PLAINTIFFS' EXHIBIT 194

FEDERAL ELECTION COMMISSION

11 CFR Parts 102, 104 and 106

[Notice 1990-6]

Methods of Allocation Between Federal and Non-Federal Accounts; Payments; Reporting

AGENCY: Federal Election Commission.

ACTION: Final rules; transmittal of regulations to Congress.

SUMMARY: The Commission has revised its regulations at 11 CFR Parts 102, 104 and 106. These regulations implement the contribution and expenditure limitations and prohibitions established by 2 U.S.C. 441a and 441b, provisions of the Federal Election Campaign Act of 1971, as amended ("the Act" or "FECA"), 2 U.S.C. 431 *et seq.*, by providing for allocation of expenses for activities that jointly benefit both federal and non-federal candidates and elections. The amended rules apply to party committees, nonconnected committees, and (under certain circumstances) separate segregated funds making disbursements on behalf of both federal and non-federal candidates and elections. The revisions provide guidance to committees on how to allocate such costs by creating a comprehensive set of allocation rules, and by enhancing the Commission's ability to monitor the allocation process to ensure that prohibited funds are excluded from federal election activities. In addition, the revisions clarify how committees are to allocate expenses attributable to more than one clearly identified candidate. The revisions also specify additional information that is to be reported to the Commission by each type of committee covered by the rules. Further information on these revisions is provided in the supplementary information which follows.

DATES: Further action, including the announcement of an effective date, will be taken after these regulations have been before Congress for 30 legislative days pursuant to 2 U.S.C. 438(d). A document announcing the effective date will be published in the Federal Register.

FOR FURTHER INFORMATION CONTACT: Ms. Susan E. Propper, Assistant General Counsel, 999 E Street, NW., Washington, DC 20463. (202) 376-5690 or (800) 424-9530.

SUPPLEMENTARY INFORMATION: The Commission is publishing today the final text of revisions to its regulations at 11 CFR parts 102, 104 and 106. These revisions set forth rules for allocation of expenses for four categories of activity that jointly benefit both federal and non-federal candidates and elections. These include (1) Administrative expenses such as rent, utilities, office supplies, and salaries; (2) the direct costs of fundraising programs or events; (3) state and local party activities exempt from the definitions of "contribution" and "expenditure" under the Act, wher conducted in conjunction with non-federal election activities; and (4) generic voter drive activity such as voter identification, voter registration, and get-out-the-vote campaigns. The new rules set percentages and methods by which committees are to allocate the costs of these activities between their federal and non-federal accounts. The rules also provide procedures for how committees are to pay the bills resulting from these activities, and require disclosure of information related to allocated expenses and disbursements.

The final allocation rules published today are the result of a long and complex rulemaking process. The Commission first considered revising its allocation regulations in 1984. In November of that year, the Commission received a petition for rulemaking urging it to address the alleged use of funds raised outside of the Act's requirements for the prohibited purpose of influencing federal elections. The Commission received five written comments on the petition, in response to a Notice of Availability issued on January 4, 1985. See 50 FR 477. On December 18, 1985, the Commission published a Notice of Inquiry seeking further input on the alleged use of undisclosed funds to influence federal elections (see 50 FR 51535), and received seventeen comments in response. In addition, a public hearing was held on January 29, 1986, at which three witnesses testified. After reviewing all comments and testimony, the Commission voted on April 17, 1986, to deny the petition for rulemaking. See 51 FR 15915.

The petitioner subsequently filed suit in federal district court for judicial review of the denial of the petition. The court rejected the claim that the Commission was required to prohibit the allocation of any expenses to non-federal accounts. The court did, however, direct the Commission to revise its allocation regulations to give party committees more guidance in complying with the FECA. See *Common Cause* v. *Federal Election Commission*, 692 F. Supp. 1391, 1396 (D.D.C. 1987). The Commission issued a new Notice of Inquiry in compliance with this order on February 23, 1988 (see 53 FR 5277), and received three comments in response.

On September 29, 1988, the Commission issued a Notice of Proposed Rulemaking ("NPRM") in which it sought comments on proposed revisions to its allocation regulations. See 53 FR 38012. In the Notice, the Commission presented four alternative proposals, along with draft regulatory language for each alternative. These proposals ranged from complex sets of rules providing options of allocation methods for different categories of activity and varying requirements for different types of election years, to a uniform requirement that all committees with federal and non-federal accounts must allocate their expenses on a fixed percentage basis between those accounts. A public hearing was held on December 15, 1988, at which six witnesses presented testimony on the issues raised in the rulemaking. These witnesses represented national committees of both major political parties, a state party committee, and two public interest organizations. The Commission also received sixteen written comments, including several submitted after the close of the comment period while the Commission was considering drafts of final allocation rules.

In addition to the Notice of Proposed Rulemaking and the public hearing, the Commission initiated two other measures to obtain input relevant to allocation of expenses for federal and non-federal activities. On February 10, 1989, the Commission sent a seven-page questionnaire to the 110 Democratic and Republican state party chairs, soliciting information on current allocation practices in the states. Twenty-two responses to the questionnaire were received, providing a substantial amount of new information supplementing the comments previously submitted. In addition, on April 17, 1989, the Commission sent letters and questions to the chief fundraiser for each of the major political parties during the 1988 election year. These questions focused on (1) the fundraisers' roles in their parties' presidential campaigns and in the national party committees during the 1988 election cycle, (2) the relationship between the national party committees' fundraising activities and the presidential campaigns, and (3) the national parties' involvement in raising and spending money not subject to federal limits and prohibitions.

Each of these forms of input provided valuable information which serves as the basis for the revised rules published today. These rules also incorporate elements of each of the four proposals previously published in the Notice of Proposed Rulemaking.

Section 438(d) of title 2, United States Code, requires that any rules or regulations prescribed by the Commission to carry out the provisions of title 2 of the United States Code be transmitted to the Speaker of the House of Representatives and the President of the Senate thirty legislative days before they are finally promulgated. These regulations were transmitted to Congress on June 15, 1990.

Explanation and Justification

In regulations promulgated in 1977, the Commission required political committees active in both federal and non-federal elections to allocate their administrative expenses between separate federal and non-federal accounts "in proportion to the amount of funds expended on federal and non-federal elections, or on another reasonable basis." 11 CFR 106.1(e). Since 1978, the Commission has also recognized that such committees may allocate the costs of certain activities that affect both federal and non-federal elections, provided that they defray a reasonable portion of those costs with funds permissible under the Act. See Advisory Opinion 1978-10.

The revised regulations published today provide committees with significantly more guidance on how they are to allocate their administrative expenses and costs for combined federal and non-federal activities. Unlike current 11 CFR 106.1(e), which addresses only administrative expenses, the revisions specify explicit percentages or methods for allocation of each category of allocable expense by each type of committee covered by the rules. See §§ 106.5 and 106.6. Similarly, new paragraph 106.1(a) extends the allocation and reporting requirements of current 11 CFR 106.1(a) to cover payments that include both amounts attributable to specific non-federal candidates and amounts attributable to specific federal candidates, as well as expenditures on behalf of specific federal candidates alone. The new rules also ensure that the public record reflects how committees are allocating their shared federal and non-federal expenses by requiring more detailed disclosure of such allocation, to be reported on a new set of reporting forms. See § 104.10. In addition, the revised rules significantly alter the procedure by which committees are to pay the bills for their allocable activities. For the first time, committees are required to pay their allocable expenses from their regular federal accounts or from new separate allocation accounts, rather than making such payments from their non-federal accounts as permitted under the Commission's current policy. The new rules include specific payment and reimbursement procedures to allow the Commission to track the flow of non-federal funds transferred into federal accounts, and to ensure that such funds are used solely to pay the non-federal portion of a committee's allocable expenses. See paragraphs 106.5(g) and 106.6(e). Finally, the new rules provide additional safeguards against the use of impermissible funds in federal election activity by expanding the disclosure of receipts and disbursements by national party committees, and by creating a presumption that funds solicited by party committees with reference to federal candidates or elections are solicited for the purpose of influencing federal elections. See §§ 102.5(a)(3), 104.8, and 104.9.

Part 102—Registration, Organization and Recordkeeping by Political Committees

Section 102.5 Organizations Financing Political Activity in Connection With Federal and Non-federal Elections, Other Than Through Transfers and Joint Fundraisers

Revised § 102.5 adds a technical amendment regarding transfers of non-federal funds into a committee's federal accounts, and sets forth a presumption regarding funds solicited by party committees. Current 11 CFR 102.5(a)(1)(i) prohibits committees from transferring funds from a non-federal account to a federal account for any reason. Under the new rules, committees are required to make such transfers for the limited purpose of paying for allocated expenses. See paragraphs 106.5(g) and 106.6(e). Thus, paragraph (a)(1)(i) has been amended to allow transfers of non-federal funds into a federal account as provided in paragraphs 106.5(g) and 106.6(e) of the new rules.

New paragraph (a)(3) creates a presumption that any funds solicited by a party committee with reference to a federal candidate or election are raised for the purpose of influencing a federal election, and are thus subject to the prohibitions and limitations of the Act. This presumption may be rebutted by demonstrating that the funds were solicited with express notice that they would not be used for federal election purposes. Paragraph (a)(3) has been added to the rules to address the common perception, reflected in several comments, that funds prohibited under the Act have been solicited on behalf of political parties with the implication that they would be used to benefit federal candidates when, in fact, the funds could only be used for non-federal election activity. This provision, in combination with current 11 CFR 102.5(a)(2) regarding funds deposited in federal accounts, will ensure that funds collected by party committees are used for the purpose for which they were solicited, and will make clear to donors that funds prohibited under the Act will only be used to support non-federal candidates and elections.

Part 104—Reports by Political Committees

Section 104.8 Uniform Reporting of Receipts

Revised § 104.8 requires national party committees to disclose the source and amount of receipts by their non-federal accounts and building funds, as well as by their federal accounts as required under the current rules. The section has therefore been retitled to reflect its broadened application to both federal and non-federal receipts.

Paragraph (a), which governs disclosure of receipts by all reporting committees, has been amended to make clear that it only applies to committee's federal accounts. New paragraphs (e) and (f) require national party committees to also disclose information about receipts to their non-federal accounts and buildings funds. The language of paragraphs (e) and (f) parallels that of paragraph (a), applying the same itemization threshold to all three types of accounts. National party committees are to disclose this information on a separate Schedule A for each of their accounts, but shall list their non-federal and building fund receipts as memo entries, in order to isolate them from the federal receipts that are summarized for each reporting period.

This broadened disclosure provision has been added to the rules based on the Commission's belief that it will help eliminate the perception that prohibited funds have been used to benefit federal candidates and elections. This approach was supported by several comments on the rules. Representatives of the major parties' national committees testified that their committees did not object to broader disclosure at the national party level. However, several commenters strongly objected to such disclosure at either state or local party levels, and some Commissioners expressed concern about the FEC's jurisdiction to require such reporting by state and local party committees. Based, in part, on this input, the Commission has limited the reporting of non-federal receipts to national party committees. The Commission also took into consideration

the national committees' primary involvement in Presidential and other federal elections, such committees' ability to comply with more complicated reporting requirements, and the fact that there is no comprehensive reporting of non-federal activity by national party committees that is comparable to the non-federal reporting by state and local party committees at the state level.

Section 104.9 Uniform Reporting of Disbursements

This section has been amended to require national party committees to disclose disbursements from their non-federal accounts and building funds, as well as from their federal accounts as required under the current rules. These changes parallel the expansion of § 104.8 regarding national committee disclosure of non-federal receipts. Section 104.9 has also been retitled to reflect its broadened application to both federal and non-federal disbursements.

Paragraph (a), which governs disclosure of expenditures by all reporting committees, has been amended to make clear that it only applies to a committee's federal accounts. New paragraphs (c) and (d) require national party committees to also disclose information about disbursements from their non-federal accounts and building funds. The language of paragraphs (c) and (d) parallels that of paragraph (a), applying the same itemization threshold to all three types of accounts. In addition, new paragraph (e) requires national party committees to report each transfer of funds from their non-federal accounts to the non-federal account of a state or local party committee. National party committees are to disclose this information on a separate Schedule B for each of their accounts, but shall list their non-federal and building fund disbursements as memo entries, in order to isolate them from the federal expenditures that are summarized for each reporting period.

These revisions, together with revised § 104.8, have been added to the rules based on the belief that increased disclosure will help eliminate the perception that prohibited funds have been used to benefit federal candidates and elections. Like the disclosure of non-federal receipts, the reporting of disbursements from non-federal accounts has been limited to national party committees.

Section 104.10 Reporting of Expenses Allocated Among Candidates and Activities

Section 104.10 sets forth the rules for the reporting of information related to a committee's allocable expenses. These rules only apply to committees that qualify as "political committees" under the Act. See 2 U.S.C. 431(4). Current 11 CFR 104.10 addresses only the reporting of allocation of expenditures made on behalf of more than one specific candidate. In contrast, the revised section also covers the reporting of allocation of a committee's administrative expenses and its costs for fundraising, exempt activities, and generic voter drive activity. The new section has therefore been retitled to reflect its broadened application to the reporting of expenses allocated between federal and non-federal activities as well as expenses allocated between specific candidates.

New § 104.10 is based on the reporting provisions described in the Notice of Proposed Rulemaking. However, several additional requirements have been added to the final rules to reflect the changed procedure by which payment for allocable activities is made. Under that procedure, committees are to pay their allocable expenses from their regular federal accounts or from new separate allocation accounts, which are also federal accounts and therefore subject to the full reporting requirements of the Act. See §§ 106.5(g) and 106.6(e). Revised § 104.10 requires committees to itemize each transfer of non-federal funds to their federal or allocation accounts, as well as each allocated disbursement made from those accounts.

These rules were designed to provide sufficient information to allow the Commission to monitor committees' allocation procedures, while reflecting the Commission's commitment to avoiding overly burdensome reporting requirements. The information required is the minimum necessary to track the flow of non-federal funds into federal accounts, and to ensure that the use of such funds is strictly limited to payment for the non-federal share of allocable activities. In contrast, any information that could be deduced from a committee's reports or calculated by the Commission will not be required on the new reporting forms, which are being designed to implement these reporting provisions.

It should also be noted that these rules have been placed in a different section than the reporting provisions described in the Notice of Proposed Rulemaking. The NPRM alternatives addressed reporting in draft § 106.5, which was intended to cover all allocation issues. In the revised regulations, these requirements have been moved to § 104.10, so that all reporting requirements will continue to be located together in part 104 of the regulations.

Paragraph 104.10(a) Expenses Allocated Among Candidates

This paragraph expands current 11 CFR 104.10 to more clearly describe the rules for reporting the allocation of expenses attributable to specific candidates. In the case of expenditures allocated between more than one clearly identified federal candidate, political committees must report the amount of each in-kind contribution, independent expenditure, or coordinated party expenditure attributed to each candidate. In the case of payments involving both expenditures on behalf of one or more specific federal candidates and disbursements on behalf of one or more specific non-federal candidates, political committees with separate federal and non-federal accounts shall report the payments according to the instructions included in new paragraph 104.10(a). These instructions parallel those contained in paragraph 104.10(b) for the reporting of other allocable costs, but make clear the added requirements for reporting costs attributable to specific federal candidates. In paragraphs (a)(1) through (a)(4), the new rules set forth procedures by which committees are to report their allocation ratios used, as well as transfers of funds between their accounts and disbursements made from their federal accounts for the purpose of paying for activities conducted on behalf of both specific federal and specific non-federal candidates. Committees are instructed to assign a unique identifying title or code to each such activity, in order to track the funds designated to pay for its costs. These identifying titles and codes are also intended to decrease the burden placed on reporting committees, by allowing them to state relevant allocation ratios one time only, rather than repeating them for every itemized expense. Thus, it is especially critical that committees use precisely the same identifier each time they refer in their reports to a particular activity.

Paragraph 104.10(b) Expenses Allocated Among Activities

This new paragraph sets forth the rules by which political committees with separate federal and non-federal accounts are to report their allocation of administrative expenses and the costs of fundraising, exempt activities, and generic voter drive activity. In paragraphs (b)(1) through (b)(5), the new rules set forth procedures by which committees are to report their allocation ratios used for each category of activity.

as well as transfers of funds between their accounts and disbursements made from their federal accounts for the purpose of paying their allocable expenses. In contrast to the allocation of administrative expenses and generic voter drive costs, for which one ratio is calculated for each category as a whole, committees are to calculate a separate allocation ratio for each fundraising program or exempt activity because the allocation methods used for these categories would be expected to yield different ratios for each such event. See paragraphs 106.5 (e) and (f) and 106.6(d). Committees are also instructed to assign a unique identifying title or code to each fundraising program or exempt activity, in order to track the funds designated to pay for its costs.

Part 106—Allocations of Candidate and Committee Activities

Section 106.1 Allocation of Expenses Between Candidates

Current 11 CFR 106.1 contains both the rules for allocation between specific candidates and the rules for allocation of administrative expenses. In the revised regulations, the Commission has created new §§ 106.5 and 106.6 to govern allocation of administrative expenses and the costs of all activities not attributable to specific candidates, including fundraising events, exempt activities, and generic voter drive activity. Thus, new § 106.1 is limited to allocation of expenses attributable to more than one clearly identified candidate, and has been retitled accordingly. Paragraph 106.1(a) has been revised to clarify how committees are to allocate expenses for activities conducted on behalf of several specific candidates. Paragraph 106.1(e) has been revised to cross-reference the reader to new §§ 106.5 and 106.6 for the rules governing allocation of administrative expenses, and the costs of fundraising, exempt activities, and generic voter drive activity.

Paragraph 106.1(a) General Rule

This paragraph has been expanded to more fully describe the methods by which committees are to allocate expenses attributable to more than one specific candidate, including in-kind contributions, independent expenditures, and coordinated party expenditures. These rules present no change in Commission policy as to when a given expense constitutes an in-kind contribution or particular type of expenditure. Rather, the rules are intended to provide guidance as to how committees are to allocate such expenses once they are determined to be in-kind contributions, independent expenditures, or coordinated party expenditures.

The new paragraph retains the general rule of current 11 CFR 106.1(a) that expenses shall be attributed to each candidate according to the benefit reasonably expected to be derived. The revision adds examples of the general rule, specifying allocation methods for two different types of activity that may be conducted on behalf of several specific candidates.

The first example stated in the rules covers publications and broadcast communications, which are to be allocated according to the space or time devoted to each candidate as compared to the total space or time devoted to all candidates. If the costs of a phone bank are attributable, in whole or in part, to one or more federal candidates as an in-kind contribution, independent expenditure, or coordinated party expenditure, then those costs should be allocated on a similar basis, according to the number of questions or statements devoted to each candidate.

The second example stated in the rules covers the costs of fundraising events where funds are collected by one committee for more than one clearly identified candidate. Such costs are to be allocated according the amount of funds received on behalf of each candidate as compared to the total receipts by all candidates. This situation should not be confused with that described in 11 CFR 102.17, which concerns joint fundraising activities conducted by more than one committee. The Commission intends that any other types of activity not covered by the stated examples are to be allocated according to the general rule of this paragraph when those activities are conducted on behalf of more than one clearly identified candidate.

New paragraph 106.1(a) also makes clear that committees are to use the designated methods to allocate costs between specific federal candidates, as well as to allocate payments involving both expenditures on behalf of specific federal candidates and disbursements on behalf of specific non-federal candidates. In the case of the latter type of payments, political committees with separate federal and non-federal accounts are to make such payments according the same procedures required for paying administrative expenses and the costs of joint federal and non-federal activities (see paragraphs 106.5(g) and 106.6(e)), but shall report such payments according to paragraph 104.10(a). It should be noted that the methods set forth in paragraph 106.1(a) will also be used by publicly-financed presidential general election candidates, who are to allocate the costs of joint activities pursuant to 11 CFR 9002.11(b)(3). Such candidates must keep records of their allocable expenses pursuant to paragraph 104.10(a).

Paragraph 106.1(e)

This paragraph cross-references the reader to new §§ 106.5 (for party committees) and 106.6 (for nonconnected committees and separate segregated funds) for the rules governing allocation for administrative expenses and all activities not attributable to specific candidates. In contrast to current 11 CFR 106.1(e), which provides only for allocation of administrative expenses, the new rules apply the referenced allocation requirements to fundraising events, exempt activities, and generic voter drive activity as well. This expanded application is consistent with the Commission's position in Advisory Opinions 1978–10, 1978–28, and 1978–50. These opinions clarified the scope of 11 CFR 106.1(e) by interpreting "administrative expenses" as including generic voter activities such as voter registration and get-out-the-vote drives, and requiring that such activities be allocated according to the same methods as approved for other administrative expenses. The Commission has also interpreted the allocation requirement of 11 CFR 106.1(e) as applying to publications and fundraising events. See Advisory Opinions 1978–46 and 1979–12.

In addition, the new rules extend the allocation requirements to all committees that make disbursements for joint federal and non-federal election activities, whereas current 11 CFR 106.1(e) applies only to political committees with separate federal and non-federal accounts. Under the revised rules, organizations that are not political committees and that maintain only a single account shall demonstrate, upon the Commission's request, that their expenses for joint activities have been allocated as required by these rules, and that the federal share of such expenses has been paid with funds permissible under the Act. See 11 CFR 102.5(b)(1)(ii).

Section 106.5 Allocation of Expenses Between Federal and Non-federal Activities by Party Committees

This section has been added to the rules to provide party committees with detailed instructions as to how they are to allocate their administrative expenses and costs for combined federal and non-federal activities. These rules apply only

to those committees that make disbursements in connection with both federal and non-federal elections. Paragraphs 106.5 (a) through (g) specify percentages and methods by which different types of party committees are to allocate expenses for each category of allocable activity, and set forth procedures by which committees are to pay the bills for these allocable expenses. The allocation methods required by § 106.5 are based on those previously approved in Commission advisory opinions and described in the Notice of Proposed Rulemaking. However, following receipt of the comments and testimony on the rules, the Commission refined several of the allocation methods, and combined aspects of the four NPRM proposals.

One of the major issues addressed by the Commission in developing these regulations was whether uniform rules should be applied to all committees and activities, or whether options of methods should be available for certain committees and circumstances. Of the four alternatives described in the Notice of Proposed Rulemaking, two specified uniform allocation methods to be used by all committees, and two offered a choice of methods in given situations. The latter two alternatives also allowed committees the option of allocating expenses "on any other reasonable basis approved by the Commission in an advisory opinion," based on the language of the current allocation rule at 11 CFR 106.1(e).

In response to the Notice, one non-party commenter urged the Commission to adopt a uniform method for all committees, based on the concern that too much flexibility would lead to confusion in application of the rules. This comment also suggested that allowing different methods for state versus local party committees would result in a diversion of funds to whichever level permitted a higher non-federal share of allocable expenses. In constrast, the party committee commenters stressed the importance of flexibility in the rules, given the disparities between political activity at different levels of party organizations, and in different states and localities.

While concerned about keeping the rules as simple as possible, the Commission concluded that some differences between types of committees and activities must be acknowledged. Thus, the revised regulations include different requirements for national versus state and local party committees, as well as special variations for the House and Senate campaign committees, and for state and local party committees that elect statewide offices in years with no regularly scheduled federal elections. In the course of the rulemaking, it also became clear that some allocation methods were appropriate for certain activities and committees, while inappropriate for others. For example, the funds received method (see paragraph 106.5(f)) may reflect a fair division of costs involved in paying for a particular fundraising event, but bears no relationship to a committee's administrative functions and get-out-the-vote activities. Similarly, the ballot composition method (see paragraph 106.5(d)) may accurately reflect the priorities of state and local party committees, but is less applicable to national party committees primarily focused on national candidates and elections. Thus, the new regulations require different allocation methods for different types of committees and expenses, and eliminate the option of choosing between methods within each category of activity. While these variations may initially appear complex, once a committee determines the category into which it falls, the rules applied to that class of committee will be clear, and will not vary from year to year.

A second major issue addressed by the Commission in developing these regulations was whether committees should be required to allocate fixed or minimum percentages to their federal accounts for certain categories of activity. One alternative described in the Notice of Proposed Rulemaking would have set a minimum federal percentage for all allocable expenses, to be applied if greater than the percentages produced by the specified allocation methods. A second alternative would have set fixed allocation percentages for all activities, with a higher federal percentage required for generic voter drive costs in presidential election years. A third alternative would have required different allocation methods in federal versus non-federal election years, with a set minimum federal percentage for generic voter drive costs in presidential election years.

Following receipt of the comments on the NPRM alternatives, the Commission considered several variations on the concept of minimum or fixed allocation percentages. These ranged from proposals that would have set minimum federal percentages only for national party committees or in presidential election years, to other proposals that would have applied minimum percentages to all activities by all party committees in all years. The Commission also considered proposals that would have set fixed allocation percentages presumed appropriate for all party committees, but that would have allowed a committee to rebut the presumption by demonstrating through the advisory opinion process that, in its case, the fixed federal percentage was too high.

The new allocation rules published today are drawn from the proposals described in the Notice of Proposed Rulemaking and from the variations subsequently considered by the Commission. In the revised rules, the Commission has retained the concept of minimum percentages only for allocation of administrative expenses and costs of generic voter drive activity by the House and Senate campaign committees of the national parties. See paragraph 106.5(c). For other national party committees, the Commission has set fixed percentages for allocation of these categories of expense. See paragraph 106.5(b). In contrast, all of these committees are to allocate their fundraising costs solely according to the funds received method, as described in this section. See paragraph 106.5(f). State and local party committees, nonconnected committees, and separate segregated funds shall also calculate allocation ratios according to methods specified in the rules, with neither fixed nor minimum federal percentages required. See paragraphs 106.5 (d), (e) and (f), and 106.6 (c) and (d).

The revised regulations also eliminate the option of case-by-case approval of customized allocation methods through the advisory opinion process, as well as the option of allowing committees to rebut fixed allocation percentages by a showing of individual circumstances. These decisions were based on the Commission's concern that such open-ended options would be very difficult to administer, and would potentially allow many exceptions to the general rules. They would also risk a return to the "any reasonable method" standard of the current rules that was disapproved by the United States District Court. See *Common Cause* v. *Federal Election Commission*, 692 F.Supp. 1391, 1398 (D.D.C. 1987).

Paragraph 106.5(a) General Rules

This paragraph provides a general overview of the allocation rules for party committees and defines the four categories of activity for which costs are to be allocated. These include administrative expenses, fundraising programs, exempt activities conducted by state and local parties, and generic voter drive activity such as voter

registration and get-out-the-vote campaigns. While earlier drafts of these rules and the alternatives described in the Notice of Proposed Rulemaking included fundraising costs in the category of administrative expenses, the revised rules divide these expenses into two separate categories. This distinction became necessary to allow for the difference in allocation methods applied to each of these types of expense. See paragraphs 106.5(b), (c), (d) and (f). Please note that all administrative expenses must be allocated between federal and non-federal accounts, if incurred by a committee that makes disbursements in connection with both federal and non-federal elections, and that chooses to pay any portion of such disbursements from its non-federal account. Such committees must also allocate all costs of generic voter drive activity, except for get-out-the-vote drives conducted on behalf of a wholly federal or wholly non-federal special election. In contrast, fundraising costs are allocable only when federal and non-federal funds are collected by one committee through the same fundraising event. Similarly, exempt activities are allocable only when conducted in conjunction with non-federal election activities.

One of the alternatives described in the Notice of Proposed Rulemaking offered committees the option of defraying the total cost of an allocable activity with funds raised under federal law. This option has been retained in paragraph 106.5(a)(1), reflecting the Commission's view that allocating a portion of certain costs to a committee's non-federal account is a permissive rather than a mandated procedure. Thus, the amounts that would be calculated under the rules for a committee's federal share of allocable expenses represent the minimum amounts to be paid from the committee's federal account, without precluding the committee from paying a higher percentage with federal funds.

The same NPRM alternative offered certain local party committees the option of selecting fixed allocation percentages for their administrative expenses and generic voter drive activity. In subsequent drafts of this paragraph, the Commission considered a similar "safe harbor" provision by which certain local party committees could choose to allocate these categories of expense according to a low fixed federal percentage. This option was originally conceived as a way for local party committees with limited activity to avoid the burden of calculating complicated allocation ratios, and to be assured of a relatively low federal percentage. However, the Commission has since revised the ballot composition method by which such committees are to allocate their administrative expenses and generic voter drive costs. See paragraph 106.5(d). Under the revised method, the process of calculating an allocation ratio is greatly simplified, and the resulting federal percentages for all local party committees are generally similar to those provided by the "safe harbor" option. For these reasons, the Commission decided to eliminate this option from the final allocation rules.

Paragraph 106.5(b) National Party Committees Other Than Senate or House Campaign Committees; Fixed Percentages for Allocating Administrative Expenses and Costs of Generic Voter Drive Activity

This paragraph sets forth the rules by which national party committees other than the House or Senate campaign committees are to allocate their administrative expenses and costs of generic voter drive activity. Unlike other committees, which are to calculate individualized ratios according to specified allocation methods for these categories of activity, the national party committees are to allocate fixed percentages to their federal and non-federal accounts each year. The fixed federal percentage is set at 65% in presidential election years, and at 60% in all other years. While committees are free to allocate higher percentages to their federal accounts, they may not allocate less than the specified percentages.

The Commission adopted this fixed percentage rule after considering several other alternative approaches. Previous drafts of the regulations would have allowed national party committees to allocate their administrative expenses and costs of generic voter drive activity according to the funds expended method or an aggregate ballot composition method, in combination with specified minimum federal percentages. These approaches were ultimately rejected by the Commission based on concerns about the practicability of applying either method at the national committee level. The particular percentages adopted by the Commission are intended to reflect the national party committees' primary focus on presidential and other federal candidates and elections, while still recognizing that such committees also participate in party-building activities at state and local levels of the party organizations.

Paragraph 106.5(c) Senate and House Campaign Committees of a National Party; Method and Minimum Federal Percentages for Allocating Administrative Expenses and Costs of Generic Voter Drive Activity

This paragraph sets forth the rules by which the Senate and House campaign committees of the national parties are to allocate their administrative expenses and costs of generic voter drive activity. Such expenses shall be allocated according to the funds expended method, with a minimum of 65% to be allocated to the committees' federal accounts each year. This rule differs from that applied to the other national party committees, which sets fixed allocation percentages that need not be compared to any other calculated ratios. In contrast, the minimum percentages required by this paragraph create a floor for federal allocation, while requiring a higher federal share if a higher percentage is calculated under the funds expended method. This more stringent requirement has been applied to the House and Senate campaign committees due to their narrower focus on Congressional candidates, and their limited involvement in non-federal elections.

The funds expended method was first described in Advisory Opinion 1975-21 and is codified in the current allocation rule at 11 CFR 106.1(e). It also appeared in two of the alternatives described in the Notice of Proposed Rulemaking. Under one alternative, committees were to allocate their administrative expenses and costs of generic voter drive activity according to the ratio of federal disbursements to total federal and non-federal disbursements made in the year four years prior to the year in question. The second alternative would have required committees to estimate a ratio at the beginning of the calendar year based upon their federal and non-federal disbursements in a prior comperable year, and to adjust their allocation ratio at the end of the year to reflect actual disbursements made during the year.

These proposals were addressed in several of the comments received by the Commission. While commenters from both national parties endorsed the concept of the funds expended method, they opposed as unworkable the four year "look back" approach described in the first NPRM alternative. One non-party commenter opposed any "prior year" model based on the concern that it would allow continued misallocation if the prior year's ratio had been improperly calculated. Another non-

party commenter described the method as circular, requiring a committee to have calculated an allocation ratio for a prior year without any guidance on how the calculation should have been done. This commenter supported the use of estimated and adjusted allocation ratios, using actual disbursements in the prior year as a guideline for estimating the initial allocation.

The revised regulations incorporate elements of several of these approaches. New paragraph 106.5(c) requires committees to report estimated allocation ratios at the beginning of the year, and to adjust their ratios on each periodic report to reflect the ratio of actual federal and non-federal funds expended, to date. However, the method has been revised from earlier drafts of the rules to resolve a concern about its application in years in which no federal election is held. Under the revised method, allocation ratios are determined by disbursements made over the two-year federal election cycle, rather than by disbursements made in the current calendar year. Thus, committees would have a basis for allocating their administrative expenses and costs of generic voter drive activity each year, including years in which no federal election is held. Such allocation is necessary to account for the portion of a committee's off-year administrative functions and generic activities that impact on future federal elections. The estimated ratio reported at the beginning of the year may be based either on disbursements from a prior comparable election cycle, or on a reasonable prediction of disbursements in the coming election cycle if no data from prior years is relevant or available. The revised rule also requires committees to transfer funds from their federal to their non-federal accounts to reflect their adjusted ratios, if the non-federal account has paid more than its allocable share due to an estimate later shown to be incorrect.

Paragraph 106.5(d) State and Local Party Committees; Method for Allocating Administrative Expenses and Costs of Generic Voter Drive Activity

This paragraph sets forth the rules by which state and local party committees are to allocate their administrative expenses and costs of generic voter drive activity. Paragraph 106.5(d)(1) states the general rule that such committees are to allocate these categories of expense according to the ballot composition method, as set forth in paragraphs (d)(1) (i) and (ii).

The ballot composition method was first described in the Commission's response to Advisory Opinion Request 1978–72, which permitted committees to allocate expenses according to the ratio of federal offices on the ballot to total federal and non-federal offices on the ballot, with the federal offices given proportionately more weight. It also appeared in three of the alternatives described in the Notice of Proposed Rulemaking, with two of them specifically limiting use of the method to allocation of administrative expenses and costs of generic voter drive activity by state and local party committees. The new rule replaces the poorly defined "weighting" concept with an "average ballot" approach, as suggested by several of the comments received on this method. Under this approach, committees are to calculate a ballot composition ratio according to the ballot which an average voter would face in that committee's state or geographic area, rather than basing the ratio on the aggregates of all federal and all non-federal reaces on the ballot. The method has been further simplified to produce a ratio by counting the categories of offices on the ballot rather than counting each individual office. Paragraph 106.5(d)(1)(ii) specifies the categories to be included in the ratio, and the number of federal or non-federal offices to be counted for each such category.

It should be noted that in states where candidates for governor and lieutenant governor run on a single ticket, the latter office may not be separately counted in the category of "other partisan statewide executive candidates." The same principle applies to the offices of president and vice president, which are counted together as one federal office. In contrast, in states where the governor and lieutenant governor are independently elected, the office of lieutenant governor may be counted separately from the governor, in the category of "other partisan statewide executive candidates." California is one example of such a state, where candidates from different parties may be simultaneously elected to the offices of governor and lieutenant governor.

The ballot composition method was the subject of several late comments from national and state party committees, expressing concern that the scope of party activity at state and local levels was not adequately reflected in the method, as revised. In response to this concern, the Commission reexamined the method and further refined the ballot composition rules. In the final version of paragraph 106.5(d)(1)(ii), the Commission deleted the category of "partisan statewide judicial offices," which would have benefited only those states that elect statewide judges through partisan elections. In its place, the Commission added to the ratio an additional non-federal office to reflect state party support for partisan local candidates. Thus, this non-federal slot is now available to virtually every state party committee.

It should be noted that the ballot composition method has also been revised from earlier drafts of the rules to resolve a concern about its application in years in which no federal election is held. Under the revised method, allocation ratios are determined by the offices expected on the ballot in the next general election to be held in the committee's state or geographic area. Thus, committees would have a basis for allocating their administrative expenses and costs of generic voter drive activity each year, including years in which no federal election is held. Such allocation is necessary to account for the portion of a committee's off-year administrative functions and generic activities that impact on future federal elections.

The broader language of new paragraph 106.5(d)(1) also generally covers years in which a special election is held. However, because of the varying situations that might arise, the Commission has not spelled out rules to cover each variation. The allocation formula to be used and attribution of disbursements to specific candidates will have to be determined on a case-by-case basis.

