



Legislative Recommendations

2005

Federal Election Commission

Legislative Recommendations – 2005

Part One: Priority Recommendations

(Compliance) Addition of Commission to the List of Agencies Authorized to Issue Immunity Orders Under Title 18 (2005)

Section: 18 U.S.C. §6001(1)

Recommendation: The Commission recommends that Congress revise 18 U.S.C. §6001(1) to add the Commission to the list of agencies authorized to issue immunity orders according to the provisions of title 18.

Explanation: Congress has entrusted the Commission with the exclusive jurisdiction for the civil enforcement of the Federal Election Campaign Act of 1971, as amended, the Presidential Election Campaign Fund Act and the Presidential Primary Matching Payment Account Act. The Commission is authorized, in any proceeding or investigation, to order testimony to be taken by deposition and to compel testimony and the production of evidence under oath pursuant to subpoena. *See* 2 U.S.C. §437d(a)(3) and (4). However, in some instances, an individual who has been called to testify or provide other information refuses to do so on the basis of his privilege against self-incrimination. There is currently no mechanism whereby the Commission, with the approval of the Attorney General, can issue an order providing limited criminal immunity for information provided to the Commission. Many other independent agencies, including the Federal Communications Commission and the Federal Trade Commission, can grant such immunity.

Federal immunity grants are governed by 18 U.S.C. §§6001-6005. 18 U.S.C. §§ 6002 and 6004(a) provide that if a witness asserts his Fifth Amendment privilege against self-incrimination and refuses to answer questions at any “proceeding before an agency of the United States,” the agency may seek approval from the Attorney General to immunize the witness from criminal prosecution for testimony or information provided to the agency (and any information directly or indirectly derived from such testimony or information). If the Attorney General approves the agency’s request, the agency may then issue an order immunizing the witness and compelling his testimony. Once that order is issued and communicated to the witness, he cannot continue to refuse to testify in the inquiry. The order issued by the agency only immunizes the witness as to criminal liability, and does not preclude civil enforcement action. The immunity conferred is “use” immunity, not “transactional” immunity. The government also can criminally prosecute the witness for perjury or giving false statements if the witness lies during his immunized testimony, or for otherwise failing to comply with the order.

Only “an agency of the United States,” as that term is defined in 18 U.S.C. §6001(1), can avail itself of the mechanism described above. The term is currently defined to mean an executive department or military department, and certain other persons or entities, including a large number of enumerated independent federal agencies.

The Commission is not one of the enumerated agencies. When the provision was added to title 18 in 1970, the enumerated agencies were those that already had immunity granting power, but additional agencies have been substituted or added since then. Adding the Commission as one of the enumerated agencies in 18 U.S.C. §6001(1) would enhance its ability to obtain information relevant to the effective execution of its enforcement responsibilities.

Legislative Language:

Title 18, United States Code is amended in section 6001(1) by inserting “the Federal Election Commission,” after “the Federal Deposit Insurance Corporation,”.

(Compliance) Increase the Record Retention Period from Three Years to Five Years (2005)

Section: 2 U.S.C. §432(d)

Recommendation: The Commission recommends that Congress increase the record retention period for political committees from three years after the related report is filed to five years after the related report is filed. This change would make the record retention requirement coincide with the five-year statute of limitations for litigation and would improve the Commission’s ability to conduct audits and compliance proceedings.

Explanation: Treasurers of political committees are required to preserve all required records and copies of all reports required to be filed for three years after the report is filed. 2 U.S.C. §432(d). The general Federal five-year statute of limitations, 28 U.S.C. §2462, applies to civil enforcement litigation that seeks the imposition of civil penalties. *See FEC v. Williams*, 104 F.3d 237 (9th Cir. 1996), *cert. denied*, 522 U.S. 1015 (1997). The statute of limitations for criminal violations of FECA at 2 U.S.C. §455(a) was increased by BCRA from three years to five years. Increasing the record retention requirement will correspond more closely with both civil and criminal statutes of limitations. It will also enhance the Commission’s ability to obtain information in its civil enforcement and audit proceedings.

Legislative Language:

Section 302(d) of the Federal Election Campaign Act of 1971 (2 U.S.C. §432(d)) is amended by striking the “3” before the phrase “years after the report is filed,” and inserting “5” in lieu thereof.

(Compliance) Persons Who Can Be Named As Respondents (2005)

Section: New section 2 U.S.C. §441j

Recommendation: The Commission recommends that Congress add a provision related to enforcement of the Act that makes it a violation for anyone to aid and abet another party in violating the Act.

