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FEDERAL ELECTION COMMISSION
Washington, DC 20463

NOV 14 2003

MEMORANDUM

AGENDA ITEM
For Meeting of: 11-20-03

SUBMITTED LATE

TO: The Commission

THROUGH: James A. Pehrkon
Staff Director

FROM: Lawrence H. Norton
General Counsel

Rosemary C. Smith
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Acting Assistant General Counsel

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SUBJECT: Draft Final Rules and Explanation and Justification on Leadership PACs

On December 26, 2002, the Commission published a notice of proposed rulemaking (NPRM) entitled "Leadership PACs." That NPRM proposed rules to address the question of whether an unauthorized committee may become affiliated with an authorized committee, and the consequences of any possible affiliation. See 67 Fed. Register 78753. The attached document grew out of a proposal from Commissioners Mason and Thomas and reflects discussions between their offices and OGC, and discussions with the Regulations Committee.

Attachment

FEDERAL ELECTION COMMISSION

11 CFR Parts 100, 102

[Notice 2003 -__]

Leadership PACs

AGENCY: Federal Election Commission.

ACTION: Final rules and transmittal of regulations to Congress.

SUMMARY: The Federal Election Commission is revising portions of its regulations to address the relationship between the authorized committee of a Federal candidate or officeholder and entities that are not authorized committees but are associated with the Federal candidate or officeholder. The final rules state that authorized committees and entities that are not authorized committees shall not be deemed to be affiliated. Thus, certain disbursements by those unaffiliated entities will be treated as in-kind contributions to the candidates. Further information is contained in the Supplementary Information that follows.

EFFECTIVE DATE: [Insert date 30 days after date of publication in the Federal Register.]

FOR FURTHER INFORMATION CONTACT: Ms. Mai T. Dinh, Acting Assistant General Counsel, Mr. J. Duane Pugh Jr., Senior Attorney, or Mr. Anthony T. Buckley, Attorney, 999 E Street, NW, Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

SUPPLEMENTARY INFORMATION: The Commission is adopting final rules at 11 CFR 100.5(g)(5) to address the relationship between authorized committees and unauthorized committees that are associated with a Federal candidate or officeholder, more commonly known as "leadership PACs," as well as other entities that are not Federal political committees, but are established, financed, maintained, or controlled by, or acting on behalf of, a Federal candidate or officeholder (collectively "leadership PACs"). Rather, the final rule is a neutral attempt to regularize Commission treatment of these entities. Previously, the Commission has examined this relationship on a case-by-case basis to determine whether transactions between an authorized committee and a leadership PAC constituted in-kind contributions or resulted in affiliation under 11 CFR 100.5(g). In promulgating rules of general applicability, the Commission is changing its case-by-case approach and is deciding to analyze these transactions as in-kind contributions exclusively and not to engage in an affiliation analysis in examining the relationship between an authorized committee and a leadership PAC. As such, under the new rules, an authorized committee and a leadership PAC will not be deemed to be affiliated. Additionally, the adoption of these rules requires a change in the Commission's regulations at 11 CFR 102.2(b)(1)(i), which, in part, governs the disclosure of the names of all unauthorized committees affiliated with an authorized committee.

The Commission published a Notice of Proposed Rulemaking on December 26, 2002, 67 FR 78753 ("NPRM"). Written comments were due by January 31, 2003. Comments were received from: the Campaign and Media Legal Center; the Center for Responsive Politics and Common Cause and Democracy 21 (joint comment); Cleta Mitchell, Esq.; Paul E. Sullivan, Esq.; Republicans Members of the U.S. House of

