



Legislative Recommendations

2003

Federal Election Commission

May 6, 2003

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

Dear Mr. President:

In accordance with 2 U.S.C. § 438(a)(9), the Commission is pleased to submit for your consideration 7 recommendations for legislative action.

The Commission has substantially reduced the number of recommendations for legislative action, including only high priority recommendations with broad Commission support. Each recommendation is followed by an explanation of the need for and expected benefits from the recommended change.

We hope these recommendations can assist Congress in bringing to fruition some necessary changes in campaign finance law. With more than 25 years of experience and accomplishments in these areas, the FEC stands ready to work with the President and Congress to implement the legislative package.

Sincerely,

Ellen L. Weintraub
Chair

Enclosure

May 6, 2003

The Honorable J. Dennis Hastert
Speaker
U.S. House of Representatives
H-232, The Capitol
Washington, D.C. 20515

Dear Mr. Speaker:

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Ellen L. Weintraub
Chair

Enclosure

May 6, 2003

The Honorable Richard B. Cheney
President of the Senate
United States Senate
S-212, The Capitol
Washington, D.C. 20510

Dear Mr. Vice President:

In accordance with 2 U.S.C. § 438(a)(9), the Commission is pleased to submit for your consideration 7 recommendations for legislative action.

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Compliance

Making Permanent the Administrative Fine Program for Reporting Violations (2003)

Section: 2 U.S.C. §437g

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

Explanation: On November 12, 2001, President Bush signed the Fiscal Year 2002 Treasury and General Government Appropriations Act, which extended the Administrative Fine Program to cover violations of 2 U.S.C. § 434(a) that relate to reporting periods through December 31, 2003. Since the Administrative Fine program was implemented with the 2000 July Quarterly report, the Commission has processed and made public 519 cases, with \$722,221 in fines collected. The Administrative Fine Program has been remarkably successful: over the course of the program, the number late and nonfiled reports has generally decreased. As a result, the Administrative Fine Program has become an integral part of the Commission's mission to administer and enforce the Act. By making the program permanent, Congress would ensure that the Commission would not lose one of the most cost-effective and successful programs in its history.

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

Ethics

Allowing the FEC to Restrict the Political Activities of its Employees (2003)

Section: 2 U.S.C. §437c(f), 5 U.S.C. §7323(b)(1)

Recommendation: The Commission recommends that Congress amend the Act, by adding a new subsection (f)(5) to 2 U.S.C. §437c, which would prohibit an FEC Commissioner or employee from publicly supporting or opposing a candidate, political party or political committee subject to the FEC's jurisdiction, regardless of whether the activity is performed in concert with a political party, partisan political group or a candidate for partisan public office.

Explanation: In 1993, the enactment of the Hatch Reform Act (Pub. L. 103-94) lifted many of the original Hatch Act's restrictions on many Federal employees with regard to participation in political campaigns. The Hatch Reform Act places special limitations on Commission employees, prohibiting them from requesting or receiving political contributions from, or giving political contributions to, an employee, a Member of Congress or an officer of a uniformed service, as well as from taking an active part in political management or political campaigns. 5 U.S.C. §§7323(b)(1) and 7323(b)(2).

The Hatch Reform Act specifically states, "employees should be encouraged to exercise fully, freely, and without fear of penalty or reprisal, and to the extent not expressly prohibited by law, their right to participate or to refrain from participating in the political processes of the nation." 5 U.S.C. §7321. It also provides that "[a]n employee retains the right to vote as he chooses and to express his opinion on political subjects and candidates." 5 U.S.C. §7323(c). OPM has authority to issue regulations regarding the Hatch Reform Act. *See* 5 U.S.C. §1103(a)(5) and 5 U.S.C. §7325. With regard to agencies such as the Commission whose employees are limited in their political activity, OPM regulations allow such employees to "[e]xpress his or her opinion as an individual privately and publicly on political subjects and candidates." 5 CFR 734.402. The OPM regulations provide that such activity may not be done "in concert with a political party, partisan political group or a candidate for partisan political office."