Explanation: Many sections of the Act specifically list the parties that can be found in violation of those sections. See, e.g., 2 U.S.C. §§434(a)(1), 441a(f), 441b, and 441f. Frequently, however, parties other than those listed are actively involved in committing the violations. For example, section 441b makes it illegal for an officer or director of a corporation, national bank or labor union to consent to the making of a contribution prohibited under that section. The Commission has seen many instances where these types of organizations have made prohibited contributions which were consented to by individuals who have the authority to approve the making of the contributions, even though those individuals did not hold the titles listed in the statute.

This situation also arises in the context of violations of 2 U.S.C. §441f. That section prohibits anyone from making or knowingly accepting a contribution made in the name of another, or from knowingly allowing his/her name to be used to effect such a contribution. Many times, there are additional parties, not specified in the statute, who are actively involved in carrying out the violation. The court has recognized the Commission's authority to enforce the Act against persons who actively assist in the violation of section 441f, *FEC v Rodriguez*, No. 86-687 Civ-T-10(B) (M.D. Fla. May 5, 1987)(unpublished order denying motion for summary judgment), and the Commission incorporated that decision in its regulations at 11 CFR 110.4(b).

As a result, the law presents an anomalous situation in which persons can be penalized for aiding and abetting in the violation of some provisions of the Act, but not others. This amendment would eliminate this inconsistency and provide for coherent and consistent application of the Act.

This approach would be consistent with the approach in Title 18 of the United States Code (Crimes and Criminal Procedure) which provides for punishment “as a principal” a person who “aids, abets...” the commission of an offense against the United States. See 18 U.S.C. §2. Currently, this provision allows the U.S. government to file criminal charges against those who aid and abet violations of campaign finance laws, while there is no parallel provision for civil enforcement against those who aid and abet.

Legislative Language:

Title III of the Federal Election Campaign Act of 1971 (2 U.S.C. §431 *et seq.*) is amended by adding, at new section 441j, the following:

SEC. 329. AIDING AND ABETTING A VIOLATION

Any person who aids and abets another person in committing a violation of any provision of this Act, or of chapter 95 or chapter 96 of title 26, is liable, under 2 U.S.C. §437g, for the violation as if he committed the violation himself.

(Disclosure) Making Permanent the Administrative Fine Program for Reporting Violations (Revised 2005)

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, 2005.

Explanation: On January 23, 2004, President Bush signed the Consolidated Appropriations Act, 2004, which extended the Administrative Fine Program to cover violations of 2 U.S.C. §434(a) that relate to reporting periods through December 31, 2005. Since the Administrative Fine program was implemented with the 2000 July Quarterly report, the Commission has processed and made public 1,042 cases, with \$1,397,823 in fines collected. The Administrative Fine Program has been remarkably successful: over the course of the program, the number of 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 determined by the estimated 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.

While the Commission strongly supports making the Administrative Fine Program permanent, should Congress decide not to make the program permanent, Congress should, at a minimum, extend the program to cover violations of 2 U.S.C. §434(a) that relate to reporting periods through December 31, 2008.

(Disclosure) Electronic Filing of Senate Reports (Revised 2005)

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

Recommendation: The Commission recommends that Congress require:

- Mandatory electronic filing, to be commenced by a date to be determined by Congress, for all Senate candidates (or those candidates' authorized committees) and 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 (\$50,000). The Bipartisan Campaign Reform Act of 2002 (Public Law No. 107-155) required the Commission to develop software and software standards that will allow information concerning reportable receipts and disbursements to be "transmitted immediately" and posted on the Commission's web site "immediately upon receipt." BCRA also expanded the class of persons required to file electronically, mandating that "each candidate for Federal office (or that candidate's authorized committee) shall use software" that meets the new standards once such software is made available to the candidate. 2 U.S.C. §434(a)(12)(C). The plain language of this statutory revision does not appear to exempt Senate candidates and their authorized committees from the electronic filing requirements, but it does not specify where the electronic reports must be filed. Thus, a plain reading of these new requirements indicates that all Senate candidates and their authorized committees must use software, presumably to file electronically, with the Senate (or with the FEC). (The Commission notes that legislation was introduced in the 108th Congress (S.1874) to mandate electronic filing by Senate campaigns.)

Data from electronically filed reports is received, processed and disseminated more easily and efficiently, resulting in better use of resources. Reports that are filed electronically are normally available within five minutes and detailed data is available in the Commission's databases within 24 to 48 hours. In contrast, the time between the receipt of a report filed through the paper filing system and its appearance on the Commission's web site is 48 hours. It can take as long as 30 days before some detailed data filed on paper is available in the Commission's databases.

