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.
102.50 What are the definitions for this subpart A?
102.51 To which organizations does this subpart A apply?
102.52 What must a committee, club, association, or other group of persons do

upon becoming a political committee under 11 CFR 100.5(a)?
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)?
102.54 How can a political committee convert its Federally permissible funds to Federal funds?
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?
102.56 What are the initial reporting requirements?

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.

[FR Doc. 04–5290 Filed 3–10–04; 8:45 am]

BILLING CODE 6715–01–P