In the course of refining the ballot composition method, the Commission became aware of an additional problem in applying the method to states that do not hold federal and non-federal elections in the same year. The method as described in paragraph 106.5(d)(1) would have allowed these states to allocate 100% of their administrative expenses and costs of generic voter drive activity to their non-federal accounts in years in which "the next general election" was only for non-federal offices. Such an allocation would not account for the impact of these activities on upcoming federal elections. Thus, the Commission adopted an exception to the regular rule for states that hold non-federal elections in odd-numbered years when no special federal election is scheduled. Paragraph 106.5(d)(2) describes a variation of the ballot composition method to be used by such states, whereby one ratio is calculated for generic voter drive costs based on the election to be held that year, and a separate ratio is calculated for administrative expenses based on the federal election cycle. This variation

will ensure that committees allocate a portion of their administrative expenses to their federal accounts even in solely non-federal election years, as well as providing guidance on how to allocate costs in years in which no elections are held.

Paragraph 106.5(e) State and Local Party Committees; Method for Allocating Costs of Exempt Activities

This paragraph sets forth the rules by which state and local party committees are to allocate the costs of activities that are exempt from the definitions of "contribution" and "expenditure" under the Act (see 11 CFR 100.7(b)(9), (15) and (17), and 100.8(b)(10), (16) and (18)), when such activities are conducted in conjunction with non-federal election activities. Committees are to allocate these expenses according to the time or space devoted to federal elections as compared to the total time or space devoted to federal and non-federal elections in a particular publication or phone bank. This method was described in Advisory Opinion 1978–46, and appeared in two of the alternatives included in the Notice of Proposed Rulemaking. Under the method, committees are to calculate a separate allocation ratio for each individual exempt activity, unlike administrative expenses and generic voter drive activity, which are allocated according to a single ratio calculated for the entire category of activity. This procedure is necessary because each exempt communication is likely to devote a different amount of time or space to federal and non-federal elections. It should also be noted that an exempt activity may be conducted in conjunction with a non-exempt activity that is attributable to one or more clearly identified candidates. In that case, the costs of the activity must be proportionally allocated between the committee's federal and non-federal accounts according to this paragraph, and allocated between candidates as required by paragraph 106.1(a).

Paragraph 106.5(f) All Party Committees; Method for Allocating Direct Costs of Fundraising

Paragraph 106.5(f) sets forth the rules by which all party committees are to allocate the direct costs of each fundraising program or event, where both federal and non-federal funds are collected by one committee through such program or event. These rules should not be confused with 11 CFR 102.17, which concerns joint fundraising activities conducted by more than one committee. Under this paragraph, committees are to allocate their fundraising costs according to the funds received method. As with allocation of exempt activity costs, committees are to calculate a separate allocation ratio for each individual fundraising event.

The funds received method was first described in the *FEC Record* of December 1977 as an example of an allocation procedure that would meet the "reasonable basis" requirement of current 11 CFR 106.1(e). The method was subsequently cited in several advisory opinions as a permissible method for allocating administrative expenses (later extended to include voter registration and get-out-the-vote drives), along with the funds expended and ballot composition methods. See, *e.g.*, Advisory Opinion 1978–46.

Of the four alternatives described in the Notice of Proposed Rulemaking, only one retained the funds received method, proposing that it be used to allocate administrative expenses and costs of generic voter drive activity in non-federal election years. All of the comments received on this method expressed concern that the amount of federal versus non-federal funds received by a committee is not meaningfully related to how expenses for joint federal and non-federal activities should be divided. However, several commenters suggested that the method be retained for the narrow purpose of allocating the costs of fundraising activities, because it provides the most accurate basis for division of these costs. Based on these comments, the Commission adopted this method for allocating the direct costs of fundraising programs and events through which both federal and non-federal funds are obtained.

Paragraph 106.5(g) Payment of Allocable Expenses by Committees With Separate Federal and Non-federal Accounts

This paragraph sets forth the procedures by which party committees with separate federal and non-federal accounts are to pay the bills for their administrative expenses and shared federal and non-federal activities. These rules do not apply to organizations that maintain only a single account, even though such organizations may be required to demonstrate to the Commission that they have allocated their expenses as required by other sections of the allocation regulations.

The provisions of new paragraph 106.5(g) represent a significant departure from the Commission's current policy. In enforcing the current allocation rule at 11 CFR 106.1(e), the Commission has permitted three procedures by which committees may pay their administrative expenses. Under current policy, committees are allowed to write two separate checks from their federal and non-federal accounts to cover the respective portions of each expense. Alternatively, committees could pay the entire expense from their non-federal accounts, which would then be reimbursed by their federal accounts. Finally, committees could pay the expense through a separate "escrow" account established solely for the purpose of paying for allocable expenses. Reimbursement of a federal account by a non-federal account that contains funds prohibited by the Act is not permitted under the current rules. See 11 CFR 102.5(a)(1)(i) and Advisory Opinion 1978–6.

While the Commission has interpreted 11 CFR 106.1(e) to also require allocation of fundraising, exempt activity, and generic voter drive costs (see Advisory Opinions 1978–10, 1978–28, 1978–46, 1978–50 and 1979–12), it has limited the option of paying allocable bills through a non-federal account to the payment of administrative expenses. This distinction has been based on the premise that fundraising, voter drives, and exempt activities have a direct impact on federal elections, and thus committees should not be permitted to advance non-federal funds for those purposes.

This distinction was incorporated into three of the alternatives described in the Notice of Proposed Rulemaking. Those alternatives would have allowed payment of an entire administrative expense by a committee's non-federal account, provided that it was reimbursed by the committee's federal account within ten days after the bill was paid. All other allocable expenses were to be paid by two separate checks from the federal and non-federal accounts, which was also provided as an option for payment of administrative expenses. The fourth NPRM alternative permitted the same two procedures, but made no distinction between different categories of expense. The option of paying expenses through a separate "escrow" account was eliminated in all four of the NPRM alternatives, but was raised for comment as an additional issue.

The Commission received considerable comment on these proposed payment procedures. First, the ten-day reimbursement limitation was unanimously rejected as unworkable. Several commenters asserted that at least thirty days were needed for such reimbursement to realistically occur. Second, two commenters expressed the

concern that federal account reimbursement of a state account could trigger state law disclosure requirements for the federal account, thus creating a duplicate federal and state-level reporting burden. Third, the same two commenters proposed that the current "escrow" procedure be retained as a payment option, even though it had been excluded from the alternatives described in the Notice of Proposed Rulemaking. Finally, one commenter suggested that the Commission consider changing its policy to allow a committee to pay an entire allocable expense through its federal account, with reimbursement from its non-federal account. This procedure would ensure that disbursements for allocable expenses would be disclosed by a committee's federal accounts under the Act's reporting requirements.

Based on these comments, the Commission significantly revised the proposed payment procedures described in the Notice of Proposed Rulemaking. Paragraph 106.5(g)(1) of the rules published today offers committees an option of two procedures by which they may pay for their administrative expenses and shared federal and non-federal activities. Under the first procedure, committees would pay an entire bill from their regular federal accounts, and would transfer funds from their non-federal accounts to their federal accounts to cover the non-federal share of the allocable expense. The second procedure would allow committees to establish a separate allocation account (referred to previously as an "escrow" account), which is considered by the Commission to be a federal account, and to transfer funds to that account from their regular federal accounts and their non-federal accounts solely for the purpose of paying allocable expenses. Under both procedures, transfers of non-federal funds must be itemized in the committee's reports to show the allocable activities for which they are intended to pay, and must occur within ten days before or thirty days after the bills for those activities are paid. Each allocated disbursement from a committee's federal account or allocation account must also be itemized, to show the particular expenses covered by that disbursement. These requirements will allow the Commission to track the flow of non-federal funds into federal accounts, and to ensure that the use of such funds is strictly limited to payment for the non-federal share of allocable activities.

It should be noted that this is the first time that the Commission has allowed non-federal funds to be transferred to a committee's federal account, and that it does so now only for the limited purpose of paying allocable expenses. Under the new rules, committees are prohibited from making such payments through their non-federal accounts, as permitted under the Commission's current policy. That procedure has failed to provide sufficient disclosure of the federal and non-federal portions of allocated disbursements. Such disclosure is critical to the Commission's ability to monitor whether expenses have been allocated as required, and is the basis for the procedures adopted by the new allocation rules.

It should also be noted that the new rules allow committees to transfer funds to their federal account or allocation account prior to actual payment of a vendor's bill, as well as allowing reimbursement of those accounts after the bill has been paid. This rule is more flexible than that proposed by the NPRM alternatives, which would have limited such transfers to post-payment reimbursement. However, the new rules set a ten-day time limit on pre-payment transfers that are made from a non-federal account, in order to prevent such accounts from subsidizing federal election activity with prohibited funds. This ten-day limit differs from the one objected to by the commenters in response to the Notice, as the new rules provide for a total forty-day time period in which transfers for allocation purposes may occur.

The procedures contained in paragraph 106.5(g) are intended to provide committees the flexibility to make single payments to their vendors, rather than requiring that every expense be paid with two separate checks. Such flexibility is indispensable for committees paying large numbers of bills from many different vendors. In fact, the new rules have eliminated the two-check option altogether, as that procedure does not provide sufficient disclosure of how funds allocated for shared federal and non-federal activity are actually spent. Instead, committees must choose from the two payment procedures authorized by the new allocation rules.

Section 106.6 Allocation of Expenses Between Federal and Non-Federal Activities by Separate Segregated Funds and Nonconnected Committees

This section has been added to the rules to provide separate segregated funds and nonconnected committees with detailed instructions as to how they are to allocate their administrative expenses and costs for combined federal and non-federal activities. These rules apply only to those committees that make disbursements in connection with federal and non-federal elections. For purposes of this section, "nonconnected committee" includes any committee that conducts activities in connection with a federal election, but which is not a party committee, an authorized committee of any candidate for federal office, or a separate segregated fund.

Paragraph 106.6(b) describes the categories of activity that are to be allocated by each type of committee. These categories are generally the same as those defined in paragraph 106.5(a)(2) for party committees, with one important difference. Unlike party committees and nonconnected committees, separate segregated funds need only allocate their administrative and fundraising expenses if those expenses are not paid by their connected organizations, as permitted by 11 CFR 114.5(b).

Paragraph 106.6(c) specifies the method for allocating administrative expenses and the costs of generic voter drive activity. Separate segregated funds and nonconnected committees are to allocate these expenses according to the funds expended method calculated over a two-year federal election cycle. This method is identical to that described in paragraph 106.5(c) for use by the Senate and House campaign committees, except that no minimum federal percentages are required for separate segregated funds or nonconnected committees.

Paragraph 106.6(d) specifies the method for allocating the direct costs of each fundraising program or event, where both federal and non-federal funds are collected by one committee through such program or event. Separate segregated funds and nonconnected committees are to allocate these expenses according to the funds received method, which is identical to that described in paragraph 106.5(f) for use by all party committees.

Paragraph 106.6(e) sets forth procedures by which separate segregated funds and nonconnected committees are to pay the bills for their allocable expenses. These procedures are identical to those described in paragraph 106.5(g) for use by all party committees.

In earlier drafts of these regulations, the Commission considered combining the allocation rules for separate segregated funds and nonconnected committees with those required for party committees. However, the Commission was concerned that different types of committees might have difficulty sorting out the particular rules that applied to

them. By creating new § 106.6, the Commission intends to make it as simple as possible for each type of committee to easily locate the appropriate set of allocation rules. In contrast, the reporting requirements of part 104 apply to all political committees, including party committees, separate segregated funds, and nonconnected committees. Similarly, the rules set forth in § 106.1 apply to all committees that make disbursements on behalf of more than one clearly identified candidate.

List of Subjects

11 CFR Part 102

Political committees and parties, Campaign funds.

11 CFR Part 104

Campaign funds, Political committees and parties, Reporting requirements, Political candidates.

11 CFR Part 106

Campaign funds, Political committees and parties, Political candidates.

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

The attached final rules, if promulgated, will not have a significant economic impact on a substantial number of small entities. The primary purpose of the revision is to clarify the Commission's rules governing allocation of certain costs by party committees, nonconnected committees and separate segregated funds.

For the reasons set out in the preamble, title 11, chapter I, subchapter A of the Code of Federal Regulations, is amended as follows:

PART 102—REGISTRATION, ORGANIZATION, AND RECORDKEEPING BY POLITICAL COMMITTEES (2 U.S.C. 433)

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

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

2. Section 102.5 is amended by revising paragraph (a)(1)(i), and by adding paragraph (a)(3) as follows:

§ 102.5 Organizations financing political activity in connection with Federal and non-federal elections, other than through transfers and joint fundraisers.

(a) * * *

(1) * * *

(i) Establish a separate federal account in a depository in accordance with 11 CFR part 103. Such account shall be treated as a separate federal political committee which shall comply with the requirements of the Act including the registration and reporting requirements of 11 CFR part 102 and 104. Only funds subject to the prohibitions and limitations of the Act shall be deposited in such separate federal account. All disbursements, contributions, expenditures and transfers by the committee in connection with any federal election shall be made from its federal account. No transfers may be made to such federal account from any other account(s) maintained by such organization for the purpose of financing activity in connection with non-federal elections, except as provided in 11 CFR 106.5(g) and 106.6(e). Administrative expenses shall be allocated pursuant to 11 CFR part 106 between such federal account and any other account maintained by such committee for the purpose of financing activity in connection with non-federal elections; or

* * * * *

(3) Any party committee solicitation that makes reference to a federal candidate or a federal election shall be presumed to be for the purpose of influencing a federal election, and contributions resulting from that solicitation shall be subject to the prohibitions and limitations of the Act. This presumption may be rebutted by demonstrating to the Commission that the funds were solicited with express notice that they would not be used for federal election purposes.

* * * * *

PART 104—REPORTS BY POLITICAL COMMITTEES (2 U.S.C. 434)

3. The authority citation for part 104 continues to read as follows:

Authority: 2 U.S.C. 431(1), 431(8), 431(9), 432(i), 434, 438(a)(8), 438(b).

4. Section 104.8 is amended by revising the heading and paragraph (a), and by adding paragraphs (e) and (f) as follows:

§ 104.8 Uniform reporting of receipts.

(a) A reporting committee shall disclose the identification of each individual who contributes an amount in excess of $200 to the committee's federal account(s). This identification shall include the individual's name, mailing address, occupation, the name of his or her employer, if any, and the date of receipt and amount of any such contribution. If an individual contributor's name is known to have changed since an earlier contribution reported during the calendar year, the exact name or address previously used shall be noted with the first reported contribution from that contributor subsequent to the name change.

* * * * *

(e) National party committees shall disclose in a memo Schedule A information about each individual, committee, corporation, labor organization, or other entity that donates an aggregate amount in excess of $200 in a calendar year to the committee's non-federal account(s). This information shall include the donating individual's or entity's name, mailing address, occupation or type of business, and the date of receipt and amount of any such donation. If a donor's name is known to have changed since an earlier donation reported during the calendar year, the exact name or address previously used shall be noted with the first reported donation from that donor subsequent to the name change. The memo entry shall also include, where applicable, the information required by paragraphs (b) through (d) of this section.

(f) National party committees shall also disclose in a memo Schedule A information about each individual, committee, corporation, labor organization, or other entity that donates an aggregate amount in excess of $200 in a calendar year to the committee's building fund account(s). This information shall include the donating individual's or entity's name, mailing address, occupation or type of business, and the date of receipt and amount of any such donation. If a donor's name is known to have changed since an earlier donation reported during the calendar year, the exact name or address previously used shall be noted with the first reported donation from that donor subsequent to the name change. The memo entry shall also include, where applicable, the information required by paragraphs (b) through (d) of this section.

5. Section 104.9 is amended by revising the heading and paragraph (a), and by adding paragraphs (c), (d) and (e) as follows:

§ 104.9 Uniform reporting of disbursements.

(a) Political committees shall report the full name and mailing address of each person to whom an expenditure in an aggregate amount or value in excess of $200 within the calendar year is made from the reporting committee's federal account(s), together with the date, amount and purpose of such expenditure, in accordance with 11 CFR 104.9(b). As used in 11 CFR 104.9, "purpose" means a brief statement or

description as to the reasons for the expenditure. See 11 CFR 104.3(b)(3)(i)(A).

* * * * *

(c) National party committees shall report in a memo Schedule B the full name and mailing address of each person to whom a disbursement in an aggregate amount or value in excess of $200 within the calendar year is made from the committee's non-federal account(s), together with the date, amount and purpose of such disbursement, in accordance with 11 CFR 104.9(b). As used in 11 CFR 104.9, "purpose" means a brief statement or description as to the reasons for the disbursement. See 11 CFR 104.3(b)(3)(i)(A).

(d) National party committees shall report in a memo Schedule B the full name and mailing address of each person to whom a disbursement in an aggregate amount or value in excess of $200 within the calendar year is made from the committee's building fund account(s), together with the date, amount and purpose of such disbursement, in accordance with 11 CFR 104.9(b). As used in 11 CFR 104.9, "purpose" means a brief statement or description as to the reasons for the disbursement. See 11 CFR 104.3(b)(3)(i)(A).

(e) National party committees shall report in a memo Schedule B each transfer from their non-federal account(s) to the non-federal account(s) of a state or local party committee.

6. Section 104.10 is revised to read as follows:

§ 104.10 Reporting of expenses allocated among candidates and activities.

(a) *Expenses allocated among candidates.* A political committee making an expenditure on behalf of more than one clearly identified candidate for federal office shall allocate the expenditure among the candidates pursuant to 11 CFR part 106. Payments involving both expenditures on behalf of one or more clearly identified federal candidates and disbursements on behalf of one or more clearly identified non-federal candidates shall also be allocated pursuant to 11 CFR part 106. For allocated expenditures, the committee shall report the amount of each in-kind contribution, independent expenditure, or coordinated expenditure attributed to each federal candidate. If a payment also includes amounts attributable to one or more non-federal candidates, and is made by a political committee with separate federal and non-federal accounts, then the payment shall be made according to the procedures set forth in 11 CFR 106.5(g) or 106.6(e), as appropriate, but shall be reported pursuant to paragraphs (a)(1) through (a)(4), as follows:

(1) *Reporting of allocation of expenses attributable to specific federal and non-federal candidates.* In each report disclosing a payment that includes both expenditures on behalf of one or more federal candidates and disbursements on behalf of one or more non-federal candidates, the committee shall assign a unique identifying title or code to each program or activity conducted on behalf of such candidates, shall state the allocation ratio calculated for the program or activity, and shall explain the manner in which the ratio was derived. The committee shall also summarize the total amounts attributed to each candidate, to date, for each joint program or activity.

(2) *Reporting of transfers between accounts for the purpose of paying expenses attributable to specific federal and non-federal candidates.* A political committee that pays allocable expenses in accordance with 11 CFR 106.5(g) or 106.6(e) shall report each transfer of funds from its non-federal account to its federal account or to its separate allocation account for the purpose of paying such expenses. In the report covering the period in which each transfer occurred, the committee shall explain in a memo entry the allocable expenses to which the transfer relates and the date on which the transfer was made. If the transfer includes funds for the allocable costs of more than one program or activity, the committee shall itemize the transfer, showing the amounts designated for each program or activity conducted on behalf of one or more clearly identified federal candidates and one or more clearly identified non-federal candidates.

(3) *Reporting of allocated disbursements attributable to specific federal and non-federal candidates.* A political committee that pays allocable expenses in accordance with 11 CFR 106.5(g) or 106.6(e) shall also report each disbursement from its federal account or its separate allocation account in payment for a program or activity conducted on behalf of one or more clearly identified federal candidates and one or more clearly identified non-federal candidates. In the report covering the period in which the disbursement occurred, the committee shall state the full name and address of each person to whom the disbursement was made, and the date, amount and purpose of each such disbursement. If the disbursement includes payment for the allocable costs of more than one program or activity, the committee shall itemize the disbursement, showing the amounts designated for payment of each program or activity conducted on behalf of one or more clearly identified federal candidates and one or more clearly identified non-federal candidates. The committee shall also report the amount of each in-kind contribution, independent expenditure, or coordinated expenditure attributed to each federal candidate, and the total amount attributed to the non-federal candidate(s). In addition, the committee shall report the total amount expended by the committee that year, to date, for each joint program or activity.

(4) *Recordkeeping.* The treasurer shall retain all documents supporting the committee's allocation on behalf of specific federal and non-federal candidates, in accordance with 11 CFR 104.14.

(b) *Expenses allocated among activities.* A political committee that has established separate federal and non-federal accounts under 11 CFR 102.5(a)(1)(i) shall allocate between those accounts its administrative expenses and its costs for fundraising, exempt activities, and generic voter drives according to 11 CFR 106.5 or 106.6, as appropriate, and shall report those allocations according to paragraphs (b) (1) through (5), as follows:

(1) *Reporting of allocation of administrative expenses and costs of generic voter drives.*

(i) In the first report in a calendar year disclosing a disbursement for administrative expenses or generic voter drives, as described in 11 CFR 106.5(a)(2) or 106.6(b), the committee shall state the allocation ratio to be applied to these categories of activity according to 11 CFR 106.5 (b), (c) or (d) or 106.6(C), and the manner in which it was derived. The Senate and House campaign committees of each political party shall also state whether the calculated ratio or the minimum federal percentage required by 11 CFR 106.5(c)(2) will be used.

(ii) In each subsequent report in the calendar year itemizing an allocated disbursement for administrative expenses or generic voter drives:

(A) The committee shall state the category of activity for which each allocated disbursement was made, and shall summarize the total amount spent by the federal and non-federal accounts that year, to date, for each such category.

(B) Nonconnected committees, separate segregated funds, and Senate and House campaign committees of a

national party that have allocated expenses according to the funds expended method as described in 11 CFR 106.5(c)(1) or 106.6(c) shall also report in a memo entry the total amounts expended in donations and direct disbursements on behalf of specific state and local candidates, to date, in that calendar year.

(2) *Reporting of allocation of the direct costs of fundraising and costs of exempt activities.* In each report disclosing a disbursement for the direct costs of a fundraising program or an exempt activity, as described in 11 CFR 106.5(a)(2) or 106.6(b), the committee shall assign a unique identifying title or code to each such program or activity, shall state the allocation ratio calculated for the program or activity according to 11 CFR 106.5 (e) and (f) or 106.6(d), and shall explain the manner in which the ratio was derived. The committee shall also summarize the total amounts spent by the federal and non-federal accounts that year, to date, for each such program or activity.

(3) *Reporting of transfers between accounts for the purpose of paying allocable expenses.* A political committee that pays allocable expenses in accordance with 11 CFR 106.5(g) or 106.6(e) shall report each transfer of funds from its non-federal account to its federal account or to its separate allocation account for the purpose of paying such expenses. In the report covering the period in which each transfer occurred, the committee shall explain in a memo entry the allocable expenses to which the transfer relates and the date on which the transfer was made. If the transfer includes funds for the allocable costs of more than one activity, the committee shall itemize the transfer, showing the amounts designated for administrative expenses and generic voter drives, and for each fundraising program or exempt activity, as described in 11 CFR 106.5(a)(2) or 106.6(b).

(4) *Reporting of allocated disbursements.* A political committee that pays allocable expenses in accordance with 11 CFR 106.5(g) or 106.6(e) shall also report each disbursement from its federal account or its separate allocation account in payment for a joint federal and non-federal expense or activity. In the report covering the period in which the disbursement occurred, the committee shall state the full name and address of each person to whom the disbursement was made, and the date, amount and purpose of each such disbursement. If the disbursement includes payment for the allocable costs of more than one activity, the committee shall itemize the disbursement, showing the amounts designated for payment of administrative expenses and generic voter drives, and for each fundraising program or exempt activity, as described in 11 CFR 106.5(a)(2) or 106.6(b). The committee shall also report the total amount expended by the committee that year, to date, for each category of activity.

(5) *Recordkeeping.* The treasurer shall retain all documents supporting the committee's allocated disbursement for three years, in accordance with 11 CFR 104.14.

PART 106—ALLOCATIONS OF CANDIDATE AND COMMITTEE ACTIVITIES

7. The authority citation for part 106 is revised to read as follows:

Authority: 2 U.S.C. 438(a)(8), 441a(b), 441a(g).

8. Section 106.1 is amended by revising the heading and paragraphs (a) and (e) to read as follows:

§ 106.1 Allocation of expenses between candidates.

(a) *General rule.* (1) Expenditures, including in-kind contributions, independent expenditures, and coordinated expenditures made on behalf of more than one clearly identified federal candidate shall be attributed to each such candidate according to the benefit reasonably expected to be derived. For example, in the case of a publication or broadcast communication, the attribution shall be determined by the proportion of space or time devoted to each candidate as compared to the total space or time devoted to all candidates. In the case of a fundraising program or event where funds are collected by one committee for more than one clearly identified candidate, the attribution shall be determined by the proportion of funds received by each candidate as compared to the total receipts by all candidates. These methods shall also be used to allocate payments involving both expenditures on behalf of one or more clearly identified federal candidates and disbursements on behalf of one or more clearly identified non-federal candidates.

(2) An expenditure made on behalf of more than one clearly identified federal candidate shall be reported pursuant to 11 CFR 104.10(a). A payment that also includes amounts attributable to one or more non-federal candidates, and that is made by a political committee with separate federal and non-federal accounts, shall be made according to the procedures set forth in 11 CFR 106.5(g) or 106.6(e), as appropriate, but shall be reported pursuant to 11 CFR 104.10(a).

* * * * *

(e) Party committees, separate segregated funds, and nonconnected committees that make disbursements for administrative expenses, fundraising, exempt activities, or generic voter drives in connection with both federal and non-federal elections shall allocate their expenses in accordance with § 106.5 or § 106.6, as appropriate.

9. Part 106 is amended by adding § 106.5 as follows:

§ 106.5 Allocation of expenses between federal and non-federal activities by party committees.

(a) *General rules.* (1) Party committees that make disbursements in connection with federal and non-federal elections shall make those disbursements entirely from funds subject to the prohibitions and limitations of the Act, or from accounts established pursuant to 11 CFR 102.5. Political committees that have established separate federal and non-federal accounts under 11 CFR 102.5(a)(1)(i) shall allocate expenses between those accounts according to this section. Organizations that are not political committees but have established separate federal and non-federal accounts under 11 CFR 102.5(b)(1)(i), or that make federal and non-federal disbursements from a single account under 11 CFR 102.5(b)(1)(ii) shall also allocate their federal and non-federal expenses according to this section. This section covers (i) General rules regarding allocation of federal and non-federal expenses by party committees, (ii) percentages to be allocated for administrative expenses and costs of generic voter drives by national party committees, (iii) methods for allocation of administrative expenses, costs of generic voter drives, and exempt activities by state and local party committees, and of fundraising costs by all party committees, and (iv) procedures for payment of allocable expenses. Requirements for reporting of allocated disbursements are set forth in 11 CFR 104.10.

(2) *Costs to be allocated.* Committees that make disbursements in connection with federal and non-federal elections shall allocate expenses according to this section for the following categories of activity:

(i) Administrative expenses including rent, utilities, office supplies, and salaries, except for such expenses directly attributable to a clearly identified candidate;

(ii) The direct costs of a fundraising program or event including disbursements for solicitation of funds and for planning and administration of actual fundraising events, where federal and non-federal funds are collected by one committee through such program or event;

(iii) State and local party activities exempt from the definitions of "contribution" and "expenditure" under 11 CFR 100.7(b) (9), (15) or (17), and 100.8(b) (10), (16) or (18) ("exempt activities") including the production and distribution of slate cards and sample ballots, campaign materials distributed by volunteers, and voter registration and get-out-the-vote drives on behalf of the party's presidential and vice-presidential nominees, where such activities are conducted in conjunction with non-federal election activities; and

(iv) Generic voter drives including voter identification, voter registration, and get-out-the-vote drives, or any other activities that urge the general public to register, vote or support candidates of a particular party or associated with a particular issue, without mentioning a specific candidate.

(b) *National party committees other than Senate or House campaign committees; fixed percentages for allocating administrative expenses and costs of generic voter drives*—(1) *General rule.* Each national party committee other than a Senate or House campaign committee shall allocate a fixed percentage of its administrative expenses and costs of generic voter drives, as described in paragraph (a)(2) of this section, to its federal and non-federal account(s) each year. These percentages shall differ according to whether or not the allocable expenses were incurred in a presidential election year. Such committees shall allocate the costs of each combined federal and non-federal fundraising program or event according to paragraph (f) of this section, with no fixed percentages required.

(2) *Fixed percentages according to type of election year.* National party committees other than the Senate or House campaign committees shall allocate their administrative expenses and costs of generic voter drives according to paragraphs (b)(2) (i) and (ii) as follows:

(i) *Presidential election years.* In presidential election years, national party committees other than the Senate or House campaign committees shall allocate to their federal accounts at least 65% each of their administrative expenses and costs of generic voter drives.

(ii) *Non-presidential election years.* In all years other than presidential election years, national party committees other than the Senate or House campaign committees shall allocate to their federal accounts at least 60% each of their administrative expenses and costs of generic voter drives.

(c) *Senate and House campaign committees of a national party; method and minimum federal percentage for allocating administrative expenses and costs of generic voter drives*—(1) *Method for allocating administrative expenses and costs of generic voter drives.* Subject to the minimum percentage set forth in paragraph (c)(2) of this section, each Senate or House campaign committee of a national party shall allocate its administrative expenses and costs of generic voter drives, as described in paragraph (a)(2) of this section, according to the funds expended method, described in paragraphs (c)(1) (i) and (ii) as follows:

(i) Under this method, expenses shall be allocated based on the ratio of federal expenditures to total federal and non-federal disbursements made by the committee during the two-year federal election cycle. This ratio shall be estimated and reported at the beginning of each federal election cycle, based upon the committee's federal and non-federal disbursements in a prior comparable federal election cycle or upon the committee's reasonable prediction of its disbursements for the coming two years. In calculating its federal expenditures, the committee shall include only amounts contributed to or otherwise spent on behalf of specific federal candidates. Calculation of total federal and non-federal disbursements shall also be limited to disbursements for specific candidates, and shall not include overhead or other generic costs.

(ii) On each of its periodic reports, the committee shall adjust its allocation ratio to reconcile it with the ratio of actual federal and non-federal disbursements made, to date. If the non-federal account has paid more than its allocable share, the committee shall transfer funds from its federal to its non-federal account, as necessary, to reflect the adjusted allocation ratio. The committee shall make note of any such adjustments and transfers on its periodic reports, submitted pursuant to 11 CFR 104.5.

(2) *Minimum federal percentage for administrative expenses and costs of generic voter drives.* Regardless of the allocation ratio calculated under paragraph (c)(1) of this section, each Senate or House campaign committee of a national party shall allocate to its federal account at least 65% each of its administrative expenses and costs of generic voter drives each year. If the committee's own allocation calculation under paragraph (c)(1) of this section yields a federal share greater than 65%, then the higher percentage shall be applied. If such calculation yields a federal share lower than 65%, then the committee shall report its calculated ratio according to 11 CFR 104.10(b), and shall apply the required minimum federal percentage.

(3) *Allocation of fundraising costs.* Senate and House campaign committees shall allocate the costs of each combined federal and non-federal fundraising program or event according to paragraph (f) of this section, with no minimum percentages required.

(d) *State and local party committees; method for allocating administrative expenses and costs of generic voter drives*—(1) *General rule.* All state and local party committees except those covered by paragraph (d)(2) of this section shall allocate their administrative expenses and costs of generic voter drives, as described in paragraph (a)(2) of this section, according to the ballot composition method, described in paragraphs (d)(1)(i) and (ii) as follows:

(i) Under this method, expenses shall be allocated based on the ratio of federal offices expected on the ballot to total federal and non-federal offices expected on the ballot in the next general election to be held in the committee's state or geographic area. This ratio shall be determined by the number of categories of federal offices on the ballot and the number of categories of non-federal offices on the ballot, as described in paragraph (d)(1)(ii) of this section.

(ii) In calculating a ballot composition ratio, a state or local party committee shall count the federal offices of President, United States Senator, and United States Representative, if expected on the ballot in the next general election, as one federal office each. The committee shall count the non-federal offices of Governor, State Senator, and State Representative, if expected on the ballot in the next general election, as one non-federal office each. The committee shall count the total of all other partisan statewide executive candidates, if expected on the ballot in the next general election, as a maximum of two non-federal offices. State party committees shall also include in the ratio one additional non-federal office if any partisan local candidates are expected on the ballot in that election. Local party committees

shall also include in the ratio a maximum of two additional non-federal offices if any partisan local candidates are expected on the ballot in that election.

(2) *Exception for states that do not hold federal and non-federal elections in the same year.* State and local party committees in states that do not hold federal and non-federal elections in the same year shall allocate the costs of generic voter drives according to the ballot composition method described in paragraph (d)(1) of this section, based on a ratio calculated for that calendar year. These committees shall allocate their administrative expenses according to the ballot composition method described in paragraph (d)(1) of this section, based on a ratio calculated for the two-year Congressional election cycle.

(e) *State and local party committees; method for allocating costs of exempt activities.* Each state or local party committee shall allocate its expenses for activities exempt from the definitions of "contribution" and "expenditure" under 11 CFR 100.7(b) (9), (15) or (17), and 100.8(b) (10), (16) or (18), when conducted in conjunction with non-federal election activities, as described in paragraph (a)(2) of this section, according to the proportion of time or space devoted in a communication. Under this method, the committee shall allocate expenses of a particular communication based on the ratio of the portion of the communication devoted to federal candidates or elections as compared to the entire communication. In the case of a publication, this ratio shall be determined by the space devoted to federal candidates or elections as compared to the total space devoted to all federal and non-federal candidates or elections. In the case of a phone bank, the ratio shall be determined by the number of questions or statements devoted to federal candidates or elections as compared to the total number of questions or statements devoted to all federal and non-federal candidates or elections.

(f) *All party committees; method for allocating direct costs of fundraising.* If federal and non-federal funds are collected by one committee through a joint activity, that committee shall allocate its direct costs of fundraising, as described in paragraph (a)(2) of this section, according to the funds received method. Under this method, the committee shall allocate its fundraising costs based on the ratio of funds received into its federal account to its total receipts from each fundraising program or event. This ratio shall be estimated prior to each such program or event based upon the committee's reasonable prediction of its federal and non-federal revenue from that program or event, and shall be noted in the committee's report for the period in which the first disbursement for such program or event occurred, submitted pursuant to 11 CFR 104.5. Any disbursements for fundraising costs made prior to the actual program or event shall be allocated according to this estimated ratio. The committee shall adjust its estimated allocation ratio following each fundraising program or event from which both federal and non-federal funds are collected, to reflect the actual ratio of funds received. If the non-federal account has paid more than its allocable share, the committee shall transfer funds from its federal to its non-federal account, as necessary, to reflect the adjusted allocation ratio. The committee shall make note of any such adjustments and transfers in its report for the period in which the fundraising program or event occurred.

(g) Payment of allocable expenses by committees with separate federal and non-federal accounts—(1) *Payment options.* Committees that have established separate federal and non-federal accounts under 11 CFR 102.5 (a)(1)(i) or (b)(1)(i) shall pay the expenses of joint federal and non-federal activities described in paragraph (a)(2) of this section according to either paragraph (g)(1) (i) or (ii), as follows:

(i) *Payment by federal account; transfers from non-federal account to federal account.* The committee shall pay the entire amount of an allocable expense from its federal account and shall transfer funds from its non-federal account to its federal account solely to cover the non-federal share of that allocable expense.

(ii) *Payment by separate allocation account; transfers from federal and non-federal accounts to allocation account.* (A) The committee shall establish a separate allocation account into which funds from its federal and non-federal accounts shall be deposited solely for the purpose of paying the allocable expenses of joint federal and non-federal activities. Once a committee has established a separate allocation account for this purpose, all allocable expenses shall be paid from that account for as long as the account is maintained.

(B) The committee shall transfer funds from its federal and non-federal accounts to its allocation account in amounts proportionate to the federal or non-federal share of each allocable expense.

(C) No funds contained in the allocation account may be transferred to any other account maintained by the committee.

(2) *Timing of transfers between accounts.* (i) Under either payment option described in paragraphs (g)(1) (i) or (ii) of this section, the committee shall transfer funds from its non-federal account to its federal account or from its federal and non-federal accounts to its separate allocation account following determination of the final cost of each joint federal and non-federal activity, or in advance of such determination if advance payment is required by the vendor and if such payment is based on a reasonable estimate of the activity's final cost as determined by the committee and the vendor(s) involved.

