Parent: Department of Transportation

Components

Federal Aviation Administration
Federal Highway Administration
Federal Motor Carrier Safety Administration (effective January 30, 2003)
Federal Railroad Administration
Federal Transit Administration
Maritime Administration
National Highway Traffic Safety Administration
Saint Lawrence Seaway Development Corporation
Surface Transportation Board (effective May 16, 1997)
Transportation Security Administration (effective January 30, 2003, expiring February 22, 2005.)
United States Coast Guard (expiring February 22, 2005.)

Parent: Department of the Treasury

Components

Alcohol and Tobacco Tax and Trade Bureau (effective November 23, 2004.)
Bureau of Alcohol, Tobacco and Firearms (expiring February 22, 2005.)
Bureau of Engraving and Printing
Bureau of the Mint
Bureau of the Public Debt
Comptroller of the Currency
Federal Law Enforcement Training Center (expiring February 22, 2005.)
Financial Crimes Enforcement Network (FinCEN) (effective January 30, 2003)
Financial Management Service
Internal Revenue Service
Office of Thrift Supervision
United States Custom Service (expiring February 22, 2005.)
United States Secret Service (expiring February 22, 2005.)

■ 3. Effective February 22, 2005, appendix B to part 2641 is further amended by:

■ A. Removing the Immigration and Naturalization Service from the listing for the Department of Justice;

■ B. Removing the Transportation Security Agency and the United States Coast Guard from the listing for the Department of Transportation; and

■ C. Removing the Bureau of Alcohol, Tobacco and Firearms, the Federal Law Enforcement Training Center, the United States Custom Service and the United States Secret Service from the listing for the Department of the Treasury.

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FEDERAL ELECTION COMMISSION

11 CFR Parts 100, 102, 104, and 106

[Notice 2004–15]

Political Committee Status, Definition of Contribution, and Allocation for Separate Segregated Funds and Nonconnected Committees

AGENCY: Federal Election Commission.

ACTION: Final rules and transmittal of regulations to Congress.

SUMMARY: The Federal Election Commission (''Commission'') is revising portions of its regulations regarding the definition of ''contribution'' and the allocation of certain costs and expenses by separate segregated funds (''SSFs'') and nonconnected committees. A new rule explains when funds received in response to certain communications by any person must be treated as ''contributions.'' In the allocation regulations, the final rules eliminate the previous allocation formula under which SSFs and nonconnected committees used the ''funds expended'' method to calculate a ratio for use of Federal and non-Federal funds for administrative and generic voter drive expenses, replacing it with a flat 50% minimum. These rules also spell out how SSFs and nonconnected committees must pay for voter drives and certain public communications. Other changes proposed previously regarding the definitions of ''political committee'' and ''expenditure'' are not being adopted. Further information is provided in the supplementary information that follows.

DATES: Effective January 1, 2005.

FOR FURTHER INFORMATION CONTACT: Ms. Mai T. Dinh, Assistant General Counsel, Mr. J. Duane Pugh Jr., Senior Attorney, Mr. Richard T. Ewell, Attorney, Mr. Robert M. Knop, Attorney, or Ms. Margaret G. Perl, Attorney, 999 E Street, NW., Washington, DC 20463, (202) 694–1650 or (800) 424–9530.

SUPPLEMENTARY INFORMATION: The Commission published a Notice of Proposed Rulemaking on March 11, 2004. *See* Notice of Proposed Rulemaking on Political Committee Status, 69 FR 11736 (Mar. 11, 2004) (''NPRM''). Written comments were due by April 5, 2004 for those commenters who wished to testify at the Commission hearing on these proposed rules, and by April 9, 2004 for commenters who did not wish to testify. The NPRM addressed a number of proposed changes to 11 CFR parts 100, 102, 104, 106 and 114. The Commission received over 100,000 comments from the public with regard to the various issues raised in the NPRM. The comments are available at *http://www.fec.gov/register.htm* under ''Political Committee Status.'' The Commission held a public hearing on April 14 and 15, 2004, at which 31 witnesses testified. A transcript of the public hearing is also available at *http://www.fec.gov/register.htm* under ''Political Committee Status.'' For the purposes of this document, the terms ''comment'' and ''commenter'' apply to both written comments and oral testimony at the public hearing.

Under the Administrative Procedure Act, 5 U.S.C. 553(d), and the Congressional Review of Agency Rulemaking Act, 5 U.S.C. 801(a)(1), agencies must submit final rules to the Speaker of the House of Representatives and the President of the Senate and publish them in the **Federal Register** at least 30 calendar days before they take effect. The final rules that follows were transmitted to Congress on November 18, 2004.

Explanation and Justification

Solicitations

The Commission is adopting one addition to the regulatory definition of ''contribution'' in 11 CFR part 100, subpart B. This addition comports with the statutory standard for ''contribution'' by reaching payments ''made * * * for the purpose of influencing any election for Federal office.'' 2 U.S.C. 431(8)(A)(i); 11 CFR 100.51 and 100.52. This addition has several exceptions to avoid sweeping too broadly.

11 CFR 100.57—Funds Received in Response to Solicitations

Section 100.57 is a new rule that explains when funds received in response to certain communications by any person must be treated as ''contributions'' under FECA. Paragraph (a) sets out the general rule, paragraphs (b) and (c) create two specific exceptions: Paragraph (b) addresses certain allocable solicitations, and paragraph (c) addresses joint fundraisers. These rules in new 11 CFR 100.57 apply to all political committees, corporations, labor organizations, partnerships, organizations and other entities that are ''persons'' under the Federal Election Campaign Act of 1971, as amended (''FECA''). *See* 2 U.S.C. 431(11). The rules apply without regard to tax status, so they reach all FECA ''persons,'' including, for example, entities described in or operating under section 501(c)(3), 501(c)(4), and 527 of the Internal Revenue Code.

