**HEARING ON S. 271, 527 REFORM ACT OF 2005**

Testimony of Commissioner David M. Mason
before the Committee on Rules and Administration
United States Senate
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Chairman Lott and Members of the Committee, I appreciate the opportunity to testify on this legislation proposing to amend the Federal Election Campaign Act. My testimony represents my own views, not those of my colleagues or of the Federal Election Commission collectively. I do, however, want to acknowledge the analytical efforts of the Commission's Office of General Counsel and Reports Analysis Division, which were helpful in preparing this testimony, and to thank my own staff members, Karen Cence and Randy Elf, for their assistance.

**Commission Rulemaking**

Last year the Federal Election Commission completed a rulemaking on political committee status. Some of the approaches considered during the rulemaking, and supported by some of the sponsors of S. 271, included the addition of a "major purpose test" to the Commission's regulations defining political committees. In the Federal Election Campaign Act, however, political committees are defined only by the making of "expenditures" and the receipt of "contributions," terms which are, in turn, defined in great detail in both the FECA statute and in the Commission's regulations.

The major purpose test as enunciated in *Buckey v. Valeo*, 424 U.S. 1, 79 (1976) and *MCFL*, 479 U.S. 238, 262 (1986) is a judicially-devised tool to limit the reach of the FECA's otherwise overbroad definition of political committee. It was used by the Supreme Court, and by the Commission with explicit judicial sanction, not to determine what organizations are political committees, but to exclude organizations otherwise apparently covered by the statute from that definition. Though the application of the test (to contributions as well as expenditures) was disputed, the major purpose test was also treated as excluding organizations that otherwise qualified as political committees from that definition in *Akins v. FEC*, 101 F 3$^{rd}$ 731 (DC Cir. 1996)(*en banc*), *vacated and remanded,* 524 U.S. 11 (1998).

The claim by some that the law requires the Commission to begin its inquiry with a major purpose analysis and then work backwards to consider whether an organization whose major purpose is political has made expenditures or contributions turns the judicial test inside out. It attempts to use a doctrine enunciated as necessary to limit the reach of the statute into a tool to expand the statute's reach. In addition, since the Court has held that all spending by political committees is campaign-related, this approach attempts to short circuit the statutory approach though expenditures and contributions by begging those questions: beginning with a "major purpose" inquiry which is not mentioned or defined in the statue, and then simply declaring that all or virtually all spending by a "major purpose" group is an "expenditure." This would make the statute's expenditure definition, and the statute's use of that term to define political committee, superfluous.

There are, of course, judicial constructs which have been incorporated through statutory amendments into federal election law, most notably perhaps the express advocacy doctrine. If Congress wishes to include a major purpose test as a statutory means to expand the reach of the FECA (as opposed to a judicial test to limit it), that is certainly within your power. This would however, use the concept very differently than it has been employed by the courts, and effectively under judicial mandate, by the Commission. Working such a fundamental change in the statutory scheme is clearly something only Congress itself may accomplish.

It was significantly for this reason that I supported in the Commission's political committee rulemaking, along with a majority of my colleagues, an approach which revised the definition of "contribution" and the Commission's allocation rules in ways which I believe will address many of the concerns about organizations which operated in 2004 with an apparent focus on the Presidential election but without registering and reporting under the FECA.

More narrowly, the FEC also clearly does not have authority (without statutory amendment) to adopt many of the particular provisions of S. 271.

- The FECA registration and reporting threshold is $1,000 for non-authorized committees whereas S. 271 includes a $25,000 reporting threshold for certain committees.
- S. 271 limits sources and amounts contributed to certain non-federal accounts, which the Commission now has authority to do only for political party committees;
- The FECA currently (431(9)(B)(ii)) exempts "non-partisan activity designed to encourage individuals to vote or to register to vote" from the definition of expenditure, but S. 271 would include some non-partisan voter drives as activities triggering FECA registration, reporting and compliance.
- S. 271 would trigger FECA requirements based on certain tax code provisions which the FEC currently has no authorization to do.

Again, these sorts of changes can only be made by Congress, which is why legislation, rather than regulatory fiat, is the only appropriate means to achieve the aims envisioned by S. 271.