(ii) Funds transferred from a committee's non-federal account to its federal account or its allocation account are subject to the following requirements:

(A) For each such transfer, the committee must itemize in its reports the allocable activities for which the transferred funds are intended to pay, as required by 11 CFR 104.10(b)(3); and

(B) Such funds may not be transferred more than 10 days before or more than 30 days after the payment for which they are designated is made.

(iii) Any portion of a transfer from a committee's non-federal account to its federal account or its allocation account that does not meet the requirements of paragraph (g)(2)(ii) of this section shall be presumed to be a loan or contribution from the non-federal account to a federal account, in violation of the Act.

(3) *Reporting transfers of funds and allocated disbursements.* A political committee that transfers funds between accounts and pays allocable expenses according to this section shall report each such transfer and disbursement pursuant to 11 CFR 104.10(b).

10. Part 106 is amended by adding new § 106.6 as follows:

§ 106.6 Allocation of expenses between federal and non-federal activities by separate segregated funds and nonconnected committees.

(a) *General rule.* Separate segregated funds and nonconnected committees that make disbursements in connection with federal and non-federal elections shall make those disbursements either entirely from funds subject to the prohibitions and limitations of the Act, or from accounts established pursuant to 11 CFR 102.5. Separate segregated funds and nonconnected committees that have established separate federal and non-federal accounts under 11 CFR

102.5 (a)(1)(i) or (b)(1)(i), or that make federal and non-federal disbursements from a single account under 11 CFR 102.5(b)(1)(ii), shall allocate their federal and non-federal expenses according to paragraphs (c) and (d) of this section. For purposes of this section, "nonconnected committee" includes any committee which conducts activities in connection with an election, but which is not a party committee, an authorized committee of any candidate for federal election, or a separate segregated fund.

(b) *Costs to be allocated*—(1) *Separate segregated funds.* Separate segregated funds that make disbursements in connection with federal and non-federal elections shall allocate expenses for the following categories of activity:

(i) Administrative expenses including rent, utilities, office supplies, and salaries not attributable to a clearly identified candidate, if such expenses are not paid by the separate segregated fund's connected organization;

(ii) The direct costs of a fundraising program or event including disbursements for solicitation of funds and for planning and administration of actual fundraising events, where federal and non-federal funds are collected through such program or event, if such expenses are not paid by the separate segregated fund's connected organization; and

(iii) Generic voter drives including voter identification, voter registration, and get-out-the-vote drives, or any other activities that urge the general public to register, vote or support candidates of a particular party or associated with a particular issue, without mentioning a specific candidate.

(2) *Nonconnected committees.* Nonconnected committees that make disbursements in connection with federal and non-federal elections shall allocate expenses for the following categories of activity:

(i) Administrative expenses including rent, utilities, office supplies, and salaries, except for such expenses directly attributable to a clearly identified candidate;

(ii) The direct costs of a fundraising program or event including disbursements for solicitation of funds and for planning and administration of actual fundraising events, where federal and non-federal funds are collected through such program or event; and

(iii) Generic voter drives including voter identification, voter registration, and get-out-the-vote drives, or any other activities that urge the general public to register, vote or support candidates of a particular party or associated with a particular issue, without mentioning a specific candidate.

(c) *Method for allocating administrative expenses and costs of generic voter drives.* Nonconnected committees and separate segregated funds shall allocate their administrative expenses and costs of generic voter drives, as described in paragraph (b) of this section, according to the funds expended method, described in paragraphs (c) (1) and (2) as follows:

(1) Under this method, expenses shall be allocated based on the ratio of federal expenditures to total federal and non-federal disbursements made by the committee during the two-year federal election cycle. This ratio shall be estimated and reported at the beginning of each federal election cycle, based upon the committee's federal and non-federal disbursements in a prior comparable federal election cycle or upon the committee's reasonable prediction of its disbursements for the coming two years. In calculating its federal expenditures, the committee shall include only amounts contributed to or otherwise spent on behalf of specific federal candidates. Calculation of total federal and non-federal disbursements shall also be limited to disbursements for specific candidates, and shall not include overhead or other generic costs.

(2) On each of its periodic reports, the committee shall adjust its allocation ratio to reconcile it with the ratio of actual federal and non-federal disbursements made, to date. If the non-federal account has paid more than its allocable share, the committee shall transfer funds from its federal to its non-federal account, as necessary, to reflect the adjusted allocation ratio. The committee shall make note of any such adjustments and transfers on its periodic reports, submitted pursuant to 11 CFR 104.5.

(d) *Method for allocating direct costs of fundraising.* If federal and non-federal funds are collected by one committee through a joint activity, that committee shall allocate its direct costs of fundraising according to the funds received method. Under this method, the committee shall allocate its fundraising costs based on the ratio of funds received into its federal account to its total receipts from each fundraising program or event. This ratio shall be estimated prior to each such program or event based upon the committee's reasonable prediction of its federal and non-federal revenue from that program or event, and shall be noted in the committee's report for the period in which the first disbursement for such program or event occurred, submitted pursuant to 11 CFR 104.5. Any disbursements for fundraising costs made prior to the actual program or event shall be allocated according to this estimated ratio. The committee shall adjust its estimated allocation ratio following each fundraising program or event from which both federal and non-federal funds are collected, to reflect the actual ratio of funds received. If the non-federal account has paid more than its allocable share, the committee shall transfer funds from its federal to its non-federal account, as necessary, to reflect the adjusted allocation ratio. The committee shall make note of any such adjustments and transfers in its report for the period in which the fundraising program or event occurred.

(e) *Payment of allocable expenses by committees with separate federal and non-federal accounts*—(1) *Payment options.* Nonconnected committees and separate segregated funds that have established separate federal and non-federal accounts under 11 CFR 102.5 (a)(1)(i) or (b)(1)(i) shall pay the expenses of joint federal and non-federal activities described in paragraph (b) of this section according to either paragraph (e)(1) (i) or (ii), as follows:

(i) *Payment by federal account; transfers from non-federal account to federal account.* The committee shall pay the entire amount of an allocable expense from its federal account and shall transfer funds from its non-federal account to its federal account solely to cover the non-federal share of that allocable expense.

(ii) *Payment by separate allocation account; transfers from federal and non-federal accounts to allocation account.* (A) The committee shall establish a separate allocation account into which funds from its federal and non-federal accounts shall be deposited solely for the purpose of paying the allocable expenses of joint federal and non-federal activities. Once a committee has established an allocation account for this purpose, all allocable expenses shall be paid from that account for as long as the account is maintained.

(B) The committee shall transfer funds from its federal and non-federal accounts to its allocation account in amounts proportionate to the federal or non-federal share of each allocable expense.

(C) No funds contained in the allocation account may be transferred to any other account maintained by the committee.

(2) *Timing of transfers between accounts.* (i) Under either payment option described in paragraphs (e)(1)(i) or (ii) of this section, the committee shall

transfer funds from its non-federal account or from its federal and non-federal accounts to its separate allocation account following determination of the final cost of each joint federal and non-federal activity, or in advance of such determination if advance payment is required by the vendor and if such payment is based on a reasonable estimate of the activity's final cost as determined by the committee and the vendor(s) involved.

(ii) Funds transferred from a committee's non-federal account to its federal account or its allocation account are subject to the following requirements:

(A) For each such transfer, the committee must itemize in its reports the allocable activities for which the tranferred funds are intended to pay, as required by 11 CFR 104.10(b)(3); and

(B) Such funds may not be transferred more than 10 days before or more than 30 days after the payment for which they are designated is made.

(iii) Any portion of a transfer from a committee's non-federal account to its federal account or its allocation account that does not meet the requirements of paragraph (e)(2)(ii) of this section shall be presumed to be a loan or contribution from the non-federal account to a federal account, in violation of the Act.

(3) *Reporting transfers of funds and allocated disbursements.* A political committee that transfers funds between accounts and pays allocable expenses according to this section shall report each such transfer and disbursement pursuant to 11 CFR 104.10(b).

Dated: June 15, 1990.

Lee Ann Elliott,

Chairman, Federal Election Commission.

[FR Doc. 90-14461 Filed 6-25-90; 8:45 am]

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PLAINTIFFS' EXHIBIT 195

Proposed Rules

Federal Register
Vol. 59, No. 239
Wednesday, December 14, 1994

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

FEDERAL ELECTION COMMISSION

[Notice 1994–18]

11 CFR Parts 9003, 9004, 9006, 9007, 9033, 9034, 9037, and 9038

Public Financing of Presidential Primary and General Election Candidates

AGENCY: Federal Election Commission.

ACTION: Extension of comment period.

SUMMARY: On October 6, 1994, the Federal Election Commission published a Notice of Proposed Rulemaking seeking comments on proposed revisions to its regulations governing publicly financed Presidential primary and general election candidates. The Commission has now decided to extend the comment period until January 9, 1995.

DATES: Comments must be received on or before January 9, 1995.

ADDRESSES: Comments must be in writing and addressed to: Ms. Susan E. Propper, Assistant General Counsel, 999 E Street, NW., Washington, DC 20463.

FOR FURTHER INFORMATION CONTACT: Ms. Susan E. Propper, Assistant General Counsel, 999 E Street, NW., Washington, DC 20463, (202) 219–3690 or (800) 424–9530.

SUPPLEMENTARY INFORMATION: The Commission has initiated a rulemaking to determine what changes should be made to its regulations at 11 CFR Parts 9001 *et seq.* and 9031 *et seq.* governing public financing of Presidential campaigns. See 59 FR 51006 (October 6, 1994). These regulations implement the provisions of the Presidential Election Campaign Fund Act and the Presidential Primary Matching Payment Account Act. The Notice of proposed rulemaking indicated that comments were due on December 5, 1994. Two requests for an extension of the comment period have been received. Commenters who are engaged in winding down 1994 election activities are finding it difficult to submit timely comments. Accordingly, the Commission has now concluded that it would be appropriate to extend the comment period until January 9, 1995 to allow commenters sufficient time after the elections to prepare their comments and suggestions.

Dated: December 9, 1994.

Trevor Potter,

Chairman.

[FR Doc. 94–30692 Filed 12–13–94, 8:45 am]

BILLING CODE 6715–01–M

FEDERAL RESERVE SYSTEM

12 CFR Part 226

[Regulation Z; Docket No. R–0863]

Truth in Lending

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Proposed rule; official staff interpretation.

SUMMARY: The Board is publishing for comment proposed revisions to the official staff commentary to Regulation Z (Truth in Lending). The commentary applies and interprets the requirements of Regulation Z. The proposed revisions would clarify regulatory provisions or provide further guidance on issues of general interest, such as the treatment of various fees and taxes associated with real estate-secured loans and a creditor's responsibilities when investigating a claim of unauthorized use of a credit card.

DATES: Comments must be received on or before February 1, 1995.

ADDRESSES: Comments should refer to Docket No. R–0863, and may be mailed to William W Wiles, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, NW., Washington; DC 20551 Comments also may be delivered to Room B–2222 of the Eccles Building between 8:45 a.m. and 5:15 p.m. weekdays, or to the guard station in the Eccles Building courtyard on 20th Street, NW. (between Constitution Avenue and C Street) at any time. Comments may be inspected in Room MP–500 of the Martin Building between 9 a.m. and 5 p.m. weekdays, except as provided in 12 CFR 261.8 of the Board's rules regarding the availability of information.

FOR FURTHER INFORMATION CONTACT: For Subparts A and B (open-end credit), Jane Jensen Gell or Obrea O. Poindexter, Staff Attorneys; for Subparts A and C (closed-end credit), Kyung Cho-Miller, Sheilah A. Goodman, or Natalie E. Taylor, Staff Attorneys, Division of Consumer and Community Affairs, Board of Governors of the Federal Reserve System, at (202) 452–3667 or 452–2412; for the hearing impaired *only*, Dorothea Thompson, Telecommunications Device for the Deaf, at (202) 452–3544.

SUPPLEMENTARY INFORMATION:

I. Background

The purpose of the Truth in Lending Act (TILA, 15 U.S.C. 1601 et seq.) is to promote the informed use of consumer credit by requiring disclosures about its terms and cost. The act requires creditors to disclose credit terms and the cost of credit as an annual percentage rate (APR). The act requires additional disclosures for loans secured by a consumer's home, and permits consumers to cancel certain transactions that involve their principal dwelling. It also imposes limitations on some credit transactions secured by a consumer's principal dwelling. The act is implemented by the Board's Regulation Z (12 CFR part 226). The regulation authorizes the issuance of official staff interpretations of the regulations (See Appendix C to Regulation Z.)

The Board is publishing proposed amendments to the commentary to Regulation Z. The commentary is designed to provide guidance to creditors in applying the regulation to specific transactions and is a substitute for individual staff interpretations. It is updated periodically to address significant questions that arise. It is expected that this update will be adopted in final form in March 1995 with compliance optional until October 1, 1995, the effective date for mandatory compliance.

II. Proposed Commentary

Subpart A—General

Section 226.2—Definitions and Rules of Construction.

2(a) Definitions

2(a)(17) Creditor

Paragraph 2(a)(17)(i)

Comment 2(a)(17)(i)-8 would be revised to provide further guidance on

the identity of the creditor for participant loans from an employee savings plan, such as 401(k) plans. Under applicable law, it is the plan that extends the credit, not the trust or trustee receiving and disbursing plan funds. Therefore, for purposes of the TILA, the plan is deemed to be the creditor.

Section 226.4—Finance Charge

4(a) Definition

Comment 4(a)–1 would be revised to indicate to creditors that section 12 of the Real Estate Settlement Procedures Act (RESPA; 12 U.S.C. 2610) prohibits fees from being charged for preparing TILA disclosure statements in RESPA-covered transactions.

Comment 4(a)–3 would be revised to provide additional guidance on when fees charged by a third party are finance charges.

4(c) Charges Excluded From the Finance Charge

Paragraph 4(c)(7)

Comment 4(c)(7)–1 would be revised to clarify the interplay of the fourth and fifth sentences, dealing with a lump sum charge for services. Proposed new language makes clear that a lawyer's attendance at a closing or a charge for conducting the closing is entirely excluded from the finance charge, even though fees for the incidental services might not be excluded if they were imposed separately; this is an exception to the general rule on the treatment of lump sum fees.

Proposed comment 4(c)(7)–2 would clarify that real estate or residential mortgage transaction charges excludable under § 226.4(c)(7) are those charges imposed in connection with the initial decision to grant credit and paid prior to or at consummation or loan closing—for example, a fee to search for tax liens on the property or to determine if flood insurance is required. Additional fees assessed during the loan term to monitor a consumer's continued compliance with contract provisions, such as paying property taxes or purchasing flood insurance, are not excludable under § 226.4(c)(7). These recurring administrative fees, paid by the consumer to protect the creditor's security interest, are finance charges.

4(e) Certain Security Interest Charges

Comment 4(e)–1 would be revised to clarify that the security interest charges excludable as finance charges are those that relate to the agreement between the creditor and the consumer. When a creditor sells or otherwise assigns the consumer's obligation to a third party and the fee to record the assignment is imposed on the consumer, that fee is not excludable from the finance charge under § 226.4(e).

Subpart B—Open-End Credit

Section 226.5—General Disclosure Requirements

(5b) Time of Disclosures

5(b)(1) Initial Disclosures

Comment 5(b)(1)–1 provides that initial disclosures must be provided before the consumer makes the first purchase under an open-end plan; the proposed revision provides an example to illustrate that when a consumer makes a purchase and opens an account contemporaneously with a retailer, for example, disclosures must be given to the consumer at that time.

Proposed comment 5(b)(1)–5 addresses the timing of disclosures for open-end credit plan solicitations that offer consumers an option to transfer outstanding balances with other creditors.

Section 226.6—Initial Disclosure Statement

6(b) Other Charges

Comment 6(b)–1 would be revised to state that a fee imposed for terminating an open-end credit plan must be disclosed as an "other charge." Under § 226.6(b) of the regulation, significant charges related to the plan (that are not finance charges) must be disclosed.

While a termination fee might technically meet the definition of a finance charge, there is no detriment to the consumer for a creditor to disclose this fee as a significant charge under § 226.6(b)—other charges—rather than a finance charge under § 226.4. There seems to be little benefit to the consumer's receiving an APR (disproportionately high in some cases) on what might be the last periodic statement under an active plan for a fee imposed when the consumer closes the account.

Section 226.12—Special Credit Card Rules

12(b) Liability of Cardholder for Unauthorized Use

Proposed comments 12(b)–2 and –3 address a card issuer's rights and responsibilities in responding to a claim of unauthorized use under § 226.12. Proposed comment 12(b)–2 clarifies that card issuers are not required to impose any liability. Proposed comment 12(b)–3 clarifies that a card issuer wishing to impose liability must investigate claims in a reasonable manner.

Proposed comment 12(b)–3 lists some of the steps that card issuers may take in the investigation of a claim. For example, card issuers may request that a cardholder provide information needed to resolve the claim. But a card issuer cannot automatically deny a claim based on a cardholder's failure, for instance, to submit a signed statement or notarized document, or to file a police report. The steps appropriate for investigating particular claims may differ, and card issuers are not required to take certain minimum steps on all claim investigations. Specific comment is solicited on the proposed approach for providing guidance that identifies, by example, actions that card issuers may take in a reasonable investigation of a claim of unauthorized use.

Section 226.15—Right of Rescission

15(a) Consumer's Right To Rescind

Paragraph 15(a)(1)

Comments 15(a)(1)–5 and –6 would be revised to provide further guidance on the right to rescind a transaction secured by a consumer's principal dwelling. The right of rescission does not apply to residential mortgage transactions. (See § 226.15(f)(1).) Proposed comment 15(a)(1)–5 adds examples of transactions that are and are not rescindable.

Comment 15(a)(1)–6—which contains an exception to the "one principal dwelling" rule of comment 15(a)(1)–5—would be revised to clarify that a credit transaction secured by the equity in the consumer's current principal dwelling, not by the new home, is subject to the rescission requirements of § 226.15.

15(d) Effects of Rescission

Consumers who rescind transactions are refunded any fees that they paid to obtain the loan. Comment 15(d)(2)–1 would be revised to clarify that broker fees, although paid by the consumer to a third party, must be refunded by the creditor to the consumer if the consumer rescinds the transaction.

Section 226.16—Advertising

16(d) Additional Requirements for Home Equity Plans

Proposed comment 16(d)–7 would clarify disclosure requirements for balloon payments in home equity plan advertisements. Commentary to § 226.5b(d)(5)(ii) provides that for plans in which a balloon payment will occur if the consumer makes only the minimum payments, the disclosure must state that fact. The proposed

comment would apply this requirement to advertisements, since the regulatory provisions on treatment of balloon payments in home equity advertising and in disclosures are generally parallel.

Subpart C—Closed-end Credit

Section 226.17—General Disclosures

17(a) Form of Disclosures

Paragraph 17(a)(1)

Comment 17(a)(1)–5 would be revised to include a late payment fee on a single payment loan as information directly related to the segregated disclosures. Section 226.18(l) requires disclosure of a late payment fee only if a dollar or percentage charge may be imposed *before maturity* due to a late payment, other than a deferral or extension charge. Creditors suggest that the only distinction between requiring the fee to be reflected on a loan that has not matured, as compared with a loan that has matured, is of a technical nature. Disclosure of a late payment fee is information valuable to a consumer obligated on a single payment loan that would not distract from or obscure the segregated disclosures.

17(c) Basis of Disclosures and Use of Estimates

Paragraph 17(c)(4)

Section 226.17(c)(4) allows creditors to disregard in the payment schedule and other calculations small variations in the first payment due to a long or short first period. Proposed comment 17(c)(4)–4 clarifies that prepaid finance charges, such as odd days interest paid at or prior to closing, may not be considered as the first payment on a loan. Thus, creditors cannot disregard any irregularity in disclosing such finance charges in the payment schedule.

17(f) Early Disclosures

Comment 226.17(f)–1 would be revised to clarify that redisclosure is not only required if the annual percentage rate in the consummated transaction differs from the disclosed rate by more than the allowable 1/8 or 1/4 of 1 percent tolerance, but also if the early disclosures were not indicated as estimates, and consummated terms other than the rate differ from the terms disclosed.

Section 226.18—Content of Disclosures

18(c) Itemization of Amount Financed

Paragraph 18(c)(1)(iv)

Proposed comment 18(c)(1)(iv)–2 clarifies disclosure requirements under the TILA that are affected by new rules under the Real Estate Settlement Procedures Act (RESPA; 12 U.S.C. 2601). In October 1994, the Department of Housing and Urban Development (HUD), which implements RESPA through Regulation X (24 CFR Part 3500), amended its regulation to implement new procedures for calculating the amount consumers must pay into escrow accounts associated with RESPA-covered home mortgage loans (59 FR 53890, October 26, 1994). These procedures are being phased in over time for existing escrow accounts; all new escrow accounts established on or after April 24, 1995 must comply with the new procedures. Eventually, all lenders will be required to use an aggregate accounting method instead of a single-item method for RESPA transactions. The use of the aggregate method will affect disclosure requirements under Regulation Z.

Currently, in calculating the amounts required to be paid into escrow accounts at closing, lenders use what is referred to as the single-item analysis. (Property taxes, insurance, and mortgage insurance premiums are common examples of escrow items.) Under single-item analysis, lenders account separately for each item to be collected at closing and held in escrow.

Under the aggregate accounting method, rather than accounting for each item separately, the amount for escrow is determined as a whole. This will make it difficult for a creditor to determine how much of the aggregate amount is actually allocated to each escrow item.

Regardless of how they collect the funds under RESPA, lenders will continue to disclose escrow items on the HUD settlement statement using the single-item analysis. If the amount actually collected at settlement is affected by the aggregate accounting method, the settlement statement will reflect the adjustment on a separate line in the 1000 series. Mortgage insurance premiums, one of the items typically paid at settlement and included in the escrow account, are listed on line 1002 of the HUD statement. This amount is also a prepaid finance charge under Regulation Z.

If a creditor is collecting the settlement charges using aggregate analysis the amount actually collected may be less than the amount listed on line 1002. Guidance has been requested on what amount lenders should use as the prepaid finance charge, since the amount disclosed is not precisely the amount collected. Various alternatives have been considered to ensure as accurate and uniform a disclosure as possible. The proposed comment provides that creditors may use the amount on line 1002, without adjustment, to calculate the prepaid finance charge under the TILA. This approach will ease compliance and provide consumers with an easily identifiable amount for the mortgage insurance. While this method does slightly overstate the amount of the prepaid finance charge for mortgage insurance, nonetheless this method seems to provide the more accurate and equitable treatment possible given the problems associated with identifying the amount of any single item in an aggregate accounting analysis. Comment is solicited on the use of the figure in line 1002 as the amount for the prepaid finance charge for mortgage insurance along with any other concerns the shift to aggregate accounting raises for lenders under Regulation Z.

18(d) Finance Charge

Proposed comment 18(d)–2 states that although there is no specific tolerance for the amount financed, an error in that figure—resulting from an error in a finance charge that is a component part of the amount financed—does not violate the act or the regulation provided the finance charge disclosed under § 226.18(d) is within the permissible tolerance provided in footnote 41 of the regulation. The same interpretation would apply to other disclosures for which the regulation provides no specific tolerance, such as the total of payments.

Section 226.19—Certain Residential Mortgage Transactions

19(b) Certain Variable-Rate Transactions

Paragraph 19(b)(2)(vii)

Proposed comment 19(b)(2)(vii)–2 states that loans with more than one way to trigger negative amortization are separate variable-rate loan programs requiring disclosures under § 226.19(b)(2) (viii) and (x) to the extent they vary from each other. For example, a loan that provides for monthly interest rate changes but only annual payment changes, or automatic payment caps for a set period of time, or an option for the borrower to cap the amount of monthly payments whenever the new payment would exceed the old payment by more than a certain margin, consists of three separate variable-rate programs. Each program may trigger negative amortization. For the program that gives the borrower an option to cap monthly payments, the creditor must fully disclose the rules relating to the payment cap option, including the effects of exercising it (such as negative amortization occurs and the principal

balance will increase), except that the disclosure in § 19(b)(2)(vii) need not be given for the option.

Section 226.22—Determination of the Annual Percentage Rate

22(a) Accuracy of the Annual Percentage Rate

Paragraph 22(a)(1)

Comment 22(a)(1)–5 would be revised to correct an erroneous footnote reference.

Section 226.23—Right of Rescission

23(a) Consumer's Right To Rescind

Paragraph 23(a)(1)

The right of rescission does not apply to residential mortgage transactions. (See § 226.23(f)(1).) Comments 23(a)(1)–3 and –4 would be revised to provide further guidance on the right to rescind a transaction secured by a consumer's principal dwelling. Proposed comment 23(a)(1)–3 adds examples of transactions that are and are not rescindable.

Comment 23(a)(1)–4—which contains an exception to the "one principal dwelling" rule in comment 23(a)(1)–3—would be revised to clarify that a credit transaction secured by the equity in the consumer's current principal dwelling, not by the new home, is subject to the rescission requirements of § 226.23.

23(d) Effects of Rescission

Paragraph 23(d)(2)

Consumers who rescind transactions are refunded any fees that they paid to obtain the loan. Comment 23(d)(2)-1 would be revised to clarify that broker fees, although paid by the consumer to a third party, must be refunded by the creditor to the consumer if the consumer rescinds the transaction.

23(f) Exempt Transactions

Paragraph 23(f)(4)

Section 226.23(f)(2) exempts refinancings by the original creditor, to whom the obligation was originally payable. (See definition of a creditor under TILA in § 226.2(a)(17).) Comment 23(f)-4 would be revised to clarify that in a merger, consolidation, or acquisition, the successor institution is considered the original creditor for purposes of the exemption in § 226.23(f)(2). For example, if two lending institutions merge, the resulting institution is considered the original creditor for refinancings of any mortgage loans that were made by either of the two institutions. In refinancing transactions, any creditor that is not the original creditor for the obligation being refinanced must deliver the general rescission notice (model form H–8).

Appendix J—Annual Percentage Rate Computations for Closed-end Credit Transactions

In the reference section, the *1981 changes* paragraph would be revised to make a technical correction to the second sentence. Paragraph (b)(5)(vi) does not permit creditors to use either the 12-month or the 365-day unit period methods "in all cases" where the transaction term equals a whole number of months, but only in a single-advance, single-payment transaction in which the term is less than a year and is equal to a whole number of months.

III. Form of Comment Letters

Comment letters should refer to Docket No. R–0863, and, when possible, should use a standard courier typeface with a type size of 10 or 12 characters per inch. This will enable the Board to convert the text in machine-readable form through electronic scanning, and will facilitate automated retrieval of comments for review. Also, if accompanied by an original document in paper form, comments may be submitted on 3½ inch or 5¼ inch computer diskettes in any IBM-compatible DOS-based format.

List of Subjects in 12 CFR Part 226

Advertising, Banks, banking, Consumer protection, Credit, Federal Reserve System, Mortgages, Reporting and recordkeeping requirements, Truth in lending.

Certain conventions have been used to highlight the proposed revisions to the regulation. New language is shown inside bold-faced arrows, while language that would be deleted is set off with bold-faced brackets. Comments are numbered to comply with new **Federal Register** publication rules.

For the reasons set forth in the preamble, the Board proposes to amend 12 CFR part 226 as follows:

PART 226—TRUTH IN LENDING (REGULATION Z)

1. The authority citation for part 226 continues to read as follows:

Authority: 12 U.S.C. 3806, 15 U.S.C. 1604 and 1637(c)(5).

Subpart A—General

* * * * *

2. In supplement I to part 226, under *§ 226.2—Definitions and rules of construction*, under *Paragraph 2(a)(17)(i).*, paragraph 8. would be revised to read as follows:

Supplement I—Official Staff Interpretations

§ 226.2 Definitions and rules of construction.

* * * * *

Paragraph 2(a)(17)(i)

* * * * *

8. *Loans from employee savings plan.* Some employee savings plans permit participants to borrow money up to a certain percentage of their account balances[.]►, and use a trust to administer the receipt and disbursement of funds. The plan (not the trust or the trustee) is the creditor for purposes of this regulation. Thus, unless◄ [Unless] each participant's account is an individual ►plan and◄ trust►, such as an individual retirement account◄, the numerical tests should be applied to the plan as a whole rather than to the individual accounts, even if the loan amount is determined by reference to the balance in an individual account and the repayments are credited to the individual account.

* * * * *

3. In Supplement I to part 226, *§ 226.4—Finance Charge*, the following amendments would be made:

a. Under *4(a) Definition.*, paragraphs 1. and 3. would be revised;

b. Under *Paragraph 4(c)(7).*, paragraph 1. would be revised and a new paragraph 2. would be added; and

c. Under *(4)(e) Certain security interest charges.*, paragraph 1. would be revised.

The revisions and additions would read as follows:

* * * * *

§ 226.4 Finance charge.

4(a) Definition

1. *Charges in comparable cash transactions.* Charges imposed uniformly in cash and credit transactions are not finance charges. In determining whether an item is a finance charge, the creditor should compare the credit transaction in question with a similar cash transaction. A creditor financing the sale of property or services may compare charges with those payable in a similar cash transaction by the seller of the property or service.

►i.◄ For example, the following items are not finance charges:

►A.◄ Taxes, license fees, or registration fees paid by both cash and credit customers;

►B.◄ Discounts that are available to cash and credit customers, such as quantity discounts;

►C.◄ Discounts available to a particular group of consumers because

they meet certain criteria, such as being members of an organization or having accounts at a particular financial institution. This is the case even if an individual must pay cash to obtain the discount, provided credit customers who are members of the group and don't qualify for the discount pay no more than the non-member cash customers.

►D.◄ Charges for a service policy, auto club membership, or policy of insurance against latent defects offered to or required of both cash and credit customers for the same price.

►ii.◄ In contrast, the following items are finance charges:

►(A)◄ Inspection and handling fees for the staged disbursement of construction loan proceeds;

►(B)◄ Fees for preparing a Truth in Lending disclosure statement►, if permitted by law (for example, the Real Estate Settlement Procedures Act (RESPA) prohibits such charges in certain transactions secured by real property).

►(C)◄ Charges for a required maintenance or service contract imposed only in a credit transaction.

►iii.◄ If the charge in a credit transaction exceeds the charge imposed in a comparable cash transaction, only the difference is a finance charge. For example:

►(A)◄ If an escrow agent is used in both cash and credit sales of real estate and the agent's charge is $100 in a cash transaction and $150 in a credit transaction, only $50 is a finance charge.

* * * * *

3. *Charges by third parties.* ►i. Third party charges paid by the consumer are not finance charges if the creditor does not retain the charges or require the service. For example:

A. A state or local tax on the credit transaction paid by the consumer, even if the tax is collected by the creditor; and

B. A fee for a courier charged by an independent closing agent to send a document to the title company or some other party, provided that the creditor has not required the use of the courier.

ii. In contrast, third party charges are finance charges (unless otherwise excluded) if the creditor requires the service as a condition of making the loan, even if the consumer can choose the service provider. Examples are:

A. The cost of required mortgage insurance, even if the consumer is allowed to choose the insurer; and

B. A mortgage broker fee when the use of a broker is required, such as when a consumer cannot get the same loan terms and conditions directly through the creditor (for example, the consumer is offered a loan for 8 percent only by using a broker; otherwise, the particular loan is offered at 9 percent).◄ [Charges imposed on the consumer by someone other than the creditor for services not required by the creditor are not finance charges, as long as the creditor does not retain the charges.

In contrast, charges imposed on the consumer by someone other than the creditor are finance charges (unless otherwise excluded) if the creditor requires the services of the third party. For example:

- A fee charged by a loan broker if the consumer cannot obtain the same credit terms from the creditor without using a broker.

For example:

- A fee charged by a loan broker to a consumer, provided the creditor does not require the use of a broker (even if the creditor knows of the loan broker's involvement or compensates the broker).
- A tax imposed by a state or other governmental body on the credit transaction that is payable by the consumer (even if the tax is collected by the creditor).]

* * * * *

Paragraph 4(c)(7)

1. *Real estate or residential mortgage transaction charges.* The list of charges in § 226.4(c)(7) applies both to residential mortgage transactions (which may include, for example, the purchase of a mobile home) and to other transactions secured by real estate. The fees are excluded from the finance charge even if the services for which the fees are imposed are performed by the creditor's employees rather than by a third party. In addition, credit report fees include not only the cost of the report itself, but also the cost of verifying information in the report. If a lump sum is charged for several services and includes a charge that is not excludable, a portion of the total should be allocated to that service and included in the finance charge. ►However, a◄ [A] charge for a lawyer's attendance at the closing or a charge for conducting the closing (for example, by a title company) is excluded from the finance charge if the charge is primarily for services related to items listed in § 226.4(c)(7) (for example, reviewing or completing documents), even if other incidental services such as explaining various documents or disbursing funds for the parties, are performed. ►The entire charge is excluded even though a fee for the incidental services would be a finance charge if it was imposed separately.◄ In all cases, charges excluded under § 226.4(c)(7) must be bona fide and reasonable.

►2. *Charges assessed during the loan term.* The exclusion in § 226.4(c)(7) for charges imposed in real estate or residential mortgage transactions is not available for fees to be assessed periodically during the loan term. For example, a fee to be assessed at intervals during a 30-year loan (whether collected at closing or when the service is rendered) for determining current tax lien status or flood insurance requirements is a finance charge. In contrast, where such fees are imposed solely in connection with the creditor's initial decision to grant credit, the fees are excluded from the finance charge under § 226.4(c)(7).◄

* * * * *

4(e) Certain Security Interest Charges

1. *Examples.* ►Only sums actually paid to public officials are excludable from the finance charge under § 226.4(e)(1).◄ Examples of ►excludable◄ charges ►are◄ [excludable from the finance charge under § 226.4(e)(1) include]:

►i.◄ Charges for filing or recording security agreements, mortgages, continuation statements, termination statements, and similar documents► that evidence the obligation between the creditor and the consumer◄;

►ii.◄ Stamps evidencing payment of taxes on property if the stamps are required to file a security agreement on the property; and

►iii. An intangible tax on the property if the payment of the tax is required to file a security agreement on the property.◄

[Only sums actually paid to public officials are excludable under § 226.4(e)(1).]

* * * * *

Subpart B—Open-End Credit

4. In Supplement I to part 226, under *§ 226.5—General Disclosure Requirements*, under *5(b)(1) Initial disclosures.*, in paragraph 1., the first and second sentences would be revised, and a new paragraph 5. would be added to read as follows:

* * * * *

§ 226.5 General disclosure requirements.

* * * * *

5(b)(1) Initial Disclosures

1. *Disclosure before the first transaction.* The rule that the initial disclosure statement must be furnished "before the first transaction" requires delivery of the initial disclosure statement before the consumer becomes

obligated on the plan. For example, the initial disclosures must be given before the consumer makes the first purchase ►(such as when consumers open credit plans and make purchases contemporaneously at retail stores)◄, receives the first advance, or pays any fees or charges under the plan other than an application fee or refundable membership fee (see below).* * *

* * * * *

►5. *Balance transfers.* A creditor that solicits the transfer by a consumer of outstanding balances from an existing account to a new open-end plan must comply with § 226.6 before the consumer authorizes the balance transfer. Card issuers that are subject to the requirements of § 226.5a may establish procedures that comply with both sections in a single disclosure statement.◄

* * * * *

5. In Supplement I to part 226, under *§ 226.6—Initial disclosure statement*, under *6(b) Other charges.*, paragraph 1 would be revised to read as follows:

* * * * *

§ 226.6 Initial disclosure statement.

* * * * *

6(b) Other Charges

1. *General; examples of other charges.* Under § 226.6(b), significant charges related to the plan (that are not finance charges) must also be disclosed. For example:

►i.◄ Late payment and over-the-credit-limit charges.

►ii.◄ Fees for providing documentary evidence of transactions requested under § 226.13 (billing error resolution).

►iii.◄ Charges imposed in connection with real estate transactions such as title, appraisal, and credit report fees. (See § 226.4(c)(7).)

►iv.◄ A tax imposed on the credit transaction by a state or other governmental body, such as a documentary stamp tax on cash advances. (See the commentary to § 226.4(a).)

►v.◄ Membership or participation fees for a package of services that includes an open-end credit feature, unless the fee is required whether or not the open-end credit feature is included. For example, a membership fee to join a credit union would not be an "other charge," even if membership is required to apply for credit.

►vi.◄ Automated teller machine (ATM) charges described in comment 4(a)–5 that are not finance charges.