1. 11 CFR 100.57(a)—Treatment as Contributions

New section 100.57(a) classifies all funds provided in response to a communication as contributions under the FECA if the communication indicates that any portion of the funds received will be used to support or oppose the election of a clearly identified Federal candidate.

Most political committees and other organizations pay careful attention to communications with potential donors. These communications are commonly the cornerstone of the relationship between a group and its donors, and their effectiveness is vital to almost all organizations. Many groups' fundraising solicitations will say nothing of an electoral objective regarding the use of funds (*i.e.*, that any funds provided in response to the solicitation will be used to support or oppose the election of clearly identified Federal candidates). Communications that do so, however, plainly seek funds ''for the purpose of influencing Federal elections.'' Thus, the new rule appropriately concludes that such funds are ''contributions'' under FECA.

The standard in new section 100.57 draws support from a 1995 decision of the United States Court of Appeals for the Second Circuit. *FEC* v. *Survival Education Fund, Inc.*, 65 F.3d 285 (2d Cir. 1995). In the Second Circuit case, the court found that a July 1984 letter from two nonprofit issue advocacy groups solicited ''contributions'' under FECA because it included a statement ''[t]hat * * * leaves no doubt that the funds contributed would be used to advocate President Reagan's defeat at the polls, not simply to criticize his policies during the election year.'' *Id.* at 295. According to the court, the critical statement from the mailing was: ''your special election-year contribution today will help us communicate your views to hundreds of thousands of members of the *voting public*, letting them know why Ronald Reagan and his anti-people policies *must* be stopped.'' *Id.* at 289 and 295 (first emphasis added by court, second in original). The mailing described in *FEC* v. *Survival Education Fund*, if used following the effective date of these rules and modified to identify clearly a current Federal candidate, would trigger new section 100.57(a) and would require the group issuing the mailing to treat all the funds received in response to the mailing as ''contributions'' under FECA.

The following are examples of solicitations based on the one that Survival Education Fund used that illustrate how a variation in the text of a solicitation would change the result of whether a solicitation is subject to new section 100.57. A solicitation might state the following:

- The President wants to cut taxes again. Our group has been fighting for lower taxes since 1960, and we will fight for the President's tax cuts. Send us money for our important work.''

Because this solicitation does not indicate that any funds received will be used to support or oppose the election of any candidates, any funds received in response are not subject to new section 100.57.

In contrast, a solicitation that would trigger the new rule might read as follows:

- The President wants to cut taxes again. Our group has been fighting for lower taxes since 1960, and we will fight to give the President four more years to fight for lower taxes. Send us money for our important work.''

Because this solicitation indicates that the funds received will be used to support the election of a Federal candidate (''give the President four more years''), any funds received in response to this solicitation are ''contributions'' under the new rule.

The rule's focus on the planned use of funds leaves the group issuing the communication with complete control over whether its communications will trigger new section 100.57. After determining that a clearly identified candidate is mentioned, new section 100.57 requires an examination of only the text of a communication. The regulation turns on the plain meaning of the words used in the communication and does not encompass implied meanings or understandings. It does not depend on reference to external events, such as the timing or targeting of a solicitation, nor is it limited to solicitations that use specific words or phrases that are similar to a list of illustrative phrases.

It is important to note that if a solicitation indicates that *any portion* of the funds received will be used to support or oppose the election of a clearly identified candidate, new section 100.57(a) applies even if the solicitation states that funds received would be used for other purposes too, subject to the exceptions in new 11 CFR 100.57(b)(2) and (c), discussed below. In addition, a disclaimer stating that any funds received that cannot be treated as contributions, or that cannot be accepted by a political committee or cannot be deposited in a committee's Federal account, will be deposited in the organization's non-Federal account does not negate the application of new section 100.57(a). Thus, an organization that sends out a solicitation that is subject to new section 100.57(a) or (b)(1) with a disclaimer similar to the one described above cannot accept any funds that are not Federal funds (funds that comply with the amount limitations, source prohibitions and reporting requirements of FECA) in response to that solicitation unless it satisfies one of the exceptions in new section 100.57(b)(2) or (c), discussed below.

Further examples of communications that solicit contributions under new section 100.57(a) are:

1. ''*Electing Joe Smith* is crucial to our efforts to preserve the environment. Please send money to us so that we can be successful in this cause.''

2. ''Our group strives to preserve Social Security, and Representative Jones has a great plan to protect this vital program. The Congressman needs *our help to stay in Washington* and implement his plan to save Social Security. Give now to help us fight to save Social Security.''

3. ''Senator Jane Doe voted against a tax package that would have helped working families. Your generous gift will enable us to *make sure Californians remember in November*.''

Because the italicized language in each of these solicitations indicates that the funds received will be used to support the election or defeat of a Federal candidate, any funds received in response to these solicitations are ''contributions'' under the new rule.

In the NPRM, the proposed regulation text for section 100.57 took a different approach. *See* NPRM at 11757. However, new section 100.57(a) is similar to an approach that the Commission sought comment on in the narrative of the NPRM. *See* NPRM at 11743. The commenters did not address the approach discussed in the NPRM's narrative, but some addressed the proposed regulation text for this provision. Those commenters raised objections to proposed section 100.57 based on some of the exemptions from the ''expenditure'' definition for certain communications, as discussed below. The exemption from the ''expenditure'' definition for the costs of internal communications by corporations, labor organizations and membership organizations in 2 U.S.C. 431(9)(B)(iii) and 11 CFR 100.134 is not affected by the Commission's promulgation of new section 100.57.