**Application of a "Major Purpose" Test**

Since S. 271 does not directly address the major purpose question, some guidance as to the application of that judicially-required test will be necessary. Proposed new FECA Section 431(4)(D) could be interpreted to mean that Congress has made a finding that an organization described in Section 527 of the Internal Revenue Code satisfies the major purpose test and need only make $1,000 in expenditures or receive $1,000 in contributions for it to become a political committee without an additional inquiry or analysis concerning its major purpose. Since all political committees, those already registered under FECA, those now reporting only to the IRS, and state committees exempt from both IRS and FECA reporting are "described in Section 527," does Congress intend for the Commission to apply the $1,000 expenditure and contribution tests to all 527 organizations (or all non-exempt organizations) without additional consideration of "major purpose"?

Given that many of the sponsors of S. 271 supported legislation in the last Congress to add a major purpose test to the FECA, clarification on this point would be helpful: Is 527 status a proxy for a major purpose test? In examining organizations which do not acknowledge 527 status, are the Section 527 definitions of "political organization" and "exempt function" to be applied in making a major purpose determination?

If the Commission is to treat the major purpose test as satisfied for all 527s, I note that the operation of proposed new FECA Section 431(27)(D) would effectively amend the definition of expenditure (as applied to 527s) to include voter drive activity and communications that promote, support, attack or oppose Federal candidates in the year before their elections.

**Apparent Concern Behind Legislation, Constitutional Question**

Statements of sponsors in support of this legislation have cited very large donations made to non-FEC-registered 527 organizations which conducted extensive voter drives or made non-express advocacy communications associated with the 2004 presidential election. The organizations at issue claim to have conducted their activities independently of federal candidates and political parties. Even if the activities of these groups are deemed "expenditures" for FECA purposes, the expenditures, at least as advertised, are independent of candidates and parties; this independence raises a substantial question.

The Supreme Court in a 4-1-4 alignment in *California Medical Association* 453 US 182 (1981) upheld the constitutionality of the $5,000 limitation on contributions to PACs which make contributions to candidates on the rationale that this limit was permissible to prevent circumvention of the fundamental limits on contributions to candidates. Justice Blackman's controlling concurrence noted that he would not have found a limit on contributions to PACs which make only independent expenditures to be constitutional. That concurrence does not represent binding precedent, so its effect has been to leave open the question of whether it is constitutionally permissible to limit contributions to independent expenditure PACs.

Since *California Medical,* the Court has not considered the constitutionality of restricting contributions to political committees that make only independent expenditures. *North Carolina Right to Life, Inc. v. Leake,* 344 F.3d 418, 433-34 (4th Cir. 2003), *cert. granted and judgment vacated,* 124 S.Ct. 2065 (2004). Nevertheless, the issue has arisen in two federal appellate opinions.

The first is *North Carolina Right to Life.* Among the provisions at issue there is a North Carolina statute limiting contributions to political committees. Citing Justice Blackmun's concurrence, the Fourth Circuit held that the statute is unconstitutional as applied to committees that make only independent expenditures. *Id.* Other provisions are also at issue in *NCRL, see id.* at 420-33, and the Supreme Court vacated the Fourth Circuit's opinion for reconsideration in light of *McConnell. See* 124 S.Ct. at 2065.

The IEPAC issue has arisen in another circuit as well. In *Landell v. Sorrell,* the district court issued its order in August 2000. *See* 118 F.Supp.2d 459 (D.Vt. 2000). A Second Circuit panel issued an opinion in August 2002, *see* 300 F.3d 129 (2nd Cir. 2002), withdrew it from the bound volume in October 2002, *see* 2002 WL 31268493 (2nd Cir. Oct 3, 2002) (No. 00-9159(L), 00-9239(XAP), 00-9180(CON), 00-9240(XAP), 00-9231(XAP)), and issued a second opinion in August 2004. *See* 382 F.3d 91 (2nd Cir. 2004). In February 2005, the Second Circuit denied a petition for rehearing and suggestion of rehearing *en banc,* so the August 2004 panel opinion remains standing, and the 90-day window for filing *a certiorari* petition remains open. *See* SUP. CT. R. 13.1 (1999).