►vii. Charges imposed for the termination of an open-end credit plan.◄

* * * * *

6. In Supplement I to part 226, under *26.12—Special credit card provisions*, under *12(b) Liability of cardholder for unauthorized use.*, new paragraphs 2. and 3. would be added to read as follows:

* * * * *

§ 226.12 Special credit card provisions.

* * * * *

12(b) Liability of Cardholder for Unauthorized Use

* * * * *

►2. Imposing liability. A card issuer is not required to impose liability on a cardholder for the unauthorized use of a credit card; if the card issuer does not seek to impose liability, the issuer need not conduct any investigation of the cardholder's claim.

3. *Reasonable investigation.* If a card issuer seeks to impose liability when a claim of unauthorized use is made by a cardholder, the card issuer must conduct a reasonable investigation of the claim. In conducting its investigation, the card issuer may reasonably request the cardholder's cooperation, but the card issuer may not automatically deny a claim based solely on the cardholder's failure or refusal to comply with a particular request. The steps necessary for investigating claims may differ, but actions such as the following represent steps that a card issuer may take, as appropriate, in conducting a reasonable investigation:

i. Reviewing the types or amounts of purchases made in relation to the cardholder's previous purchasing pattern.

ii. Reviewing where the purchases were delivered in relation to the cardholder's residence or place of business.

iii. Reviewing where the purchases were made in relation to where the cardholder resides or has normally shopped.

iv. Comparing any signature on credit slips for the purchases to the signature of the cardholder or an authorized user in the card issuer's records including other credit slips.

v. Requesting a written, signed statement from the cardholder or authorized user.

vi. Advising the cardholder that an appearance may be required in a court action against the person who allegedly used the card without authority.

vii. Requesting a copy of a police report, if one was filed.◄

* * * * *

7. In Supplement I to part 226, under *§ 226.15—Right of rescission*, the following amendments would be made:

a. Under *Paragraph 15(a)(1).*, in paragraph 5., the third sentence is revised, and two new sentences are added following the third sentence;

b. Under *Paragraph 15(a)(1).*, paragraph 6. would be revised; and

c. Under *Paragraph 15(d)(2).*, in paragraph 1., the third sentence would be revised.

The additions and revisions would read as follows:

* * * * *

§ 226.15 Right of Rescission.

* * * * *

Paragraph 15(a)(1)

* * * * *

5. *Principal dwelling.* * * * When a consumer buys or builds a new dwelling that will become the consumer's principal dwelling within one year or upon completion of construction, the new dwelling is considered the principal dwelling [when]►if◄ it secures the open-end credit line. ►In that case, the transaction secured by the new dwelling is a residential mortgage transaction and is not rescindable. For example, if a consumer whose principal dwelling is currently A builds B, to be occupied by the consumer upon completion of construction, an advance on an open-end line to finance B and secured by B is a residential mortgage transaction.◄ * * *

6. *Special rule for principal dwelling.* When the consumer is acquiring or constructing a new principal dwelling, [any]►a◄ credit plan or extension ►that is subject to Regulation Z and is◄ secured by the equity in the consumer's current principal dwelling (for example, an advance to be used as a bridge loan) is still subject to the right of rescission. ►For example, if a consumer whose principal dwelling is currently A builds B, to be occupied by the consumer upon completion of construction, a loan to finance B and secured by A is subject to the right of rescission. But a credit transaction secured by both A and B is a residential mortgage transaction and is not rescindable.◄

* * * * *

Paragraph 15(d)(2)

1. *Refunds to consumer.* * * * "Any amount" includes finance charges already accrued, as well as other charges such as ►*broker fees,*◄ application and commitment fees►,◄ or fees for a title search or appraisal, whether paid to the creditor, paid directly to a third

party, or passed on from the creditor to the third party. * * *

* * * * *

8. In Supplement I to part 226, under *§ 226.16—Advertising*, under *16(d) Additional Requirements for Home Equity Plans*, a new paragraph 7. would be added to read as follows:

* * * * *

§ 226.16 Advertising.

* * * * *

16(d) Additional Requirements for Home Equity Plans

* * * * *

►7. *Balloon payment.* In programs where a balloon payment will occur if only the minimum payments under the plan are made, the advertisement must state that a balloon payment will result. (See comment 5b(d)(5)(ii)–3 regarding disclosure requirements for a balloon payment.)◄

* * * * *

9. In Supplement I to part 226, under *§ 226.17—General disclosure requirements*, the following amendments would be made:

a. Under *Paragraph 17(a)(1).*, paragraph 5. would be revised;

b. Under *Paragraph 17(c)(4).*, a new paragraph 4 would be added; and

c. Under *17(f) Early disclosures.*, paragraph 1. would be revised.

The revisions and additions would read as follows:

* * * * *

Subpart C—Closed-end Credit

§ 226.17 General disclosure requirements.

* * * * *

Paragraph 17(a)(1)

* * * * *

5. *Directly related.* The segregated disclosures may, at the creditor's option, include any information that is directly related to those disclosures. Directly relation information includes, for example, the following:

►i.◄ A description of a grace period after which a late payment charge will be imposed. For example, the disclosure given under § 226.18(l) may state that a late charge will apply to "any payment received more than 15 days after the due date."

►ii.◄ A statement that the transaction is not secured. For example, the creditor may add a category labelled "unsecured" or "not secured" to the security interest disclosures given under § 226.18(m).

►iii.◄ The basis for any estimates used in making disclosures. For example, if the maturity date of a loan depends solely on the occurrence of a future event, the creditor may indicate that the disclosures assume that events will occur at a certain time.

►iv.◄ The conditions under which a demand feature may be exercised. For example, in a loan subject to demand after five years, the disclosures may state that the loan will become payable on demand in five years.

►v.◄ An explanation of the use of pronouns or other references to the parties to the transaction. For example, the disclosures may state, "'you' refers to the customer and 'we' refers to the creditor."

►vi.◄ Instructions to the creditor or its employees on the use of a multiple-purpose form. For example, the disclosures may state, "Check box if applicable."

►vii.◄ A statement that the borrower may pay a minimum finance charge upon prepayment in a simple-interest transaction. For example, when state law prohibits penalties, but would allow a minimum finance charge in the event to prepayment, the creditor may make the § 226.18(k)(1) disclosure by stating, "You may be charged a minimum finance charge."

►viii.◄ A brief reference to negative amortization in variable-rate transactions. For example, in the variable-rate disclosure, the creditor may include a short statement such as "Unpaid interest will be added to principal." (See the commentary to § 226.18(f)(1)(iii).)

►ix.◄ A brief caption identifying the disclosures. For example, the disclosures may bear a general title such as "Federal Truth in Lending Disclosures" or a descriptive title such as "Real Estate Loan Disclosures."

►x.◄ A statement that a due-on-sale clause or other conditions on assumption are contained in the loan document. For example, the disclosure given under § 226.18(q) may state, "Someone buying your home may, subject to conditions in the due-on-sale clause contained in the loan document, assume the remainder of the mortgage on the original terms."

►xi.◄ If a state or Federal law prohibits prepayment penalties and excludes the charging of interest after prepayment from coverage as a penalty, a statement that the borrower may have to pay interest for some period after prepayment in full. The disclosure given under § 226.18(k) may state, for example, "If you prepay your loan on other than the regular installment date, you may be assessed interest charges until the end of the month."

►xii.◄ More than one hypothetical example under § 226.18(f)(1)(iv) in transactions with more than one variable-rate feature. For example, in a variable-rate transaction with an option permitting consumers to convert to a fixed-rate transaction, the disclosures may include an example illustrating the effects on the payment terms of an increase resulting from conversion in addition to the example illustrating an increase resulting from changes in the index.

►xiii.◄ The disclosures set forth under § 226.18(f)(1) for variable-rate transactions subject to § 226.18(f)(2).

►xiv.◄ A statement whether or not a subsequent purchaser of the property securing an obligation may be permitted to assume the remaining obligation on its original terms.

►xv. A late-payment fee disclosure under § 226.18(l) on a single payment loan.◄

* * * * *

Paragraph 17(c)(4)

* * * * *

►4. *Relation to prepaid finance charges.* Prepaid finance charges paid prior to or at closing may not be treated as the first payment period on a loan. Thus, creditors may not disregard an irregularity in disclosing such finance charges.◄

* * * * *

17(f) Early Disclosures

1. *Change in rate* ►or other terms◄ [No redisclosure] ►Redisclosure◄ is required for changes that occur between the time disclosures are made and consummation. [unless] ◄if► the annual percentage rate in the consummated transaction exceeds the limits prescribed in section 226. 22(a) (⅛ of 1 percentage point in regular transactions and ¼ of 1 percentage point in irregular transactions). ►Redisclosure is also required, even if the APR is within the permitted tolerance, if the disclosures were not based on estimates in accordance with section 226.17(c)(2) and labelled as such.◄ To illustrate:

►i.◄ If disclosures are made in a regular transaction on July 1, the transaction is consummated on July 15, and the actual annual percentage varies by more than ⅛ of 1 percentage point from the disclosed annual percentage rate, the creditor must either redisclose the changed terms or furnish a complete set of new disclosures before consummation. Redisclosure is required even if the disclosures made on July 1 are based on estimates and marked as such; and

►ii. If disclosures are made on January 15, the transaction is consummated on February 10, and the

finance charge increased by $35 but the disclosed annual percentage rate is within the permitted tolerance, the creditor must at least redisclose the changed terms. (See § 226.18(d) and footnote 41 of this part.)◀

* * * * *

10. In Supplement I to part 226, under *§ 226.18—Content of disclosures*, the following amendments would be made:

a. Under *Paragraph 18(c)(1)(iv).*, a new paragraph 2. would be added; and

b. Under *18(d) Finance charge.*, paragraph 2 would be revised.

The additions and revisions would read as follows:

* * * * *

§ 226.18 Content of disclosures.

* * * * *

Paragraph 18(c)(1)(iv)

* * * * *

►2. *Prepaid mortgage insurance premiums.* RESPA requires creditors to give consumers a settlement statement disclosing the costs associated with mortgage loan transactions. Included on the settlement statement are mortgage insurance premiums collected at settlement, which are prepaid finance charges. In calculating the total amount of prepaid finance charges, creditors should use the amount for mortgage insurance that is listed on the line for mortgage insurance on the settlement statement, without adjustment, even if the actual amount collected at settlement varies because of RESPA's escrow accounting rules.◀

18(d) Finance Charge

* * * * *

2 *Tolerance.* A tolerance for the finance charge is provided in footnote 41 ►of this part. When a miscalculation of the amount financed, or of some other numerical disclosure for which the regulation provides no specific tolerance, results from an error in a finance charge that constitutes a part of that amount, the miscalculated amount financed or other numerical disclosure does not violate the act or the regulation if the finance charge disclosed under § 226.18(d) is within the permissible tolerance under footnote 41 of this part◀.

* * * * *

11. In Supplement I to part 226, under *§ 226.19—Certain residential mortgage and variable-rate transactions*, under Paragraph 19(b)(2)(vii)., in paragraph 2., three new sentences are added following the second sentence to read as follows:

* * * * *

§ 226.19 Certain residential mortgage and variable-rate transactions.

* * * * *

Paragraph 19(b)(2)(vii)

* * * * *

2. *Negative amortization and interest rate carryover.* * * * ►Loans that provide for more than one way to trigger negative amortization are separate variable-rate programs requiring separate disclosures. (See the commentary to § 226.19(b)(2) and 226.19(b)(3) for a discussion on the definition of variable-rate loan programs and the format for disclosure.) If a consumer is given the option to cap monthly payments that may result in negative amortization, the creditor must fully disclose the rules relating to the option, including the effects of exercising the option (such as negative amortization will occur and the principal loan balance will increase); however, the disclosure in § 226.19(b)(2)(viii) need not be provided.◀ * * *

* * * * *

12. In Supplement I to part 226, under *§ 226.22—Determination of the annual percentage rate*, under Paragraph 22(a)(1)., in paragraph 5., the reference to footnote "45a" is revised to read "45d".

13. In Supplement I to part 226, under *§ 226.23—Right of Rescission*, the following amendments would be made:

a. Under *Paragraph 23(a)(1).*, in paragraph 3., the fourth sentence is revised and two new sentences are added following the fourth sentence;

b. Under *Paragraph 23(a)(1).*, paragraph 4. is revised;

c. Under *Paragraph 23(d)(2).*, in paragraph 1., the third sentence is revised; and

d. Under *23(f) Exempt transactions.*, in paragraph 4., two new sentences are added following the first sentence, and a new sentence is added at the end of the paragraph.

The revisions and additions would read as follows:

* * * * *

§ 226.23 Right of rescission.

* * * * *

Paragraph 23(a)(1)

* * * * *

3. *Principal dwelling.* * * * When a consumer buys or builds a new dwelling that will become the consumer's principal dwelling within one year or upon completion of construction, the new dwelling is considered the principal dwelling [when] ►if◀ it secures the acquisition or construction loan. ►In that case, the transaction secured by the new dwelling is a residential mortgage transaction and is not rescindable. For example, if a consumer whose principal dwelling is currently A builds B, to be occupied by the consumer upon completion of construction, an construction loan to finance B and secured by B is a residential mortgage transaction.◀

* * *

4. *Special rule for principal dwelling* When the consumer is acquiring or constructing a new principal dwelling, [any] ►a◀ loan ►(subject to Regulation Z)◀ secured by the equity in the consumer's current principal dwelling (for example, a bridge loan) is still subject to the right of rescission [regardless of the purpose of that loan] ►For example, if a consumer whose principal dwelling is currently A builds B, to be occupied by the consumer upon completion of construction, a construction loan to finance B and secured by A is subject to the right of rescission. But a credit transaction secured by both A and B is a residential mortgage transaction and is not rescindable.◀

* * * * *

Paragraph 23(d)(2)

1 *Refunds to consumer.* * * * "Any amount" includes finance charges already accrued, as well as other charges such as ►*broker fees,*◀ application and commitment fees►,◀ or fees for a title search or appraisal, whether paid to the creditor, paid directly to a third party, or passed on from the creditor to the third party. * * *

* * * * *

23(f) Exempt Transactions

* * * * *

4. *New advances.* * * * ►The creditor to whom the obligation was initially made payable is the original creditor. In a merger, consolidation, or acquisition, the successor institution is considered the original creditor for purposes of the exemption in § 226.23(f)(2).◀ * * * ►In refinancing transactions, any creditor that was not the original creditor for the obligation being refinanced must deliver the general rescission notice (model form H–8).◀

* * * * *

14. In Supplement I to part 226, under Appendix J, under the subheading References, under *1981 changes:*, the second sentence would be revised to read as follows:

* * * * *

Appendix J—Annual Percentage Rate Computations for Closed-End Credit Transactions

* * * * *

References

* * * * *

1981 changes: * * * Paragraph (b)(5)(vi) has been revised to permit creditors ▶in single-advance, single-payment transactions in which the term is less than a year and is equal to a whole number of months◀ [in all cases where the transaction term equals a whole number of months], to use either the 12-month method or the 365-day method to compute the number of unit-periods per year.

By order of the Board of Governors of the Federal Reserve System, acting through the Secretary of the Board under delegated authority, December 8, 1994.

William W. Wiles,

Secretary of the Board.

[FR Doc. 94–30606 Filed 12–13–94; 8:45 am]

BILLING CODE 6210–01–P

COMMODITY FUTURES TRADING COMMISSION

17 CFR Parts 35 and 36

Section 4(c) Contract Market Transactions; Swap Agreements

AGENCY: Commodity Futures Trading Commission.

ACTION: Extension of comment period.

SUMMARY: On October 28, 1994, the Commission published in the **Federal Register** a notice proposing rules in a new Part 36 which would permit certain contract market transactions meeting specified criteria to trade pursuant to an exemption from certain requirements of the Commodity Exchange Act and Commission regulations. The notice also seeks comment on whether Part 35 (Exemption of Swap Agreements) should be amended to include stand-alone prohibitions of fraud and price manipulation similar to those being proposed in new Part 36, and whether the proposed requirements for eligible participants in new Part 36 should be applied to the Commission's previously-granted exemptions, including the exemption for swap agreements in Part 35. 59 FR 54139.

The applicable comment period expires on December 12, 1994. The Commission has received a number of requests for an extension of the comment period, particularly with regard to amendments to Part 35. In order to ensure that all interested parties have an opportunity to submit meaningful comments, the Commission has determined to extend the period for public comment concerning only those issues involving swap agreements. This extension would not affect the closing date for commenting on proposed Part 36.

DATES: Written comments concerning swap agreements must be received by the Commission by the close of business on January 31, 1995.

ADDRESSES: Comments should be sent to Jean A. Webb, Secretary, Commodity Futures Trading Commission, 2033 K Street, NW., Washington, DC 20581. Reference should be made to section 4(c) contract market transactions and/or swap agreements.

FOR FURTHER INFORMATION CONTACT: Ellyn S. Roth, Attorney, Office of the General Counsel, Commodity Futures Trading Commission, 2033 K Street, NW., Washington DC 20581. Telephone: (202) 254–9880.

Issued in Washington, DC, this 8th day of December, 1994, by the Commission.

Jean A. Webb,

Secretary of the Commission.

[FR Doc. 94–30690 Filed 12–13–94; 8:45 am]

BILLING CODE 6351–01–M

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1, 53 and 301

[EE–48–90]

RIN 1545–AO77

Political Expenditures by Section 501(c)(3) Organizations

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed regulations regarding excise taxes, accelerated tax assessments, and injunctions imposed for certain political expenditures made by organizations that (without regard to any political expenditure) would be described in section 501(c)(3) and exempt from taxation under section 501(a). These sanctions were enacted as part of the Revenue Act of 1987

DATES: Written comments and requests for a public hearing must be received by March 14, 1995

ADDRESSES: Send submissions to: CC:DOM:CORP:T:R (EE–48–90), room 5228, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044. In the alternative, submissions may be hand delivered between the hours of 8 a.m. and 5 p.m. to: CC:DOM:CORP:T:R (EE–48–90), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Cynthia Morton or Paul Accettura, (202) 622–6070 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

This document provides proposed amendments to the Income Tax Regulations to supply rules under sections 4955, 6852, and 7409 of the Internal Revenue Code of 1986 (Code). Sections 4955, 6852, and 7409 were enacted by the Omnibus Budget Reconciliation Act of 1987 (OBRA), Public Law 100–203.

In addition, proposed amendments were made to regulations under other sections in order to reflect the effects of sections 4955, 6852, and 7409. Proposed amendments were made to the following regulations sections: §§ 1.6091–2, 53.4963–1, 53.6011–1, 53.6071–1, 53.6091–1, 301.6211–1, 301.6212–1, 301.6213–1, 301.6861–1, 301.6863–1, 301.6863–2, 301.7422–1, and 301.7611–1.

These regulations will be effective upon publication of the final regulations in the **Federal Register.**

Explanation of Provisions

Section 501(a) exempts from income tax any organization described in section 501(c). Section 501(c)(3) describes organizations that are organized and operated exclusively for charitable purposes. An organization is not described in section 501(c)(3) if it participates or intervenes in any political campaign on behalf of (or in opposition to) any candidate for public office (political intervention).

Before sections 4955, 6852, and 7409 were enacted in 1987, revocation of the recognition of exemption was the sole sanction available against political intervention by public charities. In contrast, private foundations have been subject since 1969 to the section 4945 excise tax on taxable expenditures such as political expenditures. The sanctions in sections 4955, 6852, and 7409 apply to all organizations described in section 501(c)(3) (public charities and private foundations).

Congress enacted sections 4955, 6852 and 7409 because it determined that revocation of exemption was not a sufficient sanction to enforce effectively the prohibition on political intervention by section 501(c)(3) organizations. For example, if an organization engaged in significant, uncorrected political

intervention, revocation could be ineffective as a penalty or deterrent, particularly if the organization used all its assets for political intervention and then ceased operations. On the other hand, if an organization made a small, unintentional political expenditure and subsequently adopted procedures to assure no similar future expenditures (particularly if the responsible managers left the organization), the revocation was also ineffective because it was considered a disproportionate penalty and, therefore, not used.

Section 4955 was modeled on the section 4945 excise tax on political expenditures (taxable expenditures) according to the legislative history, while sections 6852 and 7409 provide new sanctions against flagrant political expenditures and flagrant political intervention, respectively. Section 4955 provides a two-tiered excise tax on the political expenditures of a section 501(c)(3) organization and on the agreement of its managers to make the expenditures. Section 6852 allows the immediate assessment of section 4955 taxes and income taxes against a section 501(c)(3) organization in the case of flagrant political expenditures by the organization. Section 7409 enables the Service to seek an injunction against further political expenditures by a 501(c)(3) organization after flagrant political intervention by the organization.

The proposed regulations address the following issues:

A. Political Intervention Prohibition for Section 501(c)(3) Organization Unaltered

Consistent with the legislative history, the proposed regulations under section 4955 provide that the excise taxes imposed by section 4955 do not affect the substantive standards for tax exemption under section 501(c)(3), under which an organization is described in section 501(c)(3) only if it does not participate or intervene in any political campaign on behalf of any candidate for public office. Revocation is generally a separate issue from the application of sections 4955, 6852, and 7409, and is not governed by the proposed regulations. Therefore, sections 4955, 6852, and 7409 may be employed independent of the presence or absence of revocation proceedings, except for the accelerated assessment of income tax under section 6852.

B. Amplification of Political Expenditure Definition

Section 4955(d) provides two definitions of political expenditures. One definition covers amounts paid or incurred by a section 501(c)(3) organization to participate or intervene in the political campaign of any candidate for public office. For purposes of this first definition, any expenditure that would cause an organization that makes the expenditure to be classified as an *action* organization by reason of § 1.501(c)(3)–1(c)(3)(iii) is a political expenditure. Section 1.501(c)(3)–1(c)(3)(iii) defines *candidate for public office* and provides that political intervention can be direct or indirect.

The other statutory definition of political expenditures includes certain expenditures of organizations that are formed primarily for the purpose of promoting a person's candidacy, or used primarily for that purpose and effectively controlled by the candidate. The proposed regulations follow the legislative history by providing that whether the primary purpose of an organization is promoting an individual's candidacy or prospective candidacy depends upon facts and circumstances such as whether the surveys, studies, and other materials prepared by the organization are made available only to one candidate or are made available to the general public, and whether the organization pays for speeches and travel expenses for only one individual or for several persons. The proposed regulations provide that an organization is considered as effectively controlled by a candidate or prospective candidate only if the individual has a continuing, substantial involvement in the day-to-day operations or management of the organization.

C. Imposition of Initial Taxes on Organization Manager Under Section 4955

Consistent with the intention expressed in the legislative history that section 4955 be applied in a similar manner to section 4945 (regarding excise taxes for political expenditures), the proposed section 4955 regulations follow the section 4945 regulations in providing guidance on the first tier tax on organization managers. Under section 4955(a)(2), there is a first tier tax imposed on the agreement of any organization manager to the making of any expenditure, knowing that it is a political expenditure, unless such agreement is not willful and is due to reasonable cause. The proposed section 4955 regulations follow the section 4945 regulations in specifying the type of organization managers and the type of agreement covered by the statute. The proposed section 4955 regulations also explain how to determine when an organization manager *knows* an expenditure is a political expenditure and when the agreement is *willful and without reasonable cause.*

D. Abatement, Refund or No Assessment of Initial Section 4955 Taxes

The proposed section 4955 regulations follow the legislative history in providing that an initial tax under section 4955(a) will be abated, refunded, or not assessed if the organization or an organization manager establishes to the satisfaction of the IRS that the political expenditure was not willful and flagrant, and that the political expenditure was corrected.

E. Correction of Political Expenditures Under Section 4955

As noted above, the excise taxes provided in section 4955 follow the two-tiered approach of the taxes on taxable expenditures by private foundations provided in section 4945. Thus, section 4955 imposes initial taxes at moderate rates, to be followed by more severe taxes if the political expenditure in question is not *corrected* within a prescribed period. *Correction* of a political expenditure, as defined in section 4955(f)(3), requires recovery of the expenditure to the extent possible. The proposed regulations, following the regulations under section 4945, provide that an organization is not required to initiate legal action to recover an expenditure if the action would in all probability not result in the satisfaction of execution on a judgment.

F. Procedures for Taxation Under Section 6852

Section 6852 provides for accelerated assessment of income taxes and section 4955 excise taxes in cases in which a section 501(c)(3) organization makes political expenditures that constitute a flagrant violation of the prohibition against making such expenditures. The accelerated assessment provisions authorize the Secretary to make an immediate determination and assessment of taxes payable. Any income taxes assessed under section 6852 are computed as if the taxpayer's taxable year ended on the date of the determination.

The proposed regulations prescribe procedures to be followed in making an accelerated assessment under section 6852. The regulations provide that such an assessment must be authorized by the District Director. In addition, the regulations provide that an organization cannot be subject to an accelerated assessment of income taxes under section 6852 unless the organization makes political expenditures that result

in revocation of the organization's tax exemption under section 501(a).

The proposed regulations require a taxpayer subject to an assessment under section 6852 to pay the amount assessed within 10 days after the District Director sends the notice and demand for immediate payment. Finally, the regulations provide that cases involving assessments under section 6852 are not cases in which the collection of tax is in jeopardy. Therefore, an assessment under section 6852 does not suspend the normal collection procedures.

G. Procedures for Seeking an Injunction Under Section 7409

The proposed regulations under section 7409 provide procedures for the IRS to use in seeking an injunction against further political expenditures by a section 501(c)(3) organization that has flagrantly participated in, or intervened in any political campaign on behalf of (or in opposition to) any candidate for public office (flagrant political intervention). The procedural framework for seeking an injunction consists of a letter from the Assistant Commissioner (Employee Plans and Exempt Organizations) to the organization notifying it of the Service's intention to seek an injunction if the flagrant intervention does not stop or the charge is not refuted, a 10-day period for the organization to respond to the letter, and the personal determination by the Commissioner regarding whether to seek an injunction. The power given to the Commissioner cannot be delegated.

Special Analysis

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in EO 12866. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) and the Regulatory Flexibility Act (5 U.S.C. chapter 6) do not apply to these regulations, and, therefore, a Regulatory Flexibility Analysis is not required. Pursuant to section 7805(f) of the Internal Revenue Code, this notice of proposed rulemaking will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Requests for a Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written comments (preferably a signed original and eight (8) copies) that are submitted timely to the IRS. All comments will be available for public inspection and copying. A public hearing may be scheduled if requested in writing by a person that timely submits written comments. If a public hearing is scheduled, notice of the date, time, and place for the hearing will be published in the Federal Register.

Drafting Information

The principal author of these regulations is Cynthia D. Morton, Office of Associate Chief Counsel (Employee Benefits and Exempt Organizations). However, other personnel from the IRS and Treasury Department participated in their development.

List of Subjects

26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

26 CFR Part 53

Excise taxes, Foundations, Investments, Lobbying, Reporting and recordkeeping requirements.

26 CFR Part 301

Employment taxes, Estate taxes, Excise taxes, Gift taxes, Income taxes, Penalties, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR parts 1, 53, and 301 are amended as follows:

PART 1—INCOME TAXES

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

Authority: 26 U.S.C. 7805 * * *

Par. 2. Section 1.6091–2 is amended by adding paragraph (g) to read as follows:

§ 1.6091–2 Place for filing income tax returns.

* * * * *

(g) *Returns of persons subject to a termination assessment.* Notwithstanding paragraph (c) of this section, income tax returns of persons with respect to whom an income tax assessment was made under section 6852(a) with respect to the taxable year must be filed with the district director as provided in paragraphs (a) and (b) of this section.

PART 53—FOUNDATION AND SIMILAR EXCISE TAXES

Par. 3. The authority citation for part 53 continues to read as follows:

Authority: 26 U.S.C. 7805.

Par. 4. Section 53.4955–1 is added under subpart K to read as follows:

§ 53.4955–1 Tax on political expenditures.

(a) ***Relationship between section 4955 excise taxes and substantive standards for exemption under section 501(c)(3).*** The excise taxes imposed by section 4955 do not affect the substantive standards for tax exemption under section 501(c)(3), under which an organization is described in section 501(c)(3) only if it does not participate or intervene in any political campaign on behalf of any candidate for public office.

(b) ***Imposition of initial taxes on organization managers.***—(1) ***In general.*** The excise tax under section 4955(a)(2) of the Internal Revenue Code on the agreement of any organization manager to the making of a political expenditure by a section 501(c)(3) organization is imposed only in cases where—

(i) A tax is imposed by section 4955(a)(1);

(ii) The organization manager knows that the expenditure to which the manager agrees is a political expenditure; and

(iii) The agreement is willful and is not due to reasonable cause.

(2) *Type of organization managers covered.*—(i) ***In general.*** The tax under section 4955(a)(2) is imposed only on those organization managers who are authorized to approve, or to exercise discretion in recommending approval of, the making of the expenditure by the organization and on those organization managers who are members of a group (such as the organization's board of directors or trustees) which is so authorized.

(ii) *Officer.* For purposes of section 4955(f)(2)(A), a person is an officer of an organization if—

(A) That person is specifically so designated under the certificate of incorporation, bylaws, or other constitutive documents of the foundation; or

(B) That person regularly exercises general authority to make administrative or policy decisions on behalf of the organization. Independent contractors, acting in a capacity as attorneys, accountants, and investment managers and advisors, are not officers.

(iii) *Employee.* For purposes of section 4955(f)(2)(B), an individual rendering services to an organization is an employee of the organization only if that individual is an employee within the meaning of section 3121(d)(2).

(3) *Type of agreement required.* An organization manager agrees to the making of a political expenditure if the

manager manifests approval of the expenditure which is sufficient to constitute an exercise of the organization manager's authority to approve, or to exercise discretion in recommending approval of, the making of the expenditure by the organization. The manifestation of approval need not be the final or decisive approval on behalf of the organization.

(4) *Knowing*—(i) *General rule.* For purposes of section 4955, an organization manager is considered to have agreed to an expenditure *knowing* that it is a political expenditure only if—

(A) The manager has actual knowledge of sufficient facts so that, based solely upon these facts, the expenditure would be a political expenditure;

(B) The manager is aware that such an expenditure under these circumstances may violate the provisions of federal tax law governing political expenditures; and

(C) The manager negligently fails to make reasonable attempts to ascertain whether the expenditure is a political expenditure, or the manager is aware that it is a political expenditure.

(ii) *Amplification of general rule.* For purposes of section 4955, *knowing* does not mean *having reason to know.* However, evidence tending to show that an organization manager has reason to know of a particular fact or particular rule is relevant in determining whether the manager had actual knowledge of the fact or rule. Thus, for example, evidence tending to show that an organization manager has reason to know of sufficient facts so that, based solely upon those facts, an expenditure would be a political expenditure is relevant in determining whether the manager has actual knowledge of the facts.

(5) *Willful.* An organization manager's agreement to a political expenditure is willful if it is voluntary, conscious, and intentional. No motive to avoid the restrictions of the law or the incurrence of any tax is necessary to make an agreement willful. However, an organization manager's agreement to a political expenditure is not willful if the manager does not know that it is a political expenditure.

(6) *Due to reasonable cause.* An organization manager's actions are due to reasonable cause if the manager has exercised his or her responsibility on behalf of the organization with ordinary business care and prudence.

(7) *Advice of counsel.* An organization manager's agreement to an expenditure is ordinarily not considered knowing or willful and is ordinarily considered *due to reasonable cause* if the manager, after full disclosure of the factual situation to legal counsel (including house counsel), relies on the advice of counsel expressed in a reasoned written legal opinion that an expenditure is not a political expenditure under section 4955 (or that expenditures conforming to certain guidelines are not political expenditures). For this purpose, a written legal opinion is considered *reasoned* even if it reaches a conclusion which is subsequently determined to be incorrect, so long as the opinion addresses itself to the facts and applicable law. A written legal opinion is not considered *reasoned* if it does nothing more than recite the facts and express a conclusion. However, the absence of advice of counsel with respect to an expenditure does not, by itself, give rise to any inference that an organization manager agreed to the making of the expenditure knowingly, willfully, or without reasonable cause.

(8) *Cross reference.* For provisions relating to the burden of proof in cases involving the issue of whether an organization manager has knowingly agreed to the making of a political expenditure, see section 7454(b).

(c) *Amplification of political expenditure definition*—(1) *General rule.* Any expenditure that would cause an organization that makes the expenditure to be classified as an *action* organization by reason of § 1.501(c)(3)-1(c)(3)(iii) is a political expenditure within the meaning of section 4955(d)(1).

(2) *Other political expenditures*—(i) For purposes of section 4955(d)(2), an organization is effectively controlled by a candidate or prospective candidate only if the individual has a continuing, substantial involvement in the day-to-day operations or management of the organization. An organization is not effectively controlled by a candidate or a prospective candidate merely because it is affiliated with the candidate, or merely because the candidate knows the directors, officers, or employees of the organization. The effectively controlled test is not met merely because the organization carries on its research, study, or other educational activities with respect to subject matter or issues in which the individual is interested or with which the individual is associated.

(ii) For purposes of section 4955(d)(2), a determination of whether the primary purpose of an organization is promoting the candidacy or prospective candidacy of an individual for public office is made on the basis of all the facts and circumstances. The factors to be considered include whether the surveys, studies, materials, etc. prepared by the organization are made available only to the candidate or are made available to the general public; and whether the organization pays for speeches and travel expenses for only one individual, or for speeches or travel expenses of several persons. The fact that a candidate or prospective candidate utilizes studies, papers, materials, etc., prepared by the organization (such as in a speech by the candidate) is not to be considered as a factor indicating that the organization has a purpose of promoting the candidacy or prospective candidacy of that individual where such studies, papers, materials, etc. are not made available only to that individual.

(iii) Expenditures for voter registration, voter turnout, or voter education constitute *other expenses*, treated as political expenditures by reason of section 4955(d)(2)(E), only if the expenditures violate the prohibition on political activity provided in section 501(c)(3).

(d) *Abatement, refund, or no assessment of initial tax.* No initial (first-tier) tax will be imposed under section 4955(a), or the initial tax will be abated or refunded, if the organization or an organization manager establishes to the satisfaction of the IRS that—

(1) The political expenditure was not willful and flagrant; and

(2) The political expenditure was corrected.

(e) *Correction*—(1) *Recovery of Expenditure.* For purposes of section 4955(f)(3) and this section, correction of a political expenditure is accomplished by recovering part or all of the expenditure to the extent recovery is possible, and, where full recovery cannot be accomplished, by any additional corrective action which the Commissioner may prescribe. The organization making the political expenditure is not under any obligation to attempt to recover the expenditure by legal action if the action would in all probability not result in the satisfaction of execution on a judgment.

(2) *Establishing safeguards.* Correction of a political expenditure must also involve the establishment of sufficient safeguards to prevent future political expenditures by the organization. The determination of whether safeguards are sufficient to prevent future political expenditures by the organization is made by the District Director.

(f) *Effective date.* This section is effective the date these regulations are published as final regulations in the **Federal Register.**

§ 53.4963–1 [Amended]

Par. 5. In § 53.4963–1, paragraphs (a), (b), and (c) are amended by adding the reference "4955," immediately after the reference "4952,".

§ 53.6011–1 [Amended]

Par. 6. In section § 53.6011–1, paragraph (b) is amended as follows: 1. In the first sentence, the language "or 4945(a)," is removed and ", 4945(a) or 4955(a)," is added in its place.

2. In the last sentence, the language "or 4955(a)" is added immediately following the language "section 4945(a)".

Par. 7. Section 53.6071–1(a) is amended by adding paragraph (e) to read as follows:

§ 53.6071–1 Time for filing returns.

* * * * *

(e) *Taxes related to political expenditures of organizations described in section 501(c)(3) of the Internal Revenue Code.* A Form 4720 required to be filed by § 53.6011–1(b) for an organization liable for tax imposed by section 4955(a) must be filed by the unextended due date for filing its annual information return under section 6033 or, if the organization is exempt from filing, the date the organization would be required to file an annual information return if it was not exempt from filing. The Form 4720 of a person whose taxable year ends on a date other than that on which the taxable year of the organization described in section 501(c)(3) ends must be filed on or before the 15th day of the fifth month following the close of the person's taxable year.

Par. 8. Section 53.6091–1 is amended by adding paragraph (d) to read as follows:

§ 53.6091–1 Place for filing chapter 42 tax returns.