New section 100.57 does not address when the costs of communications are expenditures under FECA. Instead, it specifies when funds received in response to certain communications must be treated as contributions under

FECA. Thus, a corporation, labor organization or membership organization that issues an internal communication of the type described in new section 100.57 may consider the costs of the communication to be disbursements not subject to FECA requirements under section 100.134, but it must treat any funds received in response as FECA contributions under new section 100.57. If the corporation, labor organization, or membership organization maintains a separate segregated fund (''SSF''), treating the funds received in response to the communication as contributions to the SSF will satisfy new section 100.57.

Section 100.141 exempts from the ''expenditure'' definition any payments made by corporations or labor organizations that are permissible under 11 CFR part 114. Part 114 authorizes the use of non-Federal funds for the costs of various corporate, labor organization, and membership organization communications under certain conditions. *See, e.g.*, 11 CFR 114.3 to 114.8; 2 U.S.C. 441b(b)(2)(A), (b)(2)(B), (b)(4)(B). New section 100.57 does not make the costs of these communications expenditures; instead, it concerns the treatment of funds received in response to certain communications without regard to how the costs of those communications were paid.

One commenter argued that its status as an MCFL-type corporation (a qualified nonprofit corporation allowed to make independent expenditures pursuant to 11 CFR 114.10) means its communications that inform potential contributors of the organization's ability to advocate in connection with a Federal election must be immune from FECA consequences. The Supreme Court holding in *FEC* v. *Massachusetts Citizens for Life*, 479 U.S. 238 (1986) (''*MCFL*''), is not so broad. Indeed, the Court twice has recognized that an *MCFL*-type corporation's independent spending can have FECA consequences. *See id.* at 262 (noting: ''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''); *see also FEC* v. *Beaumont*, 539 U.S. 146, 149 (2003) (holding that the ban on corporate contributions directly to Federal candidates applies to *MCFL*-type corporations). Independent expenditures were the core of the *MCFL* holding, yet the opinion expressly notes that the independent expenditures can trigger political committee status. Nonetheless, the commenter claims that an *MCFL* corporation's ability to explain to potential contributors that it will make independent expenditures on behalf of particular Federal candidates must be immune from consequences under new section 100.57. Just as an *MCFL* corporation's independent expenditures can make it a political committee, an *MCFL* corporation's solicitations can make it the recipient of contributions under the FECA. These contributions will not transform an *MCFL* corporation into a political committee unless its expenditures and contributions become so extensive as to lead to a conclusion that the organization's major purpose is campaign activity. Therefore, new section 100.57 is not inconsistent with *MCFL*.

Some commenters addressed the interplay between this regulation and other proposed rules that the Commission is not adopting, which renders these comments moot.

New section 100.57 provides one example of communications that can generate contributions; it is not an exhaustive list. The rule addresses communications that indicate that the funds received in response will be used to support or oppose the election of a clearly identified Federal candidate. Other communications that do not include such an indication may also generate contributions under FECA. A solicitation that states that the funds received will be used to influence Federal elections will generate FECA contributions, *see* 11 CFR 102.5(a)(2)(ii), even though such a communication would not be subject to new section 100.57 because it does not mention a clearly identified Federal candidate.

Any funds that are ''contributions'' by operation of new section 100.57 are contributions for purposes of the ''political committee'' definition in 2 U.S.C. 431(4)(A) and 11 CFR 100.5(a), which defines a ''political committee'' as any group that makes $1,000 of expenditures or receives $1,000 of contributions during a calendar year. In *Buckley* v. *Valeo*, 424 U.S. 1, 79 (1976), the Supreme Court narrowed the ''political committee'' definition with a ''major purpose'' test, which is discussed further below. The ''major purpose'' test applies in the same way to groups that make or receive $1,000 of contributions and groups that make $1,000 of expenditures.

2. 11 CFR 100.57(b)—Certain Allocable Solicitations

a. 11 CFR 100.57(b)(1)

New section 100.57(b)(1) states that a solicitation that meets section 100.57(a) and refers to a political party so that its costs are allocable under 11 CFR 106.6 or 106.7 is nonetheless subject to the rule that all of its proceeds are ''contributions'' under FECA. This approach is consistent with the ''candidate-driven'' approach in the revised allocation rules, discussed below. *See, e.g., Explanation and Justification* for new 11 CFR 106.6(f)(1).

b. 11 CFR 100.57(b)(2)

New section 100.57(b)(2) provides that where the costs of a solicitation are allocable under 11 CFR 106.1, 106.6 or 106.7, if the solicitation also refers to at least one clearly identified non-Federal candidate, at least fifty percent of the proceeds of the solicitation must be treated as contributions under FECA. *See* new 11 CFR 100.57(b)(2). The funds that satisfy the requirement that fifty percent of the funds received must be contributions under the FECA under new section 100.57(b)(2) must also comply with FECA's amount limitations and source prohibitions and must be reported as contributions if the recipient is a political committee. Thus, if such a solicitation does not yield at least fifty percent in funds that meet the FECA's amount limitations and source prohibitions, then the organization must refund some of the donations to comply with new section 100.57. For example, a political committee might raise a total of $30,000 for its Federal and non-Federal accounts with a fundraising event where the invitation includes a solicitation that is subject to both new section 100.57 and allocation under section 106.6(d). Under new section 100.57(b)(2), the political committee must consider at least fifty percent of the proceeds to be contributions. If the $30,000 total receipts include only $12,000 that are in compliance with FECA's limitations and prohibitions, then the committee may retain only $12,000 in non-Federal funds. The political committee must then refund $6,000 of donations so that fifty percent of the proceeds from this solicitation are contributions.