In the August 2004 opinion, the Second Circuit panel, after discussing *California Medical* with respect to other issues, *see* 382 F.3d at 140-41, remanded the IEPAC issue to the district court for further consideration. *Id.* at 144.

The appeal to equity, that these groups should just play by the same rules as other PACs, is powerful. The problem is that a contribution limit must be justified as a means of preventing corruption or, at least, on an anti-circumvention rationale. If the groups at issue are independent of candidates, officeholders and parties, there would appear to be little direct threat or corruption or its appearance. And if the limit potentially circumvented by these groups is the limit on independent expenditures, then there is nothing to circumvent.

Put practically, if it is OK for George Soros and Peter Lewis each to spend $10 million independently to defeat President Bush, why is it wrong for the two of them to get together and spend $20 million jointly? Why does combining two rights (those of speech and association) make a wrong?

Both the judicial deference to Congressional findings evidenced in *McConnell* and Congress' own independent obligation to the constitution indicate that Congress should, in considering this legislation, carefully consider whether there is a constitutional impediment to the effective imposition of a $5,000 contribution limit to IE PACs and to present its conclusions and constitutional justification for any proposed limit. Even with what might appear to be a favorable breeze from *McConnell*, given the explicit reservation of this issue by the Supreme Court and the active examination of it in two federal circuits, it would be shortsighted to fail to address this constitutional question squarely.

**Disclaimer**

Having uttered a couple of prominent names, let me issue some disclaimers. Virtually all of the non-FEC registered 527 groups discussed in connection with this legislation, and some individuals associated with those groups, are the subject of complaints to the FEC regarding their activities in 2004. The Commission is barred by the FECA from discussing its investigations of complaints until they are complete. Nothing I say today should be taken as a comment on the status or validity of any such complaints. My discussion of particular persons or organizations should not be construed as approval or disapproval of their activities. My discussion of the apparent effects of S. 271 should not be interpreted as a conclusion on my part as to how existing law does or should apply to particular persons or organizations and their activities in 2004.

**What Should the Contribution Limit Be for IE PACs?**

Assuming that some limit on contributions to IE PACs might be constitutional, what should that limit be? The Supreme Court has upheld contribution limits but noted that limits so low as to prevent effective advocacy would be unconstitutional. At least one example from 2004 provides some evidence that a $5,000 contribution limit would severely impair the ability of some groups to get their message heard and indeed might be so low as to prevent some groups from ever getting off the ground at all.

With my previous disclaimers in mind, let me review some fundraising figures from the Swift Boat group. This group registered with the IRS in April, but made its first significant public efforts with a press conference and media buy beginning August 4. By that point the Swift Boat group apparently (based on IRS reports) had raised about $850,000, about $800,000 of which would be excessive or prohibited for a political committee. (The allowance for contributions of up to $25,000 to a qualified non-Federal account would not have been of use for the type of ads the Swift Boat group ran.) Two donors alone appear to have provided $700,000 of this total.

After their initial media buy, the group apparently raised significant amounts in small donations but continued to rely predominantly on donations in excess of $5,000 and on some corporate funding.

I take from this history that it is a very real possibility that the Swift Boat group might never have gotten off the ground with a paid media effort had it had to rely on individual donations of no more than $5,000. As it was, the group took three months to raise the seed money, less than $50,000 of which was permissible for a Federal political committee, for its initial media buy. Had it taken significantly longer, the issue they wished to raise might not have been timely. The imposition of political committee limits very likely would have effectively muzzled this group.

I know that the Swift Boat group and its ads were controversial, but their message appeared to be salient with a significant portion of the public, and any preference to mute a group because of distaste for its message, or its popularity or lack thereof, is not a valid reason for government regulation. Indeed, it is the unpopular and politically objectionable speech that needs constitutional protection.

If limits are permitted at all for IE PACs, I conclude that for this one group, at least, a limit of less than $100,000 might well have effectively prevented their speech from being heard. Even looking to existing limits within the FECA, a group with national scope and interest might just as well be compared to a national political party, with a (now) $26,700 contribution limit as to an ordinary PAC which makes contributions to individual candidates.