* * * * *

(d) *Returns of persons subject to a termination assessment.* Notwithstanding paragraph (c) of this section, income tax returns of persons with respect to whom a chapter 42 tax assessment was made under section 6852(a) with respect to the taxable year must be filed with the district director as provided in paragraphs (a) and (b) of this section.

PART 301—PROCEDURE AND ADMINISTRATION

Par. 9. The authority citation for part 301 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

§ 301.6211–1 [Amended]

Par. 10. In § 301.6211–1, the last sentence of paragraph (b) is amended by adding "or 6852" immediately after "section 6851".

§ 301.6212–1 [Amended]

Par. 11. In § 301.6212–1, the second sentence of paragraph (c) is amended by adding "termination assessments in section 6851 or 6852," immediately after "section 6213(b)(1),".

§ 301.6213–1 [Amended]

Par. 12. Section 301.6213–1 is amended as follows:

1. Paragraph (a)(2), first sentence, is amended by adding ", 6852," immediately after "section 6851".

2. Paragraph (e), first sentence, is amended by adding "4955," immediately after "4952,".

Par. 13. Section 301.6852–1 is added immediately following § 301.6851–1 to read as follows:

§ 301.6852–1 Termination assessments of tax in the case of flagrant political expenditures of section 501(c)(3) organizations.

(a) *Authority for making.* Any assessment under section 6852 as a result of a flagrant violation by a section 501(c)(3) organization of the prohibition against making political expenditures must be authorized by the District Director.

(b) *Determination of income tax.* An organization shall be subject to an assessment of income tax under section 6852 only if the flagrant violation of the prohibition against making political expenditures results in revocation of the organization's tax exemption under section 501(a) because it is not described in section 501(c)(3). An organization subject to such an assessment is not liable for income taxes for any period prior to the effective date of the revocation of the organization's tax exemption.

(c) *Payment.* Where a District Director has made a determination of income tax under paragraph (b) of this section or of section 4955 excise tax, notwithstanding any other provision of law, any tax will become immediately due and payable. The taxpayer is required to pay the amount of the assessment within 10 days after the District Director sends the notice and demand for immediate payment regardless of the filing of an administrative appeal or of a court petition. Regardless of filing an administrative appeal or of petitioning a court, enforced collection action may proceed after the 10-day payment period unless the taxpayer posts the bond described in section 6863. For purposes of collection procedures such as section 6331 (regarding levy), assessments under the authority of paragraph (a) of this section do not constitute situations in which *the collection of such tax is in jeopardy* and, therefore, do not suspend normal collection procedures.

(d) *Effective date.* This section is effective the date these regulations are published as final regulations.

§ 301.6861–1 [Amended]

Par. 14. In § 301.6861–1, paragraph (g) is amended by:

1. Adding the language "4955(a)," immediately after "4952(a),".

2. Adding the language "4955(b)," immediately after "4952(b),".

§ 301.6863–1 [Amended]

Par. 15. Section 301.6863–1 is amended as follows:

1. Paragraph (a)(1) is amended by adding the language ", or under section 6852 (referred to as a *political assessment* for purposes of this section)" immediately after "for purposes of this section)".

2. Paragraphs (a)(3), (a)(4), and (b) are amended by adding the language "or political assessment" immediately after "jeopardy assessment".

3. Paragraph (b) is further amended by adding the language "(or political assessment)" immediately after "jeopardy" in the last sentence.

§ 301.6863–2 [Amended]

Par. 16. In § 301.6863–2, paragraph (a), the first sentence is amended by adding the language "6852," immediately after "section 6851,".

Par. 17. Section 301.7409–1 is added immediately after § 301.7406–1 to read as follows:

§ 301.7409–1 Action to enjoin flagrant political expenditures of section 501(c)(3) organizations.

(a) *Letter to organization.* When the Assistant Commissioner (Employee Plans and Exempt Organizations) concludes that a section 501(c)(3) organization has engaged in flagrant political intervention and is likely to continue to engage in political intervention that involves political expenditures, the Assistant Commissioner (Employee Plans and Exempt Organizations) shall send a letter to the organization providing it with the facts based on which the Service believes that the organization has been engaging in flagrant political intervention and is likely to continue to engage in political intervention that involves political expenditures. The organization will have 10 calendar days after the letter is sent to respond by establishing that it will immediately

cease engaging in political intervention, or by providing the Service with sufficient information to refute the Service's evidence that it has been engaged in flagrant political intervention. The Internal Revenue Service will not proceed to seek an injunction under section 7409 until after the close of this 10-day response period.

(b) *Determination by Commissioner.* If the organization does not respond within 10 calendar days to the letter under paragraph (a) of this section in a manner sufficient to dissuade the Assistant Commissioner (Employee Plans and Exempt Organizations) of the need for an injunction, the file will be forwarded to the Commissioner of Internal Revenue. The Commissioner of Internal Revenue will personally determine whether to forward to the Department of Justice a recommendation that it immediately bring an action to enjoin the organization from making further political expenditures. The Commissioner may also recommend that the court action include any other action that is appropriate in ensuring that the assets of the section 501(c)(3) organization are preserved for section 501(c)(3) purposes. The authority of the Commissioner to make the determinations described in this paragraph may not be delegated to any other persons.

(c) *Flagrant political intervention.* For purposes of this section, *flagrant political intervention* is defined as participation in, or intervention in (including the publication and distribution of statements), any political campaign by a section 501(c)(3) organization on behalf of (or in opposition to) any candidate for public office in violation of the prohibition on such participation or intervention in section 501(c)(3) and the regulations thereunder if the participation or intervention is flagrant.

(d) *Effective date.* This section is effective the date these regulations are published as final regulations.

§ 301.7422–1 [Amended]

Par. 18. In § 301.7422–1, paragraphs (a), (c) and (d) are amended by adding the language "4955," immediately after "4952,".

§ 301.7611–1 [Amended]

Par. 19. In § 301.7611–1, A–6, the first sentence is amended by adding the language "or 6852," immediately after "section 6851".

Margaret Milner Richardson,

Commissioner of Internal Revenue.

[FR Doc. 94–30729 Filed 12–13–94; 8:45 am]

BILLING CODE 4830–01–U

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[CA 71–6–6615b; FRL–5115–1]

Approval and Promulgation of State Implementation Plans; California State Implementation Plan Revision; Ventura County Air Pollution Control District

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve revisions to the California State Implementation Plan (SIP) which concern the control of volatile organic compound (VOC) emissions from gasoline transfer operations, and petroleum sumps, pits, ponds, and well cellars. The intended effect of proposing approval of these rules is to regulate emissions of VOCs in accordance with the requirements of the Clean Air Act, as amended in 1990 (CAA or the Act). In the Rules Section of this **Federal Register**, the EPA is approving the state's SIP revision as a direct final rule without prior proposal because the Agency views this as a noncontroversial revision amendment and anticipates no adverse comments. A detailed rationale for this approval is set forth in the direct final rule. If no adverse comments are received in response to this proposed rule, no further activity is contemplated in relation to this rule. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. The EPA will not institute a second comment period on this document. Any parties interested in commenting on this action should do so at this time.

DATES: Comments on this proposed rule must be received in writing by January 13, 1995.

ADDRESSES: Written comments on this action should be addressed to: Daniel A. Meer, Rulemaking Section (A–5–3), Air and Toxics Division, U.S. Environmental Protection Agency, Region IX, 75 Hawthorne Street, San Francisco, CA 94105–3901.

Copies of the rule revisions and EPA's evaluation report of each rule are available for public inspection at EPA's Region IX office during normal business hours. Copies of the submitted rule revisions are also available for inspection at the following locations:

California Air Resources Board, Stationary Source Division, Rule Evaluation Section, 2020 "L" Street, Sacramento, CA 95812.

Ventura County Air Pollution Control District, 702 County Square Drive, Ventura, CA 93003.

FOR FURTHER INFORMATION CONTACT: Mae Wang, Rulemaking Section (A–5–3), Air and Toxics Division, U.S. Environmental Protection Agency, Region IX, 75 Hawthorne Street, San Francisco, CA 94105–3901, Telephone (415) 744–1200.

SUPPLEMENTARY INFORMATION: This document concerns the following rules from the Ventura County Air Pollution Control District: Rule 70, Storage and Transfer of Gasoline; Rule 71, Crude Oil and Reactive Organic Compound Liquids; and Rule 71.4, Petroleum Sumps, Pits, Ponds, and Well Cellars. These rules were submitted to EPA by the California Air Resources Board on November 18, 1993. For further information, please see the information provided in the direct final action which is located in the Rules Section of this **Federal Register**.

Authority: 42 U.S.C. 7401–7671q.

Dated: November 18, 1994

David P. Howekamp,

Acting Regional Administrator

[FR Doc. 94–30611 Filed 12–13–94; 8:45 am]

BILLING CODE 6560–50–W

40 CFR Part 52

[CO36–4–6305b; FRL–5117–7]

Clean Air Act Approval and Promulgation of PM_{10} Contingency Measure Plans for Canon City and Lamar, CO

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of proposed rulemaking.

SUMMARY: EPA proposes to fully approve the contingency measures submitted by the State of Colorado on December 9, 1993, for the nonattainment areas of Canon City and Lamar, for particulate matter with an aerodynamic diameter less than or equal to a nominal 10 micrometers (PM_{10}) The submittal was made in accordance with the requirements specified under section 172(c)(9) of the Clean Air Act (Act). In the final rules section of this **Federal Register**, EPA is approving the State Implementation Plan (SIP) revision as a direct final rule without prior proposal because the Agency views this as a noncontroversial revision amendment and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule If no adverse comments are received in response to this proposed rule, no further activity is contemplated

PLAINTIFFS' EXHIBIT 196

Federal Register

Thursday,
March 11, 2004

Part III

Federal Election Commission

11 CFR Parts 100, 102, 104, 106, and 114
Political Committee Status; Proposed Rule

FEDERAL ELECTION COMMISSION

11 CFR Parts 100, 102, 104, 106, and 114

[Notice 2004–6]

Political Committee Status

AGENCY: Federal Election Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Federal Election Commission is seeking comment on whether to amend the definition of ''political committee'' applicable to nonconnected committees. The Commission is also considering amending its current regulations to address when disbursements for certain election activity should be treated as ''expenditures.'' Related amendments to the allocation regulations for nonconnected committees and separate segregated funds are also under consideration to determine whether those regulations need further refinement. While the Commission requests comments on proposed changes to its rules, it has made no final decisions on any of the proposed revisions in this notice. Further information is provided in the supplementary information that follows.

DATES: The Commission will hold a hearing on these proposed rules on April 14 and 15, 2004, at 10 a.m. Commenters wishing to testify at the hearing must submit their request to testify along with their written or electronic comments by April 5, 2004. Commenters who do not wish to testify must submit their written or electronic comments by April 9, 2004.

ADDRESSES: All comments should be addressed to Ms. Mai T. Dinh, Acting Assistant General Counsel, and must be submitted in either electronic or written form. Commenters are strongly encouraged to submit comments electronically to ensure timely receipt and consideration. Electronic mail comments should be sent to *politicalcommitteestatus@fec.gov* and must include the full name, electronic mail address and postal service address of the commenter. Electronic mail comments that do not contain the full name, electronic mail address and postal service address of the commenter will not be considered. If the electronic mail comments include an attachment, the attachment must be in the Adobe Acrobat (.pdf) or Microsoft Word (.doc) format. Faxed comments should be sent to (202) 219–3923, with printed copy follow-up to ensure legibility. Written comments and printed copies of faxed comments should be sent to the Federal Election Commission, 999 E Street, NW., Washington, DC 20463. The Commission will post public comments on its Web site. The hearing will be held in the Commission's ninth floor meeting room, 999 E Street, NW., Washington, DC.

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

SUPPLEMENTARY INFORMATION:

I. Introduction

The Bipartisan Campaign Reform Act of 2002 (''BCRA''), which amended the Federal Election Campaign Act (''FECA'' or ''the Act''), was signed into law on March 27, 2002. The Supreme Court upheld most of BCRA in *McConnell* v. *FEC,* 540 U.S. —, 124 S. Ct. 619 (2003).

McConnell recognized that regulation of certain activities that affect Federal elections is a valid measure to prevent circumvention of FECA's contribution limitations and prohibitions. Consequently, the Commission is undertaking this rulemaking to revisit the issue of whether the current definition of ''political committee'' adequately encompasses all organizations that should be considered political committees subject to the limitations, prohibitions and reporting requirements of FECA.

FECA, and the Commission's regulations, with certain exceptions, define a political committee as ''any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 in a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year.'' 2 U.S.C. 431(4)(A); 11 CFR 100.5(a). FECA subjects political committees to certain registration and reporting requirements, as well as limitations and prohibitions on the contributions they receive and make, that do not apply to organizations that are not political committees. *See, e.g.*, 2 U.S.C. 432, 433, 441a, 441b; 11 CFR part 102.

While the statutory and regulatory definitions of ''political committee'' set forth above depend solely on the dollar amount of annual contributions received and expenditures made, the Supreme Court, in *Buckley* v. *Valeo,* explained that to fulfill the purposes of FECA, the definition of political committee ''need only encompass organizations that are under the control of a candidate or *the major purpose of which is the nomination or election of a candidate,*'' and does not ''reach groups engaged purely in issue discussion.'' *Buckley* v. *Valeo,* 424 U.S. 1, 79 (1976) (emphasis added). The Supreme Court has reaffirmed the applicability of the ''major purpose'' test in subsequent opinions. *See FEC* v. *Massachusetts Citizens for Life, Inc.,* 479 U.S. 238 (1986)(''*MCFL*''). Therefore, the definition of ''political committee'' arguably should have two elements: First, the $1,000 contribution or expenditure threshold;[1] and second, the major purpose test for organizations not controlled by Federal candidates.

The FECA generally defines ''expenditures'' as ''(i) any purchase, payment, distribution, loan advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office; and (ii) a written contract, promise, or agreement to make an expenditure.'' 2 U.S.C. 431(9)(A). The definition also includes a lengthy list of exceptions. 2 U.S.C. 431(9)(B). Commission regulations at 11 CFR part 100, subparts D and E implement this statutory definition. Since the enactment of the FECA, there have been debates about whether certain activities, not specifically mentioned in the statutory or regulatory definitions, were expenditures. BCRA did not amend the definition of expenditure, but instead categorized certain election-related activities into new statutory definitions. *McConnell* shed light on what the Supreme Court considered to be activities that could affect Federal elections. *See McConnell,* 124 S. Ct. at 673–675 and 696–697 (upholding BCRA's provisions concerning Federal election activity and electioneering communications).

This notice of proposed rulemaking (''NPRM'') explores whether and how the Commission should amend its regulations defining whether an entity is a nonconnected political committee [2] and what constitutes an ''expenditure'' under 11 CFR 100.5(a) or 11 CFR part 100, subparts D and E. With respect to the second element of the definition of ''political committee,'' the Commission's regulations do not expressly incorporate the ''major purpose'' test into 11 CFR 100.5(a). However, the Commission does apply the ''major purpose'' test when assessing

[1] This threshold, however, does not apply to separate segregated funds and state or local party committees. *See* 2 U.S.C. 431(4)(B) and (C) and 11 CFR 100.5(b) and (c).

[2] The Commission is not proposing to change the definition of ''political committee'' applicable to party committees, Federal candidates' authorized committees or separate segregated funds.

whether an organization is a political committee. See, *e.g.*, Advisory Opinions (''AOs'') 1994–25 and 1995–11. In this NPRM, the Commission is seeking comment on whether to amend its regulations to incorporate the major purpose test into the regulatory definition of ''political committee'' in 11 CFR 100.5(a). Furthermore, the Commission seeks comment on whether the effective date for any final rules that the Commission may adopt should be delayed until after the next general election and whether there is a legal basis for delaying the effective date. The Commission also seeks comment on whether changing the definition of basic terms such as ''political committee,'' ''expenditure,'' and ''contribution,'' in the middle of an election year would cause undue disruption to the regulated community.[3]

II. Expenditures

In *Buckley,* 424 U.S. at 62–63, the Supreme Court first examined FECA's definitions of ''expenditure'' and ''contribution'' and their operative phrase, which is ''for the purpose of influencing any election for Federal office.'' *See* 2 U.S.C. 431(8) and (9). The Supreme Court found that the ambiguity of this phrase posed constitutional problems as applied to expenditures made by individuals other than candidates and organizations other than political committees. *Buckley,* 424 U.S. at 77. To avoid the vagueness and potential overbreadth of the statutory definition, *Buckley* adopted a narrowing construction so that FECA's definition of ''expenditure'' reached ''only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate.'' *Buckley,* 424 U.S. at 79–80.[4]

A. McConnell v. FEC, 540 U.S. —, 124 S. Ct. 619 (2003).

The Supreme Court clarified in *McConnell* that *Buckley's* ''express advocacy'' test is not a constitutional barrier in determining whether an expenditure is ''for the purpose of influencing any Federal election.'' *McConnell,* 124 S.Ct. at 688–89. The Supreme Court explained: ''In narrowly reading the FECA provisions in *Buckley* to avoid problems of vagueness and overbreadth, we nowhere suggested that a statute that was neither vague nor overbroad would be required to toe the same express advocacy line.'' *McConnell,* 124 S.Ct. at 688.

With this understanding of express advocacy, the Supreme Court found constitutional Congress' regulation of two types of activities addressed in BCRA: ''Federal election activity,'' as defined in 2 U.S.C. 431(20), and ''electioneering communication,'' as defined in 2 U.S.C. 434(f)(3)(A)(i). *McConnell,* 124 S.Ct. at 670–77 and 685–99. In upholding BCRA's amendments to FECA, the Supreme Court discussed the effects that Federal election activities and electioneering communications have on Federal elections.

1. Federal Election Activities

As the Supreme Court observed in *McConnell,* ''[t]he core of [section 441i(b)] is a straightforward contribution regulation: It prevents donors from contributing nonfederal funds to state and local party committees to help finance ''Federal election activity.' '' 124 S.Ct. at 671.[5] The Supreme Court noted that this regulation arises out of Congressional recognition of ''the close ties between federal candidates and state party committees.'' *Id.,* at 670. ''Federal election activity'' encompasses four distinct categories of activities: (1) Voter registration activity during the 120 days preceding a regularly scheduled Federal election; (2) voter identification, get-out-the-vote (''GOTV''), and generic campaign activity that is conducted in connection with an election in which a candidate for Federal office appears on the ballot; (3) a public communication that refers to a clearly identified Federal candidate and that promotes, supports, attacks, or opposes a candidate for that office; and (4) the services provided by certain political party committee employees. *See* 2 U.S.C. 431(20) through (24); 11 CFR 100.24 through 100.28. *McConnell* referred to all four types of Federal election activities as ''electioneering,'' and found BCRA's definition of Federal election activities to be ''narrowly focused'' on ''those contributions to state and local parties that can be used to benefit federal candidates directly.'' *McConnell,* 124 S.Ct. at 671 and 674.

Considering the first two types of Federal election activities, which include certain voter registration, voter identification, GOTV and generic campaign activities, the Supreme Court determined that all of these activities ''confer substantial benefits on federal candidates.'' *McConnell,* 124 S.Ct. at 675. The Supreme Court also stated that ''federal candidates reap substantial rewards from any efforts that increase the number of like-minded registered voters who actually go to the polls.'' *Id.,* 124 S.Ct. at 674. *McConnell* described the factual record as ''show[ing] that many of the targeted tax-exempt organizations engage in sophisticated and effective electioneering activities for the purpose of influencing elections, including waging broadcast campaigns promoting or attacking particular candidates and conducting large scale voter registration and GOTV.'' *Id.,* 124 S.Ct. at 678 n.68. Like the first two types, public communications that promote, support, attack, or oppose a clearly identified Federal candidate, ''also undoubtedly have a dramatic effect on Federal elections. Such ads were a prime motivating force behind BCRA's passage * * *. [A]ny public communication that promotes or attacks a clearly identified federal candidate directly affects the election in which he is participating.'' *Id.,* 124 S.Ct. at 675. Because the fourth type of Federal election activities applies on its face only to certain political party committees, it is not considered further in this proposal. 2 U.S.C. 431(20)(A)(iv).

2. Electioneering Communications

An ''electioneering communication'' is any broadcast, cable, or satellite communication that refers to a clearly identified Federal candidate, is publicly distributed for a fee within 60 days before a general election or 30 days before a primary election or convention, and is targeted to the relevant electorate. *See* 2 U.S.C. 434(f)(3)(A)(i); 11 CFR 100.29. For communications that refer to congressional candidates, targeting means the communication can be received by 50,000 persons in the relevant State or congressional district. 2 U.S.C. 434(f)(3)(C); 11 CFR 100.29(b)(5). For communications that refer to presidential candidates in the nomination context, ''publicly distributed'' means the communication

[3] By way of historical background, on March 7, 2001, the Commission published an Advance Notice of Proposed Rulemaking (''ANPR'') seeking comment on the definitions of ''political committee,'' ''contribution'' and ''expenditure.'' *See* ''Definition of Political Committee; Advance Notice of Proposed Rulemaking,'' 66 FR 13681 (Mar. 7, 2001). After receiving comments on the ANPR, the Commission voted on September 27, 2001, to hold that rulemaking in abeyance pending changes in legislation, future judicial decisions, or other action. The ANPR and related comments are available on the FEC's Web site at: *http://www.fec.gov/register.htm* under ''Definition of Political Committee.'' This NPRM is a separate proceeding.

[4] A communication refers to a clearly identified candidate if it includes ''the candidate's name, nickname, photograph, or drawing'' or if ''the identity of the candidate is otherwise aparent through unambiguous reference [or] through unambiguous reference to his or her status a candidate.'' 11 CFR 100.17.

[5] The Supreme Court acknowledged that the Levin Amendment ''carves out an exception to this general rule.'' *McConnell,* 124 S.Ct. at 671.

can be received by 50,000 persons in the relevant State prior to its presidential primary election or anywhere in the United States prior to the presidential nominating convention. 11 CFR 100.29(b)(3)(ii). BCRA establishes disclosure requirements for persons who make electioneering communications. 2 U.S.C. 434(f); 11 CFR 104.20. *McConnell* upheld regulation of electioneering communications against a facial challenge, explaining that the definition of ''electioneering communication'' serves ''to replace the narrowing construction of FECA's disclosure provisions adopted by this Court in *Buckley,*'' which, for nonpolitical committee groups, was the express advocacy construction. *McConnell,* 124 S.Ct. at 686 and 695. In so holding, the Court observed that ''the definition of ''electioneering communication'' raises none of the vagueness concerns that drove our analysis in *Buckley.*'' *Id.,* at 689.

BCRA also amended the definition of ''contribution or expenditure'' in 2 U.S.C. 441b to include any payment for an electioneering communication, thereby expressly prohibiting corporations and labor organizations from using their general treasury funds to pay for electioneering communications. *McConnell* described electioneering communications subject to 2 U.S.C. 441b as ''communications that are intended to, or have the effect of, influencing the outcome of federal elections.'' *McConnell,* 124 S.Ct. at 654.

BCRA further provides that any disbursement for an electioneering communication that is coordinated with a candidate, candidate authorized committee, or a Federal, State, or local political party committee shall be treated as a contribution to the candidate or the candidate's party and as an expenditure by that candidate or party. 2 U.S.C. 441a(a)(7)(C).

In rejecting various challenges to BCRA's electioneering communication requirements, the Supreme Court addressed the purpose and effect of electioneering communications in several instances. *McConnell* concluded that while advertisers seeking to evade the express advocacy line create advertisements that ''do not urge the viewer to vote for or against a candidate in so many words, they are no less clearly intended to influence the election.'' *McConnell,* 124 S.Ct. at 689. The Supreme Court also referred a second time to the use of electioneering communications ''to influence federal elections'' and quoted approvingly from the decision below, which referred to electioneering communications as either ''designed to influence federal elections'' or, in fact, ''influencing elections.'' *Id.,* at 691 (*quoting McConnell* v. *FEC,* 251 F.Supp.2d 176, at 237 (D.D.C. 2003)). The Supreme Court also concluded that ''the vast majority'' of advertisements that qualify as electioneering communications had an ''electioneering purpose,'' which the Court equated with advertisements that are ''intended to influence the voters' decisions and [that] have that effect.'' *McConnell,* 124 S.Ct. at 696. The Court considered such advertisements to be ''the functional equivalent of express advocacy.'' *Id.*

The Commission seeks comment on whether the Supreme Court's treatment of Federal election activity or electioneering communications in *McConnell* requires or permits the Commission to change its regulations defining ''expenditure'' and ''contribution'' in 11 CFR part 100, subparts B, C, D and E to include those concepts. In the alternative, the Commission seeks comment on whether *McConnell* recognizes additional activities that may be constitutionally regulated by Congress, but in the absence of new legislation doing so, the Commission is prohibited from expanding the regulatory definitions of ''expenditure'' and ''contribution.''

The Commission further seeks comment on whether, even if it may so amend its regulations, the Commission should refrain from redefining such fundamental and statutorily defined terms, in the absence of further guidance from Congress. Is it consistent with BCRA to include all Federal election activity within the regulatory definition of ''expenditure'' when BCRA only added electioneering communications to the definition of ''contribution or expenditure'' in 2 U.S.C. 441b(b)(2)? Does BCRA's specification in 2 U.S.C. 441a(a)(7)(C) that coordinated ''disbursements'' for electioneering communications can be contributions provide any guidance regarding whether payments for electioneering communications should be considered expenditures? Is it consistent with Congressional intent for the Commission to categorize voter registration, voter identification, get-out-the-vote and generic campaign activities by a State or local candidate committee as ''for the purpose of influencing any election to Federal office?''

Does the definition of ''independent expenditure'' in 2 U.S.C. 431(17)(A), which requires express advocacy, limit Commission's ability to define an ''expenditure'' to communications that include express advocacy? If not, can communications be considered ''expenditures'' if they fail to meet both the definition of ''independent expenditure'' in 2 U.S.C. 431(17) and the definition of ''coordinated communication'' under 11 CFR 109.21? Is the function of the definition of ''independent expenditure'' in 2 U.S.C. 431(17)(A) limited to the 24-hour and 48-hour reporting requirements in 2 U.S.C. 434(g)?

B. Proposed Regulations

In this NPRM, the Commission considers whether, in light of *McConnell,* it should revise current regulations to reflect that certain communications and certain voter drive activities have the purpose of influencing Federal elections. This proposal includes several alternatives. The Commission has not made any final decisions on any of the proposed rules or alternatives, which are described below, and seeks comment on all of them.

1. Proposed 11 CFR 100.5—Definition of ''political committee''

Current 11 CFR 100.5(a) specifies that any committee, club, association, or other group of persons that receives contributions aggregating in excess of $1,000 or which makes expenditures aggregating in excess of $1,000 during a calendar year is a political committee. In addition to considering amending this regulation to include *Buckley's* major purpose test, the proposal for which is discussed separately below, the Commission is considering amending this definition so that the first three types of Federal election activity and electioneering communications would be counted toward the $1,000 expenditure thresholds.

Alternative 1–A would define those ''expenditures'' that count toward the $1,000 threshold, but this definition would not apply in any other context in which the term ''expenditure'' is used in FECA or in the Commission's regulations.

The Commission is considering a number of issues related to Alternative 1–A. Should persons other than political party committees be subject to a rule that treats the first three types of Federal election activities as ''expenditures'' for purposes of the $1,000 threshold in the definition of ''political committee?'' Should all of Federal election activity and all electioneering communications count toward political committee status, or should the Commission make distinctions to count only certain types of Federal election activity or only certain electioneering communications toward political committee status? For

example, should Federal election activity that does not refer to a clearly identified Federal candidate count toward political committee status? Would a definition of ''expenditure'' that includes voter drive activities by State or local candidate committees on behalf of their own candidacies be overly broad?

Should funds received for Federal election activities types 1 through 3 or electioneering communications count as contributions for purposes of the $1,000 threshold? If any disbursements for these activities should count as expenditures, should the corresponding funds received to make those disbursements count as contributions? Should the Commission treat funds raised by a State or local candidate committee through solicitations advocating their own election, as well as incidentally expressly advocating the election or defeat of a clearly identified Federal candidate, or promoting, supporting, attacking or opposing a clearly identified Federal candidate, as funds contributed ''for the purpose of influencing any election for Federal office?'' Please note that none of the regulatory text set forth below relates to this proposal regarding ''contributions'' as used in proposed 11 CFR 100.5(a)(1)(i).

Finally, should the Commission confine any reexamination of the definition of ''expenditure'' to apply only as that term is used as part of the definition of ''political committee?'' FECA already provides two definitions of ''expenditure,'' one in 2 U.S.C. 431(9) and a broader definition in 2 U.S.C. 441b. Currently, ''expenditure'' in 11 CFR 100.5(a) uses the definition in 2 U.S.C. 431(9) and 11 CFR part 100, subpart D. Should the Commission create by regulation a third definition of ''expenditure'' for determining political committee status?

2. 11 CFR Part 100, Subpart D—Definition of ''expenditure''

The Commission is also considering amendments to its general definition of ''expenditure'' to reflect *McConnell's* conclusion that certain communications and certain voter drives have the purpose or effect of influencing Federal elections.

One approach would be to add payments for the Federal election activities described in 2 U.S.C. 431(20)(A)(i) through (iii) and payments for electioneering communications to the definition of ''expenditure'' in 11 CFR part 100, subpart D. In evaluating this approach to amending its rules, the Commission will consider the same issues raised above concerning BCRA's application of the concepts of Federal election activities and electioneering communications in connection with Alternative 1–A.

BCRA imposes prohibitions and restrictions related to Federal election activities on national party committees (2 U.S.C. 441i(c)), State, district, and local political party committees (2 U.S.C. 441i(b)), Federal candidates (2 U.S.C. 441i(e)(1)(A), (e)(4)(A), and (e)(4)(B)), and State candidates (2 U.S.C. 441i(f)). Consequently, most of the Supreme Court's consideration of Federal election activities arose with respect to political party committees. In this context, the ''close relationship'' of Federal officeholders and candidates to their political parties was part of the justification of the Government's interest in regulating Federal election activities. *See McConnell,* 124 S.Ct. at 668 and n.51. In fact, in disposing of an equal protection claim that BCRA discriminates against political party committees in favor of ''interest groups,'' the Supreme Court acknowledged: ''Interest groups, however, remain free to raise soft money to fund voter registration, GOTV activities, mailings, and broadcast advertising (other than electioneering communications).'' *Id.,* 124 S.Ct. at 686.

The approach of including all funds disbursed for Federal election activities in the definition of ''expenditure,'' if adopted, would extend restrictions related to Federal election activities beyond political party committees and Federal candidates to all persons, including a State or local candidate committee.[6] Would such a regulation be consistent with FECA, as amended by BCRA? Would it be consistent with Congressional intent?

Similarly, BCRA amended the definition of ''contribution or expenditure'' in the corporate and labor organization prohibitions to include payments ''for any applicable electioneering communication.'' 2 U.S.C. 441b(b)(2). BCRA did not amend, however, the definition of ''expenditure'' with a broader application in 2 U.S.C. 431(9). Would the approach of including all payments for electioneering communications in the regulations implementing the 2 U.S.C. 431(9) definition of ''expenditure'' be consistent with FECA, as amended by BCRA? Would it be consistent with Congressional intent?

The proposed rules that follow as Alternative 1–B present a narrower approach. Although the Supreme Court's discussion of Federal election activities in *McConnell* was framed in the political party and candidate context, it recognized that these same activities by tax-exempt organizations do affect Federal elections. *McConnell,* 124 S.Ct. at 678 n.68. Given the Supreme Court's conclusions that types 1 through 3 of Federal election activities have a demonstrable effect on Federal elections, can the Commission conclude that the same communications and the same activities by actors other than political party committees and candidates are not expenditures, *i.e.*, payments for the purpose of influencing a Federal election? In an effort to take the Supreme Court's conclusions into consideration, Alternative 1–B would incorporate the concepts of Federal election activities types 1 through 3, but would also recognize that applying these concepts to actors other than political party committees and candidates requires some tailoring of Federal election activities.

A proposal to regulate Federal election activities by persons other than political party committees and candidates requires a reexamination of those activities in order to determine whether those activities carried out by such persons are the functional equivalent of the same activities when carried out by political party committees and candidates. Inherent in any activities conducted by political party committees or candidates is a partisan purpose, as the Supreme Court has recognized in other contexts. *See FEC* v. *Colorado Republican Federal Campaign Committee,* 533 U.S. 431, 450 (2001) (noting ''the seemingly unexceptionable premise that parties are organized for the purpose of electing candidates'' and agreeing that ''political parties are dominant players, second only to the candidates themselves, in federal elections''). When the proposed rules in Alternative 1–B consider Federal election activities conducted by other persons, they attempt to be consistent with *McConnell* by limiting the activities included in the ''expenditure'' definition to those with a partisan purpose.

Are the proposed rules consistent with *McConnell*? Do they limit the activities included in the ''expenditure'' definition to those activities that have a partisan purpose? Is Alternative 1–B's treatment of a State or local candidate committee's partisan activities consistent with BCRA? Is Alternative 1–B consistent with 2 U.S.C. 441i(e)(4), which permits Federal candidates to solicit up to $20,000 per individual for certain Federal election activities or for an entity whose principal purpose is to

[6] State and local candidate committees are subject to limitations with respect to their type 3 Federal election activities. 2 U.S.C. 441i(f).

conduct certain Federal election activities?

a. Proposed 11 CFR 100.115—Federal election activity: Partisan voter drives. Because the Supreme Court recognized that voter registration activity that takes place within 120 days before a Federal election, voter identification, and get-out-the-vote activities ''confer substantial benefits on federal candidates'' and because voter drives may be for the purpose of influencing Federal elections even when performed by tax-exempt organizations, Alternative 1–B would incorporate these aspects of Federal election activities in the definition of ''expenditure.'' *See McConnell,* 124 S.Ct. at 675, 678 n.68, and the discussion above in part II, A., 1. Proposed section 100.34 would define ''partisan voter drives,'' and proposed section 100.115 would include payments for voter registration, voter identification, and GOTV activities into the regulatory definition of ''expenditure,'' subject to the exceptions described below.

As reflected in FECA, the proposed rules in Alternative 1–B would distinguish partisan from nonpartisan Federal election activities. FECA exempts ''nonpartisan activity designed to encourage individuals to vote or register to vote'' from the definition of ''expenditure.'' 2 U.S.C. 431(9)(B)(ii). In order for voter drives to be ''nonpartisan,'' Commission regulations currently require that no effort is or has been made to determine the party or candidate preference of individuals before encouraging them to vote. 11 CFR 100.133.

Alternative 1–B includes proposed changes to section 100.133. First, the proposal would expressly state that if voter registration or get-out-the-vote activities included a communication that promotes, supports, attacks, or opposes a Federal or non-Federal candidate or if it promotes or opposes a political party, then the voter registration or get-out-the-vote activities is partisan. *See* proposed 11 CFR 100.133(a). Second, the proposal would add a provision that if information concerning likely party or candidate preference has been used to determine which voters to encourage to register to vote or to vote, the voter registration and get-out-the-vote activities would be partisan. *See* proposed 11 CFR 100.133(b).

These proposed changes would achieve more harmony between the Commission's approach to this issue and the Internal Revenue Service's (''the IRS's'') approach. The IRS regulations provide that ''to be nonpartisan, voter registration and 'get-out-the-vote' campaigns must not be specifically identified by the organization with any candidate or political party.'' 26 CFR 1.527–6(b)(5). In a private letter ruling, the IRS determined that a voter drive was partisan, even though the activities ''may not be specifically identified with a candidate or party in every case.'' It did so due to ''the intentional and deliberate targeting of individual voters or groups of voters on the basis of their expected preference for pro-issue candidates, as well as the timing of the dissemination and format of the materials used.'' Priv. Ltr. Rul. 99–25–051 (Mar. 29, 1999). Should the Commission otherwise clarify this rule or consider any other criteria?

Should voter identification be considered part of get-out-the-vote activities subject to section 100.133? If so, what changes to the proposed rules, if any, are necessary?