New section 100.57 does not change the allocation of direct costs of fundraising under current 11 CFR 106.6(d) or 106.7(d)(4). These costs are subject to allocation according to the funds received method. New section 100.57, however, does affect the nature of the funds received from a solicitation and requires that either 100% or at least 50% of the funds received must be contributions. The amount of contributions received, in turn, impacts how the funds received method operates when the fundraising includes a solicitation that is subject to new section 100.57. For example, consider again the situation described above

where a political committee raised $30,000 for its Federal and non-Federal accounts and spent $2,000 in direct costs of fundraising. After the $6,000 refund, the funds received from that event were 50% Federal and 50% non-Federal, so the political committee must use at least $1,000 in Federal funds to pay for direct costs of fundraising under section 106.6(d). In accordance with 11 CFR 106.6(d)(2), the final allocation of the direct costs of fundraising must result in the Committee using at least $1,000 of Federal funds to pay those costs, and prior payments based on an estimated allocation ratio under section 106.6(d)(1) must be adjusted to match the final allocation ratio.

3. 11 CFR 100.57(c)—Joint Fundraisers

New section 100.57(c) concerns joint fundraising. It provides that funds received in response to solicitations conducted between or among the authorized committees of Federal and non-Federal candidates are excepted from being treated entirely as contributions under the new rule in section 100.57. Nevertheless, when a Federal candidate's authorized committee participates in a joint fundraiser, all funds solicited are subject to restrictions imposed on Federal candidates by BCRA. *See* 2 U.S.C. 441i(e)(1) and either 11 CFR 300.61 or 300.62. When a Federal candidate conducts a joint fundraiser with a State candidate, the candidates must divide the receipts according to the written joint fundraising agreement under 11 CFR 102.17. All funds raised for the Federal candidate are subject to 11 CFR 300.61 and all funds raised for the State candidate are subject to 11 CFR 300.62 because of the Federal candidate's participation in the joint fundraiser.

All other joint fundraising pursuant to section 102.17 is subject to new section 100.57(a) and (b). Thus, section 100.57 applies to solicitations for joint fundraisers involving unauthorized political committees or other organizations that are not political committees where the solicitations indicate that any portion of the funds received will be used to support or oppose the election of a clearly identified Federal candidate. If the communication is subject to new section 100.57(a) or (b)(1), then the entire amount of the proceeds of the joint fundraiser must be treated as contributions. Alternatively, if the solicitation is subject to new section 100.57(b)(2) (includes at least one clearly identified Federal candidate and at least one clearly identified non-Federal candidate), then at least fifty percent of the proceeds must be treated as FECA contributions, without regard to which entity receives those contributions. Any joint fundraising agreement must reflect the appropriate division of proceeds and costs in order for the joint fundraising entities to comply with new section 100.57 and in 11 CFR 102.17.

For example, two political committees, called A and B, each with a Federal and non-Federal account, sign a joint fundraising agreement stating that A will receive 75% of the proceeds and B will receive 25% of the proceeds. In accordance with the agreement, they jointly raise $100,000 with a solicitation subject to new section 100.57(b)(2), with A receiving $75,000 and B receiving $25,000. The $100,00 raised by the two committees must be distributed among their Federal and non-Federal accounts in any way that results in at least 50% of the $100,000 total proceeds being deposited in the Federal accounts. For example, A may deposit one third of its $75,000 in proceeds ($25,000) in its Federal account and the remaining two thirds ($50,000) in its non-Federal account. B would then treat all of its $25,000 in proceeds as Federal funds, deposit $25,000 in its Federal account, and nothing in its non-Federal account. All funds deposited in Federal accounts must comply with the amount limitations, source prohibitions, and reporting requirements of the Act. Furthermore, at least 50% of the direct costs of fundraising must be paid for with Federal funds.

Allocation

The Commission is adopting final rules at 11 CFR 106.6 to change the allocation regime for SSFs and nonconnected committees. These final rules establish a simpler bright-line rule providing that administrative expenses, generic voter drives, and certain public communications that refer to a political party must be paid for with at least 50% Federal funds. Under the previous regulations, SSFs and nonconnected committees applied a complex ''funds expended'' formula to arrive at a ratio of Federal funds to total Federal and non-Federal disbursements and then paid for these expenses with allocated amounts from Federal and non-Federal accounts. The previous rules were a source of confusion for some SSFs and nonconnected committees and resulted in time-consuming reporting.

These final rules also establish candidate-driven allocation rules for voter drives and public communications that refer to clearly identified Federal or non-Federal candidates regardless of whether the voter drive or public communication refers to a political party. When the voter drive or public communication refers to clearly identified Federal candidates, but no clearly identified non-Federal candidates, the costs must be paid for with 100% Federal funds. Similarly, when the voter drive or public communication refers to clearly identified non-Federal candidates, but no clearly identified Federal candidates, the costs may be paid 100% from a non-Federal account. Any voter drives or public communications that refer to both clearly identified Federal and non-Federal candidates are subject to the time/space method of allocation under 11 CFR 106.1. The final rules do not change the allocation methods in 11 CFR 106.1, which are based on the benefit reasonably expected to be derived by each candidate. Minor changes are being made in 11 CFR 102.5 and 104.10 to conform to the changes in 11 CFR 106.6.