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 presence of anthrax powder in the Senate buildings and U.S. Postal Service facilities in 2001 and the more

recent discovery of Ricin in mail delivered to the Senate office buildings. In each case, the disruptions have significantly delayed amendments to Senate campaign reports that were filed via regular mail. In 2001, reports submitted by regular mail took months to arrive at the Secretary of the Senate (and the FEC), delaying disclosure. In contrast, amendments electronically filed during the same time periods by other types of filers were received and processed in a timely manner.

Legislative Language:

Section 304(a)(11)(D) of the Federal Election Campaign Act of 1971 (2 U.S.C. 434(a)(11)(D)) is amended to read as follows: “As used in this paragraph, the terms “designation”, “statement”, or “report” mean a designation, statement or report, respectively, which-- (i) is required by this Act to be filed with the Commission, or (ii) is required under section 302(g) to be filed with the Secretary of the Senate and forwarded by the Secretary to the Commission.”

Section 302(g)(2) of the Federal Election Campaign Act of 1971 (2 U.S.C. 432(g)(2)) is amended by inserting “or 1 working day in the case of a designation, statement, or report filed electronically” after “2 working days”.

Section 304(a)(11)(B) of the Federal Election Campaign Act of 1971 (2 U.S.C. 434(a)(11)(B)) is amended by inserting “, or filed with the Secretary of the Senate under section 302(g)(1) and forwarded to the Commission,” after “Act”.

Part Two: Non-Priority/Substantive or Technical Legislative Recommendations

(Public Financing) Stabilizing the Presidential Public Funding Program (Revised 2005)

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

Recommendation: The Commission strongly recommends that Congress take immediate action to stabilize the Presidential public funding program for upcoming election years.

Explanation: The Presidential public funding program has experienced shortfalls during each of the last three Presidential elections. The shortfalls are a result of declining participation in the check-off program and the fact that the checkoff is not indexed to inflation while payouts are indexed. To date, the shortfalls have principally affected primary candidates, whose funding is given lowest priority under the law.

For example, the Presidential Election Campaign Fund experienced a brief shortfall in February 2004, when the U.S. Treasury made its second payment for the 2004 elections. It was only able to provide approximately 46 percent of the public funds that qualified Presidential candidates were entitled to receive at that time. Specifically, only a little over \$2.3 million was available for distribution to qualified primary candidates on February 1, 2004, 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 \$5 million, twice as much as the amount of available public funds.

The 2004 shortfall could have been considerably more severe had three major party candidates not opted out of public funding for the primary. While this left more money for candidates who chose to participate in the program, the candidates who opted out appeared to do so out of a desire to spend beyond the spending limits. Their ability to operate outside the restrictions of the public funding program may encourage more candidates to opt out in future election years.

The Commission further notes that the 2008 Presidential elections may pose even greater problems than past Presidential elections with respect to a possible shortfall. As was the case in 1988 and 2000, neither major party will include a Presidential incumbent as one of the primary contestants, thus heightening the potential for a more wide open series of primary elections.

The Commission recommends several specific legislative changes. First, to alleviate future shortfalls, the statute should be revised so that Treasury will be able to

¹ The Commission certified a total of \$29.18 million in convention grants, and \$149.2 million was set aside for use by general election candidates.

rely on *expected* 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. The Commission is mindful that other factors also influence the fund’s balance, including the number of candidates participating, the number of contributions they can have matched, the taxpayer participation rate and deposits of repayments. Nevertheless, an indexing of the checkoff amount for inflation would help guarantee some money coming in to replenish the public funding program.

(Contributions/Expenditures) Indexing for Inflation the Limit on Contributions by One Authorized Committee to Another (2005)

Sections: 2 U.S.C. §§432(e)(3)(B) and 441a(c)

Recommendation: The Commission recommends that Congress consider indexing for inflation the contribution limitation that applies when a federal candidate’s authorized committee contributes to the authorized committee of another federal candidate.

Explanation: Under the Act, with certain exceptions, no political committee that supports, or has supported, more than one candidate may be designated as an authorized committee. 2 U.S.C. §432(e)(3)(A). Until recently, the FECA, at 2 U.S.C. §432(e)(3)(B), defined “support” as excluding a contribution by any authorized committee in an amount of \$1,000 or less to an authorized committee of any other federal candidate. This in effect provided a \$1,000 limit for contributions from one federal candidate’s authorized committee to another. As part of the Consolidated Appropriations Act of 2005, Congress raised this limit to \$2,000 to harmonize the limit with that which an individual may contribute to a candidate (found at 2 U.S.C. §441a(a)(1)(A)).