Thus, I would urge you, if you do conclude that there is a constitutionally valid justification for limitations on contributions to independent expenditure PACs, to consider a limit far higher than the $5,000 applicable to PACs which make contributions to candidates. Personally, I do not find $100,000 shocking for these purposes. In fact, I would note that if the original 1974 FECA limit for national political parties had been adjusted for effective inflation in communications costs it would have been in the neighborhood of $100,000 by the late 1990s, and a limit of that level might have deterred the aggressive exploitation of soft money by the national parties.

I acknowledge that setting a separate limit for IE PACs would require more extensive redrafting of the FECA than S. 271 currently contemplates, including a definition and separate limit for IE PACs and some appropriate adjustment to or exemption as to the aggregate individual contribution limit. (If we consider contributions to independent expenditure PACs to be the equivalent of independent expenditures, then it would make sense to exempt contributions to such PACs from the aggregate individual limit.)

**Circumvention**

There is a strong ideological preference by some of the sponsors of S. 271 for the lower rather than higher limits. At the same time S. 271 is in some respects a fairly limited step, specifically disclaiming, for instance, any intention to affect the determination of whether a 501(c) group is a political committee. One disturbing aspect of this feature is the general acknowledgment that this proposal is, in fact, just one limited step in what reform advocates hope will be a continually evolving statutory and regulatory structure for "continuously managing the problems of money in politics, not definitively solving them." (Thomas Mann, Bloomberg.com, February 2, 2005) After the 527 disclosure legislation and BCRA, S. 271 may be only the next in a series of legislation proposing yet more regulation of political activity. However threatening some find the political activities of non-FECA registered organizations, I do not find the prospect of a continually expanding gyre of political regulation a healthy prospect either.

Today the activities of the 527 organizations at issue are almost wholly transparent: they register with the government and disclose their funding, spending, and key organizational features. (Section 527 does include provisions for paying tax in lieu of disclosure, but that option appears to have been rarely used.) A predictable effect of the passage of S. 271 in its current form is the migration of at least some, and possibly a large amount, of funds from 527 to 501(c) organizations which may conduct voter drives, make lobbying communications and even (subject to certain tax consequences) make 527 "exempt function" expenditures, all without disclosure. Just as under BCRA a significant amount of soft money moved from political parties to 527 organizations, under S. 271 a significant amount of money would move from 527 to 501(c) organizations. Lost in this latter transfer would be the significant disclosure we have today.

Congress and the IRS have, in a progressive evolutionary process, encouraged groups to migrate into an explicitly political arena and to segregate their political activities from social welfare, business, educational or membership functions. I see nothing wrong, and indeed much to praise, in encouraging political activity through the tax code. S. 271 would significantly reverse this policy progression by, effectively, placing a $5,000 individual contribution limit on the accounts of most 527 organizations. If Congress is concerned that favorable tax treatment should be restricted to small rather than to million dollar donations using the tax code to limit the scope of, for instance, the gift tax exemption, might be preferable to effectively banning large donations to independent political groups altogether.

There is clearly some appeal to getting politically-active groups to report to the same agency, on the same schedule, and with the same details (itemization thresholds). Doing so would improve the quality and utility of disclosure. But attempting to do so without adjusting the contribution limits for IE PACs would almost certainly result in a net loss, and probably a significant loss, in disclosure.

In addition to the constitutional and other policy considerations which may counsel in favor of a higher contribution limit for the types of independent organizations most at issue, the anti-circumvention interests asserted as the basis of the bill may well be better served by a more generous limit which would, in effect, encourage donors and organizations to stay in the disclosed 527/FECA realms rather than virtually demanding that the groups modify their activities, possibly in ways that may not be terribly significant, in an effort to fit in the undisclosed and non-contribution limited 501(c) area.

**State and Local Organizations**

In 2002 Congress amended Section 527 to exempt Qualified State or Local Political Organizations (QSLPOs) from the requirement to file reports of their receipts and disbursements so long as they filed similar reports with a state agency. S. 271 would revoke this exemption for any state or local organization that spends more than $1,000 for voter drive activity in connection with an election in which a candidate for federal office appears on the ballot. I am concerned that this could transform an organization genuinely interested in state or local candidates into a federal PAC, even if the state organization never even mentioned a federal candidate. I see no reason why a properly functioning QSLPO in which "*all* of the exempt functions are *solely* for the purposes of influencing" elections to state or local office (26USC527(e)(5)(A)(i), emphasis added) need be considered a federal political committee. I think it would be preferable to exempt QSLPOs in S. 271 for the same reasons Congress exempted those organizations from Section 527 reporting requirements in 2002.