11 CFR 102.5—Organizations Financing Political Activity in Connection With Federal and Non-Federal Elections, Other Than Through Transfers and Joint Fundraisers: Accounts and Accounting

Section 102.5(a)(1)(i) regulates how political committees, other than national committees, that finance political activity in connection with both Federal and non-Federal elections set up accounts and transfer monies between Federal and non-Federal accounts to pay for these activities. As explained below in the *Explanation and Justification* for revised 11 CFR 106.6, the Commission is revising the rules for SSFs and nonconnected committees regarding allocation of administrative and generic voter drive expenses, and adding rules regarding the payment of costs of certain voter drives and public communications. In order to conform to revised 11 CFR 106.6, the Commission is revising section 102.5(a)(1)(i) to add references to sections 106.6(c) and 106.6(f), which govern transfers from non-Federal to Federal accounts under 11 CFR 102.5(a) to pay for allocable activities.

11 CFR 104.10—Reporting by Separate Segregated Funds and Nonconnected Committees of Expenses Allocated Amount Candidates and Activities

Section 104.10 specifies how SSFs and nonconnected committees must report expenses allocated among candidates and activities pursuant to 11 CFR 106.1 and 106.6. Previously, section 104.10(b)(1) established the reporting requirements for allocation of administrative and generic voter drive expenses under the former ''funds

expended'' method in section 106.6. As explained in greater detail below (*see Explanation and Justification* for revised 11 CFR 106.6), the Commission is revising the rules for SSFs and nonconnected committees and removing the ''funds expended'' method of allocation. In order to conform to the revised 11 CFR 106.6, the Commission is deleting the requirements for reporting allocated expenditures and disbursements under the ''funds expended'' method in section 104.10(b)(1). Instead, revised paragraph (b)(1) states that in each report disclosing a disbursement for administrative expenses, generic voter drives, or public communications that refer to a political party, but do not refer to any clearly identified candidates, the committee shall state the allocation ratio used for these categories of expenses under revised 11 CFR 106.6(c). The committee must report whether it is using the 50% minimum Federal funds required under section 106.6(c) or another percentage of Federal funds (greater than 50%). Because of the simplified approach under the revised allocation provisions of section 106.6 explained below, the reporting obligations for SSFs and nonconnected committees should be easier to meet than the obligations under former section 104.10.

11 CFR 106.6—Payment for Administrative Expenses, Voter Drives and Certain Public Communications

This section specifies how SSFs and nonconnected committees must pay for certain activities that are in connection with Federal elections, non-Federal elections, or both, using Federal and non-Federal accounts established pursuant to 11 CFR 102.5. As noted in section 106.6(a), political committees required to allocate under this section do not include party committees and the authorized committees of any candidate for Federal election. The NPRM included several proposals to amend the allocation provisions in 11 CFR 106.6, which are discussed in greater detail below. NPRM at 11753–55 and 11759–60. Approximately ten commenters provided substantive comments regarding these proposals. In general, the commenters were divided as to the impact of the U.S. Supreme Court decision in *McConnell* v. *FEC*, 540 U.S. 93 (2003), on the allocation rules for SSFs and nonconnected committees. One commenter argued that *McConnell* reaffirmed that allocation between Federal and non-Federal accounts is appropriate for SSFs and nonconnected committees. Other commenters believed that *McConnell's* statements regarding the circumvention of the FECA permitted under the former party committee allocation rules could just as easily be said of the allocation regime for SSFs and nonconnected committees.

After carefully considering these public comments and examining information regarding how the allocation system under former 11 CFR 106.6 has worked over the past ten years, the Commission adopts the following amendments to 11 CFR 106.6: (1) Deleting the ''funds expended'' ratio from 11 CFR 106.6(c) and replacing it with a 50% flat minimum Federal percentage; (2) applying this new 50% Federal minimum to administrative and generic voter drive expenses, as well as to a newly added category of allocable expenses—public communications that refer to a political party but do not refer to any clearly identified Federal or non-Federal candidates; (3) providing for allocation of certain voter drives and public communications that may refer to political parties and do refer to clearly identified candidates, based upon whether the candidates are Federal, non-Federal, or both; and (4) directing SSFs and nonconnected committees to use the time/space allocation method for certain voter drives and public communications that refer to at least one clearly identified Federal candidate, and to at least one clearly identified non-Federal candidate, regardless of whether there is a reference to a political party. Through these final rules, the Commission seeks to enhance compliance with the FECA, to simplify the allocation system, and to make it easier for SSFs and nonconnected committees to comprehend and for the Commission to administer these requirements.

1. 11 CFR 106.6(b)—Payments for Administrative Expenses, Voter Drives and Certain Public Communications

Previous 11 CFR 106.6(b)(1) listed disbursements that must be allocated by SSFs, and previous 11 CFR 106.6(b)(2) listed disbursements that must be allocated by nonconnected committees. Because the allocation method is very similar for both SSFs and nonconnected committees, it is unnecessary to create separate lists for them. Rather, the distinction in the final rules concerning allocation is between the types of disbursements that are subject to allocation and the types of disbursements that are not. Thus, revised 11 CFR 106.6(b)(1) lists the disbursements that SSFs and nonconnected committees must allocate in accordance to revised 11 CFR 106.6(c). Revised 11 CFR 106.6(b)(2) lists the disbursements that are not subject to allocation but must be paid for in accordance with new 11 CFR 106.6(f).

Proposed 11 CFR 106.6(b)(1) would have applied the allocation rules to public communications that promote or support a political party or promote, support, attack or oppose a clearly identified candidate. NPRM at 11759. The final rules do not adopt this approach. Rather, revised section 106.6(b) lists public communications that refer to a political party or a clearly identified candidate. The Commission is adopting the standard in the final rules because it is an objective standard that is easy to administer.