Representatives Tom DeLay, Roy Blunt, Deborah Pryce, David Dreier, John Doolittle, Jack Kingston, Tom Reynolds, Bob Ney, Tom Davis, Phil English, Greg Walden, Buck McKeon, Hal Rogers, and Pete Sessions, and the American Liberty PAC, American Success PAC, Federal Victory Fund, Help America's Leaders PAC, Pacific Northwest Leadership Fund, People for Enterprise, Trade, and Economic Growth, Together for Our Majority PAC, and the 21st Century Fund (joint comment); the Rely on Your Beliefs Fund; and Lyn Utrecht, Esq., Eric Kleinfeld, Esq., Jim Lamb, Esq., and Pat Fiori, Esq. (joint comment). The comments are available at http://www.fec.gov/register.htm under "Leadership PACs." The Commission held a public hearing on February 26, 2003, at which it heard testimony from seven witnesses: Donald McGahn, Esq.; Cleta Mitchell, Esq.; Paul E. Sullivan, Esq.; Lawrence M. Noble, Esq.; Paul Sanford, Esq.; Glen Shor, Esq.; and Donald Simon, Esq. Transcripts of the hearing are available at the website identified above. Please note that, for purposes of this document, "comment" and "commenter" apply to both written comments and oral testimony at the public hearing.

Under the Administrative Procedures Act, 5 U.S.C. 553(d), and the Congressional Review of Agency Rulemaking Act, 5 U.S.C. 801(a)(1), agencies must submit final rules to the Speaker of the House of Representatives and the President of the Senate, and publish them in the Federal Register at least 30 calendar days before they take effect. The final rule that follows was transmitted to Congress on >> >>, 2003.

Explanation and Justification

11 CFR 100.5 Political Committee

I. Background

The Federal Election Campaign Act of 1971, as amended ("FECA"), 2 U.S.C. 431 et seq., defines "authorized committee" as "the principal campaign committee or any other political committee authorized by a candidate under section 432(e)(1) of this title to receive contributions or make expenditures on behalf of such candidate." 2 U.S.C. § 431(6); see also 11 CFR 100.5(f)(1). "Unauthorized committee" is defined in the Commission's regulations as "a political committee which has not been authorized in writing by a candidate to solicit or receive contributions or make expenditures on behalf of such candidate, or which has been disavowed pursuant to 11 CFR 100.3(a)(3)." 11 CFR 100.5(f)(2) (emphasis added). An unauthorized committee may accept contributions in greater amounts than those allowed to be accepted by an authorized committee, compare 2 U.S.C. 441a(a)(1)(C) with 2 U.S.C. 441a(a)(1)(A), and, if it attains multicandidate committee status,[1] may contribute greater amounts to Federal candidates than those allowed to be contributed by an authorized committee. Compare 2 U.S.C. 441a(a)(2)(A) with 2 U.S.C. 441a(a)(1)(A).

The term "leadership PAC" lacks a formal definition. Generally, such PACs "are formed by individuals who are Federal officeholders and/or Federal candidates. The monies these committees receive are given to other Federal candidates to gain support

[1] A committee achieves multicandidate status when it has been registered under 2 U.S.C. 433 for not less than six months, has received contributions from more than 50 persons, and except for a State political party organization, has made contributions to five or more candidates for federal office. 2 U.S.C. 441a(a)(4); 11 CFR 100.5(c)(3).

when the officeholder seeks a leadership position in Congress, or are used to subsidize the officeholder's travel when campaigning for other Federal candidates. The monies may also be used to make contributions to party committees, including State party committees in key states, or donated to candidates for State and local office." Notice of Proposed Rulemaking on Leadership PACs, 67 FR 78753, 78754 (Dec. 26, 2002) (citations omitted).

Pursuant to 2 U.S.C. 441a(a)(5), "all contributions made by political committees established or financed or maintained or controlled by any corporation, labor organization, or any other person, including any parent, subsidiary, branch, division, department, or local unit of such corporation, labor organization, or any other person, or by any group of such persons, shall be considered to have been made by a single political committee. . . ."

Under the Commission's regulations, committees that are affiliated, that is, committees that are established, financed, maintained, or controlled by the same corporation, labor organization, person or group of persons, et al., share a single limitation on the amount they can accept from any one contributor. 11 CFR 100.5(g), 110.3(a)(1), 110.3(a)(3)(ii). Typically, under FECA and the Commission's regulations, the Commission has treated "leadership PACs" as unauthorized political committees, and usually has not found them to be affiliated with authorized committees sharing contribution limits of affiliated committees.