The proposed new rules for voter registration and get-out-the-vote activities at 11 CFR 100.34(a) and (c) would retain by reference the nonpartisan exception to the definition of ''expenditure'' in proposed 11 CFR 100.133. Similarly, proposed 11 CFR 100.34(b) would exclude disbursements for voter identification when no effort has been or will be made to determine or record the party or candidate preference of individuals on the voter list from the definition of ''partisan voter drive'' and therefore ''expenditure.'' *See* proposed 11 CFR 100.34(b) and 100.115.

The proposed rule at new 11 CFR 100.115 would also exclude Levin funds from the definition of ''expenditure.'' Levin funds are funds raised by State, district, or local political party committees and party organizations pursuant to 11 CFR 300.31 and disbursed by the same committee or organization pursuant to 11 CFR 300.32. BCRA specifically permits State, district, and local political party committees to raise and spend Levin funds for an allocable portion of voter registration, voter identification, and get-out-the-vote activities, rather than requiring these committees to use entirely Federal funds for these Federal election activities. 2 U.S.C. 441i(b)(2). This exception in BCRA would be preserved for State, district, and local political party committees and organizations by the exclusion of Levin funds from the proposed rules.

State and local political party committees may also conduct voter drives under the ''coattails'' exception to the definition of ''expenditure.'' 2 U.S.C. 431(9)(B)(ix); 11 CFR 100.149. Under certain conditions, voter registration and GOTV activities conducted by these party committees on behalf of the Presidential nominees are not treated as expenditures. In order to leave this exemption unaffected by the inclusion of the types 1 and 2 of Federal election activity in the definition of ''expenditure,'' the proposed rules would also amend 11 CFR 100.149 to provide expressly that the ''coattails'' exemption would apply notwithstanding proposed 11 CFR 100.115.

A proposal for the allocation of these expenditures is discussed below. Proposed section 100.155 would state that any non-Federal funds permissibly disbursed by a separate segregated fund or a nonconnected committee for partisan voter drives pursuant to the allocation rule in proposed 11 CFR 106.6 would not be ''expenditures.'' Consequently, the non-Federal funds would not count toward the $1,000 of expenditures required for political committee status under current 11 CFR 100.5(a) (or proposed 11 CFR 100.5(a)(1)(i)). The Commission seeks comment on whether this is an appropriate conclusion.

Additionally, the Commission seeks comment on the following questions. Are proposed sections 100.34 and 100.115 sufficiently tailored to reflect the application of Federal election activities to persons other than political party committees and candidates? The proposed regulations would treat many of the voter activities conducted by State and local candidate committees on behalf of their own candidacies as ''expenditures.'' Is there any evidence that Congress intended for the Commission to categorize such activities as ''for the purpose of influencing any election for Federal office?'' Should the Commission give any consideration in this context to the statutory exemptions from the definition of Federal election activity set forth in 2 U.S.C. 431(20)(B)? Should the proposed rules include an exception for the receipt of funds solicited by Federal candidates under 2 U.S.C. 441i(e)(4)(B)(ii), which under certain circumstances permits Federal candidates to solicit funds from individuals of up to $20,000—an amount that exceeds the contribution limit applicable to certain political committees in 2 U.S.C. 441a? Or, should the exception in 2 U.S.C. 441i(e)(4)(B)(ii) be limited to entities that are not political committees or that confine their voter registration, voter identification, and get-out-the-vote activities to nonpartisan activities? If the exception were confined to nonpartisan activities, what evidence, if any, is there that Congress intended for the exception

in 2 U.S.C. 441i(e)(4)(B)(ii) to be interpreted in such a way?

The definition of ''partisan voter drive'' in proposed section 100.34 would not include some voter registration and get-out-the-vote activities that would simultaneously fail to qualify for the exemption of ''nonpartisan voter registration and get-out-the-vote activities'' in section 100.133, in either its current form or as proposed to be amended. For example, some voter registration activity could take place more than 120 days before an election, which would mean that payments for it would not be expenditures. *See* proposed 11 CFR 100.34(a) (citing current 11 CFR 100.24(b)(1)) and 100.115. That same activity could also fail to qualify as nonpartisan under proposed 11 CFR 100.133 if it is subject to any of that section's exclusions, which include, for example, directing voter drives to supporters of a political party. Any voter registration or get-out-the-vote activities that fall in this ''gap'' would not be expenditures under proposed section 100.115, even though they would not qualify as ''nonpartisan'' under the exception in proposed section 100.133. This gap may be appropriate in that it reflects that such activity cannot be considered nonpartisan for purpose of the exemption, but it may not rise to the level of an ''expenditure'' under proposed sections 100.34 and 100.115 for the same reason that similar activity by a political party committee would be excluded from the definition of ''Federal election activity.'' 11 CFR 100.24(b)(1).

Alternatively, this gap could be eliminated by either adding an additional exemption from the definition of ''expenditure'' in 11 CFR part 100, subpart E, or dropping the time limitations of current 11 CFR 100.24(a)(1), (a)(3)(i), and (b)(1) from proposed section 100.34. Under the latter approach, the time limitations in current section 100.24 would be maintained with respect to the political party committees whose Federal election activities are subject to BCRA's time limits. 2 U.S.C. 431(20)(A)(i). The Commission seeks comment on these issues.

b. Proposed 11 CFR 100.116—Certain public communications. Alternative 1–B would also incorporate into the definition of ''expenditure'' payments for public communications that refer to a political party or a clearly identified Federal candidate and promote or support, or attack or oppose any political party or any Federal candidate. *See* proposed 11 CFR 100.116. This proposed rule is based on two types of Federal election activities: generic campaign activities, which are public communications that promote or oppose a political party, and public communications that promote, support, attack, or oppose a clearly identified candidate. *See* 2 U.S.C. 431(20)(A)(ii) and (iii); 11 CFR 100.24(a)(1); (b)(2)(ii); (b)(3); 100.25; and 100.26. Proposed section 100.155 would state that any non-Federal funds permissibly disbursed by a separate segregated fund or a nonconnected committee for public communications pursuant to the allocation rule in proposed 11 CFR 106.6 would not be ''expenditures.'' The Commission seeks comment on whether this is an appropriate conclusion.

The Supreme Court found that public communications that promote, support, attack or oppose a clearly identified Federal candidate ''have a dramatic effect on federal elections.'' *McConnell,* 124 S.Ct. at 675. The Supreme Court also found that generic campaign activity ''confer[s] substantial benefits on federal candidates.'' *Id.* If the Commission were to apply the voter drive activities of types 1 and 2 of Federal election activities outside of the political party committee context, these concepts may require modification to incorporate a partisan element. In contrast, generic campaign activity and type 3 of Federal election activities, by definition, include material that either promotes, supports, attacks or opposes a clearly identified Federal candidate or promotes or opposes a political party. This partisan content obviates the need to tailor these concepts for application outside the political party and candidate context.

Consistent with this approach, the Commission recently issued Advisory Opinion 2003–37 in which it stated that ''communications that promote, support, attack or oppose a clearly identified Federal candidate have no less a 'dramatic effect' on Federal elections when aired by other types of political committees, rather than party committees or candidate committees.'' AO 2003–37, at 3. In that advisory opinion, the Commission concluded that public communications that promote, support, attack or oppose a clearly identified Federal candidate when made by political committees are expenditures. Proposed section 100.116 would incorporate this conclusion in the Commission's regulations. It would also treat public communications that promote or oppose political parties in a similar fashion, and it would apply to communications made by all persons, not just political committees. If new rules apply the ''promote, support, attack or oppose'' standard to actors other than political party committees and candidates, should a temporal element be included in any such rule? Might an advertisement by a person other than a political party committee or candidate be properly understood as, for example, promoting a Federal candidate if publicly distributed close to an election, but the same advertisement by the same person publicly distributed far from an election might not promote the candidate? Should any of FECA's temporal limitations, which are discussed in connection with expenditures generally below, be adapted for this purpose?

Would the ''promote, support, attack or oppose'' standard be appropriate for those 527 organizations (tax exempt ''political organizations,'' discussed more *infra*) that by their very nature have influencing elections as a primary purpose? Would the ''promote, support, attack or oppose'' standard be appropriate for all 527 organizations? Should the Commission adopt a different standard for 501(c) organizations (other tax exempt organizations, discussed more *infra*) that would require not only ''promote, support, attack or oppose'' content, but also some basis for concluding the message is to influence a Federal election? Such additional bases could include: (1) Reference to the clearly identified candidate *as a candidate*; (2) reference to the election or to the voting process; (3) reference to the clearly identified candidate's opponent; or (4) reference to the character or fitness for office of the clearly identified candidate. Alternatively, should the Commission adopt the ''promote, support, attack or oppose'' standard for 501(c) organizations, but build in an exception for a message that is confined to expressly advocating seeking action by the clearly identified candidate on an upcoming legislative or executive decision without reference to any candidacy, election, voting, opponent, character, or fitness for office? In essence, the Commission seeks comment on whether it should define what is an expenditure in a way that follows the functional distinctions in the Internal Revenue Code and recognizes that some organizations engage in ''grassroots lobbying'' campaigns primarily designed to affect upcoming legislative or executive actions. If so, what regulatory language would be appropriate?

In different contexts, FECA now provides at least three content standards for communications—express advocacy; promote, support, attack or oppose; and reference to a clearly identified Federal candidate. *See, e.g.*, 2 U.S.C. 431(17)(A); (20)(A)(iii); 434(f)(3)(A)(i)(I) and

441d(a). What other content standards that are not vague or overbroad, if any, should be included in the definition of ''expenditure?''

c. Electioneering communications. Alternative 1–B does not include payments for electioneering communications in the definition of ''expenditures.'' Many electioneering communications either already are included in the definition of ''expenditure'' or would be included under the proposal. Under the current rules, political committees must report communications that satisfy the general definition of ''electioneering communications'' in 2 U.S.C. 434(f)(3)(A) as expenditures. 11 CFR 104.20(b). In addition, if an electioneering communication promotes, supports, attacks, or opposes a Federal candidate, it would also be a public communication that promotes, supports, attacks, or opposes a Federal candidate, which would make it an expenditure under proposed section 100.116. Consequently, the only electioneering communications that would not be treated as expenditures under Alternative 1–B would be those made by persons other than political committees that do not promote, support, attack, or oppose a clearly identified Federal candidate. Should the final rules include all electioneering communications in the definition of ''expenditure?''

d. Other potential approaches. The Commission also seeks comments on other potential approaches to amending the definition of ''expenditure'' in 11 CFR part 100, subpart D. Should a payment's status as an ''expenditure'' depend on the identity of the maker? For example, should payments for public communications that promote, support, attack or oppose a Federal candidate be expenditures only if made by a Federal political committee?

Are there other identifying characteristics that should be considered in determining whether a payment is an expenditure? For example, should payments by a tax-exempt, charitable organization operating under 26 U.S.C. 501(c)(3) be exempt from the definition of ''expenditure?'' In this regard, how should the Commission interpret the Internal Revenue Service's Technical Advice Memorandum 89–36–002 (Sept. 8, 1989), which permitted a 501(c)(3) organization to make advertisements that ''support or oppose a candidate in an election campaign,'' without losing its 501(c)(3) status for intervening in a political campaign?

Should the Commission consider an organization's status under section 501(c) or 527 of the Internal Revenue Code in determining whether a payment is an expenditure? Should some activities be expenditures if made by a section 527 organization, regardless of whether it is a Federal political committee? Should the same rules or different rules apply to organizations operating under section 501(c)(3), (4), or (6)?

Should the timing of a payment affect whether it is an ''expenditure?'' FECA and BCRA provide several temporal limitations on various provisions that recognize the significance of proximity to an election. FECA provides that certain independent expenditures must be reported within 24 hours if made during the twenty days before an election. 2 U.S.C. 434(g)(1) (formerly 2 U.S.C. 434(c)(2)(C)). BCRA limits electioneering communications to the thirty days before a primary election and the sixty days before a general election. 2 U.S.C. 434(f)(3)(A)(i)(II). BCRA also includes voter registration activity in Federal election activity only in the 120 days before a regularly scheduled Federal election. 2 U.S.C. 431(20)(A)(i). Do any of these time periods provide an appropriate temporal standard for any expenditures?

Should the rules address expenditures that might be in connection with more than one Federal election? The Commission recently concluded in an advisory opinion that an advertisement that was coordinated by a Congressional candidate with a presidential campaign committee could be a contribution to the presidential campaign committee in connection with the upcoming Presidential primary election in that State and an expenditure of the Congressional candidate in connection with her special election. AO 2004–1. Should this conclusion be incorporated into regulations or should it be reconsidered?

The Commission also seeks comment on whether any aspect of Alternative 1–B should be revised in order to harmonize the definition of ''expenditure'' in the Commission's regulations with the approach taken by the IRS. Section 527(e)(2) of the Internal Revenue Code of 1986, as amended, defines the term ''exempt function'' as ''the function of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization, or the election of Presidential or Vice Presidential electors, whether or not such individual or electors are selected, nominated, elected, or appointed.'' 26 U.S.C. 527(e)(2). IRS regulations implementing this statutory definition provide that ''the term 'exempt function' includes all activities that are directly related to and support the process of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to public office or office in a political organization.'' 26 CFR 1.527–2(c)(1). IRS regulations also specify that whether an expenditure is for an exempt function depends on all the facts and circumstances. *Id.*

A Revenue Ruling issued by the IRS on December 23, 2003, stated that ''[w]hen an advocacy communication explicitly advocates the election or defeat of an individual to public office, the expenditure clearly is for an exempt function under § 527(e)(2).'' Rev. Rul. 04–6, at 4. The Revenue Ruling also identified a non-exhaustive list of factors that ''tend to show'' whether an advocacy communication on a public policy issue is for an exempt function or not, in the absence of ''explicit advocacy.'' The six identified factors that tend to show a communication is for an exempt function are: (a) The communication identifies a candidate for public office; (b) the timing of the communication coincides with an electoral campaign; (c) the communication targets voters in a particular election; (d) the communication identifies that candidate's position on the public policy issue that is the subject of the communication; (e) the position of the candidate on the public policy issue has been raised as distinguishing the candidate from others in the campaign, either in the communication itself or in other public communications; and (f) the communication is not part of an ongoing series of substantially similar advocacy communications by the organization on the same issue. The five factors that tend to show a communication is not for an exempt function are: (a) The absence of one or more of the factors listed in (a) through (f) above; (b) the communication identifies specific legislation, or a specific event outside the control of the organization, that the organization hopes to influence; (c) the timing of the communication coincides with a specific event outside the control of the organization that the organization hopes to influence; (d) the communication identifies the candidate solely as a government official who is in a position to act on the public policy issue in connection with the specific event; and (e) the communication identifies the candidate solely in the list of key or principal sponsors of the legislation that is the subject of the communication.

To what extent should Alternative 1–B be modified for harmony with the IRS's approach?

3. 11 CFR Part 100, Subpart B—Definition of ''contribution''

The Commission is also considering amending the definition of ''contribution'' in 11 CFR part 100, subpart B to make changes that would correspond to those proposed for the definition of ''expenditure'' in Alternative 1–B. Additionally, the Commission is considering amending its definition of ''contribution'' to include any funds that are received in response to a communication containing express advocacy of a clearly identified candidate.

a. Amendments corresponding to amendments to ''expenditure'' definition. Current 11 CFR 102.5(b) imposes requirements on organizations that do not qualify as ''political committees'' under current 11 CFR 100.5 and that make contributions or expenditures. The organization must demonstrate through a reasonable accounting method that, whenever it makes expenditures, it has received sufficient funds subject to the limitations and prohibitions of FECA to make the expenditures. Such organizations must also keep records of receipts and disbursements and, upon request, must make such records available to the Commission. *See* current 11 CFR 102.5(b)(1). Consequently, if the definition of ''expenditure'' is amended in any way, then any entity making such expenditures would be required to do so using only contributions that comply with the amount limitations and source prohibitions of FECA. If the Commission adopts the amended definition of ''expenditure,'' as proposed in Alternative 1–B, is an amendment to Commission regulations needed to state that funds used for any expenditures are contributions to that entity? Please note that proposed rule text for this approach is not included below, but if the Commission were to decide to adopt Alternative 1–B and this approach, then the text in the final rules amending the definition of ''contribution'' would be similar to the text in proposed sections 100.115 and 100.116 regarding ''expenditure.'' Should entities that are not political committees be required to report their contributions received and expenditures made in this context?

b. Proposed 11 CFR 100.57—Funds solicited with express advocacy. The Commission is considering whether solicitations containing express advocacy of federal candidates establish that any funds received in response are necessarily ''for the purpose of influencing any election for Federal office,'' so that they are contributions. Proposed section 100.57 would state that any funds provided in response to a solicitation that contained express advocacy for or against a clearly identified Federal candidate are contributions. If a solicitation states that the solicitor intends to take actions to elect or defeat a particular candidate, is it then logical to treat funds that are provided in response as funds that are ''for the purpose of influencing a Federal election?'' Should the standard be that the solicitation must not just include express advocacy but state that the funds will be used for express advocacy? Should funds raised by a State or local candidate for his or her own candidacy be treated as contributions ''for the purpose of influencing a Federal election'' if the State or local candidate's solicitation includes express advocacy for or against a clearly identified Federal candidate? Should proposed section 100.57 also include solicitations that expressly advocate the election or defeat of Federal candidates of a particular party without clearly identifying the particular candidates? Should the new rule use a standard other than express advocacy, such as a solicitation that promotes, supports, attacks, or opposes a Federal candidate, or indicates that funds received in response thereto will be used to promote, support, attack, or oppose a clearly identified Federal candidate? Should the new rule specify which contributions result from which solicitations? Should the new rule incorporate the standards in current 11 CFR 102.5(a)(2)(i) through (iii) to clarify further the types of funds received that must be treated as contributions? A conforming amendment to current 11 CFR 102.5(a)(2)(ii) would be necessary if any rule based on proposed section 100.57 is adopted.

4. Proposed 11 CFR 114.4—Corporate and Labor Organization Communications

Current 11 CFR 114.4(c)(2) and (d) permit corporations and labor organizations to conduct voter registration and get-out-the-vote activities beyond their restricted class provided that any communication does not expressly advocate the election or defeat of any clearly identified candidate(s) or candidates of a clearly identified political party and subject to other restrictions. The Commission seeks comment on proposed rules that would amend paragraphs (c)(2) and (d) and add new paragraph (c)(3) to specify that such voter registration and get-out-the-vote activities would be subject to the conditions set forth in proposed 11 CFR 100.133, as discussed above. The purpose of such a revision would be to ensure that corporations and labor organizations would be subject to the same conditions as political committees, as well as other conditions specific to corporations and labor organizations, when spending non-Federal funds on these voter registration and get-out-the-vote activities. The Commission seeks comment on whether the same rules should apply not only to corporations and labor organizations, but also to any person or entity who uses corporate or labor organization general treasury funds for these purposes.

The Commission also seeks comment on whether current 11 CFR 100.133 should be amended to make clear that, when a corporation or labor organization conducts voter registration or get-out-the-vote activities, it would be subject to the requirements of 11 CFR 100.133 and 114.4(c) and (d). Additionally, the Commission seeks comment on whether the ''express advocacy'' standard set forth in 11 CFR 114.4(c)(2) and (d)(1) should be changed to the ''promote, support, attack or oppose'' standard. Would the latter standard be an appropriate standard for determining whether a communication has the ''purpose of influencing a Federal election?'' Would such an approach be consistent with *MCFL*?

Corporations and labor organizations may also conduct certain voter registration and GOTV activities aimed at their restricted classes. 11 CFR 114.3(c)(4). Because these activities are permitted by 11 CFR part 114, they are exempt from the definition of ''expenditure.'' 2 U.S.C. 431(9)(B)(v); 11 CFR 100.141. No changes to section 114.3(c)(4) are proposed because the Commission intends to retain this exception to the definition of ''expenditure.''

III. Major Purpose

A. Major Purpose Requirement

The Commission seeks comment as to whether the existing definition of ''political committee'' in 11 CFR 100.5(a) should be amended by incorporating the major purpose requirement, and if so, how that should be accomplished. Under the proposed section 100.5(a)(1), a committee, club, association or group of persons that receives in excess of $1,000 in total contributions or makes in excess of $1,000 in total expenditures would be a political committee only if ''the nomination or election of one or more

Federal candidates is *a* major purpose'' of the committee, club, association or group of persons (emphasis added).

1. Major Purpose or Primary Purpose?

The proposed rule would include the indefinite article ''a'' to modify ''major purpose,'' rather than the definite article ''the.'' The consequence would be that the major purpose element of the definition of ''political committee'' may be satisfied if the nomination or election of a candidate or candidates is one of two or more major purposes of an organization, even if it is not its primary purpose. The Commission seeks comment regarding whether, to satisfy the major purpose requirement, the nomination or election of candidates must be the predominant purpose of the organization, or whether the major purpose standard is satisfied when the nomination or election of candidates is a major purpose of the organization, even when the organization spends more funds for another purpose.

In first articulating the major purpose requirement in *Buckley,* the Supreme Court determined that the definition of political committee ''need only encompass organizations that are under the control of a candidate or *the major purpose* of which is the nomination or election of a candidate.'' *Buckley,* 424 U.S. at 79 (emphasis added). Likewise, in *MCFL,* the Supreme Court observed that:

> should MCFL's independent spending become so extensive that *the organization's major purpose* may be regarded as campaign activity, the corporation would be classified as a political committee. As such it would automatically be subject to the obligations and restrictions applicable to those groups whose *primary objective* is to influence political campaigns.

MCFL, 479 U.S. at 262 (emphasis added and citations omitted). These passages indicate that the nomination or election of candidates must be *the* major purpose or, put another way, the *primary objective* of the organization. In light of the Supreme Court's repeated use of the term ''the major purpose,'' can the Commission substitute the term ''a major purpose,'' which appears to have a different meaning?

Could the major purpose standard in *Buckley* nevertheless be interpreted to require that the nomination or election of candidates be ''a'' major purpose of the organization, even when the organization has other, perhaps more significant, purposes? The Commission notes that the ''major purpose'' requirement appears only in judicial opinions not in any statute, and that the Supreme Court has warned against ''dissect[ing] the sentences of the United States Reports as though they were the United States Code.'' *St. Mary's Honor Ctr.* v. *Hicks,* 509 U.S. 502, 515 (1993). *In Aka* v. *Washington Hosp. Ctr.,* 156 F.3d 1284 (D.C. Cir. 1998), the Circuit Court explained that ''the [Supreme] Court's every word and sentence cannot be read in a vacuum; its pronouncements must be read in light of the holding of the case and to the degree possible, so as to be consistent with the Court's apparent intentions.'' *Id.* at 1291.

As explained above, in *Buckley,* the Court imposed the ''major purpose'' requirement because it was concerned that the statutory definition of political committee ''could be interpreted to reach groups engaged purely in issue discussion.'' *Buckley,* 424 U.S. at 79. Consequently, the ''apparent intention'' of the Court appears to have been to limit the applicability of the definition of political committee so that it would not cover organizations involved ''purely in issue discussion'' but that nevertheless engage in some incidental activity that might otherwise satisfy the Act's $1,000 expenditure or contribution political committee thresholds. Would it be consistent with the Court's apparent intention for the Commission to amend its definition of ''political committee'' to only require that the nomination or election of candidates be a major purpose rather than the primary purpose of the organization? It seems that an organization that has the nomination or election of candidates as a major purpose is not ''engaged purely in issue discussion.'' Moreover, such a definition of political committee appears unlikely to cover organizations that engage in some incidental activity that causes them to exceed the $1,000 expenditure or contribution thresholds.

In *United States* v. *Harriss,* 347 U.S. 612, 621–22 (1954), the Supreme Court interpreted the meaning of the term ''principal purpose'' in the Federal Regulation of Lobbying Act. That statute provided that certain provisions applied only to those persons whose ''principal purpose'' is to aid in the passage or defeat of legislation. *Id.* at 619. The Court refused to interpret the statute to require that the influencing of legislation be the person's most important—or primary—purpose. Instead, the Court concluded that the phrase ''principal purpose'' was designed to exclude from the coverage of the act those persons ''having only an incidental purpose of influencing legislation.'' *Id.* at 622. According to the Supreme Court:

> [i]f it were otherwise,—if an organization, for example, were exempted because lobbying was only one of its main activities—the Act would in large measure be reduced to a mere exhortation against abuse of the legislative process. In construing the Act narrowly to avoid constitutional doubts, we must also avoid a construction that would seriously impair the effectiveness of the Act in coping with the problem it was designed to alleviate.

Id. at 622–23.

The Court's ruling in *Harriss* may be instructive because, in that case, the Court was interpreting the meaning of the word ''principal,'' which, when used as an adjective, is defined as ''most important.'' *See* Webster's II New Riverside Dictionary 556 (1st ed. 1984). The term ''major,'' on the other hand, is defined as ''greater in importance rank or stature'' or ''demanding great attention.'' Webster's II New Riverside Dictionary 421 (1st ed. 1984). Thus, ''major,'' unlike ''principal,'' does not signify ''most important'' or ''primary'' or ''first in rank.'' Given that the Supreme Court has interpreted the phrase ''principal purpose'' in a statute to include an organization for which lobbying is merely ''one of its main activities,'' would the Commission be justified in interpreting the phrase ''major purpose'' in *Buckley* to also mean ''one of its main activities?'' Is it significant that the Court in *Buckley* chose to use the phrase ''major purpose'' instead of ''primary purpose'' or ''principal purpose?''

2. Particular Federal Candidates

The proposed rule would require that the organization have as a major purpose the nomination or election of candidates for Federal office, as opposed to non-Federal office. The Commission seeks comment regarding whether the proposed rule should be limited to the nomination or election of Federal candidates or, instead, whether the nomination or election of all candidates, including candidates for non-Federal office will suffice. Likewise, the Commission asks whether the major purpose requirement mandates that the organization be involved in the nomination or election of one or more particular candidates or, instead, whether it is sufficient for the organization to have a major purpose of nominating or electing certain categories of candidates, such as Democrats or Republicans, or women, or candidates who take a position on a particular issue. In *FEC* v. *GOPAC, Inc.,* 917 F. Supp. 851 (D.D.C. 1996), the District Court interpreted *Buckley* and *MCFL* to require that the major purpose of the organization be ''the nomination or election of a *particular* candidate or

candidates for *federal* office.'' *GOPAC,* 917 F. Supp. at 859 (emphasis added). The Commission seeks comment as to whether this is a proper reading of *Buckley* and *MCFL.* Should the Commission issue regulations that conflict with the GOPAC decision?

3. Existing 11 CFR 100.5(b) through (e)

Please note that current 11 CFR 100.5(b) through (e), which identify certain organizations that are considered to be political committees (separate segregated funds, local party committees, principal campaign committees, and multi-candidate committees), do not incorporate the ''major purpose'' standard. This is because the Commission has determined that these organizations, by their nature or by definition, have as their major—if not primary—purpose, the nomination or election of candidates.

For example, current 11 CFR 100.5(b) provides that a separate segregated fund established under 2 U.S.C. 441b(b)(2)(C) is a political committee because, pursuant to 2 U.S.C. 441b(b)(2)(C), a separate segregated fund is ''to be utilized for political purposes.'' 2 U.S.C. 441b(b)(2)(C). Current 11 CFR 100.5(c) provides that, under certain circumstances, the local committee of a political party is a political committee because, like national parties, these organizations exist for the purpose of nominating and electing candidates. *See* 2 U.S.C. 431(4)(C). Moreover, such organizations are organized under section 527 of the Internal Revenue Code, which requires that these organizations be organized and operated primarily for the purpose of influencing or attempting to influence the nomination, election or appointment of individuals to public office. *See* 26 U.S.C. 527(e); *see also* discussion of 527 organizations below. Current 11 CFR 100.5(d) and (e)(1) provide that an individual's principal or authorized campaign committees are political committees because these organizations are established for the purpose of nominating or electing an individual to public office. *See* 2 U.S.C. 431(5) and (6). Moreover, such organizations are ''under the control of a candidate,'' and therefore are not subject to the major purpose requirement. *See Buckley,* 424 U.S. at 79. Finally, current 11 CFR 100.5(e)(3) provides that multi-candidate committees are political committees because these organizations make and receive contributions for Federal elections. Consequently, these organizations satisfy the major purpose test.

The Commission proposes no changes to existing 11 CFR 100.5(b) through (e). Nevertheless, the Commission seeks comments regarding whether any amendments to these paragraphs are necessary.

B. Major Purpose Tests

The Commission seeks comment on proposed 11 CFR 100.5(a)(2)(i) through (iv), which provides four tests for determining when an entity would satisfy the major purpose requirement. Please note that the Commission has not made any decisions on whether to adopt any of the proposals for the major test(s). If the Commission were to decide to adopt one or more of the proposed major purpose tests, an organization that meets any of the major purpose tests would be considered to have as a major purpose the nomination or election of Federal candidates. Consequently, if that organization exceeds the $1,000 contribution or expenditure threshold in 11 CFR 100.5(a)(1)(i), it would be a political committee and would have to comply with the registration, reporting and other requirements for political committees. Are the criteria appropriate? Would other criteria be more appropriate?

1. Proposed 11 CFR 100.5(a)(2)(i)—Avowed Purpose and Spending

The first of the four proposed major purpose tests, which is set forth in proposed section 100.5(a)(2)(i), would use the organization's public pronouncements and spending to determine if its major purpose is to nominate or elect candidates. An organization would satisfy the major purpose element in proposed section 100.5(a)(2)(i) if: (1) Its organizational documents, solicitations, advertising, other similar written materials, public pronouncements, or any other communications demonstrate that its major purpose is to nominate, elect, defeat, promote, attack, support, or oppose a clearly identified candidate or candidates for Federal office or the Federal candidates of a clearly identified political party; and (2) it disburses more than $10,000 in the current calendar year or any of the previous four calendar years on the following: (1) Expenditures (including independent expenditures); (2) contributions; (3) payments for types 1 through 3 of Federal election activity; and (4) payments for all or any part of an electioneering communication, as defined in 11 CFR 100.29.

The first prong of the major purpose test in proposed section 100.5(a)(2)(i) would rely on an organization's written characterization of its own activities. This would include the organization's organizational documents, such as its charter, constitution, by-laws, etc. The second prong would require that an organization's disbursements in connection with a Federal election exceed $10,000. This two-pronged approach would ensure that documents or communications that demonstrate that an organization's avowed purpose is to nominate, elect, defeat, promote, attack, support or oppose a candidate or candidates are substantiated by its actual disbursements in connection with a Federal election.

a. Public Pronouncements. For an organization's public pronouncements and other communications to demonstrate that the organization has a major purpose of nominating, electing, promoting, attacking, supporting, or opposing clearly identified Federal candidates or the Federal candidates of a clearly identified political party, the written materials and other communications must refer to Federal candidates of a clearly identified political party or to a ''clearly identified candidate,'' which is defined in 11 CFR 100.17. Thus, under proposed paragraph (a)(2)(i), an organization would not be considered to have the nomination or election of candidates as a major purpose where the organization's public communications merely indicate that its major purpose is to elect candidates holding particular positions (*e.g.,* pro-business candidates or pro-environmental candidates) without specifying which candidates hold those positions. Such an organization, however, could still be considered to have the nomination or election of candidates as a major purpose under the other three major purpose tests—proposed paragraphs (a)(2)(ii) through (iv), which are discussed below.

The Commission seeks comment regarding whether it is appropriate to base its major purpose analysis on the written public statements, documents, solicitations, and other communications by an organization. Are there circumstances where an organization's written public statements, documents, solicitations, and other communications would not be an appropriate measure of its major purpose? Should the final rule take into account the organization's oral, as well as written, communications to determine if it satisfies the first prong of the major purpose test in proposed section 100.5(a)(2)(i)?

The Commission also seeks comment regarding how this provision should operate with respect to disavowed major purposes or apparently contradictory statements of the organization's major purposes. For example, what would be

the outcome if the leader (*e.g.,* president, chairperson, etc.) of the organization disavows the organization's previously stated purpose? What if this disavowal is attempted by someone other than the organization's leader? Should the rules account for the possibility that an organization can disavow its previous statements regarding its major purpose? Should there be a time limit on the applicability of statements made in the organization's communications? For example, should statements from five years ago be given less weight than more current statements? Are these concerns alleviated by the second prong of the major purpose test set forth in proposed section 100.5(a)(2)(i), which would require that the organization exceed $10,000 in disbursements in connection with a Federal election?

Similarly, what if some of the organization's communications indicate that its major purpose is the nomination or election of candidates, but other communications indicate that it has one or more other major purposes? How should the major purpose of the organization be assessed in these situations? Should some communications or types of communications be afforded greater weight then others when assessing major purpose under this proposed paragraph? For example, should the Commission give greater weight to statements in the organization's solicitations or in its governing documents than it gives to potentially self-serving, ambiguous or contradictory statements by its leaders or its members? Should the Commission consider only the statements it makes in its solicitations or in its organizational documents and ignore statements found elsewhere? Would these concerns be alleviated by the second prong of the major purpose test set forth in proposed section 100.5(a)(2)(i), which would require that the organization exceed $10,000 in disbursements in connection with a Federal election?

b. $10,000 Disbursement Threshold. To satisfy the second prong of the major purpose test set forth in proposed section 100.5(a)(2)(i), the organization's disbursements in connection with any election for Federal office would have to exceed the $10,000 threshold in the current year or any of the previous four calendar years. For example, to assess whether this threshold has been met in 2004, the Commission would examine the organization's disbursements in 2000, 2001, 2002, 2003 and 2004. If it exceeded the $10,000 threshold in any of those years, it would satisfy the $10,000 disbursement requirement in proposed paragraph (a)(2)(i). Because this threshold is an absolute dollar amount rather than a percentage of total spending, the current year spending would be relevant to the analysis. Consequently, this provision, unlike proposed paragraph (a)(2)(ii), would apply to both existing and newly established organizations. The Commission seeks comment regarding the use of this time period in proposed paragraph (a)(2)(i). Should the threshold have to be met in all four preceding years? If the Commission does adopt such a four-year look-back provision, would it be fair to implement it prior to 2008?

The Commission also seeks comment regarding the proposed $10,000 threshold. The Commission notes that Congress established a $10,000 threshold to trigger the reporting requirements for electioneering communications under 2 U.S.C. 434(f) and 48-hour reporting of independent expenditures under 2 U.S.C. 434(g)(2). By establishing these $10,000 thresholds, Congress indicated that it believed $10,000 in activity to be significant enough to require reporting within 48 hours of the activity. Is it appropriate for the Commission to adopt a similar threshold to use in the major purpose test set forth in proposed paragraph (a)(2)(i), or is a higher or lower threshold more appropriate and why?

The Commission also seeks comment on the proposal to count the following types of disbursements toward the $10,000 threshold: (1) Expenditures (including independent expenditures); (2) contributions; (3) payments for types 1 to 3 of Federal election activity; and (4) payments for all or any part of an electioneering communication, as defined in 11 CFR 100.29. Payments for Federal election activity would be limited to only the first three of the four types of Federal election activity described in 11 CFR 100.24(b) because the fourth type of Federal election activity—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—applies only to certain political party committees, which are presumed to satisfy the major purpose requirement.

The Commission seeks comment regarding the types of disbursements that would count toward the $10,000 threshold. Is it appropriate to count expenditures (including independent expenditures), contributions, Federal election activity (types 1 through 3), and electioneering communications toward the spending threshold? Are there other categories or types of disbursements that should be included, such as administrative costs, overhead, and costs associated with volunteer activities? Should certain exceptions be included and, if so, how should those exceptions be crafted? For example, since some Federal election activity by non-party organizations might be truly non-partisan, should the types of voter registration, voter identification, get-out-the-vote, and generic campaign activity captured in the major purpose analysis be confined to partisan activity? Since the major purpose test envisioned in the proposed rules uses ''a major purpose to influence Federal elections'' test, should the four types of disbursements be subject to an allocation regime similar to those in 11 CFR 106.1 and 106.6, where only the allocable Federal portion would count toward the $10,000 threshold?