A. 11 CFR 106.6(b)(1)—Costs To Be Allocated

The four types of disbursements in revised 11 CFR 106.6(b)(1) that are subject to allocation are: administrative expenses, direct costs of fundraising, generic voter drives and public communications that refer to a political party. The final rules retain the former descriptions of administrative expenses, direct costs of fundraising, and generic voter drives in new paragraphs (b)(1)(i), (ii) and (iii) in section 106.6, respectively. New paragraphs (b)(1)(i) and (ii) still make clear that SSFs may have the costs of administrative expenses and fundraising programs paid by their connected organization. ''Generic voter drives'' is a defined term used prior to BCRA and goes beyond the limited activities defined under ''Federal election activity.'' For example, a television ad urging the general public to vote for candidates associated with a particular issue, without mentioning a specific candidate, would be considered allocable as a generic voter drive activity under 11 CFR 106.6(b)(1)(iii). The final rules add a fourth type of disbursement that must be allocated—public communications, as defined in 11 CFR 100.26, that refer to a political party but do not refer to any Federal or non-Federal candidate. See 11 CFR 106.6(b)(1)(iv). To illustrate, public communications that use phrases such as ''the Democratic team,'' ''the Minnesota Democratic Committee,'' ''the GOP,'' ''Democrats,'' and ''Republicans in Congress,'' would fall under new paragraph (b)(1)(iv) of section 106.6 because they refer to a political party. *See also* 11 CFR 106.6.(b)(2)(iii) and (iv) discussed below.

B. 11 CFR 106.6(b)(2)—Costs Not Subject to Allocation

Revised 11 CFR 106.6(b)(2) lists the four types of disbursements that are not

subject to allocation between Federal and non-Federal accounts, but are subject to the payment requirements in new paragraph (f) of section 106.6. Two of the four types of disbursements concern voter drives and the other two types concern public communications.

The Commission recognizes that the allocation regulation for generic voter drives in new 11 CFR 106.6(b)(1)(iii) does not apply to voter drives that mention a specific Federal or non-Federal candidate. Without an additional regulatory clarification, some voter drive activity may have fallen into the gap between the regulation of generic voter drives in 11 CFR 106.6(b)(1)(iii) and the candidate-specific public communications provisions in new 11 CFR 106.6(b)(2)(iii) and (iv), discussed below. To prevent such a gap, the Commission is issuing new rules for voter drives that refer to a clearly identified Federal or non-Federal candidate.

New paragraph (b)(2)(i) of section 106.6 describes voter drives in which the printed materials or scripted messages refer to one or more clearly identified Federal candidate, or any voter drives which include written instructions that direct the committee's employee or volunteer to refer to a clearly identified Federal candidate (including voter drives that also generally refer to candidates of a particular party or those associated with a particular issue), but do not refer to any clearly identified non-Federal candidates. New paragraph (b)(2)(ii) also addresses voter drives that similarly refer to one or more clearly identified *non-Federal* candidates, including voter drives that generally refer to candidates of a particular party or candidates associated with a particular issue, but do not refer to any clearly identified Federal candidates.

In both paragraphs, the reference to the clearly identified candidate must be contained in printed materials, scripted messages, or written instructions. Only written instructions that direct the employee or volunteer to refer to a clearly identified Federal or non-Federal candidate will satisfy these paragraphs.[1] The Commission included these limitations to avoid converting an allocable generic voter drive into an unallocable candidate-specific voter drive based solely upon ''off script'' or unauthorized oral comments by an employee or volunteer. The regulation seeks to capture only authorized statements; an SSF or nonconnected committee is not required to treat an otherwise generic voter drive as a candidate-specific one based on unauthorized comments by committee employees or volunteers. SSFs and nonconnected committees should be maintaining sufficient control over their printed materials, scripts and written instructions to be on notice whether or not the voter drive would qualify as a candidate-specific voter drive in new paragraphs (b)(2)(i) or (ii) of section 106.6.

Revised 11 CFR 106.6(b)(2) also includes two types of public communications, as defined in 11 CFR 100.26. First, paragraph (b)(2)(iii) describes public communications that refer to one or more clearly identified Federal candidates, regardless of whether there is reference to a political party, but do not refer to any clearly identified non-Federal candidates. Second, paragraph (b)(2)(iv) of section 106.6 describes public communications that refer to a political party and one or more clearly identified non-Federal candidates, but do not refer to any clearly identified Federal candidates. References to clearly identified Federal or non-Federal candidates that come within new 11 CFR 106.6(b)(2)(iii) and (iv) include ''the President,'' ''your Senators,'' and ''the Republican candidate for Senate in the State of Georgia.'' *See also* 11 CFR 100.17 (definition of ''clearly identified'').

2. 11 CFR 106.6(c)—Method for Allocating Administrative Expenses, Costs of Voter Drives and Certain Public Communications

A. Proposals in the NPRM

In the NPRM, the Commission set forth several proposals to amend the allocation regulations in 11 CFR 106.6 that apply to SSFs and nonconnected committees other than state and local party committees. Those included a number of proposals where minimum Federal percentages would be added to the funds expended method. One alternative in the proposed rules would have required SSFs and nonconnected committees to use the greatest percentage applicable in any of the States in which the committee conducted its activities as the minimum Federal percentage applied to all allocations under the funds expended method. *See* NPRM at 11754. A competing alternative would have allowed committees to choose between allocating costs on a State-by-State basis according to the percentage applicable in each State, or using the highest applicable percentage across the board. *See id.*

The NPRM also discussed other possible minimums including a ''two tier'' system where SSFs and nonconnected committees that operate in fewer than 10 States would have used a lower minimum Federal percentage (such as 25%), while any committees operating in more than 10 States would have been subject to a higher percentage (such as 50%). *See id.* The NPRM also proposed the alternative of a fixed minimum Federal percentage as a replacement for the ''funds expended'' method. Finally, the NPRM also sought comment on eliminating the allocation scheme and requiring SSFs and nonconnected committees to use 100% Federal funds for partisan voter drives and public communications listed in proposed 11 CFR 106.6(b).