However, as part of the Bipartisan Campaign Reform Act of 2002 (BCRA), Congress indexed for inflation the contribution limits for individuals and other entities. See 2 U.S.C. §441a(c). In 2005, the individual contribution limit as adjusted for inflation increased to \$2,100 per candidate, per election. Congress did not similarly index for inflation the limit found at section 432(e)(3)(B) for contributions from one authorized

committee to another. Thus, unless Congress amends the statute, that limit will remain at \$2,000 while other contribution limits rise with the cost of living.

For consistency purposes, Congress may wish to make a technical amendment to the statute to include the campaign-to-campaign limit at section 432(e)(3)(B) in the list of contribution limits at section 441a(c) that are to be adjusted for inflation.

Legislative Language:

Section 315 of the Federal Election Campaign Act of 1971 (2 U.S.C. §441a) is amended—

- (1) in clause (i) of subparagraphs (c)(1)(B) and (c)(1)(C) by inserting in both “, or in section 432(e)(2)(B) of this title,” after “(h)”;
- (2) in clause (ii) of subparagraph (c)(2)(B), by inserting “or in section 432(e)(2)(B) of this title,” after “(h),”

(Compliance) Modifying Terminology of “Reason to Believe” Finding (Revised 2005)

Section: 2 U.S.C. §437g

Recommendation: The Commission recommends that Congress modify the language pertaining to “reason to believe,” contained at 2 U.S.C. §437g, so as to allow the Commission to open an investigation with a sworn complaint, or after obtaining evidence in the normal course of its supervisory responsibilities. Essentially, this would change the “reason to believe” terminology to “reason to open an investigation.”

Explanation: Under the present statute, the Commission is required to make a finding that there is “reason to believe a violation has occurred” before it may investigate. Only then may the Commission request specific information from a respondent to determine whether, in fact, a violation has occurred. The statutory phrase “reason to believe” is misleading and does a disservice to both the Commission and the respondent. It implies that the Commission has evaluated the evidence and concluded that the respondent has violated the Act. In fact, however, a “reason to believe” finding simply means that, after evaluating the complaint, the respondents’ responses to the complaint (if an externally generated complaint), and information available on the public record, the Commission believes a violation may have occurred. However, the Commission has not yet established that a violation has, in fact, occurred. In order to evaluate the validity of the alleged facts, the Commission needs to investigate, i.e., to seek information, and responses to specific inquiries, from those involved in the alleged activities. It would therefore be helpful to substitute words that sound less accusatory and that more accurately reflect what, in fact, the Commission is doing at this early phase of enforcement.

In order to avoid perpetuating the erroneous conclusion that the Commission believes a respondent has violated the law every time it finds “reason to believe,” the

statute should be amended. Note that the change in terminology recommended by the Commission would not change the standard that this finding simply represents that the Commission believes a violation may have occurred if the facts as described are accurate.

(Compliance) Fraudulent Misrepresentation of Campaign Authority (Revised 2005)
Section: 2 U.S.C. §441h

Recommendation: The Commission recommends that Congress revise the prohibitions on fraudulent misrepresentation of campaign authority to encompass all persons purporting to act on behalf of candidates and real or fictitious political committees and political organizations. In addition, the Commission recommends that Congress remove the requirement that the fraudulent misrepresentation must pertain to a matter that is “damaging” to another candidate or political party.

Explanation: 2 U.S.C. §441h(a) prohibits a Federal candidate or his or her agent or employee from fraudulent misrepresentation such as speaking, writing, or otherwise acting on behalf of a candidate or political party committee on a “matter which is damaging to such other candidate or political party” or an employee or agent of either. The Commission recommends that this prohibition be extended to any person who would disrupt a campaign by such unlawful means, rather than being limited to candidates and their agents and employees. Proving damages as a threshold matter is often difficult and unnecessarily impedes the Commission’s ability to pursue persons who employ fraud and deceit to undermine campaigns. Fraudulent solicitations of funds on behalf of a candidate or political party committee were recently prohibited in BCRA without any required showing of damage to the misrepresented candidate or political party committee. *See* §441h(b).

In addition, while both §§441h(a) and (b) directly address fraudulent actions “on behalf of any other candidate or political party,” they do not address situations where a person falsely claims to represent another type of political committee or claims to be acting on behalf of a fictitious political organization, rather than an actual political party or a candidate. For example, the narrow scope of the existing language does not bar fraudulent misrepresentation or solicitation on behalf of a corporate or union separate segregated fund or a non-connected political committee.

Congress should consider revising the statute to strengthen these important prohibitions on fraudulent activity.