There are no provisions in the Hatch Reform Act that empower any agency other than OPM to interpret its provisions, and there is currently no provision in FECA that directly refers to the Hatch Reform Act or previous Hatch restrictions. OPM has issued regulations expressly limiting the extent to which the political activities of employees may be limited beyond the restrictions in the Hatch Reform Act. *See* 11 CFR 734.104. These OPM regulations, as well as the Commission's current lack of independent statutory authority, could be read to block any additional regulatory restrictions that the Commission might wish to place on the political activities of Commission employees. *See* Statement of Basis and Purpose for 11 CFR 734.104, 59 *Fed. Reg.* 48765. The Hatch Reform Act and the OPM regulatory regime also raises questions regarding the viability of the foundation for Commission's current regulations on the political activity of Commissioners and Commission employees at 11 CFR 7.11. These questions could be

resolved if the Commission's regulatory restrictions on political activity of employees could be explicitly based on independent statutory authority in FECA.

Given its role in the political process, the Commission believes that public support of, or opposition to, any candidate, political party or political committee subject to its jurisdiction by Commissioners or employees could seriously harm its credibility as a nonpartisan agency and thus its ability to fulfill its mission. Therefore, to provide an independent statutory basis for regulating the political activities of its employees beyond the Hatch Reform Act, the Commission recommends that Congress enact a new statutory provision, as part of 2 U.S.C. §437c(f), to prohibit an FEC Commissioner or employee from publicly supporting or opposing a candidate, political party or political committee subject to the FEC's jurisdiction, regardless of whether the activity is performed in concert with a political party, partisan political group or a candidate for partisan public office.

Disclosure

Increasing and Indexing all Registration and Reporting Thresholds for Inflation (2003)

Section: 2 U.S.C. §§431 and 434

Recommendation: The Commission recommends that Congress increase and index for inflation all registration and reporting thresholds.

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

Increasing and then indexing these thresholds would ease the registration and reporting burdens on smaller political committees who, in some cases, are unaware of the Act's registration and reporting provisions. Moreover, by increasing and then indexing the thresholds for inflation, Congress would help to ensure that some committees and persons who lack the resources and technical expertise to comply with the Act's registration and reporting requirements would not have to do so. Finally, because of the effect of inflation, increasing and then indexing the registration and reporting thresholds would continue to capture the significant financial activity envisioned when Congress enacted the FECA.

Electronic Filing of Senate Reports

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

Recommendation: The Commission recommends that Congress require:

- Mandatory electronic filing, at a date to be determined by Congress, for those persons and political committees filing designations, statements, reports or notifications pertaining only to Senate elections if they have, or have reason to expect to have, aggregate contributions or expenditures in excess of \$50,000 in a calendar year.
- Electronically filed designations, statements, reports or notifications pertaining only to Senate elections to be forwarded to the Commission within 24 hours of receipt and to be made accessible to the public on the Internet, if Congress does not change the point of entry for filings pertaining only to Senate elections.

Explanation: Public Law 106-58 required, among other things, that the Commission make electronic filing mandatory for political committees and other persons required to file with the Commission who, in a calendar year, have, or have reason to expect to have, total contributions or total expenditures exceeding a threshold set by the Commission. The Commission set this threshold at \$50,000 and, in the Commission's experience, that threshold has worked well. Extending electronic filing to political committees and persons who file designations, statements, reports or notifications pertaining only to Senate elections would standardize the information received, thereby enhancing public disclosure of campaign finance information. Additionally, data from electronically filed reports is received, processed and disseminated more easily and efficiently, resulting in better use of resources.

Electronic filing (by means other than diskette) is also unaffected by disruptions in the delivery of first class mail, such as those arising from the terrorist attacks on the U.S. Postal Service. As a result of these disruptions, some amendments to Senate campaign reports that were filed via regular mail in late 2001 took months to arrive at the Secretary of the Senate (and the FEC), delaying disclosure. In contrast, amendments electronically filed during the same time period by other types of filers were received and processed in a timely manner.

Filing Reports Using Overnight Delivery, Priority or Express Mail

Section: 2 U.S.C. §§434(a)(2)(A)(i), (a)(4)(A)(ii) and (a)(5)

Recommendation: The Commission recommends that Congress amend 2 U.S.C. §§434(a)(2)(A)(i), (a)(4)(A)(ii) and (a)(5) to offer filers additional means of ensuring timely filing of designations, reports, and statements. Specifically, the Commission recommends that Congress equate the date of receipt by one of the following delivery services with the registered or certified mail postmark dates currently set forth in section 434:

- Overnight delivery with an on-line tracking system that allows delivery status to be

verified; and

- Priority Mail or Express Mail with U.S. Postal Service delivery confirmation.