B. Comments on Allocation Proposals

Little attention was focused on allocation issues during the public comment period. Fewer than 10 comments provided a substantive response to the allocation issues raised in the NPRM. One commenter wanted to eliminate allocation altogether and require 100% Federal funds for almost all activities, and two commenters recommended revamping the allocation scheme by eliminating the funds expended method.

The commenters differed regarding whether it was appropriate to add a Federal minimum percentage into the ''funds expended'' method in former section 106.6(c). One commenter supported revision of the section 106.6 allocation scheme to avoid ''absurd results'' under the former system by requiring a ''significant minimum hard money share'' for allocated expenses. Another commenter noted that the new bookkeeping, reporting, and calculations required for the proposed ''funds expended method plus a minimum percentage'' approach in the NPRM would be burdensome for political committees. Some commenters supported 100% Federal funds for certain expenditures, others supported a State-by-State approach, one supported a modified ''two tier'' approach to minimums, and others expressed concern that any number chosen as a minimum would be arbitrary.

The commenters also differed with regard to the proposals for allocation of public communications and voter drives. One commenter noted that if a communication promotes, supports,

[1] For example, a written instruction to the employees or volunteers that states ''do not mention or refer to Candidate Y'' would not by itself be covered by paragraphs (b)(2)(i) or (ii) of section 106.6.

attacks, or opposes (''PASOs'')[2] a Federal candidate, then it should be paid for with 100% Federal funds. Likewise, this commenter noted that if a communication only includes non-Federal candidates, then the committee should be allowed to use 100% non-Federal funds to pay its costs. Some commenters supported a minimum Federal percentage for both PASO communications and partisan voter drives. One commenter asserted that allocation based on the PASO standard would be vague. Another commenter argued that adding PASO communications to the ''funds expended'' ratio would be unenforceable, arbitrary, and unbalanced. In addition, some commenters suggested also revising 11 CFR 106.1 to include a minimum Federal percentage under the time/space methodology of allocation. The Commission is not able to adopt this latter suggestion because the NPRM did not seek public comment on amending section 106.1.

C. Final Rules

In examining public disclosure reports filed by SSFs and nonconnected committees over the past ten years, the Commission discovered that very few committees chose to allocate their administrative and generic voter drive expenses under former section 106.6(c). Anecdotal evidence suggested that many committees, including those that allocated, were confused as to how the funds expended ratio should be calculated and adjusted throughout the two-year election cycle. Committees have consistently requested guidance on the proper application of the allocation methods under former section 106.6 at various Commission conferences, roundtables and education events. Audit experience has also shown that some committees were not properly allocating under the complicated funds expended method. *See* Final Report of the Audit Division on Volunteer PAC (Sept. 21, 2004) (improper application of flat state ballot composition ratio instead of calculating ratio under funds expended method in section 106.6) and Final Report of the Audit Division on Republicans for Choice PAC (Dec. 2, 1999) (apparent confusion between calculation of funds received ratio and funds expended ratio in section 106.6). In addition, calculating and adjusting the funds expended ratio may have posed an administrative burden to some committees, particularly those with limited resources, because compliance required committees to monitor their Federal expenditures and non-Federal disbursements, compare their current spending to the ratio reported at the start of the election cycle, and then adjust the ratio to reflect their actual behavior. The confusion and administrative burden associated with the funds expended method may at least partly explain why, historically, SSFs and nonconnected committees have not adjusted their allocation ratios during an election cycle, or from one election cycle to the next election cycle.

Given the complexity of former section 106.6(c), the confusion regarding the proper application of this rule exhibited by some SSFs and nonconnected committees, and the administrative burden of compliance, the Commission seeks to simplify, not further complicate, the allocation system. Thus, the Commission is not retaining the funds expended method in any form.

A flat minimum percentage makes the allocation scheme easier to understand and apply, while preserving the overall rationale underlying allocation. The flat minimum percentage eliminates the requirement—and, thus, the accompanying burdens—of calculating the ratio and monitoring it continuously for accuracy. Furthermore, the Commission's recent experience with State and local party allocation ratios in 11 CFR 106.7 and 300.33 indicates that flat minimum allocation ratios are easier for committees to understand and for the Commission to administer. A flat minimum Federal percentage will also result in less complex, less intrusive, and speedier enforcement actions, thereby enhancing compliance with the law. Finally, SSFs and nonconnected committees will retain the flexibility to allocate more than the flat minimum percentage of these expenses to their Federal account if they wish to do so. Accordingly, the Commission has decided to replace the funds expended method of allocation with a flat minimum allocation percentage.

Neither FECA nor any court decision dictates how the Commission should determine appropriate allocation ratios. In fact, at least one court has recognized that the Commission has the discretion to establish the Federal funds percentage it deems best for administrative and generic voter drive expenses. *See Common Cause* v. *FEC*, 692 F. Supp. 1391, 1396 (D.D.C. 1987).