Legislative Language:

Section 322 of the Federal Election Campaign Act of 1971 (2 U.S.C. §441h) is amended:

- (1) in subsection (a), by striking “who is a candidate for Federal office or an employee or agent of such a candidate”;
- (2) in paragraph (a)(1), by striking “or political party or employee or agent thereof on a matter which is damaging to such other candidate or political

party or employee or agent thereof” and inserting in lieu thereof “, political party, other real or fictitious political committee or organization, or employee or agent of any of the foregoing,”;

- (3) in paragraph (b)(1), by striking “or political party or employee or agent thereof” and inserting in lieu thereof “, political party, other real or fictitious political committee or organization, or employee or agent of any of the foregoing,”.

(Contributions/Expenditures) Multicandidate Political Committee Contribution Limitations and Non-multicandidate Political Committee Contribution Limitations (Revised 2005)

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. It is important to note that a committee cannot opt out of multicandidate status. Instead, under section 441a(a)(4), a committee automatically triggers multicandidate status once it meets the specific requirements listed above.

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 from \$20,000 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.

Legislative Language:

Section 315 of the Federal Election Campaign Act of 1971 (2 U.S.C. §441a) is amended—

- (1) in subparagraph (a)(2)(B), by striking “\$15,000” and inserting in lieu thereof “\$25,000”;
- (2) in clause (i) of subparagraph (c)(1)(B), by inserting “(a)(2)(A), (a)(2)(B),” after “(a)(1)(B),”;
- (3) in subparagraph (c)(1)(C), by inserting “(a)(2)(A), (a)(2)(B),” after “(a)(1)(B),”;
- (4) in clause (ii) of subparagraph (c)(2)(B), by inserting “(a)(2)(A), (a)(2)(B),” after “(a)(1)(B),”.

(Disclosure) Increasing and Indexing all pre-BCRA Registration and Reporting Thresholds for Inflation (Revised 2004)

Sections: 2 U.S.C. §§431 and 434

Recommendation: The Commission recommends that Congress increase and index for inflation all pre-BCRA 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 pre-BCRA 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.

(Contributions/Expenditures) Application of the Biennial Contribution Limit (2005)

Section: 2 U.S.C. §441a(a)(1)(B), (a)(3), (c) and (h)

Recommendation: The Commission recommends that Congress make a technical amendment to the law to ensure that the biennial contribution limit for individuals contributing to candidates, at 2 U.S.C. §441a(a)(3), is applied on a two-calendar-year basis, rather than on an election cycle basis. The Commission also recommends that the technical amendment encompass other limits indexed for inflation, including the

contribution limit for individuals contributing to national party committees, at 2 U.S.C. §441a(a)(1)(B) and the contribution limit for national party committees contributing to a Senate candidate, at 2 U.S.C. §441a(h).

Explanation: As part of BCRA, Congress replaced the \$25,000 annual contribution limit for individuals, previously codified at 2 U.S.C. §441a(a)(3), with a new biennial contribution limit based on a two-calendar-year cycle (i.e., a period of time beginning with January 1 of an odd-numbered year and ending on December 31 of the next even-numbered year). Prior to that statutory change, contributions to a candidate counted against an individual's annual limit for the year in which the candidate's election was held, regardless of when the contribution was made. This approach caused confusion among donors and led to inadvertent violations of the law. The biennial limit eliminates this confusion by counting contributions against the limit for the period during which the contributions are made.

The biennial contribution limit is among those that Congress chose to index for inflation. See 2 U.S.C. §441a(c)(1)(B) and (C). Section 441a(c)(1)(C) indicates that the indexed limits apply on the first day after the general election and remain in effect until the next general election, i.e., on an election-cycle basis, rather than on a two-calendar-year basis. This is contrary to the wording of section 441a(a)(3) as revised by BCRA.

To the extent that the inconsistency between sections 441a(a)(3) and 441a(c)(1)(C) may have been an oversight, the Commission recommends that Congress make a technical amendment to section 441a(c) specifying that while other indexed limits apply on an election-cycle basis, the indexed biennial limit applies to contributions made between January 1 of odd-numbered years and December 31 of even-numbered years. Such a change will ensure that the biennial contribution limit is applied on a two-calendar-year basis, as described in BCRA's revision of section 441a(a)(3).

For consistency purposes, Congress should also specify that the biennial contribution limit will be applied on a two-calendar-year basis, as described in BCRA's revision of section 441a(a)(3) to the limit on contributions to a national party committee from an individual (located in section 441a(a)(1)(B)) and to the limit on contributions from a national party committee to a Senate campaign (located in section 441a(h)). The Commission notes that the biennial limit technically does not apply to a national party committee and only applies to contributions made by individuals, but wants to ensure consistency in the statutory and regulatory applications of the limit.