In 1986 the Commission began a rulemaking to address affiliation in general, including leadership PACs. The Commission determined in 1989, however, to maintain its existing approach, noting that "the Commission has concluded that this complex area

is better addressed on a case-by-case basis." Affiliated Committees, Transfers, Prohibited Contributions, Annual Contribution Limitations and Earmarked Contributions; Final Rule, 54 FR 34098, 34101 (Aug. 17, 1989). The Commission embarked on this rulemaking in 2002, in part, to clarify its historic approach in examining the relationship and transactions between a candidate's authorized committee and a leadership PAC associated with that candidate. NPRM at 78755.

II. Alternatives in the NPRM

The NPRM set forth three different ways of addressing the question of affiliation between an authorized committee and a leadership PAC. The first two proposals (Alternatives A and B) would have established factors for finding affiliation, with all of the consequences of affiliation applying as a result. The third proposal (Alternative C) sought to codify the Commission's existing practice.

Alternative A set out individual factors in proposed section 100.5(g)(5)(i), the presence of any one of which would result in affiliation. The factors were: (1) the candidate or officeholder, or their agent has signature authority on the unauthorized committee's checks; (2) funds contributed or disbursed by the unauthorized committee are authorized or approved by the candidate or officeholder or their agent; (3) the candidate or officeholder is clearly identified as described in 11 CFR 100.17 on either the stationery or letterhead of the unauthorized committee; (4) the candidate, officeholder or his campaign staff, office staff, or immediate family members, or any other agent, has the authority to approve, alter or veto the unauthorized committee's solicitations, contributions, donations, disbursements or contracts to make disbursements; and (5) the unauthorized committee pays for travel by the candidate, his campaign staff or office

staff in excess of $10,000 per calendar year. The second factor would have been satisfied even if the officeholder or candidate or agent authorized or approved only some and not all of the disbursements.

Alternative B described two separate tests under which affiliation would have been found. Under proposed section 100.5(g)(5)(i)(A), affiliation would have existed if any one of the following factors were present: (1) the candidate or officeholder has signature authority on the entity's checks; (2) the candidate or officeholder must authorize or approve disbursements over a certain minimum amount; (3) the candidate or officeholder signs solicitation letters and other correspondence on behalf of the entity; (4) the candidate or officeholder has the authority to approve, alter or veto the entity's solicitations; (5) the candidate or officeholder has the authority to approve, alter, or veto the entity's contributions, donations, or disbursements; or (6) the candidate or officeholder has the authority to approve the entity's contracts. Under this alternative, the authorized committee and the leadership PAC would have been considered affiliated because the candidate or officeholder exercised sufficient influence to conclude that the candidate or officeholder established, financed, maintained, or controlled the leadership PAC.

If none of the above factors were present, affiliation could still be found under Alternative B of proposed section 100.5(g)(5)(i)(B) if any three of the following factors were present: (1) the campaign staff or immediate family members of the candidate or officeholder have the authority to approve, alter or veto the entity's solicitations; (2) the campaign staff or immediate family members of the candidate or officeholder have the authority to approve, alter, or veto the entity's contributions, donations, or disbursements;

(3) the campaign staff or immediate family members of the candidate or officeholder have the authority to approve the entity's contracts; (4) the entity and the candidate or officeholder's authorized committees share, exchange, or sell contributor lists, voter lists, or other mailing lists directly to one another, or indirectly through the candidate or officeholder to one another; (5) the entity pays for the candidate or officeholder's travel anywhere except to or from the candidate or officeholder's home State or district; (6) the entity and the candidate or officeholder's authorized committees share office space, staff, a post office box, or equipment; (7) the candidate or officeholder's authorized committee(s) and the entity share common vendors; and (8) the name or nickname of the candidate or the officeholder, or other unambiguous reference to the candidate or officeholder appears on either the entity's stationery or letterhead.