I am aware of one prominent organization, Moving America Forward, associated with New Mexico Governor Bill Richardson, whose claim to qualify as a QSLPO has generated some controversy. This organization reportedly conducted voter drives in "battleground states" Florida, Colorado Arizona, and Nevada as well as New Mexico while reporting only under New Mexico law. The IRS does permit organizations active in more than one state to qualify as QSLPOs, again, so long as (among other factors) "All of [the organization's] political activities relate solely to state or local public office."

Assuming that the proposed 431(27)(D)(ii) exemption kick-out was crafted to require registration by multi-state organizations such as Moving America Forward (and leaving aside the question of whether all of that organization's exempt-function activities did in fact relate solely to influencing elections to state or local office), there are two alternatives which may be preferable by sweeping less broadly. First, Congress or the IRS, might limit the QSLPO exemption to organizations whose political activities relate solely to state or local office within a single state. Alternatively, proposed 431(27)(D)(ii) could be redrafted to cover only organizations that conduct voter drive activity in more than one state.

In either case I believe it would be preferable, through cross-references or parallel statutory provisions, to have the same exemption apply to FECA as to Section 527 reporting. Similar federal interests (or non-interests) apply in either case. To do otherwise would contribute unnecessary complexity to the body of law governing 527 organizations (FECA registered or otherwise). Without a parallel exemption structure for state and local activities we would have a 527 law exempting groups from federal reporting due to their non-federal focus and a FECA requiring federal reporting and contribution limitations due to the ostensible federal impact of their activities. If the whole premise behind S. 271 is that "political" under the tax code is "political" under the FECA, then I see no reason why there should be different exemptions defining who is strictly state and local in the two statutes.

I understand that a single-state provision would still allow persons to organize activities in a key state – Florida only or Ohio only for instance – without federal disclosure. Still, if such single-state organizations do not promote, support, attack or oppose federal candidates, and comply with applicable IRS requirements, which include full public disclosure via a state agency, it strikes me that the federal nexus is sufficiently remote as to permit those organizations to accept contributions subject to the limits and prohibitions of the applicable state law. This approach would also help prevent federally-registered 527 organizations from effectively escaping both federal and state contribution limits: they would have to live with one or the other. Furthermore, to the extent that part of the concern behind this provision is whether some organizations ought not to qualify for the QSLPO exemption in the first place, the proper place to address that is within Section 527, rather than within the FECA.

**Voter Drives**

I am concerned that the voter drive definition (325(d)(1)), which copies the "Federal election activity" (FEA) provisions of BCRA, may be ill-fitting for the non-party organizations affected by S. 271. In the context of party organizations affected by the FEA definitions in BCRA, Congress understandably assumed that party voter registration, voter ID, GOTV and generic campaign activities would be partisan, and would be intended to benefit all of the party's candidates, local, state and federal. The same cannot be assumed of non-party groups. Under proposed section 325(d)(1), apparently even non-partisan voter registration or GOTV activity, which is generally exempt under the FECA (431(9)(B)(ii)), would trigger federal political committee status. A non-party 527 organization that restricted its voter ID efforts to voters likely to support even non-partisan candidates for municipal office would likely become a federal political committee if the municipal elections were on the same ballot as federal offices. (This issue might also be addressed by the "single state" revision I have suggested above.)