Legislative Language:

Section 315 of the Federal Election Campaign Act of 1971 (2 U.S.C. §441a) is amended in subparagraph (c)(1)(C) by striking the "s" in "limitations", by striking "subsections (a)(1)(A), (a)(1)(B), (a)(3) and (h)," by inserting "subparagraph (a)(1)(A)" in lieu thereof, and by inserting after the period, "In the case of limitations under subparagraph (a)(1)(B), paragraph (a)(3) and subsection (h), such increases shall remain in effect for the two-year

period beginning on January 1 of the odd-numbered year and ending on December 31 of the next even-numbered year".

(Disclosure) Declaration of Intent to Expend Personal Funds (2005)

Sections: 2 U.S.C. §§434(a)(6)(B) and 441a-1(b),

Recommendation: The Commission recommends that Congress eliminate the requirement that candidates disclose on their Statement of Candidacy the amount by which they intend to exceed the personal spending threshold established by the Millionaires' Amendment.

Explanation: The so-called Millionaires' Amendment, enacted as part of the Bipartisan Campaign Reform Act of 2002 (BCRA), permits a candidate whose opponent's personal spending exceeds certain threshold amounts to accept individual contributions at increased limits and, in some cases, lifts the applicable coordinated party expenditure limit. In drafting this legislation, Congress initially considered using the opposing candidate's declaration of intent to exceed the threshold amount as the trigger for increased limits. As a result, the BCRA modified section 434 and added new 441a-1(b) to require candidates to notify the Commission or Secretary of the Senate (as appropriate) and each opposing candidate of their intention to spend personal funds when they file their Statement of Candidacy.

Ultimately, Congress determined that *actual* spending in excess of the threshold amount, rather than intended spending, should serve as the trigger for increased limits, and enacted a second notification requirement tied to that principle. §§434(a)(6)(B)(iii) and (iv) and 441a-1(b)(1)(B) and (C). To fulfill that requirement, the Commission created new FEC Form 10, which candidates fax to the government and to each opposing candidate when their spending exceeds the threshold amount. Based on that filing, opposing candidates can determine if they qualify for increased limits.

It appears that the notification of actual spending was meant to replace the notification of intent to spend; yet both provisions were included in the final legislation. The requirement that candidates declare their intent to spend personal funds in excess of the threshold amount and to notify their opponents serves no practical purpose and places an unnecessary burden on candidates. Therefore, to remedy what may have been an oversight during the drafting of the legislation, and to relieve candidates of this unnecessary filing burden, the Commission recommends that Congress make a technical amendment to the statute to remove the "Declaration of Intent" sections at 434(a)(6)(B)(ii) and 441a-1(b)(1)(B).

(Miscellaneous) Creation of Senior Executive Service Positions (Revised 2005)

Sections: 2 U.S.C. §437c(f)(1); 5 U.S.C. §3132(a)(1)

Recommendation: The Commission recommends that Congress amend 5 U.S.C. §3132(a)(1) by deleting subsection (C), which specifically excludes the Federal Election Commission from eligibility for the creation of Senior Executive Service positions. The

Commission also recommends that Congress revise section 437c(f)(1) to state that the Staff Director and the General Counsel will be paid at rates comparable to those for the Senior Executive Service. This would replace the current provisions stating that they would be paid at Level IV and Level V of the Executive Schedule respectively.

Explanation: The Commission believes that two statutory changes are needed to bring the Commission's personnel structure in line with that of other comparable federal agencies. This would ensure that the Commission is able to compete with other government agencies and the private sector in recruiting and retaining key management personnel, including the Staff Director and General Counsel. These changes would also enable the Commission, like other agencies, to move to merit-based pay systems for top executives.

Under the current compensation structure, statutorily mandated in 2 U.S.C. §437c(f)(1), the Staff Director and General Counsel are paid \$140,000 and \$131,400 respectively. Thus, the Staff Director earns only \$5,164 more than a GS-15, Step 10, and the General Counsel earns \$271 less than a GS-15, Step 9. The Staff Director and General Counsel have significant responsibilities and oversight duties with respect to both administrative and legal areas, as well as management over almost all agency personnel. Congress recently restructured the SES compensation system into a performance-based, payband system. National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108-136, Nov. 24, 2003). For 2005, individuals serving in SES positions are compensated in a payband that goes up to \$149,200 (or \$162,100 in agencies with a certified SES performance appraisal system). The Commission proposes a revision providing that the Staff Director and the General Counsel shall be paid at a rate no higher than the highest rate for Senior Executive Service employees in agencies that do not have a certified SES performance appraisal system. By providing the possibility for salary rates higher than those provided in the Act currently, the revision will ensure that the Commission can retain highly qualified individuals to serve in those positions as well as enable it to remain competitive in the marketplace for federal executives when a vacancy arises. At the same time, by not placing the Staff Director and General Counsel positions in the SES system itself, the Commission retains its salary-setting prerogatives free of merit system protection rights.