Alternative C would have largely continued the Commission's current treatment of leadership PACs by treating a leadership PAC as affiliated with a candidate or officeholder's authorized committees unless the leadership PAC undertook activities that would indicate its primary purpose is not to influence the nomination or election of the candidate or officeholder involved. These activities are: 1) only making disbursements to raise funds for party committees or to influence the nomination or election of persons other than the candidate or officeholder involved; 2) avoiding references to the candidacy or potential candidacy of the sponsoring candidate or officeholder in any solicitations, communications or other materials of the unauthorized committee; 3) requiring that the candidate or officeholder make no reference to his or her candidacy or potential candidacy during his or her speeches or appearances on behalf of the leadership PAC; and 4) requiring that specified expenses would have to be reimbursed by a presidential

campaign committee if the candidate or officeholder becomes a presidential candidate. If the leadership PAC did not conform its activities to these limitations, under Alternative C, it would be deemed to be an authorized committee.

III. Comments

1. Question Of Affiliation

One commenter thought that Alternative A was contrary to FECA and not mandated by the Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155, 116 Stat. 81(2002) ("BCRA"). Another commenter believed that this alternative would defeat the purpose of leadership PACs, and that it was sufficiently onerous that Federal officeholders could not and would not establish them. A third commenter agreed with this latter point, arguing that its terms went beyond what the authors of BCRA envisioned. One commenter disagreed with Alternative A's general structure, arguing that no one single factor is sufficient to prove affiliation absent express authorization by the candidate.

Other commenters disapproved of Alternative A because it did not allow for sufficient opportunities to find affiliation. One commenter stated that the alternative contained only a per se list and thus ignored numerous factors that indicated a relationship existed between two committees. Another commenter argued that Alternative A was insufficiently comprehensive to encompass all relationships covered by the statutory term "established, financed, maintained, or controlled." Similarly, one commenter supported many of the factors of Alternative A, but believed it did not include enough factors and was not sufficiently flexible.

With respect to Alternative B, one commenter argued that it also was contrary to FECA and not mandated by BCRA. Another commenter felt that it essentially defeated the purpose of leadership PACs and was sufficiently onerous that the only conclusion to be drawn is that

Federal officeholders could not and would not establish them. A third commenter agreed with this latter point, stating that Alternative B was a more burdensome version of Alternative A.

The commenter who disagreed with the general structure of Alternative A concurred that most of the eight factors listed should be considered in determining affiliation, but thought setting a specific number to be met could present problems. Of the three commenters who thought Alternative A was not sufficiently comprehensive, all three supported the structure of Alternative B, but did not feel it included enough factors. Each of these commenters proposed variations on Alternative B that included additional factors. Two of these commenters added a third option for finding affiliation, based on a "totality of the circumstances." The commenter who did not include such an option argued that the rule should only apply to political committees under FECA and political organizations organized under 26 U.S.C. 527.

One commenter stated that Alternative C was a useful starting point for addressing the issue of the status of leadership PACs in the related candidate's own election. Another commenter thought that Alternative C provided a basis for a reasonable set of criteria defining and governing leadership PACs. This commenter suggested that certain amendments to Alternative C would be appropriate: 1) specifically authorizing leadership PACs to contribute to state and local candidates and political parties within the limits and pursuant to state laws; 2) eliminating provisions that prohibit references to the related Federal candidate in solicitations or public appearances; and 3) requiring candidates and officeholders who become candidates for President and qualify for primary or general election financing to repay to the presidential campaign committee any expenses paid by the leadership PAC for travel, polling, staff, or other expenses made on behalf of the presidential campaign effort. Another commenter stated that Alternative C's proposed conditions are cumbersome and do not significantly improve the

Commission's regulatory framework. This commenter suggested that the Commission should presume a leadership PAC is unaffiliated unless its activities are for the purpose of influencing the election of the connected Federal candidate.

Another commenter argued that Alternative C continues a current system that fails to properly consider affiliation, and that the mere absence of a leadership PAC attempt to influence the specific officeholder's election should not be conclusive evidence that the committees are not affiliated. This commenter argued that such a standard ignores the "established, financed, maintained, or controlled by" test in FECA. . Two other commenters disapproved of Alternative C because it maintains the status quo.