As discussed above with regard to the proposed amendments to the definition of ''expenditure,'' certain Federal election activity influences Federal elections. Does this justify counting the three types of Federal election activity toward the $10,000 disbursement threshold? *McConnell* concluded that ''[w]hile the distinction between ''issue'' and express advocacy seemed neat in theory, the two categories of advertisements proved functionally identical in important respects.'' *McConnell,* 124 S.Ct. at 650. The Supreme Court went on to explain that both types of communications ''were used to advocate the election or defeat of clearly identified candidates, even though the so-called issue ads eschewed the use of magic words.'' *Id.* Nonetheless, since some electioneering communications (and even some ''promote, support, attack, or oppose'' messages) by certain non-party organizations, such as 501(c) organizations might, be confined to advocating action regarding a particular legislative or executive decision, is there a need to develop a more focused content analysis for the major purpose test? *McConnell* held that it is permissible to treat an organization as a political committee even when the organization makes only independent expenditures and does not make any contributions to Federal candidates. *Id.* at 665 n.48. Does this justify counting independent expenditures toward the spending threshold?

2. Proposed 11 CFR 100.5(a)(2)(ii)—50 Percent Disbursement Threshold

The second of the four proposed major purpose tests is set forth in

proposed paragraph (a)(2)(ii). This paragraph would consider an organization to have a major purpose of nominating or electing candidates if more than 50 percent of the organization's total annual disbursements during any of the previous four calendar years was spent on: (1) Expenditures (including independent expenditures); (2) contributions; (3) payments for types 1 through 3 of Federal election activity; and (4) payments for all or any part of an electioneering communication, as defined in 11 CFR 100.29.

The Commission notes that, unlike proposed paragraph (a)(2)(i), this major purpose test does not consider the organization's public pronouncements. An organization that exceeds the 50 percent threshold would be considered to have the election or nomination of candidates as a major purpose regardless of whether or not the organization's public pronouncements or other communications indicate that it has such a major purpose. The Commission seeks comments regarding whether this major purpose test should also include consideration of the organization's public pronouncements or other communications, as is the case in proposed paragraph (a)(2)(i).

As set forth above, the relevant years for proposed paragraph (a)(2)(ii) would be the previous four calendar years. For example, to apply proposed paragraph (a)(2)(ii) for an organization during the year 2004, the relevant years would be 2000, 2001, 2002, and 2003. If an organization's election-related spending exceeded the 50 percent threshold in any of these years, it would be considered to have the nomination or election of candidates as a major purpose. Alternatively, should the organization's election-related spending have to exceed the 50 percent threshold in each of the preceding four years to trigger political committee status? Because an organization's total annual disbursements are typically unknown until the end of the year, the current year spending would not be examined under this proposed major purpose test. That is why, in the example given above, the organization's spending during 2004 was not considered. For the same reason, this proposed provision would be inapplicable to newly established organizations that have no spending in any prior years. However, newly established organizations would still be subject to the other three proposed major purpose tests, including the $50,000 disbursement threshold in proposed paragraph (a)(2)(iii).

The Commission also seeks comment on the proposal to consider the organization's spending during the previous four calendar years, which would cover groups that are active only during presidential election years. Should the proposed rule look back more years or fewer years? If so, how many calendar years would it be appropriate to examine? What should be the effective date of a rule that looks back four years?

The types of spending that would be counted toward the 50 percent threshold in the major purpose test set forth in proposed paragraph (a)(2)(ii) would be the same as those that would be counted toward the $10,000 spending threshold in proposed paragraph (a)(2)(i). The Commission seeks comment regarding counting these categories of disbursements toward the 50 percent threshold. The Commission specifically refers commenters to the questions and issues raised above with respect to counting these categories of disbursements toward the $10,000 disbursement threshold in proposed paragraph (a)(2)(i).

The Commission also seeks comment on the use of the 50 percent threshold. Is another percentage more appropriate to assess an organization's major purpose? Should the Commission apply a 25 percent threshold? Could a very large organization that spends less than 50 percent of its funds on election-related disbursements nevertheless have a profound effect on Federal elections? Does this justify the Commission adopting a threshold lower than 50 percent or would this situation be addressed by absolute dollar thresholds that would be used in proposed paragraphs (a)(2)(i) and (a)(2)(iii).

Should the size of the percentage threshold depend upon the determination of whether the nomination or election of candidates must be *the* major purpose of the organization, or must be only *a* major purpose of the organization? If the proper interpretation of the major purpose requirement is that the nomination or election of candidates must be the organization's primary purpose, should this proposed 50 percent threshold be the only test for major purpose adopted by the Commission in the final rules? In other words, if the nomination or election of candidates must be the organization's most important purpose, perhaps only those organizations that spend most (*i.e.,* more than 50 percent) of their funds on the nomination or election of candidates satisfy the major purpose requirement.

On the other hand, how should the final rule address organizations that spend a plurality, but not a majority, of their money on nomination and election activities? For example, should an organization be considered to satisfy the major purpose requirement if it spends only 30 percent of its funds on election-related activities (*i.e.,* those items that would count toward the proposed 50 percent threshold) but does not spend more than 30 percent on any other activity? To apply such a rule, would the Commission have to adopt categories of non-election spending so that the 70 percent of funds that the organization spent on non-election purposes would not be combined into a single category of ''non-election activities,'' thereby allowing the organization to avoid political committee status? If such categories are required, how should they be crafted?

3. Proposed 11 CFR 100.5(a)(2)(iii)—$50,000 Disbursement Threshold

The third of the four proposed major purpose tests, which is set forth in proposed paragraph (a)(2)(iii), would consider an organization to have the nomination or election of Federal candidates as a major purpose if it spends more than $50,000 in the current calendar year or any of the previous four calendar years on the following: (1) Expenditures (including independent expenditures); (2) contributions; (3) payments for types 1 through 3 of Federal election activity; and (4) payments for all or any part of an electioneering communication, as defined in 11 CFR 100.29. When an organization exceeds the $50,000 spending threshold, it would satisfy the major purpose standard. For example, to conclude that an organization has a major purpose of nominating and electing candidates in 2004, under proposed paragraph (a)(2)(iii), the organization would have to exceed the $50,000 threshold in either 2000, 2001, 2002, 2003 or 2004. The relevant time period in proposed 11 CFR 100.5(a)(2)(iii) is the current calendar year or any of the four previous calendar years. Because this threshold is an absolute dollar amount instead of a percentage of total spending, the current year spending would be relevant to the analysis. Consequently, this provision, unlike proposed paragraph (a)(2)(ii) would apply to newly established organizations. The Commission seeks comment regarding the use of this time period in proposed paragraph (a)(2)(iii). Would it be more appropriate to require that the threshold be met in each of the four preceding calendar years?

The Commission seeks comment regarding the proposed $50,000 threshold. The Commission notes that it uses a $50,000 threshold to determine

when a political committee is subject to mandatory electronic filing of its financial disclosure statements. *See* 11 CFR 104.18(a). Is this an appropriate dollar threshold for triggering major purpose under this proposed test or is a higher or lower threshold more appropriate and why? Is a higher or lower threshold more appropriate in certain situations or with respect to particular types of organizations? Should the proposed rule incorporate a sliding-scale dollar threshold that would increase or decrease depending upon the size or type of organization, or the type of activity in which the organization engages? How might such a sliding scale specifically work? Is it preferable not to have any major purpose criteria based upon a strict dollar amount and, if so, how would the Commission assess the major purpose of a newly established organization?

Like proposed paragraphs (a)(2)(i) and (a)(2)(ii), proposed paragraph (a)(2)(iii) would count the following types of disbursements toward the spending threshold: (1) Expenditures (including independent expenditures); (2) contributions; (3) payments for types 1 through 3 of Federal election activity; and (4) payments for all or any part of an electioneering communication, as defined in 11 CFR 100.29. The Commission seeks comment regarding counting these categories of disbursements toward the $50,000 threshold. The Commission specifically refers commenters to the questions and issues raised above with respect to counting these categories of disbursements toward the $10,000 spending threshold in proposed paragraph (a)(2)(i).

4. Proposed 11 CFR 100.5(a)(2)(iv)—527 Organizations

Proposed 11 CFR 100.5(a)(2)(iv) offers two alternatives for the fourth of the four proposed major purpose tests. Both alternatives address ''527 organizations,'' which are entities organized under section 527 of the Internal Revenue Code, 26 U.S.C. 527. A 527 organization is ''a party, committee, association, fund, or other organization (whether or not incorporated) organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for an exempt function.'' 26 U.S.C. 527(e)(1). An exempt function is defined as ''the function of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization, or the election of Presidential or Vice Presidential electors.'' 26 U.S.C. 527(e)(2).

Alternative 2–A provides that all 527 organizations would be considered to have the nomination or election of candidates as a major purpose, but carves out five exceptions: (1) Any 527 organization that is the campaign organization of an individual seeking nomination, election, appointment or selection to a non-Federal office; (2) any 527 organization that is organized solely for the purpose of promoting the nomination or election of a particular individual to a non-Federal office; (3) any 527 organization that engages in nomination and election activities only with respect to elections in which there is no candidate for Federal office on the ballot; (4) any 527 organization that operates in only one State and which is required by the law of that State to file financial disclosure reports with a State agency; and (5) any 527 organization that is organized solely for the purpose of influencing the selection, appointment, or nomination of individuals to non-elective office, or the election, selection, nomination or appointment of persons to leadership positions within a political party.

The first proposed exception would recognize that the major purpose of a campaign organization for an individual seeking non-Federal office is the nomination or election of that individual to non-Federal office. Consequently, such an organization is not likely to have as a major purpose the nomination or election of candidates to Federal office. The second proposed exception would address those organizations that are organized solely to promote the nomination or election of individuals to non-Federal offices, but do not fall within the first exception because they are not under the control of that particular non-Federal candidate.

The third and fourth proposed exceptions pertain to State political organizations. The exception in proposed section 100.5(a)(2)(iv)(C) would address 527 organizations that operate only in connection with non-Federal elections and only in States, such as Virginia, that hold non-Federal elections in years where there is no regularly scheduled Federal election (*i.e.,* odd-numbered years). Such an organization, which does not engage in activity in connection with any election for Federal office, is not likely to have as a major purpose the nomination or election of Federal candidates. The exception in proposed section 100.5(a)(2)(iv)(D) would address organizations that operate in only one State and, under State law, must disclose their financial activity to a State agency. Such organizations, because they operate in only one State, would not be deemed to have a major purpose of nominating or electing Federal candidates solely because they are 527 organizations.

The fifth proposed exception would recognize that 527 organizations established solely to influence the selection, appointment or nomination of individuals to non-elective office (*e.g.,* judicial appointments), or the nomination or election of candidates for leadership positions within a political party, should be exempt from this proposed major purpose test because they appear unlikely to have a major purpose of nominating or electing candidates to Federal office.

Organizations that do not satisfy any of the five exceptions and that receive $1,000 in contributions or make $1,000 in expenditures would be Federal political committees under proposed section 100.5(a) if they are organized under section 527 of the Internal Revenue Code. Should the Commission consider additional exceptions to proposed section 100.5(a)(2)(iv) to exclude more organizations, or should the Commission conclude that other organizations should be treated as Federal political committees if they satisfy the $1,000 thresholds in proposed section 100.5(a)(1)?

The Commission notes that any 527 organization that falls within one or more of the exceptions contained in Alternative 2–A could nevertheless be considered to have a major purpose of nominating or electing Federal candidates under one of the first three major purpose tests, such as by exceeding the 50 percent threshold set forth in proposed paragraph (a)(2)(ii) or the $50,000 spending threshold set forth in proposed paragraph (a)(2)(iii). The Commission seeks comment on whether the exceptions contained in Alternative 2–A are appropriate and whether Alternative 2–A should include additional exceptions. Alternative 2–B, in contrast, would provide that all 527 organizations would be considered to have the nomination or election of candidates as a major purpose, and does not provide for any exceptions.

The Commission seeks comment regarding whether it is necessary and appropriate to mention 527 organizations in the proposed rule, or whether it would be better to eliminate the fourth major purpose test and instead subject 527 organizations, like any other organization, to analysis under the first three tests. To the extent that 527 organizations should be explicitly mentioned in the proposed rule, which alternative is more

appropriate, Alternative 2–A, Alternative 2–B, or some other alternative?

5. Other Tax-Exempt Organizations

The proposed rule does not expressly mention other tax-exempt organizations, such as those organized under section 501(c) of the Internal Revenue Code, because, unlike 527 organizations, these organizations could lose their tax-exempt status if their primary purpose were to influence elections. Should the final rule state that certain tax-exempt organizations, such as those organized under 501(c)(3) or (c)(4) of the Internal Revenue Code, will not meet any of the major purpose tests because of the nature of their tax-exempt status, and exempt them from the definition of political committee? Or should the final rule not provide an exemption for 501(c) organizations, recognizing that the various thresholds in the major purpose tests are set high enough that certain 501(c) organizations may continue to conduct incidental or low levels of election activities without satisfying any of the major purpose tests and triggering political committee status? [7] Would it be more appropriate to discard ''*a* major purpose'' analysis and use instead ''*the* major purpose'' analysis for these types of organizations? In this regard, should the Commission fashion a test whereby it would recognize three broad categories of activity for 501(c) organizations—''election influencing activity,'' ''legislative or executive lobbying activity,'' and ''educational, research, or other activity.'' If the organization put more resources, either financially or timewise, into ''election influencing activity'' than it put into either of the other two activities, the major purpose test would be met.

C. Treatment of Contributions for the Major Purpose Requirement

Should the major purpose requirement apply when an organization's status as a political committee is based upon its making in excess of $1,000 in any contributions or expenditures, or only when its status as a political committee is based solely upon its making of independent expenditures in excess of $1,000? In *Akins* v. *FEC,* 101 F.3d 731 (D.C. Cir. 1996), *vacated,* 524 U.S. 11 (1998), one appeals court interpreted *Buckley* and *MCFL* to require application of the major purpose test only when political committee status is based upon the organization's independent expenditures, not when it is based upon the organization's other expenditures, including contributions to political committees. *See Akins,* 101 F.3d at 742 (''the Court clearly distinguished *independent expenditures* and *contributions* as to their constitutional significance, and its references to a 'major purpose' test seem to implicate only the former''). Should the *Akins* court's interpretation be incorporated into the proposed rule, or should the major purpose requirement apply to organizations that exceed $1,000 in expenditures, not just those that exceed $1,000 in independent expenditures exclusively?

D. Proper Application of the Major Purpose Requirement

The Commission seeks comment regarding whether the definition of political committee in 11 CFR 100.5(a) should include a major purpose test along the lines set forth above or whether it should instead incorporate the major purpose requirement as an exception to the definition of ''political committee.'' For example, if the major purpose requirement is incorporated into the definition of political committee (as it is in the proposed rules), an organization, regardless of the amount of its contributions and expenditures, will not be considered to be a political committee unless it is shown to have a major purpose of nominating or electing candidates. This is essentially how the proposed rules described above would work. An alternative approach, which is not reflected in the proposed rules, would be to use the major purpose requirement as an exception to the definition of political committee. Under this alternative approach, an organization would be considered to be a political committee if its expenditures or contributions exceed the $1,000 threshold unless the organization has a major purpose other than nominating or electing candidates. This alternative approach would, to a certain extent, place the burden on the organization to show that it does not have a major purpose of nominating or electing candidates. Would this alternative approach reflect the correct reading of the major purpose requirement as set forth in *Buckley, MCFL* and other cases?

Although not reflected in the proposed rules, the Commission seeks comment on the proper application of the major purpose requirement to complex organizations that include a political committee within the organization. For instance, should the Commission impute major purpose across such organizations? Thus, if an organization includes a political committee, should all other committees or organizations within the complex organization be deemed to satisfy the major purpose test? Or should the Commission conclude that its current affiliation rules at 11 CFR 100.5(g) sufficiently address this issue and no amendments to the regulations are necessary?

IV. Conversion of Federally Permissible Funds to Federal Funds

The Commission recognizes that there may be a need to provide guidance to organizations that become political committees after operating for some time as a non-political committee organization, especially concerning two issues: (1) how the new political committee should demonstrate that the contributions and expenditures that it made prior to becoming a political organization were paid for with Federally permissible funds and (2) how it should treat the funds it has cash-on-hand on the day that it became a political committee. Consequently, to address these issues, this NPRM includes proposed subpart A—Organizations that Become Political Committees, which would set forth the requirements for existing organizations that become political committees under 11 CFR 100.5(a). The proposed rules would not apply to organizations that register with the Commission as a political committee prior to making any contributions, expenditures, independent expenditures or allocable expenditures. The proposed rules do not replace any of the Commission's existing rules applicable to political committees. All political committees, including the political committees subject to these proposed rules, would remain subject to all of the Commission's rules applicable to political committees.

One purpose of the proposed 11 CFR part 102, subpart A is to provide a mechanism for organizations that become political committees to convert into Federal funds some or all of the funds received prior to the time that they became political committees. As explained below, a political committee could convert these funds into Federal funds by contacting its recent donor(s), making certain disclosures, and seeking

[7] This is especially true for 501(c)(3) organizations because their communications are exempt from the definition of ''electioneering communications.'' *See* 11 CFR 100.29(c)(6). Thus, any disbursements for such communications would not count toward a 501(c)(3)'s major purpose as electioneering communications. Furthermore, the Supreme Court recognized that the Massachusetts Citizens for Life, Inc., a nonprofit corporation, could become a political committee if its independent expenditures become ''so extensive'' that it satisfies the major purpose requirement. *MCFL,* 479 U.S. at 262.

the donor(s)' consent to use the funds for the purpose of influencing Federal elections. Allowing new political committees to convert pre-existing funds into Federal funds would achieve two goals. First, it would allow political committees to account for contributions and expenditures made before they became political committees that were required under the Act and the Commission's regulations to be paid for with Federal funds (*i.e.,* funds that comply with the source prohibitions, amount limitations and other requirements of the Act). Non-political committees are already required to ''demonstrate through a reasonable accounting method that, whenever such an organization makes a contribution or expenditure, or payment, the organization has received sufficient funds subject to the limitations and prohibitions of the Act to make such contribution, expenditure, or payment.'' 11 CFR 102.5(b)(1). The proposed rules would provide guidance on the initial reporting requirements for non-political committees that subsequently become political committees but would not impose any new requirements on those groups that never become political committees. Second, the proposed rules would, under certain circumstances, allow political committees to transfer to their Federal account some of the funds in their possession when they became political committees.

The Commission seeks comment regarding the need for a mechanism for political committees to convert funds received prior to becoming a political committee into Federal funds. The proposed rules, as mentioned above, would apply only to those organizations that, prior to becoming a political committee, made contributions or expenditures that were required by the Act and the Commission's regulations to be paid for with funds that are subject to the amount limitations and source prohibitions of the Act. Should the Commission also provide a mechanism in the final rules for political committees that, prior to becoming a political committee, did not make any disbursements that were required to be paid for with funds that are subject to the limitations and prohibitions of the Act, to convert some or all of its funds received prior to becoming a political committee into Federal funds and then transfer those converted funds into its Federal account?

A. Proposed 11 CFR 102.50

Proposed 11 CFR 102.50 would set forth the definitions of four terms used in proposed subpart A. ''Allocable expenditures'' would be defined as expenditures that are allocable under 11 CFR 106.1 or 106.6. Given that proposed 11 CFR 100.115 would make partisan voter registration, partisan voter identification and partisan get-out-the-vote activities ''expenditures'' and that some of these activities would be encompassed by ''generic voter drive'' and subject to allocation in current section 106.6, should the final rules include these types of voter drive activities as ''allocable expenditures?''

''Covered period'' would be defined as the period of time beginning on January 1 of the calendar year immediately preceding the calendar year in which the organization first satisfies the definition of ''political committee'' in 11 CFR 100.5(a) and ending on the date that the organization first satisfies the definition of ''political committee'' in 11 CFR 100.5(a). This covered period is similar to the period in 2 U.S.C. 434(f)(2)(E) for disclosing information pertaining to individuals who donate $1,000 or more to persons who make electioneering communications. Should the Commission adopt a shorter or a longer covered period in the final rule?

For example, if an organization first satisfies the definition of political committee in 11 CFR 100.5(a) on March 15, 2004, the covered period for that organization would be January 1, 2003, until March 15, 2004. For an organization that first became a political committee on December 31, 2005, would have a covered period of January 1, 2004, until December 31, 2005. Consequently, the covered period for any organization would be at least one year, but would be no longer than two years.

''Federal funds'' would have the same meaning as in 11 CFR 300.2(g). Thus, it would mean funds that comply with the limitations, prohibitions and reporting requirements of the Act.

''Federally permissible funds'' would be defined as funds that comply with the amount limitations and source prohibitions of the Act and were received during the covered period by the organization becoming a political committee. Federally permissible funds are different from Federal funds because, although both comply with the source prohibitions and amount limitations of the Act, federally permissible funds do not comply with the solicitation and reporting requirements of the Act. Moreover, federally permissible funds would be limited to those funds received during the organization's covered period. Only a political committee's federally permissible funds would be able to be converted to Federal funds under the proposed rules.

Consequently, not all of the organizations pre-existing funds would be subject to conversion to Federal funds under the proposed rules. Only those pre-existing funds that comply with the amount limitations and source prohibitions of the Act (*i.e.*, federally permissible funds) would be subject to conversion to Federal funds. Consequently, funds donated to the organization by a corporation, a labor organization or foreign national could not be converted to Federal funds because these are prohibited sources under the Act. *See* 2 U.S.C. 441b and 441e. Likewise, a political committee would not be able to convert to Federal funds an entire $20,000 donation to the organization from an individual because this amount would exceed the $5,000 limit for individual contributions to non-connected political committees. *See* 2 U.S.C. 441a(a)(1)(C). Only the first $5,000 of such a donation would be able to be converted to Federal funds under the proposed rule. The remaining $15,000 would have to be treated as non-Federal funds.

B. Proposed 11 CFR 102.51

Proposed 11 CFR 102.51 provides that subpart A would apply to a committee, club, association, or other group of persons that satisfies the definition of ''political committee'' under 11 CFR 100.5(a) and that made contributions, expenditures, independent expenditures or allocable expenditures during the covered period. Consequently, the proposed rules would apply to any organization that meets the following two criteria: (1) It satisfies the Commission's definition of ''political committee'; and (2) it has made expenditures, allocable expenditures or allocable disbursements during the covered period.

C. Proposed 11 CFR 102.52

Proposed 11 CFR 102.52 would set forth the requirements for political committees that would be subject to proposed subpart A. Proposed paragraphs (a) and (b) would remind these political committees that they are required to register with the Commission and to establish a campaign depository. These requirements already exist under 11 CFR 102.1(d) and 103.2 and would not be altered under the proposed rules.

Proposed paragraph (c) would require each political committee that would be subject to proposed subpart A to determine the amount of expenditures and allocable expenditures and disbursements it made during its

covered period. Thus, under this provision, political committees would be required to determine how much of its spending in the period of time immediately before it became a political committee was required to have been paid for with Federal funds. For example, if a disbursement was an ''expenditure'' under the Act or the Commission's regulations, it would count toward this amount. Likewise, if a disbursement was an allocable expenditure, it would also go toward this amount.

Proposed paragraph (d) would require political committees subject to proposed subpart A to determine the amount of federally permissible funds that the political committee received during its covered period. Thus, only donations of $5,000 or less from persons other than corporations, labor organizations, foreign nationals and other prohibited sources would be counted toward this amount, provided that these donations were received by the organization during its covered period.

Proposed paragraph (e) would require the political committees that would be subject to proposed subpart A to file financial disclosure reports with the Commission in accordance with part 104 of the Commission's regulations and proposed 11 CFR 102.56. Part 104 of the Commission's regulations are the general reporting requirements applicable to all political committees, including those that also would be subject to proposed subpart A. Proposed 11 CFR 102.56 are reporting requirements that the Commission proposes to adopt as part of these proposed rules. These additional reporting requirements are discussed in detail below.

D. Proposed 11 CFR 102.53

Proposed 11 CFR 102.53(a) would require a political committee subject to proposed subpart A to treat the amount of expenditures and allocable expenditures and disbursements made during its covered period as debt owed by its Federal account to its non-Federal account. For example, if, under proposed section 102.52(c), a political committee determined that, during its covered period, it made $100,000 in expenditures and allocable expenditures and disbursements, its Federal account would owe $100,000 to its non-Federal account. Consequently, virtually every political committee that would be subject to proposed subpart A would, at the time it becomes a political committee, have debt owed by its Federal account to its non-Federal account.

Under proposed paragraph (b), a political committee would not be permitted to make any contributions, expenditures, independent expenditures or allocable expenditures until the debt owed by the Federal account to the non-Federal account is satisfied. Thus, a political committee would be unable to make any disbursements that must be paid for with Federal funds until the debt is satisfied pursuant to proposed section 102.53(c).

Proposed paragraph (c) would provide two methods for a political committee subject to proposed subpart A to satisfy the debt owed by its Federal account to its non-Federal account. The first method would be for the political committee to raise Federal funds and transfer those funds to its non-Federal account. The other method would be for the political committee to convert some or all of its federally permissible funds to Federal funds. The proposed rule would allow the political committee to satisfy the debt owed by its Federal account by using either method or both methods in combination.

As set forth above, the Commission is seeking comment regarding whether political committees should be permitted to maintain non-Federal accounts. How would the conversion to Federal funds operate if the Commission were to adopt a final rule prohibiting Federal political committees from maintaining non-Federal accounts?

E. Proposed 11 CFR 102.54

Proposed section 102.54 would set forth the procedure through which a political committee that is subject to proposed subpart A may convert some or all of its federally permissible funds to Federal funds. The proposed rule would provide a two-step process for a political committee to convert its federally permissible funds into Federal funds. First, the political committee would be required to send written notification to the donor(s) of any Federally permissible funds to be converted into Federal funds. The written notification would need to:

(1) Inform the donor(s) that the political committee has registered as a Federal political committee;
(2) Make all disclaimers required by 11 CFR 110.11;
(3) Inform the donor(s) of the amount of the federally permissible funds donated by the donor(s) that the political committee seeks to convert to Federal funds and request that the donor(s) grant written consent for the political committee to use that amount of federally permissible funds for the purpose of influencing Federal elections;
(4) Advise the donor(s) that they may grant written consent for an amount of federally permissible funds lower than the amount requested, and that they may refuse to grant consent entirely; and
(5) Inform the donor(s) that, by granting consent, the donor(s) will be deemed to have made a contribution to a Federal political committee, that the contribution is subject to the amount limitations and source prohibitions of the Act, and that the contribution will be deemed to have been made on the date that the written consent is signed by the donor(s).

Second, the political committee would be required to receive the written consent from the donor(s) within 60 days after the political committee first satisfies the definition of ''political committee'' in 11 CFR 100.5.

If the political committee satisfies the requirements of proposed 11 CFR 102.54, the funds for which it receives written consent pursuant to proposed paragraph (b) would be considered to be converted to Federal funds and may be used to satisfy the debt owed by the Federal account. The Commission notes that, under the proposed rules, the political committee would need to receive the written consent from the donor(s) within sixty days after the political committee becomes a political committee under 11 CFR 100.5. The funds for which the political committee receives written consent from the donor(s) after that date would not be able to be converted to Federal funds and used to satisfy the debt owed by the Federal account.

The Commission seeks comment generally regarding the proposed procedure for converting federally permissible funds into Federal funds. The written notice requirements under proposed section 102.54(a) are designed to serve at least two purposes. First, they would ensure that the donor(s) are fully informed that their donations will be or have been used by the political committee for the purpose of influencing Federal elections and that the donor(s) are given a reasonable opportunity to object to such use. Second, the disclosures would ensure that the donor(s) have adequate information to comply with the contributions limitations of the Act. Are any of the requirements for the written notice under proposed paragraph 102.54(a) unnecessary? Should any other requirements be added? Is it appropriate to require that the donor(s) grant their consent to the conversion of their donated funds in writing? Should

oral consent, perhaps subject to a requirement that the oral consent be memorialized in writing, be sufficient?

Should the Commission adopt the 60-day time limit in proposed paragraph 102.54(b)? The 60-day time limit is designed to ensure that any conversion of Federally permissible funds to Federal funds occurs shortly after the political committee achieves political committee status under 11 CFR 100.5(a). Limiting the time period for conversion also will allow for the Commission and the public to more easily assess a political committee's compliance with these proposed rules. Is a time limit necessary? Would a time period other than 60 days be preferable? If so, how long should the conversion period last?

Would it be preferable to adopt an implied consent procedure, whereby the political committee would send a written notification to the donor(s), but would not have to wait for the donor(s) to affirmatively consent to the conversion. Instead, the political committee may consider the donor(s) to have consented to the transfer unless and until it receives an affirmative objection to the conversion from the donor(s). Such a procedure would be similar to the procedures the Commission adopted for redesignation and reattribution of certain apparently excessive contributions to authorized candidate committees under 11 CFR 110.1(k)(3)(ii)(B) and 11 CFR 110.1(b)(5)(ii)(B). Are there reasons that the Commission should or should not adopt a similar regime to govern conversion of federally permissible funds to Federal funds in proposed subpart A?

F. Proposed 11 CFR 102.55

Proposed 11 CFR 102.55 would provide a mechanism for political committees to convert an amount of Federally permissible funds to Federal funds that is greater than the amount of debt owed by its Federal account. A political committee that successfully converts an amount of federally permissible funds to Federal funds that is greater than the amount of debt owed by its Federal account would be required to first use the converted funds to satisfy the debt owed by its Federal account. The surplus converted Federal funds (*i.e.*, the amount of converted federally permissible funds exceeding the amount of debt owed by the political committee's Federal account) may then be transferred to the political committee's Federal account. The amount of converted Federal funds transferred to the Federal account under this proposed section, however, may be no greater than the amount of cash-on-hand that the political committee had in its possession at the time it first became a political committee under 11 CFR 100.5(a).

For example, if a political committee has $50,000 in debt owed by its Federal account and is able to convert $75,000 of its Federally permissible funds into Federal funds pursuant to proposed section 102.54, it would be able to transfer the surplus $25,000 to its Federal account if it had at least $25,000 cash-on-hand in its possession at the time it became a political committee. If the political committee, however, had only $10,000 of cash-on-hand in its possession when it became a political committee, it would be able to transfer only $10,000 from its non-Federal account to its Federal account. If the political committee had zero cash-on-hand in its possession when it became a political committee, it would not be permitted to transfer any funds to its Federal account.

The Commission seeks comment regarding whether it is appropriate for the proposed rules to allow this surplus amount to be transferred to a political committee's Federal account. Would it be preferable to limit the conversion procedures only to the amount needed by the political committee to satisfy the debt owed by its Federal account? If it is advisable for the Commission to allow political committees to convert as much of their federally permissible funds into Federal funds as possible, and to transfer any surplus to their Federal account, should the rule limit the amount transferred to the amount of cash-on-hand in the possession of the political committee when it became a political committee?

G. Proposed 11 CFR 102.56

Proposed section 102.56 would set forth the initial reporting requirements for political committees that would be subject to proposed subpart A. Under proposed section 102.56, political committees that would be subject to proposed subpart A would be required to report certain information along with other required information in the political committee's first report due under 11 CFR 104.5. Thus, political committees that are subject to proposed subpart A are also subject to the reporting requirements of 11 CFR part 104, which apply to all political committees. Proposed section 102.56 would merely require a political committee that would be subject to proposed subpart A to report certain additional information related to its compliance with proposed subpart A. The additional subpart A information would be due whenever the political committee's first financial disclosure report is due under 11 CFR part 104.

Under proposed paragraph (a) a political committee that would be subject to proposed subpart A would be required to report the amount of expenditures and allocable expenditures and disbursements made by the political committee during its covered period. This figure would reflect the amount of debt the political committee's Federal account owes to its non-Federal account pursuant to proposed section 102.53(a). Under proposed paragraph (b), a political committee that would be subject to subpart A would be required to report the amount of any federally permissible funds converted to Federal funds under proposed 11 CFR 102.54. This figure would reflect the amount of converted Federal funds that are available for the political committee to satisfy the debt owed by its Federal account and, possibly, the amount of surplus converted Federal funds that the political committee may transfer to its Federal account pursuant to proposed 11 CFR 102.55(b).

Proposed paragraph (c) would require a political committee that is subject to proposed subpart A to report the identifying information required under 11 CFR 104.3(a)(4)(i). This is the contributor information that all political committees must report to the Commission when they receive contributions. This proposed provision is designed to require political committees that would be subject to subpart A to report this information for any donation of federally permissible funds that is converted to Federal funds.

Proposed paragraph (d) would require a political committee to report the difference between the amount reported under proposed paragraph (a), which is the amount of debt owed by the political committee's Federal account under proposed 11 CFR 102.53(a), and the amount reported under proposed paragraph (b), which is the amount of federally permissible funds converted to Federal funds under proposed 11 CFR 102.54. Consequently, the amount reported pursuant to proposed paragraph (d) would reflect whether the political committee has converted a sufficient amount of federally permissible funds to Federal funds to allow it to satisfy the debt owed by its Federal account. If not, the deficiency would be required to be reported as a debt owed by the Federal account. It would also reflect whether the political committee has converted an amount of federally permissible funds to Federal funds in excess of the amount of debt owed by the Federal account, thereby possibly permitting the political

committee to transfer some or all of the surplus funds to its Federal account pursuant to proposed 11 CFR 102.55(b).

Proposed paragraph (e) would require a political committee that would be subject to proposed subpart A to report the amount and date of any transfers to its Federal account made pursuant to proposed 11 CFR 102.55(b). This would permit the Commission to assess whether the political committee complied with the transfer requirements under proposed paragraph 102.55(b).

The Commission seeks comment regarding these additional reporting requirements that would apply to political committees that would be subject to proposed subpart A. Are any of these reporting requirements unnecessary or unduly burdensome? Are there additional reporting requirements that the Commission should include in the proposed rules?

V. Proposed 11 CFR 106.6—Allocation

Alternative 1–B includes proposed changes to the allocation rules to reflect other changes proposed in Alternative 1–B and for other purposes. The Commission has not determined that any changes to its allocation rules are appropriate, and is thus seeking comment to determine what, if any, changes are advisable. Although BCRA invalidated the Commission's allocation regime for national party committees and substituted a different allocation regime for other political party committees, it did not address the Commission's allocation regulations for separate segregated funds and nonconnected committees. Although *McConnell* criticized aspects of the Commission's allocation regulations regarding political party committees, allocation by nonconnected committees and separate segregated funds was not before the Supreme Court. *McConnell,* 124 S.Ct. at 660 and 661. Accordingly, the Commission seeks comments on whether either BCRA or *McConnell* requires, permits, or prohibits changes to the allocation regulations for separate segregated funds and nonconnected committees. Does either provide any guidance as to how the Commission should exercise any discretion it may have in this regard? Given *McConnell's* criticism of the Commission's prior allocation rules for political parties, is it appropriate for the regulations to allow political committees to have non-Federal accounts and to allocate their disbursements between their Federal and non-Federal accounts? If an organization's major purpose is to influence Federal elections, should the organization be required to pay for all of its disbursements out of Federal funds and therefore be prohibited from allocating any of its disbursements? Should any changes to the allocation regulations be effective immediately, or should their effective date be January 1, 2005, which is the first day of the year following the completion of the current election cycle? Does the Commission have a legal basis for delaying the effective date of any final rules it adopts?

Under the proposed rules in Alternative 1–B, separate segregated funds and nonconnected committees would be permitted to allocate expenses for partisan voter drives and for communications that promote or oppose a political party between Federal and non-Federal accounts according to the ''funds expended'' method, which is consistent with the requirements of current section 106.6(c) for administrative expenses and generic voter drives. The proposal would add a minimum Federal percentage to the ''funds expended'' method, and would also clarify the ratio in the ''funds expended'' method by further describing the Federal component of that ratio. Finally, the proposal would specify an allocation method for communications that promote both candidates and political parties.

A. Partisan Voter Drives

The proposal would replace the references to ''generic voter drives'' in current 11 CFR 106.6(b)(1)(iii) and (2)(iii) with references to ''partisan voter drives'' as defined in proposed 11 CFR 100.34. Political committees are currently required to allocate the costs for ''generic voter drives,'' which include voter drives that urge the general public to support candidates of a particular party or associated with a particular issue, without mentioning a specific candidate. Under Alternative 1–B, most ''generic voter drives'' would be considered an allocable expenditure as a ''partisan voter drive'' under proposed 11 CFR 100.34 and 106.6(b)(1)(iii), (2)(iii), and (c). Voter drives that urge the general public to register, vote or support candidates associated with a particular issue would continue to be allocable under proposed 11 CFR 106.6(b)(1)(iii), (b)(2)(iii), and (c).