I am uncertain as to why Congress would want to make non-partisan voter registration activity by non-party groups subject to FECA. I am uncertain as to why voter ID or GOTV by independent, non-party groups identifying solely candidates for state or local office should trigger federal political committee status. If this provision is retained, does Congress intend for the Commission to apply the BCRA FEA definitions (11CFR 100.24), the voter drive definitions currently applicable to non-connected committees (11 CFR 106.6) or to write new definitions? The 106 regulations address voter drives for candidates associated with particular issues, and thus, if applied here, could trigger federal political committee status as a result of a voter drive which mentions neither candidates nor political parties. While this definition might be refined in some fashion to get at activity more directly related to federal candidates, these questions would largely be obviated if Congress adds either a broad or single-state QSLPO exemption to S. 271 as I recommend above. And, the potential problems with application of the proposed voter drive definition is yet another reason to base a FECA exemption on QSLPO status (properly enforced or limited) rather than on "FEA" by non-party groups.

**When Candidates for Federal Office Appear on the Ballot**

Another difference between the existing 527 QSLPO exemption and S. 271's proposed FECA exemption is the restriction of the proposed FECA exemption to "elections where no candidate for Federal office appears on the ballot." (431(27(B)(iii)(I)) Here again, I think it would be preferable to harmonize the QSLPO and FECA exemptions. If the "candidate for Federal office" standard is retained, I urge the Committee's attention to Senator Corzine's pending Advisory Opinion request implicating certain federal candidate provisions of BCRA or to Congressman Weiner's current mayoral campaign. Even though the pending elections in New Jersey and New York City do not include contests for federal office, Senator Corzine and Congressman Weiner may remain "candidates" for federal office within the meaning of FECA. The appearance of these federal candidates on the ballot might then implicate the efforts of non-federal political organizations in, for instance the New York mayoral primary. A similar problem might occur in the case of a special federal election which might be called on short notice to correspond to a state or municipal election date.

If a 527 organization which was previously exempt loses its exemption because of a change in the election calendar, or due to the expenditure of $1,000 PASO or voter drive activity, at what point does the organization become a political committee? Is it required to report or allocate retroactively? May it use its non-federal funds on hand? May it transfer those funds? Is it required to apply some sort of accounting method to determine whether its funds on hand are federally-permissible or permissible for a qualified non-federal account? How are organizations which become federal political committees at S. 271's effective date to address these same transition issues?

This is yet another set of question that indicate to me that it would be preferable to use the QSLPO exemption (again with any desirable adjustments), which is focused on a committee's own activities, rather than the election calendar, to determine federal or non-federal status.

If both PASO and voter drive activity are retained as exclusionary categories, does a committee lose its exemption through a combination of PASO and voter drive activity (i.e. $500 PASO and $501 voter drive) or is the $1,000 threshold applied separately to each category?

**Who Interprets Section 527?**

S. 271 is based on an apparently simple rationale that an organization claiming to "influence elections" for tax purposes, and which does not limit its activities to non-federal elections, must be in the business of "influencing elections" for election law purposes. This simple equation may ignore important differences in the constitutional, statutory and regulatory contexts of tax and election law. This equivalence also makes it all the more puzzling as to why there should be different standards drawing the line between federal and non-federal election activity in Title 2 and Title 26.

One important regulatory question raised by this equation is who interprets the meaning of Section 527 of the tax code? S. 271, which amends the FECA, says that an organization "described in Section 527" is, with certain exceptions added to the FECA, a federal (FECA) political committee. FECA political committees are, in turn, automatically granted 527 status and are exempt from Section 527 reporting and registration requirements.

What will happen under S. 271 when the FEC receives a complaint alleging that an organization is "described" in Section 527, does not qualify for any exemption, and thus must register with the FEC? If the organization is not registered with the IRS, do we ask the IRS to make an initial determination? Is the IRS required to respond to such an inquiry in any set time or priority order? May the FEC conduct its own inquiry and analysis into whether the organization is described in Section 527? Are we bound by IRS regulations or interpretations in that inquiry? May the FEC issue its own regulations or advisory opinions addressing whether a particular organization is described in Section 527? May we issue regulations or advisory opinions addressing whether particular activities are "exempt functions" within the meaning of Section 527? If we cannot issue regulations or advisory opinions, what is the basis of any authority to make particular determinations in the enforcement process? What happens if an FEC determination appears to conflict with IRS guidance or determinations?

Given S. 271's express disclaimer as to 501(c) organizations, does our inquiry cease if the respondent named in the complaint is a 501(c) organization? What basis, other than Section 527's political organization and exempt function definitions, are we to use in determining whether a 501(c) organization is a political committee? Do we ask the IRS to review that status? Is the FEC permitted to make its own determination that an organization is "described in Section 527" even though it files with the IRS as a 501(c)?