2. Impact of BCRA

The Commission also sought comment as to how BCRA impacted a potential rule governing leadership PACs. Five commenters took issue with a suggestion in the NPRM that BCRA might require a finding of affiliation between an authorized committee and a leadership PAC. One commenter noted that one of BCRA's sponsors, Senator John McCain, had stated that, under BCRA's terms, "[a] Federal officeholder or candidate is prohibited from soliciting contributions for a Leadership PAC that do not comply with federal hard money source and amount limitations. Thus, the federal officeholder or candidate could solicit up to $5,000 per year from an individual or PAC for the federal account of the Leadership PAC and an additional $5,000 from an individual or PAC for the non-federal account of the Leadership PAC." 148 Cong. Rec. S2140 (Mar. 20, 2002). Thus, this commenter argued that BCRA does not contemplate the automatic affiliation of leadership PACs with authorized committees.

This same commenter noted that a number of leaders of the House of Representatives, all of whom voted in favor of BCRA, have leadership PACs. One commenter argued that BCRA does not require or even suggest that the Commission change its approach with respect to leadership PACs and the proper focus is on whether the activities at issue are "for the purpose of influencing the election of the individual who is connected with the PAC." In contrast, other commenters argued for an interpretation that BCRA prohibits Federal candidates and officeholders from maintaining soft money leadership PACs.

The Commission determined in the Soft Money rulemaking that BCRA does not allow a Federal candidate or officeholder to raise up to $5,000 separately for the Federal and non-Federal accounts of leadership PACs directly or indirectly established, financed, maintained, or controlled by that Federal candidate or officeholder. Rather, for their leadership PACs, they are limited to raising a total of $5,000 from any one source, per election cycle. See Final Rules on Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 FR 49064, 49107 (July 29, 2002) ("Although candidate PACs and Leadership PACs are not specifically mentioned, the legislative history indicates that 2 U.S.C. 441i(e)(1) is intended to prohibit Federal officeholders and candidates from soliciting any funds for these committees that do not comply with FECA's source and amount limitations.") Therefore Federal candidates will not violate BCRA merely by establishing and raising money for their leadership PACs within the amount limitations and source prohibitions of FECA and BCRA.

3. Other Concerns

Two commenters, a leadership PAC and a joint comment from leadership PACs and Members of the House of Representatives, stated that their support of challengers helped those candidates who are often at a fundraising disadvantage when compared to incumbents.[2] One commenter argued that leadership PAC support for open seat candidates is sometimes critical to the viability of these candidates. Another commenter urged that the rule should be clear to "encourage and validate" the important role of these committees. This same commenter argued that leadership PACs should be encouraged as an avenue for Federal officeholders to support local and state parties and candidates in a manner that is disclosed to the Commission. This commenter also noted the importance of leadership PACs in their role of replacing the loss of non-federal funds due to BCRA.

In response to the commenters arguing that BCRA precludes the result of the final rule issued today, the Commission concludes that BCRA's structure and wording answer these concerns. BCRA contemplates Federal candidate control of unauthorized committees. Otherwise, there would be no need to apply "hard money" limits. 2 U.S.C. 441i(e)(1). Thus, BCRA cannot be read generally to prohibit leadership PACs or to require that they be affiliated with a candidate's authorized committee. To the contrary, had Congress believed it was mandating a per se rule of affiliation between the two types of committees, BCRA would have gone further to require that contributions to those committees be aggregated with contributions to the candidate's authorized committee. BCRA requires no such aggregation.

[2] One commenter cited the Commission recent approval of campaign payment of candidate's salaries under certain circumstances as recognition of the importance of challengers receiving adequate funds.

IV. Final Rule

In previous advisory opinions and compliance matters, the Commission has examined leadership PACs whose activities were significantly intertwined with the activities of a Federal candidate's authorized committee. In such circumstances, the Commission had two competing, but equally valid, theories it could pursue. The Commission could consider whether the leadership PAC's actions made it affiliated with the authorized committee, or the Commission could consider the committees unaffiliated and determine whether the leadership PAC made in-kind contributions to the authorized committee. The Commission has declined in several instances to find that a leadership PAC was affiliated with a candidate's authorized committee, even where it was apparent that the committees were controlled by the same person. See affiliation factors at 11 CFR 100.5(g). Instead, the Commission exercised its discretion to determine that a leadership PAC made in-kind contributions to the related Federal candidate's campaign. Nonetheless, the Commission maintained its discretion to pursue either of the two competing approaches. In making these findings, the Commission typically found that committees formed by a candidate to further his or her campaign were affiliated; those formed for other purposes were not.