The Commission is prohibited by law from creating Senior Executive Service positions within the agency. As a result, its senior managers other than the Staff Director and the General Counsel are employed in Senior Level positions. This pay and benefits structure hinders the Commission's ability to recruit talented executives from other agencies and retain high-performing senior managers. The persons in the Senior Level positions (two Deputy Staff Directors, a Deputy General Counsel, and four Associate General Counsels) oversee major programmatic areas and supervise not only staff, but other managers as well. Although these seven executive positions are designated as Senior Level, OPM's Guide to the Senior Executive Service indicates that the Senior Level system is for non-executive positions. In fact, the OPM Guide provides that supervisory duties should occupy less than 25% of a Senior Level employee's time. At

the Commission, by contrast, supervisory and executive responsibilities occupy 100% of the time of Senior Level employees.

In terms of total compensation and benefits, individuals serving in statutory executive-level appointments and Senior Level positions are under-compensated for the responsibilities and duties required by these positions, and under-compensated when compared to individuals serving in similar capacities at virtually all other Federal agencies. Compensating the Staff Director and General Counsel at SES rates would be a useful remedy. Conversion of Senior Level managers to SES positions would provide the Commission with the flexibility needed to allow higher pay ranges for them and enable them to receive performance awards and other benefits not available to statutory officers and/or Senior Level employees. Perhaps most significantly, this includes the ability to carry over many more days of annual leave than Senior Level employees. Given that Senior Level managers frequently work extended periods in which they cannot use much leave, especially in the aftermath of BCRA, an executive's ability to accumulate and defer leave is not only an important benefit to him or her, but is also a valuable tool for the agency to ensure that executives are available to accomplish agency priorities.

Accordingly, the Commission believes that the positions of Staff Director and General Counsel should be compensated at a rate of pay not to exceed the SES rates. In addition, Senior Level positions within the agency should be converted to SES positions and any future Senior Level positions should be created in the SES. There is a trend toward performance-based pay for executives throughout the government; revising the compensation of the statutory officers and converting Senior Level positions into SES positions would ensure performance-based pay is similarly emphasized for the Commission's senior executive positions. The Commission is confident that these changes would assist in retaining highly qualified individuals and attracting superior candidates when vacancies arise, thus permitting the Commission to remain competitive in the marketplace for federal executives.

Legislative Language:

- (1) Section 3132(a)(1)(C) of Title 5 of the United States Code is amended by striking "Federal Election Commission, or".
- (2) Section 310(f)(1) of the Federal Election Campaign Act of 1971 (2 U.S.C. §437c(f)(1)) is amended by striking the second and third sentences, and replacing them with: "The staff director and general counsel shall be paid at rates not to exceed the range of rates of basic pay in effect for the Senior Executive Service under 5 U.S.C. 5382."

(Contributions/Expenditures) Modifying the Definition of Federal Election Activity to Simplify Compliance for State, District and Local Party Committees Where Certain Employees Spend More than 25 Percent of Their Time In Connection with a Federal Election (2004)

Section: 2 U.S.C. §431(20)(A)(iv)

Recommendation: The Commission recommends that Congress amend 2 U.S.C. §431(20)(A)(iv) to allow State, district and local political party committees to comply with that provision of the Act in biweekly, semimonthly or monthly periods, in conformity with the period of time a party committee selects for payroll purposes. Currently, section 431(20)(A)(iv) requires compliance in monthly periods.

Explanation: Under BCRA, “services provided during any month by an employee of a State, district or local committee of a political party who spends more than 25 percent of that individual’s compensated time during that month on activities in connection with a Federal election” are Federal election activity. 2 U.S.C. §431(20)(A)(iv). Several party committees have informed Commission staff that this provision imposes a difficult compliance burden because the committees’ payroll periods frequently are different than monthly periods. The compliance burden for party committees will be lessened if such committees can elect a section 431(20)(A)(iv) compliance period that is the same as the payroll period used by the committees (e.g., biweekly, semimonthly or monthly payroll period).

For example, a party committee that conducts payroll operations on a biweekly basis can also determine on a biweekly basis whether or not an employee meets the 25 percent test, and thus whether the employee must be compensated from the committee’s Federal account.