Given that a significant part of the argument for this legislation is an alleged failure by the FEC to enforce the FECA properly, it is imperative for Congress to answer these critical enforcement questions rather than leaving gaps or conflicts between the tax and election law enforcement mechanisms

**Does Congress Intend Duplicate Reporting for Qualified Non-Federal Accounts?**

Organizations required to report under the FECA as political committees are exempt from Section 527 notification and disclosure requirements. Non-federal accounts of federal political committees are, however, required to file notifications and reports pursuant to Section 527.

Under S. 271 political committees would have to disclose all receipts and disbursements from Qualified Non-Federal Accounts to the FEC. Does this qualify as "disclosure as a political committee" for purposes of Section 527 or does Congress intend to require dual disclosure (IRS and FEC) of receipts and disbursements of Qualified Non-Federal Accounts?

**Does Congress Intend to Pre-empt State Law Which Might Otherwise Limit Contributions to Qualified Non-Federal Accounts?**

The concept of a partially regulated allocation account is clearly analogous to the Levin Accounts permitted for state and local party committees under BCRA. 2 USC 441i(b)(2)(B)(iii) sets a $10,000 cap on contributions to a Levin Account but also makes clear that contributions are subject to State law if the State sets a lower limit (allowing amounts "donated in accordance with State law," except not more than $10,000). Proposed Section 325(c) of S. 271 sets a $25,000 limit (from individuals only), subject to "all other requirements of Federal, State, or local law." The reference to *other* requirements would likely be read to pre-empt state or local limitations of less than $25,000 which might otherwise apply to Qualified Non-Federal Accounts. If Congress intends for relevant state limits to apply to a Qualified Non-Federal Account, 325(c) should be revised to specify that such limits apply.

**Are Political Committees Permitted to Have Non-Qualified Non-Federal Accounts?**

S. 271 is silent as to whether political committees may maintain, in addition to a federal account and a qualified non-federal account, a traditional or non-qualified non-federal account. Under the bill alone it would appear that there may be no barrier to a third account which might be used for any expense that is purely non-federal and is not allocated in any way between the federal and (qualified) non-federal accounts. For instance, communications supporting state candidates (perhaps without reference to their party affiliation) in elections in which no federal candidate appears on the ballot (the odd-year elections in New Jersey, Virginia, Kentucky and Louisiana, for instance) would appear to be permitted to be funded from a non-qualified non-federal account.

However, proposed new Section 325 treats FEC allocation regulations in the same manner as statutory provisions, stating that disbursements allocated to non-federal accounts may be paid only from a qualified non-federal account. FEC regulations specify certain expenses which may be paid 100% from the non-federal account, including public communications and voter drives that refer only to non-federal candidates. Does Congress intend the reference to Commission allocation regulations in Section 325(a)(1) to require that expenses described as 100% non-federal in those regulations be paid only from a qualified non-federal account? If not, Section 325 should be revised accordingly.

**Allocation**

Despite criticism of the Commission, I take some solace in the fact that the allocation rules proposed in S. 271 are clearly based on, and to a large degree incorporate, the allocation rules adopted by the Commission last year. Some of the proposed changes would result in allocation of more expenses to federal accounts, others more to non-federal accounts.

**Party Identification Allocation**

Generally the Commission's regulations are candidate-based. Where no candidates are mentioned but political parties are identified allocation is a minimum 50% federal. S. 271 would extend the 50% federal minimum to communications and voter drives which identify a non-federal candidate and a political party. This appears to me to sweep too far. For instance, a communication urging support for a non-federal candidate and merely including that candidate's party affiliation ("vote Joan Jones, Democrat for Mayor") would require a 50% minimum federal allocation. A sample ballot which included all the party identifications of all candidates on the ballot, even if it did not endorse or include federal candidates, would be subject to the 50% minimum. A communication urging voters of one party to support a non-federal candidate of another party ("Democrats for Ehrlich," for instance) would likewise be subject to a 50% federal minimum.