New section 100.5(g)(5) clarifies the relationship between an authorized committee and a leadership PAC by removing the possibility that a candidate's authorized committee can be affiliated with an entity that is not an authorized committee, even if the candidate established, financed, maintained, or controlled that entity.

In promulgating this final rule, the Commission has considered the 25-year history of Commission enforcement and policy precedent (see, e.g., Advisory Opinions

1978-12, 1984-46, 2003-12; MURs 1870, 2897 and 3740) and the comments received in response to the NPRM. Alternatives A and B, with per se affiliation factors, would have been too rigid and overbroad. They would have created a basis for affiliation in situations where interaction between an authorized committee and a leadership PAC would not merit such designations if those interactions were undertaken by committees where neither committee was authorized in writing by the candidate. Although Alternative C reflects the Commission's historic approach to leadership PACs, it suggests that the Commission would examine them on a case-by-case basis. While the Commission has discretion to pursue either an affiliation or in-kind contributions analysis under FECA on a case-by-case basis when considering the circumstances surrounding leadership PACs, the Commission has decided, as a matter of policy, to adopt the in-kind contribution analysis as a rule of general applicability as they pertain to leadership PACs. See Michigan v. EPA, 268 F.3d 1075, 1087 (D.C. Cir. 2001) (discussing agency's discretion to choose rulemaking or case-by-case adjudicative procedure, citing SEC v. Chenery, 332 U.S. 174, 203 (1947) and Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 543 (1978)).

This decision does not affect affiliation between an authorized committee and joint fundraising committee under 2 U.S.C. 432(e)(3)(ii) and 11 CFR 102.13(c)(1). Nor does it affect the ability of a national committee of a political party to be designated as the principal campaign committee of that party's presidential candidate under 2 U.S.C. 432(e)(3)(i) and 11 CFR 102.13(c)(2). Nor does this rule allow a leadership PAC to provide support to the Federal candidate or officeholder with whom it is associated in amounts different than those available to other similar political committees. Rather, a

leadership PAC's provision of funds, goods, or services to any authorized committee will be treated as a contribution as defined in 2 U.S.C. 431(8), and thus limited to the amount at either 2 U.S.C. 441a(a)(1)(A) or 441a(a)(2)(A) per election, depending on whether the leadership PAC has attained multicandidate committee status, unless the activity falls within an exception to the definition of "contribution" or "expenditure," or is a fair market value exchange of goods or services for the usual and normal charge. See also 2 U.S.C. 431(a).

The Commission considered the issue of whether its treatment of leadership PACs comports with the purpose of the affiliation rule: the protection of contribution limitations. In adopting new section 100.5(g)(5), the Commission is applying the affiliation rule separately to distinct types of political committees to enforce different contribution limits. Typically, committees that become affiliated already operate under similar limitations on the amounts of contributions that they can make and accept. The fact of affiliation simply means that they now share one common limitation. One of the complications in affiliating authorized committees with leadership PACs is that these types of committees are subject to different amount limitations for making and receiving contributions. Requiring them to abide by a single contribution limit means choosing a limitation that is not intended for one of those committees.[3] Consequently, it is logical to view an authorized committee and a leadership PAC as separate committees, and

[3] Indeed, the NPRM sought comment on which of the two separate contribution limitations applicable to authorized and unauthorized committees should obtain in the event the Commission determined such committees would be affiliated. The one commenter who addressed this question believed that the FECA allowed the Commission no discretion in this matter, and that the lower contribution limits applicable to the authorized committee would have to be applied to the leadership PAC.

transactions between them that benefit the authorized committee as contributions and not as a basis to find them affiliated.