Legislative Language:

Section 301(20)(A)(iv) of the Federal Election Campaign Act of 1971 (2 U.S.C. §431(20)(A)(iv)) is amended:

- (1) by striking “any month” and inserting in lieu thereof “a payroll period of a State, district or local committee of a political party”;
- (2) by striking “a State, district or local committee of a political party” and inserting in lieu thereof “that party committee”;
- (3) by striking “that month” and inserting in lieu thereof “that payroll period”;
- (4) by inserting at the end the following: “For purposes of this subparagraph, a payroll period may be a biweekly, semimonthly or monthly period.”.

(Contributions/Expenditures) Federal Candidates Soliciting, Receiving or Spending Funds (2004)

Section: 2 U.S.C. §441i(e)(1) and (e)(2)

Recommendation: The Commission recommends that Congress amend 2 U.S.C. §441i(e)(1) to clarify the circumstances in which recall elections, referenda and initiatives, recounts, redistricting, legal defense funds, and related activities fall within

the scope of activities that are “in connection with a Federal election” and are thus subject to the §441i(e)(1) restrictions. The Commission also recommends that Congress clarify whether under §441i(e)(1)(A) a candidate or officeholder may solicit, direct, or transfer funds to entities not required to file reports with the Commission.

In addition, the Commission recommends that Congress amend 2 U.S.C. §441i(e)(1)(B) to make clear that this provision does not prohibit a Federal candidate or officeholder from spending his or her own personal funds in connection with an election other than an election for Federal office, and recommends that Congress amend 2 U.S.C. §441i(e)(2) to clarify that the phrase, “refers only to such State or local candidate,” does not apply to non-communicative activity.

Explanation: Section 441i(e)(1)(A) prohibits a Federal candidate or officeholder and certain entities from soliciting, receiving, directing, transferring, spending, or disbursing, in connection with a Federal election funds that are outside the limitations, prohibitions, and reporting requirements of the Act. Because these prohibitions are limited in scope to specific activities conducted “in connection with an election for Federal office,” the Commission requests additional guidance from Congress as to the meaning of this phrase in this context. Specifically, Congress should consider amending the statute to clarify the circumstances in which it intends recall elections, referenda and initiatives, recounts, redistricting, candidate litigation costs and legal defense funds to be encompassed and thus subject to the restrictions in §441i(e).

In addition, because this prohibition extends to the solicitation of funds not “subject to the ... reporting requirements of the Act,” Congress should consider resolving the potential ambiguity that might arise in situations where a candidate wishes to solicit funds on behalf of an entity in connection with a Federal election, including Federal election activity, when that entity is not yet (or may not ever be) required to file reports with the Commission. Even though such an organization’s funds are not subject to the reporting requirements of the Act, they may be subject to the limitations and prohibitions of the Act.

Section 441i(e)(1)(B) similarly prohibits a Federal candidate or officeholder and certain entities from soliciting, receiving, directing, transferring, spending, or disbursing, in connection with a *non*-Federal election, funds that are outside the limitations and prohibitions of the Act. As written, the verbs “spend” and “disburse” in section 441i(e)(1)(B) arguably apply to a Federal candidate’s or officeholder’s donation of his or her personal funds in connection with a State or local candidate or ballot measure election. This provision is meant to prevent corruption or the appearance of corruption of Federal candidates and officeholders resulting from large soft money donations made at their behest. However, there is little or no chance of such corruption in the context of a Federal candidate or officeholder donating his or her own funds. Thus, to the extent section 441i(e)(1)(B) can be read to prevent such individual donations, the Commission recommends that Congress amend this provision to remove the ambiguity.

Section 441i(e)(2) is an exception to the general rule at 2 U.S.C. §441i(e)(1)(B); the latter provision prohibits a Federal candidate or officeholder from soliciting, receiving, or spending funds in connection with a non-Federal election that are outside the amount limitations and source prohibitions of the Act. In order to qualify for the section 441i(e)(2) exception, a Federal candidate or officeholder must meet two requirements: (1) any solicitation, receipt, or spending of funds by the Federal candidate or officeholder must be permitted under State law; (2) such solicitation, receipt, or spending must “refer only to such State or local candidate, or to any other candidate for the State or local office sought by such candidate, or both.” The second condition is unclear insofar as how non-communicative activity, such as receiving funds, can “refer to” any candidate. The Commission recommends that Congress clarify this language to make clear that the second condition refers to public communications, as defined in 2 U.S.C. §431(22).

Legislative Language:

Section 323(e)(1)(B) of the Federal Election Campaign Act of 1971 (2 U.S.C. §441i(e)(1)(B)) is amended by inserting “(except for the candidate’s personal funds)” after “spend funds” and after “disburse funds”.

Section 323(e)(2) of the Federal Election Campaign Act of 1971 (2 U.S.C. §441i(e)(2)) is amended by inserting “, in the case of a public communication,” prior to the phrase “refers only to”.