Sponsors may be concerned that committees might attempt to influence Federal elections with general appeals to support the "Democratic" or "Republican" team, yet attempt to avoid federal financing rules with a reference to a single non-federal candidate. If so, the Commission probably could come up with regulations to address that concern in a more targeted way. Our allocation rules for state party phone banks that refer to the presidential candidate and the entire ticket are one possible model.

**Time-Space Allocation**

S. 271 would replace the Commission's time-space allocation method with a 50% federal minimum for communications and voter drives identifying both federal and non-federal candidates. This will result in many cases in a reduction in the federal allocation percentage. For instance, a mailing devoting 98% of its space to Presidential, Senatorial and House candidates would be eligible for 50% non-federal funding if it included a single line identifying (not even endorsing) a local candidate for Dog Catcher.

In my view the Commission's time-space allocation rules represent a fair allocation of benefits, and they have been fairly simple to apply. I would urge you to leave those rules standing rather than replace them with a flat 50% allocation regardless of the actual focus of the communication or voter drive. It is often of great benefit for local candidates to be associated with their party's presidential nominee. I see no reason why including the "top of the ticket" should automatically require 50% federal funding if, in fact, the text of the communication is focused predominantly on non-federal candidates.

Because S. 271 would set minimum allocation percentages by statute there would be a substantial question as to whether the Commission would have authority to set higher minimum federal percentages that those set in the statute. Personally, for instance, I thought the 50% minimum allocation for administrative and overhead expenses was low given the activities of committees now subject to the allocation rules. If Congress intends that the Commission be permitted by regulation to set higher minimum federal allocation percentages where circumstances warrant, you should indicate when and under what conditions we may do so.

**Funds Received Allocation**

The fundraising allocation rules in S. 271 would overturn the Commission's "funds received" methodology for this category of expenses. I know that some are concerned by the 98% allocation ratio for fundraising and overhead expenses claimed by Americans Coming Together in 2004. However, the Commission's new allocation and contribution rules have already addressed this problem. For fundraising appeals which identify a federal candidate, at least 50% of the receipts would have to be treated as federal contributions (11 CFR 100.57(b)(2)). This, in turn means that at least 50% of the fundraising expenses would be allocated to the federal account. Thus, the Commission's existing regulations already achieve the 50% minimum sought by S. 271. However, by setting a 50% minimum in the statute S. 271 might allow a committee to under-allocate its federal fundraising costs: a fundraising program raising 75% or even 95% federal funds could still be allocated 50% to the non-federal account under 325(b)(6). Again, it is unclear whether the Commission would have authority to raise the federal requirement above this statutory minimum, for instance, in those circumstances in which our existing rule would require a higher federal allocation. Since the Commission's exiting rules already require a 50% or higher federal allocation for joint fundraising, I would urge you to simply leave them in place.

**Administrative Transition**

I understand that the theory behind S. 271 is fairly simple. I hope my testimony has made the point that the application of this principle may present several complications. S. 271 includes an effective date of 60 days after enactment. If the bill passes in its current form, the Commission will be required to revise its allocation regulations and issue a number of new regulations pursuant to various provisions of the legislation. In addition, S. 271 would require registration and reporting by new entities, would require reporting of Qualified Non-Federal Accounts, and would require adjustments to several of the Commission's existing forms, instructions and schedules. All of these forms and schedules (3X, H1, H2, H3 and H4, plus new forms for Qualified Non-Federal Accounts) would have to be created or revised in both paper and electronic format. The Commission would then have to disseminate the forms and new electronic filing software to affected committees. Many electronic filers use private sector software, which would have to be revised to conform to the new filing requirements. Sixty days is simply not a realistic timeframe in which to accomplish the totality of these changes.

The Commission will, of course, do its utmost to implement any legislation Congress passes as quickly and completely as possible. If S. 271 were revised to make less extensive changes in the existing allocation practices (as I suggest), we could implement the bill far more quickly. Similarly, if the legislation reaches fewer QSLPO entities, the need for and complexity of new regulations would be greatly reduced. Thus, I will not recommend at this time an alternative to 60 days as an appropriate effective date but do strongly suggest that Congress revisit that issue depending on the complexity and extent of changes in the bill if it nears enactment.