Further, the consequences of new 11 CFR 100.5(g)(5) with respect to leadership PAC contribution limits are no different after the promulgation of this rule than before. Leadership PACs operating as unauthorized political committees—that is, political committees whose purpose is to support more than one Federal candidate—may receive up to $5000 per year from individuals, other persons, and multicandidate committees, and once they qualify as multicandidate committees, may contribute up to $5000 per candidate per election. See 2 U.S.C. 432(e)(3), 441a(a)(1)(C) and 441a(a)(2)(A); 11 CFR 110.1(d) and 110.2(b). Although such leadership PACs are not exposed to the consequences of affiliation with authorized committees, leadership PACs may still be deemed affiliated with other unauthorized committees. See 11 CFR 100.5(g)(2), (3), and (4); see also Advisory Opinion 1990-16 (where the Commission found that a committee organized under State law and devoted to supporting candidates for election to state and local office, that had previously been the campaign committee of the State's then-governor, was affiliated with a Federal political committee that had been organized by the governor and that had as its purpose supporting candidates for Federal office.). Thus, the rule in new 11 CFR 100.5(g)(5) provides no new avenue for circumventing the separate contribution limitations applicable to authorized and unauthorized committees.

The Commission concludes that since its first examination of leadership PACs, these committees cannot be assumed to be acting as authorized committees. Rather, these PACs are worthy of the same treatment as other unauthorized committees that operate without presumptions as to their status. To the extent that leadership PACs are

used to pay for costs that could and should otherwise be paid for by a candidate's authorized committee, such payments are in-kind contributions, subject to the Act's contribution limits and reporting requirements.

The Commission also concludes that in instances when leadership PAC activity results in an in-kind contribution to a candidate, Commission regulations adequately regulate such activity. 11 CFR 100.52(a) and (d), 109.20, 109.21, 109.23, 109.37; See MUR 5376 (Campaign America/Quayle); Report of the Audit Division on Bauer for President 2000, Inc., FEC Agenda Doc. No. 02-37, dated May 8, 2002 (considered in the Open Sessions on May 16, 2002 and May 23, 2002) (recommendations with respect to Campaign for Working Families PAC); MUR 3367 (Committee for America/Haig). These regulations, which define "contribution" and which address coordinated activities, will serve to ensure that leadership PACs are not used improperly to support the "associated" candidate's campaign.

The final rule at 11 CFR 100.5(g)(5) properly places the enforcement focus on the activity at issue. To support the proposition that rules governing in-kind contributions properly capture this activity, the Commission need look no further than its recently-issued final rule "to treat certain expenses incurred by multicandidate committees as in-kind contributions benefiting publicly funded Presidential candidates." Final Rules on Public Financing of Presidential Candidates and Nominating Conventions, 68 FR 47386, 47407 (Aug. 8, 2003); 11 CFR 9034.10; 11 CFR 110.2(l). Although that rule was aimed at a somewhat different range of activity, the explanation and justification stated, "For other situations not addressed [in the new regulations governing pre-candidacy activity with a nexus to a Presidential campaign], including when expenditures are paid for by

multicandidate committees after candidacy, the general provisions describing in-kind contributions at 11 CFR 100.52(a) and (d), 109.20, 109.21, 109.23, and 109.37 would apply." Final Rules on Public Financing of Presidential Candidates and Nominating Conventions, 68 FR at 47407. The Commission intends symmetry between its regulations with respect to leadership PACs and its new rules applicable to certain pre-candidacy activity benefiting Presidential candidates by multicandidate committees.

The Commission also noted that the final rules in the Public Financing of Presidential Candidates and Nominating Conventions, 68 FR at 47408, "in no way address situations where the Commission determines that the multicandidate political committee and the candidate's principal campaign committee are affiliated under 11 CFR 100.5(g)(4)." With the new rule, the Commission has decided to examine these situations with a contribution analysis, instead of an affiliation analysis.

By its terms, new 11 CFR 100.5(g)(5) also applies to entities that are not political committees. Recently, the Commission examined the situation of a State ballot initiative committee that had been established by a Federal candidate and officeholder, but was not a registered Federal committee. AO 2003-12. The Commission found that the relationship between the ballot initiative committee and the Federal candidate and officeholder was sufficiently similar to the relationship between a traditional leadership PAC and its connected Federal candidate to warrant treating the Federal candidate and officeholder and the ballot initiative committee in the same manner as the Commission had historically treated leadership PACs for affiliation purposes. Therefore, under new 11 CFR 100.5(g)(5), the Commission would not examine the transactions between the Federal candidate and officeholder and the ballot initiative committee to determine

whether the ballot initiative committee is affiliated with the Federal candidate and officeholder's authorized committee. Rather, the Commission would analyze the facts to determine whether the ballot initiative committee made an in-kind contribution to the Federal candidate and officeholder. Furthermore, the Commission will continue to use the affiliation factors in 11 CFR 300.2(c) to determine whether the Federal candidate and officeholder or his agent directly or indirectly established or finance or maintained or controlled the ballot initiative committee for purposes of the restrictions on the solicitation, receipt, transfer or disbursement of non-Federal funds in 2 U.S.C. 441i(c).