Partisan voter drives that include any communication that promotes, supports, attacks, opposes, or expressly advocates a clearly identified Federal candidate are expenditures subject to allocation under current 11 CFR 106.1, or, if the communication also promotes or opposes a political party, the partisan voter drive would be allocated under proposed 11 CFR 106.6(f), which is described below. In all other instances, expenditures for partisan voter drives would be allocable under the ''funds expended'' method of proposed 11 CFR 106.6(c). Because ''partisan voter drives'' would be defined as ''expenditures'' under proposed 11 CFR 100.34 and 100.115, the communications involved would not be limited to those that meet the definition of ''public communication'' in current 11 CFR 100.26 through 100.28.

Current 11 CFR 106.1(a)(1) provides that the allocation methods in that section shall be used to allocate payments involving both expenditures on behalf of one or more clearly identified Federal candidates and disbursements on behalf of one or more clearly identified non-Federal candidates. Proposed section 106.6(f), which is described below, would provide an allocation method similar in some respects to the ''expected benefit'' method under current section 106.1. Proposed section 106.6(g) would specify that public communications that promote, support, attack or oppose a clearly identified Federal candidate, without also promoting or opposing a political party, would be allocable under section 106.1 as expenditures or disbursements on behalf of the clearly identified Federal or non-Federal candidates. Under this approach, the Commission is not proposing any changes to 11 CFR 106.1(a)(1) and instead would rely on the limitations in proposed section 106.6(b), (c), (f) and (g) to ensure that all partisan voter drives except those that promote, support, attack, oppose, or expressly advocate a clearly identified Federal candidate would be subject to allocation under section 106.6(c). Comments are sought on this approach.

B. Public Communications That Promote or Support a Political Party

The proposal would also require nonconnected committees and separate segregated funds to allocate costs of public communications that promote or oppose a political party, which would be expenditures under proposed 11 CFR 100.116(b), under the ''funds expended'' method in proposed 11 CFR 106.6(c). If such a communication also promotes, supports, attacks, or opposes a clearly identified Federal candidate, it would be allocable under proposed 11 CFR 106.6(f), described below. Nonpartisan voter drives that include a public communication would be subject to the same allocation regime. A public communication that promotes or opposes a political party, but that does not also promote, support, attack or oppose a clearly identified Federal candidate, would be allocable under

proposed 11 CFR 106.6(c), without regard to references to Federal candidates or even express advocacy of candidates for State office. Thus, a communication that, for example, promotes the Republican Party and the Governor of New York's reelection would be allocable under proposed 11 CFR 106.6(c).

The charts below illustrate the allocation methods that would be required under Alternative 1–B.

Allocation for Nonconnected Committees and Separate Segregated Funds of Partisan Voter Drives That Include a Communication

In the communication,

How is the Federal Candidate Depicted?	Does it promote or oppose a political party?	Does it clearly identify a Non-Federal Candidate?	Allocation: citation and method
None	NO	NO	106.6(c) fund expended.
		YES	106.6(c) fund expended.
	YES	NO	106.6(c) fund expended.
		YES	106.6(c) fund expended.
Clearly ID'd Candidate	NO	NO	106.6(c) fund expended.
		YES	106.6(c) fund expended.
	YES	NO	106.6(c) fund expended.
		YES	106.6(c) fund expended.
PASO'd or Express Advocacy	NO	NO	106.1 = time/space (100% Fed).
		YES	106.1 = time/space.
	YES	NO	106.6(f) time/space & fund exp.
		YES	106.6(f) time/space & fund exp.

Allocation for Nonconnected Committees and Separate Segregated Funds of Public Communications and Non-Partisan Voter Drives That Include a Public Communication

In the communication,

How is the Federal Candidate Depicted?	Does it promote or oppose a political party?	Does it clearly identify a Non-Federal Candidate?	Allocation: citation and method
None	NO	NO	N/A
		YES	106.1 = time/space (100% NF)
	YES—*See* partisan voter drive allocation chart.		
Clearly ID'd candidate	NO	NO	N/A
		YES	106.1 = time/space
	YES—*See* partisan voter drive allocation chart.		
PASO'd or Express Advocacy	*See* partisan voter drive allocation chart.		

C. Minimum Federal percentage

The proposal would add a minimum Federal percentage to the ''funds expended'' allocation method. This minimum would be the same percentage that is applicable to State, district, and local political party committees' allocation of voter drives under current 11 CFR 106.7(d)(3). It varies with the Federal offices that appear on a particular State's ballot, ranging from 15%, in election years in which a State votes for candidates for the United States House of Representatives only, to 36%, in election years in which a State votes for president and a senator as well. *See* current 11 CFR 106.7(d)(3)(i) through (iv). Related changes to reporting requirements are also proposed for 11 CFR 104.10.

For nonconnected committees and separate segregated funds that conduct partisan voter drives, or engage in other activities subject to the ''funds expended'' allocation method, in more than one State, two alternative proposed rules are presented. Alternative 3–A would require such committees to use the greatest percentage applicable to any of the States in which the committee conducted such activities for all its disbursements allocable under proposed 11 CFR 106.6(c). Alternative 3–B would permit such committees to allocate such costs on a State-by-State basis according to the percentage applicable in each State. Under Alternative 3–B, a committee could choose to simplify its allocation by using the highest applicable percentage to avoid the complications of a State-by-State allocation.

The Commission is considering other minimum Federal percentages as alternatives to those presented in the proposed rules. Should the rules in 11 CFR 106.6 apply different minimum Federal percentages than those for State, district and local political party committees? Should the Commission adopt a fixed minimum Federal percentage? Should it select a higher minimum for committees that conduct activities in several States? For example, the allocation rule could specify that nonconnected committees and separate segregated funds that conduct activities in fewer than 10 States must use a minimum Federal percentage of 25 percent, while those that do so in 10 or more States would face a minimum Federal percentage of 50 percent. The 25 percent figure was chosen as the average of the four percentages in current 11 CFR 106.7(d)(3), and the 50 percent figure was chosen to reflect the broader scope of activities and as a slight reduction to the 60 percent or 65 percent applicable to national party committees under previous 11 CFR 106.5(b)(2), prior to its sunset on December 31, 2002. *See* 11 CFR 106.5(h)(2003). If the final rule should take such an approach, what should the minimum Federal percentages be?

D. Clarifying the Ratio in the ''Funds Expended'' Method

The ''funds expended'' allocation method provides that expenses are allocated between the Federal and non-

Federal accounts of a nonconnected committee or a separate segregated fund based on the ratio of Federal expenditures to total Federal and non-Federal disbursements made by the committee during the two-year Federal election cycle. Current section 106.6(c)(1) specifies that: ''In calculating its federal expenditures, the committee shall include only amounts contributed to or otherwise spent on behalf of specific federal candidates.'' The proposal would clarify that ''amounts * * * spent on behalf of specific Federal candidates'' includes independent expenditures and amounts spent on public communications that promote, support, attack, support, or oppose a clearly identified Federal candidate. *See* proposed 11 CFR 106.6(c)(1)(i). This proposal reflects the Commission's application of current regulations in a recent Advisory Opinion. *See* AO 2003–37, at 4 n.5. The Commission seeks comment on whether the conclusion in this Advisory Opinion should be expressly stated in proposed 11 CFR 106.6(c)(1)(i).

E. Public Communications That Promote a Political Party and a Federal Candidate

Proposed section 106.6(f) would specify an allocation method for public communications that promote or oppose a political party and promote, support, attack or oppose a clearly identified Federal candidate. This method would apply to this communication whether or not the communications also clearly identify a non-Federal candidate.

Proposed section 106.6(f) would provide an allocation method that combines the ''time and space'' method and the ''funds expended'' method for communications that support Federal candidates and a political party. The communication would first be subject to a ''time and space'' analysis to split the communication among the candidates and the political party. The portions attributed to candidates would be allocated to either the Federal or non-Federal accounts based on the candidates' status. The portion attributed to the political party would be allocated under the ''funds expended'' method in proposed 11 CFR 106.6(c).

This approach would be consistent with the Commission's analysis and conclusions based on the application of current regulations in a recent Advisory Opinion. *See* AO 2003–37, at 12. Should the Commission expressly incorporate this result in its allocation regulations?

F. Public Communications That Promote a Federal Candidate, Without Promoting or Opposing a Political Party

Proposed section 106.6(g) would specify that public communications that promote, support, attack or oppose a clearly identified Federal candidate without promoting or opposing a political party by a nonconnected committee or separate segregated fund would be allocable under current section 106.1. Nonpartisan voter drives that include a public communication with similar content would be subject to the same allocation requirements. The only other expenditures or disbursements by a nonconnected committee or separate segregated fund for a public communication or voter drive that would be allocable under current section 106.1 would involve communications that clearly identify non-Federal candidates, but do not promote, support, attack, oppose, or expressly advocate a Federal candidate.

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

When an agency issues certain rulemaking proposals, the Regulatory Flexibility Act (''RFA'') requires the agency to ''prepare and make available for public comment an initial regulatory flexibility analysis'' which will describe the impact of the proposed rule on small entities. 5 U.S.C. 603(a). Section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an initial regulatory flexibility analysis, if the proposed rulemaking is not expected to have a significant economic impact on a substantial number of small entities.

Political Committees

One part of the proposed rule would amend the Commission's definition of ''political committee.'' Under the Federal Election Campaign Act of 1971, as amended, and the Commission's regulations, political committees have certain reporting obligations that do not apply to non-political committees. Moreover, there are restrictions and limitations on the receipt of funds by political committees that do not apply to non-political committees. This part of the proposed rule would directly affect only those organizations that are not currently political committees, but would fall within the amended definition of ''political committee'' in the proposed rule, if the Commission decides to amend the definition.

It is difficult for the Commission to estimate the number of organizations that may be affected by the proposed change in the definition of political committee. The Commission believes, however, that most of the organizations that would be affected by the proposed rule are ''political organizations'' organized under section 527 of the Internal Revenue Code. Under the North American Industry Classification System (''NAICS''), political organizations are considered to be ''small entities'' if they have less than $6 million in average annual receipts. The Commission estimates that all but a few of the 527 organizations that may be affected by the proposed rules, if adopted, have less than $6 million in average annual receipts and, therefore, qualify as small entities under the NAICS.

The Commission notes that a number of these political organizations are already registered with the Commission as political committees and therefore, would not be affected by the proposed change to the definition of political committee. The proposed rule also includes various exceptions. For example, the proposed rule would only affect those political organizations that: (1) Meet the ''major purpose'' test set forth in proposed section 100.5(a)(2) of the proposed rule; and (2) exceed the $1,000 expenditure and disbursement thresholds set forth in proposed section 100.5(a)(1) of the proposed rule. Moreover, the proposed rule would exempt from political committee status those political organizations that are involved primarily in state, as opposed to Federal, political activity. Consequently, while it is difficult for the Commission to estimate precisely the number of organizations that would be affected by the proposed rule, the Commission believes that, as a result of the exceptions described above, the proposed rule would not have an economic effect on a substantial number of the small entities.

Furthermore, the Commission does not believe that the proposed rule, if adopted, will have a significant economic impact on those small entities that would be affected. As stated above, the effect of the proposed rule would be to impose certain reporting requirements and restrictions on funding certain activities upon those political organizations that would become political committees under the amended definition of ''political committee.''

The reporting requirements, however, are not complicated and would not be costly to complete. For the most part, the reports would be filed electronically, using free software provided by the Commission. The Commission also provides free technical support and free access to the

Commission's Information Specialists to assist political committees in submitting the reports. It is highly unlikely that a political committee would need to hire additional staff or retain professional services to comply with the reporting requirements.

The Commission also notes that the Act and the Commission's regulations do not place any limit on the amount of funds that a political committee would be permitted to spend. The proposed rule would merely limit the types of funds that may be used to pay for certain activities, which are essentially those activities that fall within the definition of ''expenditure.'' Political committees are, and will remain, free to spend unlimited funds on those activities that do not fall within the definition of expenditure. Moreover, the Commission is considering alternatives that would have even less of an impact than those described above, including the possibility of not making any changes to the definition of ''political committee.''

Expenditures and Allocation

The proposed rule would also amend the Commission's definition of ''expenditure'' to include payments for activities that are not expressly included in the Commission's existing definition of expenditure. Whether a disbursement qualifies as an ''expenditure'' determines whether the disbursement must be paid for with Federal funds or may be paid for with non-Federal funds. It also impacts whether an organization satisfies the $1,000 expenditure threshold for political committee status. The proposed rule would also revise the Commission's rules regarding the allocation of certain disbursements between a political committee's Federal account and non-Federal account. Consequently, these parts of the proposed rule could impact any organization or individual that engages in activities in connection with a Federal election.

As explained above with respect to the proposed amendment of the definition of ''political committee,'' the proposed changes are unlikely to have a significant economic impact on small entities. Neither the proposed change in the definition of ''expenditure'' nor the proposed change in the allocation rules would limit the amount of money that may be raised or spent on electoral activity. The proposed rules would merely require that only funds raised in accordance with the Act may be spent in connection with Federal elections. Moreover, the Commission is considering alternatives that would have even less of an impact than those described above, including the possibility of not making any changes to the definition of ''expenditure'' and the allocation rules.

Certification

For the foregoing reasons, the Commission hereby certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities. The Commission invites comment from members of the public who believe that the proposed rule will have a significant economic impact on a substantial number of small entities.

List of Subjects

11 CFR Part 100

Elections.

11 CFR Part 102

Political committees and parties, Reporting and recordkeeping requirements.

11 CFR Part 104

Campaign funds, Political committees and parties, Reporting and recordkeeping requirements.

11 CFR Part 106

Campaign funds, Reporting and recordkeeping requirements.

11 CFR Part 114

Business and industry, Elections, Labor.

For the reasons set out in the preamble, it is proposed to amend subchapter A of chapter I of title 11 of the Code of Federal Regulations as follows:

PART 100—SCOPE AND DEFINITIONS (2 U.S.C. 431)

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

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

2. Section 100.5 would be amended by revising the introductory paragraph and paragraph (a) to read as follows:

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

Political Committee means any group meeting the conditions set forth in paragraph (a), (b), (c), (d) or (e) of this section.

(a)(1) Except as provided in paragraphs (b), (c), (d), (e)(1), and (e)(3) of this section, *political committee* means any committee, club, association, or other group of persons:

(i) That receives contributions aggregating in excess of $1,000 or that makes expenditures aggregating in excess of $1,000 during a calendar year; and

(ii) For which the nomination or election of one or more Federal candidates is a major purpose.

Alternative 1–A

(iii) For purposes of paragraph (a)(1)(i) of this section only, the term *expenditure* shall include payments for Federal election activities described in 11 CFR 100.24(b)(1) through (b)(3) and payments for all or any part of an electioneering communication as defined in 11 CFR 100.29.

End of Alternative 1–A. For Alternative 1–B, *see* 11 CFR 100.34 to 114.4.

(2) For purposes of paragraph (a)(1) of this section, a committee, club, association or group of persons has the nomination or election of a candidate or candidates as a major purpose if it satisfies the conditions set forth in paragraph (a)(2)(i), (a)(2)(ii), (a)(2)(iii), or (a)(2)(iv) of this section.

(i) The organizational documents, solicitations, advertising, other similar written materials, public pronouncements, or any other communication of the committee, club, association or group of persons demonstrate that its major purpose is to nominate, elect, defeat, promote, support, attack or oppose a clearly identified candidate or candidates for Federal office or the Federal candidates of a clearly identified political party; and during the current calendar year or during any of the previous four calendar years, the committee, club, association or group of persons makes more than $10,000 total disbursements composed of any combination of the following:

(A) Contributions;

(B) Expenditures (including independent expenditures);

(C) Payments for Federal election activities described in 11 CFR 100.24(b)(1) through (b)(3); and

(D) Payments for all or any part of an electioneering communication as defined in 11 CFR 100.29.

(ii) More than 50 percent of the committee's, club's association's or group's total annual disbursements during any of the previous four calendar years are composed of any combination of the following:

(A) Contributions;

(B) Expenditures (including independent expenditures);

(C) Payments for Federal election activities described in 11 CFR 100.24(b)(1) through (b)(3); and

(D) Payments for all or any part of an electioneering communication as defined in 11 CFR 100.29.

(iii) During the current calendar year or during any of the previous four

calendar years, the committee, club, association or group of persons makes more than $50,000 in total disbursements composed of any combination of the following:

(A) Contributions;

(B) Expenditures (including independent expenditures);

(C) Payments for Federal election activities described in 11 CFR 100.24(b)(1) through (b)(3); and

(D) Payments for all or any part of an electioneering communication as defined in 11 CFR 100.29.

Alternative 2–A

(iv) The committee, club, association or group of persons is organized under Section 527 of the Internal Revenue Code, 26 U.S.C. 527, except that this paragraph (a)(2)(iv) shall not apply to:

(A) The campaign organization of an individual seeking nomination, election, appointment or selection to a non-Federal office;

(B) A committee, club, association or group of persons that is organized solely for the purpose of promoting the nomination or election of a candidate or candidates to a non-Federal office;

(C) A committee, club, association or group of persons whose election or nomination activities relate solely to elections where no candidate for Federal office appears on the ballot;

(D) A committee, club, association, or group of persons that operates solely within one State and, pursuant to State law, must file financial disclosure reports with one or more branches, departments or agencies of that State's government, showing all its activities in that State; or

(E) A committee, club, association, or group of persons that is organized solely for the purpose of influencing the nomination or appointment of individuals to a non-elected office, or the nomination, election, or selection of individuals to leadership positions within a political party.

Alternative 2–B

(iv) The committee, club, association or group of persons is organized under Section 527 of the Internal Revenue Code, 26 U.S.C. 527.

* * * * *

Alternative 1–B

3. Section 100.34 would be added to read as follows:

§ 100.34 Partisan voter drives.

Partisan voter drive means any or all of the following:

(a) Voter registration activity as described in 11 CFR 100.24(a)(2) and (b)(1), except for voter registration activity described in 11 CFR 100.133;

(b) Voter identification as described in 11 CFR 100.24(a)(1), (a)(4), and (b)(2)(i), except for voter identification when no effort has been or will be made to determine or record the party or candidate preference of individuals on the voter list; and

(c) Get-out-the-vote activity as described in 11 CFR 100.24(a)(1), (a)(3), and (b)(2)(iii), except for get-out-the-vote activity described in 11 CFR 100.133.

4. Section 100.57 would be added to subpart B to read as follows:

§ 100.57 Solicitations with express advocacy.

A gift, subscription, loan, advance, or deposit of money or anything of value made by any person in response to any communication that includes material expressly advocating, as defined in 11 CFR 100.22, a clearly identified Federal candidate is a contribution to the person making the communication.

5. Section 100.115 would be added to subpart D to read as follows:

§ 100.115 Partisan voter drives.

A payment, distribution, loan, advance, or deposit of money or anything of value made by, or on behalf of any person for partisan voter drives, as described in 11 CFR 100.34, is an expenditure, except Levin funds, as defined in 11 CFR 300.2(i), that are disbursed for partisan voter drives are not expenditures.

6. Section 100.116 would be added to subpart D to read as follows:

§ 100.116 Certain public communications.

A payment, distribution, loan, advance, or deposit of money or anything of value made by, or on behalf of any person for a public communication, as defined in 11 CFR 100.26, is an expenditure if the public communication:

(a) Refers to a clearly identified candidate for Federal office, and promotes or supports, or attacks or opposes any candidate for Federal office; or

(b) Promotes or opposes any political party.

7. Section 100.133 would be revised to read as follows:

§ 100.133 Nonpartisan voter registration and get-out-the-vote activities.

Any cost incurred for activity designed to encourage individuals to register to vote or to vote is not an expenditure if:

(a) It does not include a communication that promotes, supports, attacks, or opposes a Federal or non-Federal candidate or that promotes or opposes a political party;

(b) No effort is or has been made to determine the party or candidate preference of individuals before encouraging them to register to vote or to vote; and

(c) Information concerning likely party or candidate preference has not been used to determine which individuals to encourage to register to vote or to vote.

(d) Corporations and labor organizations that engage in such activity shall comply with the additional requirements set forth in 11 CFR 114.4(c) and (d). *See also* 11 CFR 114.3(c)(4).

8. Section 100.149 would be amended by revising the introductory paragraph to read as follows:

§ 100.149 Voter registration and get-out-the-vote activities for Presidential candidates (''coattails'' exception).

Notwithstanding 11 CFR 100.115, the payment by a State or local committee of a political party of the costs of voter registration and get-out-the-vote activities conducted by such committee on behalf of the Presidential and Vice Presidential nominee(s) of that party is not an expenditure for the purpose of influencing the election of such candidate(s) provided that the following conditions are met:

* * * * *

9. Section 100.155 would be added to read as follows:

§ 100.155 Allocated amounts.

Notwithstanding 11 CFR 100.115 or 100.116, any non-Federal funds disbursed by a separate segregated fund pursuant to 11 CFR 106.6(b)(1)(iii) through (vi) or by a nonconnected committee pursuant to 11 CFR 106.6(b)(2)(iii) through (vi) are not expenditures.

PART 102—REGISTRATION, ORGANIZATION, AND RECORDKEEPING BY POLITICAL COMMITTEES (2 U.S.C. 433)

10. The authority citation for part 102 would continue to read as follows:

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

11. Sections 102.18 through 102.49 would be added and reserved.

12. Subpart A would be added to read as follows:

Subpart A—Conversion Rules

Sec.

Subpart A—Conversion Rules

§ 102.50 What are the definitions for this subpart A?

For purposes of this subpart A, the following terms are defined as follows:

Allocable expenditures mean expenditures that are allocable under 11 CFR 106.1 or 106.6.

Covered period means the period of time beginning on January 1 of the calendar year immediately preceding the calendar year in which a committee, club, association, or other group of persons first satisfies the definition of ''political committee'' in 11 CFR 100.5(a) and ending on the date that the committee, club, association, or other group of persons first satisfies the definition of ''political committee'' in 11 CFR 100.5(a).

Federal funds has the same meaning as in 11 CFR 300.2(g).

Federally permissible funds mean funds that comply with the amount limitations and source prohibitions of the Act and were received during the covered period by the committee, club, association, or other group of persons that becomes a political committee.

§ 102.51 To which organizations does this subpart A apply?

This subpart A applies to a committee, club, association, or other group of persons that satisfies the definition of ''political committee'' under 11 CFR 100.5(a) and that made contributions, expenditures, independent expenditures, or allocable expenditures during the covered period.

§ 102.52 What must a committee, club, association, or other group of persons do upon becoming a political committee under 11 CFR 100.5?

The committee, club, association, or other group of persons, upon becoming a political committee shall:

(a) File a Statement of Organization pursuant to 11 CFR 102.1(d);

(b) Establish a campaign depository pursuant to 11 CFR 103.2;

(c) Determine the amount of contributions, expenditures, independent expenditures and allocable expenditures that it made during the covered period;

(d) Determine the amount of federally permissible funds that it received; and

(e) File financial disclosure reports with the Commission in accordance with 11 CFR part 104 and 11 CFR 102.56.

§ 102.53 How must a new political committee treat the amount of contributions, expenditures, independent expenditures and allocable expenditures that it made during the covered period (before it became a political committee)?

(a) A political committee must treat the amount of contributions, expenditures, independent expenditures, and allocable expenditures that it made during the covered period as a debt owed by its Federal account to its non-Federal account.

(b) The political committee may not make any additional contributions, expenditures, independent expenditures or allocable expenditures until this debt is satisfied.

(c) The political committee may satisfy this debt by:

(1) Converting some or all of its Federally permissible funds to Federal funds pursuant to this subpart A;

(2) Raising new Federal funds and transferring the Federal funds to the non-Federal account; or

(3) A combination of paragraphs (c)(1) and (c)(2) of this section.

§ 102.54 How can a political committee convert its Federally permissible funds to Federal funds?

A political committee may convert its Federally permissible funds to Federal funds only in accordance with this section. To convert Federally permissible funds to Federal funds, the political committee shall:

(a) Send a written notification to the donor(s) of the Federally permissible funds that the political committee seeks to convert to Federal funds. The written notification must:

(1) Inform the donor(s) that the political committee has registered with the Commission as a Federal political committee;

(2) Make all disclaimers required by 11 CFR 110.11;

(3) Inform the donor(s) of the amount of their donation that the political committee seeks to convert to Federal funds and request that the donor(s) grant written consent for the political committee to use that amount of their donation for the purpose of influencing Federal elections;

(4) Advise the donor(s) that they may grant written consent for an amount less than the amount the political committee seeks to convert to Federal funds and that they may refuse to grant consent to convert any of the funds; and

(5) Advise the donor(s) that, by granting written consent, the donor(s) will be considered to have made a contribution to the political committee, that the contribution will be subject to the amount limitations in 2 U.S.C. 441a(a), and that the contribution will be considered made on the date that the written consent is signed by the donor(s); and

(b) Receive the written consent described in paragraph (a) of this section within 60 days after first satisfying the definition of ''political committee'' in 11 CFR 100.5(a).

§ 102.55 What if the political committee is able to convert an amount of Federally permissible funds to Federal funds that is greater than the amount of contributions, expenditures, independent expenditures and allocable expenditures that it made during the covered period?

If the political committee is able to convert an amount of Federally permissible funds to Federal funds that is greater than the amount of contributions, expenditures, independent expenditures, and allocable expenditures that it made during the covered period, the political committee:

(a) Must use the converted Federal funds to satisfy the debt described in 11 CFR 102.53; and

(b) May, but is not required to, transfer to its Federal account the remaining converted Federal funds. The amount of converted Federal funds transferred to the political committee's Federal account under this section, however, may not exceed the total amount of funds the political committee had cash-on-hand on the date that it first satisfied the definition of political committee under 11 CFR 100.5(a).

§ 102.56 What are the initial reporting requirements?

In addition to filing its Statement of Organization under 11 CFR 102.2, the political committee shall include the following information along with other required information in the first report due under 11 CFR 104.5:

(a) All contributions, expenditures, independent expenditures and allocable expenditures it made during the covered period;

(b) The amount of any Federally permissible funds that have been

converted to Federal funds pursuant to 11 CFR 102.54;

(c) The information required in 11 CFR 104.3(a)(4)(i) for each donor who provided written consent under 11 CFR 102.54;

(d) The amount described in paragraph (a) of this section minus the amount described in paragraph (b) of this section as a debt owed by the Federal account to the non-Federal account; and

(e) The amount and date of any transfers made under 11 CFR 102.55.

PART 104—REPORTS BY POLITICAL COMMITTEES (2 U.S.C. 434)

13. The authority citation for part 104 would continue to read as follows:

Authority: 2 U.S.C. 431(1), 431(8), 431(9), 432(i), 434, 438(a)(8) and (b), 439a, and 441a.

14. Section 104.10 would be amended by revising the introductory text in paragraph (b), the heading in (b)(1), and paragraph (b)(1)(i) and the introductory text in paragraph (b)(1)(ii) to read as follows:

§ 104.10 Reporting by separate segregated funds and nonconnected committees of expenses allocated among candidates and activities.

* * * * *

(b) *Expenses allocated among activities.* A political committee that is a separate segregated fund or a nonconnected committee and that has established separate Federal and non-Federal accounts under 11 CFR 102.5(a)(1)(i) shall allocate between those accounts its administrative expenses and its costs for fundraising and partisan voter drives according to 11 CFR 106.6, and shall report those allocations according to paragraphs (b)(1) through (5) of this section, as follows:

(1) *Reporting of allocation of administrative expenses and costs of partisan voter drives.*

(i) In the first report in a calendar year disclosing a disbursement for administrative expenses or partisan voter drives, as described in 11 CFR 106.6(b), the committee shall state the allocation ratio to be applied to these categories of activity according to 11 CFR 106.6(c), (f), or (g), as applicable, and the manner in which it was derived. The committee shall also state whether the calculated ratio or the minimum Federal percentage required by 11 CFR 106.6(c)(1)(ii) will be used.

(ii) In each subsequent report in the calendar year itemizing an allocated disbursement for administrative expenses or partisan voter drives:

* * * * *

PART 106—ALLOCATIONS OF CANDIDATE AND COMMITTEE ACTIVITIES

15. The authority citation for part 106 would continue to read as follows:

Authority: 2 U.S.C. 438(a)(8), 441a(b), 441a(g).

16. Section 106.6 would be amended by:

a. Removing the words ''(c) and (d)'' from paragraph (a) and adding in their place the words ''(c), (d), (f) and (g)''; and

b. Revising the introductory text in paragraph (c) and paragraphs (b)(1)(iii), (b)(2)(iii), (c)(1), and (e)(2)(ii)(B) and adding paragraphs (b)(1)(iv), (b)(1)(v), (b)(1)(vi), (b)(2)(iv), (b)(2)(v), (b)(2)(vi), (f) and (g) to read as follows:

§ 106.6 Allocation of expenses between Federal and non-Federal activities by separate segregated funds and nonconnected committees.

* * * * *

(b) * * *

(1) * * *

(iii) Partisan voter drives as described in 11 CFR 100.34 or any other activities that urge the general public to register, vote or support candidates of a particular party or associated with a particular issue, without including a public communication that is described in paragraph (b)(1)(iv), (v), or (vi) of this section;

(iv) Public communications that promote or oppose a political party, as described in 11 CFR 100.116(b), but do not promote, support, attack, or oppose a clearly identified Federal candidate, as described in 11 CFR 100.116(a);

(v) Public communications that promote, support, attack, or oppose a clearly identified Federal candidate, as described in 11 CFR 100.116(a), and that promote or oppose a political party, as described in 11 CFR 100.116(b); and

(vi) Public communications that promote, support, attack, or oppose a clearly identified Federal candidate, as described in 11 CFR 100.116(a), but that do not promote or oppose a political party, as described in 11 CFR 100.116(b).

(2) * * *

(iii) Partisan voter drives as described in 11 CFR 100.34 or any other activities that urge the general public to register, vote or support candidates of a particular party or associated with a particular issue, without including a public communication that is described in paragraph (b)(2)(iv), (v), or (vi) of this section;

(iv) Public communications that promote or oppose a political party, as described in 11 CFR 100.116(b), but do not promote, support, attack, or oppose a clearly identified Federal candidate, as described in 11 CFR 100.116(a);

(v) Public communications that promote, support, attack, or oppose a clearly identified Federal candidate, as described in 11 CFR 100.116(a), and that promote or oppose a political party, as described in 11 CFR 100.116(b); and

(vi) Public communications that promote, support, attack, or oppose a clearly identified Federal candidate, as described in 11 CFR 100.116(a), but that do not promote or oppose a political party, as described in 11 CFR 100.116(b).

(c) *Method for allocating administrative expenses, costs of partisan voter drives, and certain public communications.* Nonconnected committees and separate segregated funds shall allocate their administrative expenses, costs of partisan voter drives, and costs of public communications that promote or support any political party as described in paragraph (b)(1)(i) through (iv) or (b)(2)(i) through (iv) of this section, according to the funds expended method, described in paragraphs (c)(1) and (2) as follows:

(1)(i) Under this method, expenses shall be allocated based on the ratio of Federal expenditures to total Federal and non-Federal disbursements made by the committee during the two-year Federal election cycle, subject to the minimum Federal percentage described in paragraph (c)(1)(ii) of this section. This ratio shall be estimated and reported at the beginning of each Federal election cycle, based upon the committee's Federal and non-Federal disbursements in a prior comparable Federal election cycle or upon the committee's reasonable prediction of its disbursements for the coming two years. In calculating its Federal expenditures, the committee shall include only amounts contributed to or otherwise spent on behalf of specific Federal candidates, including independent expenditures and amounts spent on public communications that promote, attack, support, or oppose clearly identified Federal candidates. Calculation of total Federal and non-Federal disbursements shall also be limited to disbursements for specific candidates, and shall not include overhead or other generic costs.

(ii) *Minimum Federal percentage for administrative expenses*, partisan voter drives, and certain public communications. The minimum Federal percentage for any costs allocable under paragraph (c) of this section is as follows:

(A) For a nonconnected committee or a separate segregated fund that conducts

partisan voter drives in or distributes public communications subject to allocation under paragraph (c) of this section to only one State, the minimum Federal percentage shall be the percentage in 11 CFR 106.7(d)(3)(i), (ii), (iii), or (iv) that is applicable to the Federal elections in that State.

Alternative 3–A

(B) For a nonconnected committee or a separate segregated fund that conducts partisan voter drives in or distributes public communications subject to allocation under paragraph (c) of this section to more than one State, the minimum Federal percentage shall be the greatest percentage in 11 CFR 106.7(d)(3)(i), (ii), (iii), or (iv) that is applicable to any of the Federal elections in any of the States in which the nonconnected committee or separate segregated fund conducts activities allocable under paragraph (c) of this section.

Alternative 3–B

(B) For a nonconnected committee or a separate segregated fund that conducts partisan voter drives in or distributes public communications subject to allocation under paragraph (c) of this section to more than one State, the minimum Federal percentage for each State in which the nonconnected committee or separate segregated fund conducts activities allocable under paragraph (c) of this section shall be the percentage in 11 CFR 106.7(d)(3)(i), (ii), (iii), or (iv) that is applicable to the Federal elections in that State.

* * * * *

(e) * * *

(2) * * *

(ii) * * *

(B) Except as provided in paragraph (d)(2) of this section or in 11 CFR part 102, subpart A, such funds may not be transferred more than 10 days before or more than 60 days after the payments for which they are designated are made.

* * * * *

(f) *Method for allocating public communications that promote, support, attack or oppose a clearly identified Federal candidate, and promote or oppose a political party.* Nonconnected committees and separate segregated funds shall allocate public communications described in paragraphs (b)(1)(v) or (b)(2)(v) of this section as follows:

(1) The public communication shall be attributed according to the proportion of space and time devoted to each candidate and political party as compared to the total space and time devoted to all candidates and political party;

(2) The portion of the public communication that is attributed to the Federal candidate(s) shall be allocated to the nonconnected committee's or separate segregated fund's Federal account;

(3) The portion of the public communication that is attributed to the political party shall be allocated in accordance with paragraph (c) of this section; and

(4) The portion of the public communication that is attributed to clearly identified non-Federal candidate(s), if any, may be allocated to either the Federal or non-Federal account.

(g) *Method for allocating public communications that promote, support, attack or oppose a clearly identified Federal candidate, without promoting or opposing a political party.* Nonconnected committees and separate segregated funds shall allocate public communications described in paragraphs (b)(1)(vi) and (b)(2)(vi) of this section under 11 CFR 106.1 as expenditures or disbursements on behalf of the clearly identified candidates.

PART 114—CORPORATE AND LABOR ORGANIZATION ACTIVITY

17. The authority citation for part 114 would continue to read as follows:

Authority: 2 U.S.C. 431(8)(B), 431(9)(B), 432, 434, 437d(a)(8), 438(a)(8), 441b.

18. Section 114.4 would be amended by revising paragraphs (c)(2), (c)(3), and the introductory text of paragraph (d) to read as follows:

§ 114.4 Disbursements for communications beyond the restricted class in connection with a Federal election.

* * * * *

(c) * * *

(2) *Registration and voting communications.* A corporation or labor organization may make registration and get-out-the-vote communications to the general public, only to the extent permitted by 11 CFR 100.133, and provided that the communications do not expressly advocate the election or defeat of any clearly identified candidate(s) or candidates of a clearly identified political party. The preparation and distribution of registration and get-out-the-vote communications shall not be coordinated with any candidate(s) or political party. A corporation or labor organization may make communications permitted under this section through posters, billboards, broadcasting media, newspapers, newsletter, brochures, or similar means of communication with the general public.

(3) *Official registration and voting information.* A corporation or labor organization may engage in the activities described in paragraphs (c)(3)(i) through (iii) of this section only to the extent permitted by 11 CFR 100.133.

* * * * *

(d) *Registration and get-out-the-vote drives.* A corporation or labor organization may support or conduct voter registration and get-out-the-vote drives that are aimed at employees outside its restricted class and the general public in accordance with the conditions set forth in paragraphs (d)(1) through (d)(6) of this section and only to the extent permitted by 11 CFR 100.133. Registration and get-out-the-vote drives include providing transportation to the polls or to the place of registration.

* * * * *

Dated: March 4, 2004.

Bradley A. Smith,

Chairman, Federal Election Commission.

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