Explanation: Section 434 of the Act permits committees that do not file electronically to rely upon a registered or certified mail postmark as evidence that their designations, reports and statements were filed on time. For example, quarterly, monthly, semiannual and post-general election reports must be postmarked by the due date, and pre-primary and pre-general election reports must be postmarked 15 days before the election.

Overnight delivery, Priority Mail and Express Mail were not widely used when the registered or certified mail provisions were adopted as part of the 1979 amendments to the FECA. Since that time, these services have come into wide use and are frequently used by political committees to file their FEC designations, reports and statements. Equating the date of receipt by one of these services with the registered or certified mail date would aid the regulated community in its efforts to comply with the Act's reporting requirements.

Overnight delivery, Priority Mail and Express Mail ensure that there is written evidence that a package was mailed and received. Additionally, due to their reliability and speed, the Commission's ability to collect, process and disseminate information would be improved if Congress were to amend 2 U.S.C. §§434(a)(2)(A)(i), (a)(4)(A)(ii) and (a)(5) to include these services.

Contribution Limits

Multicandidate Political Committee Contribution Limitations and Non-multicandidate Political Committee Contribution Limitations (2003)

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

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

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

FECA, prior to BCRA, provided a significantly higher limit on contributions to candidates for political committees with multicandidate status than for those without that status (\$5,000 per election versus \$1,000 per election). BCRA raised and indexed for inflation the contribution limit on non-multicandidate committees (to \$2,000 per election), and such limit eventually will become higher than the limit imposed on

multicandidate committees. Thus, this contribution limit itself one day will create a substantial disincentive to achieve multicandidate committee status.

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

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

Public Financing

Averting Impending Shortfall in Presidential Public Funding Program (revised 2003)

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

Recommendation: The Commission strongly recommends that Congress take immediate action to avert a projected impending shortfall in the Presidential public funding program in the 2004 election year.

Explanation: The Presidential public funding program experienced a shortfall for the election of 2000 because participation in the check-off program is declining and the checkoff is not indexed to inflation while payouts are indexed. This shortfall impacted foremost upon primary candidates. In January 2000, when the U.S. Treasury made its first payment for the 2000 election, it was only able to provide approximately 50 percent of the public funds that qualified Presidential candidates were entitled to receive. Specifically, only \$16.9 million was available for distribution to qualified primary candidates on January 1, 2000, after the Treasury paid the convention grants and set aside the general election grants.¹ However, the entitlement (i.e., the amount that the qualified candidates were entitled to receive) on that date was \$34 million, twice as much as the amount of available public funds. By January 2001, total payments made to primary candidates was in excess of \$61 million.

The Commission projects the temporary shortfall in matching funds that has occurred in the past two presidential elections may recur in 2004. Under the most realistic assumptions, it appears that the January 2004 payout may be only about 53 cents on the dollar. The funds considered 'available' by the Department of Treasury will be about \$19.3 million, the funds to which candidates will be entitled will be about \$36.6 million, and the payouts therefore will have to be reduced accordingly. February and March payouts also will be less than 100%, but by the April 2004 payouts, the temporary

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

shortfall will have been cured under this projection. This is because the check-off proceeds flowing into Treasury Department accounts will be adequate to make up the earlier deficiencies.

The Commission recommends several specific legislative changes. First, the statute should be revised so that Treasury will be able to rely on *expected* available proceeds from the voluntary checkoff, rather than relying solely on actual proceeds *on hand* as of the dates of the matching fund payments. Since large infusions of voluntary checkoff proceeds predictably occur in the first few months of the election year, including such estimated proceeds in the calculation of funds available for matching fund payouts would virtually eliminate the shortfall in the near future. Because estimates for expected payouts are an acceptable part of the calculations (e.g., setting aside sufficient funds to cover general election payouts), estimates of the checkoff proceeds could be incorporated, as well. A very simple change in the wording of 26 U.S.C. §9037 would accomplish this: changing “are available” to “will be available.” Expected payments should be based on sound statistical methods to produce a cautious, conservative estimate of the funds that will be available to cover convention and general election payments.

A second revision in the statute would further the long-term stability of the presidential public funding program: indexing the voluntary checkoff amount to inflation. Although the checkoff amount was increased from \$1 to \$3 beginning with 1993 returns, there was no indexing built in to account for further inflation thereafter. Since the payments are indexed to inflation, the statute all but assures a permanent shortfall.