V. Effect On Previous Advisory Opinions

As the Commission noted earlier, these new rules merely codify the discretion the Commission has exercised when the question of affiliation between an authorized committee and an unauthorized committee has come before it in the past. Thus, the final rules supersede Advisory Opinions 1978-12, 1984-46, 1987-12, 1990-7, 1991-12, and 1993-12, only to the extent these advisory opinions suggest that an authorized committee can be affiliated with an unauthorized committee.

11 CFR 102.2 Statement of Organization: Forms and Committee Identification Number

The Commission's previous reporting regulations at 11 CFR 102.2(b)(1)(i) provided, in part, for the eventuality of an authorized committee being affiliated with an unauthorized committee, and mandated that a principal campaign committee disclose on its statement of organization the names and addresses of all unauthorized committees with which it is affiliated. Because the new rule in 11 CFR 100.5(g)(5) eliminates the possibility of a principal campaign committee, i.e. an authorized committee, being

affiliated with an unauthorized committee, the provisions of section 102.2(b)(1)(i) addressing such a possibility are no longer valid. Accordingly, the Commission is revising section 102.2(b)(1)(i) to eliminate these provisions. Pursuant to the revised section 102.2(b)(1)(i), a principal campaign committee will still be required to disclose the names and addresses of all other authorized committees that have been authorized by its candidate. While this revision was not addressed in the NPRM, it is a logical and technical change necessitated by the new 11 CFR 100.5(g)(5).

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

The Commission certifies that the final rules do not have a significant economic impact on a substantial number of small entities. The basis of this certification is that these rules only codify current Commission practice with respect to whether certain entities established, financed, maintained, controlled by, or acting on behalf of, Federal candidates, are affiliated with authorized committees of federal candidates. Accordingly, these rules do not impose any additional costs on the contributors or the committees. Further, the primary purpose of the proposed revisions is to clarify the Commission's rules regarding affiliation and limits on contributions. This does not impose a significant economic burden because entities affected are already required to comply with the Act's requirements in these areas.

List of Subjects

11 CFR Part 100

Elections

11 CFR Part 102

Registration, organization, and recordkeeping by political committees.

For the reasons set out in the preamble, the Federal Election Commission amends subchapter A of Chapter I of Title 11 of the Code of Federal Regulations as follows:

PART 100 – SCOPE AND DEFINITIONS

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

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

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

§ 100.5 Political committee (2 U.S.C. 431(4), (5), (6)).

* * * * *

(g) * * *

(5) Notwithstanding paragraphs (g)(2) through (g)(4) of this section, no authorized committee shall be deemed affiliated with any entity that is not an authorized committee.

PART 102 - REGISTRATION, ORGANIZATION, AND RECORDKEEPING BY POLITICAL COMMITTEES

3. The authority citation for part 102 continues to read as follows:

Authority: 2 U.S.C. 432, 433, 434(a)(11), 438(a)(8), 441d.

4. In § 102.2, paragraph (b)(1)(i) is revised to read as follows:

§ 102.2 Statement of organization: Forms and committee identification number (2 U.S.C. 433(b), (c)).

* * * * *

(b) * * *

(1) * * *

(i) A principal campaign committee is required to disclose the names and addresses of all other committees that have been authorized by its candidate~~, and all other unauthorized committees that affiliated with the principal campaign committee~~. Authorized committees~~, and unauthorized committees that are affiliated,~~ need only disclose the name of their principal campaign committee.

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Ellen L. Weintraub
Chair
Federal Election Commission

DATED: _____

BILLING CODE: 6715-01-U