A flat 50% allocation minimum recognizes that SSFs and nonconnected committees can be ''dual purpose'' in that they engage in both Federal and non-Federal election activities. These committees have registered as *Federal* political committees with the FEC; consistent with that status, political committees should not be permitted to pay for administrative expenses, generic voter drives and public communications that refer to a political party with a greater amount of non-Federal funds than Federal funds. However, the 50% figure also recognizes that some Federal SSFs and nonconnected committees conduct a significant amount of non-Federal activity in addition to their Federal spending. The Commission has concluded that this approach is preferable to importing percentages used in other contexts for dissimilar entities, such as the former national party committee ratios repealed by BCRA or the current ratios applicable to State and local party committees, as suggested in the NPRM.

Public communications that refer to a political party without referring to any clearly identified Federal or non-Federal candidates are subject to the new 50% flat minimum percentage in revised 11 CFR 106.6(c). Like the administrative expenses and generic voter drives (which may refer to a political party), which are also allocated under section 106.6(c), these references solely to a political party inherently influence both Federal and non-Federal elections. Therefore, the 50% Federal funds requirement reflects the dual nature of the communication. As with other expenses under revised section 106.6(c), an SSF or nonconnected committee may choose to allocate more than 50% of the costs of any such public communication to its Federal account, if it wishes to do so.

The past decade of reports filed with the FEC indicate that most SSFs and nonconnected committees do not allocate under section 106.6(c). In fact, fewer than 2% of all registered non-party political committees filed H1 and H4 schedules allocating administrative and generic voter drive expenses under former section 106.6(c) in each election cycle since these regulations were made effective in 1991. Any SSF or nonconnected committee that was not allocating under section 106.6 was presumably already using 100% Federal funds for these expenses, except where those expenses were paid by other entities in accordance with the Act and Commission regulations, such as an SSF's connected organization paying its administrative expenses. Thus, removing the funds expended method and replacing it with a flat minimum percentage in section 106.6 should only affect a small fraction of all SSFs and nonconnected committees.

Even for those SSFs and nonconnected committees that were

[2] ''PASO'' has emerged as a convenient acronym for ''promote, support, attack or oppose.''

allocating, the impact of the final rules should not be substantial. A review of past reports filed with the FEC shows that almost half of these committees were already paying for these expenses with at least 50% Federal funds under the former system. These committees will not need to adjust their payments under the 50% flat percentage method in revised 11 CFR 106.6(c). Moreover, the actual dollar amounts of non-Federal funds that were spent in past cycles on administrative and generic voter drive expenses under former section 106.6(c), and which will have to be partially replaced with Federal funds under the final rules, is relatively low. With the exception of one or two committees per election cycle whose spending was out of line with other SSFs and nonconnected committees, the final rules affect each committee by requiring only a minimal increase in Federal funds expended. Additionally, these amounts were not high compared to total disbursements from these committees' Federal accounts in an election cycle (and would have been even smaller if disbursements from non-Federal accounts were taken into consideration). Thus, revised 11 CFR 106.6(c) should not impose a significant fundraising burden on these committees.

3. 11 CFR 106.6(f)—Payments for Public Communications and Voter Drives That Refer to One or More Clearly Identified Federal or Non-Federal Candidates

The final rules add new paragraph (f) to 11 CFR 106.6 to address payments for voter drives that refer to clearly identified Federal or non-Federal candidates, as described in new 11 CFR 106.6(b)(2)(i) and (ii), and public communications that refer to clearly identified Federal or non-Federal candidates, with or without a reference to a political party, as described in new 11 CFR 106.6(b)(2)(iii) and (iv). The final rules also direct SSFs and nonconnected committees to use the time/space allocation method for voter drives and public communications that refer to at least one clearly identified Federal candidate and to at least one clearly identified non-Federal candidate, without regard to any references to a political party.

The Commission views voter drives and public communications that refer to a political party and either Federal or non-Federal candidates, but not both, as ''candidate-driven.'' The Federal or non-Federal nature of the political party reference is determined by whether the clearly identified candidates in the communication are Federal or non-Federal. Thus, voter drives and public communications that refer to a political party and also refer only to clearly identified Federal candidates must be paid for with 100% Federal funds from the Federal account under new 11 CFR 106.6(f)(1). Permitting these voter drives and communications to be paid for with some non-Federal funds based on a cursory reference to a political party would invite circumvention of the intent of the allocation scheme. Voter drives and public communications that refer to clearly identified Federal candidates, without any reference to political parties or non-Federal candidates, similarly must be paid for with 100% Federal funds from the Federal account.[3]

On the other hand, voter drives and public communications that refer to a political party and also refer only to clearly identified non-Federal candidates may be paid for entirely by the non-Federal account under new 11 CFR 106.6(f)(2). SSFs and nonconnected committees may pay for these communications referring to non-Federal candidates partly or entirely with Federal funds, but are not required to do so. Finally, voter drives and public communications that refer to both Federal and non-Federal candidates, regardless of whether there is also a reference to a political party are subject to a time/space allocation method in new 11 CFR 106.6(f)(3), which is similar to the method outlined in 11 CFR 106.1. *See* new 11 CFR 106.6(f)(3).[4] SSFs and nonconnected committees must comply with section 106.6(f) when allocating public communications and voter drive activities, but must comply with 11 CFR 106.1 for allocation of any other expenditures made on behalf of more than one clearly identified Federal candidate.

The final rules are simpler than the approach taken in Advisory Opinion 2003–37 and proposed in the NPRM at proposed 11 CFR 106.6(f) and (g). These required a combined application of the time/space allocation method under 11 CFR 106.1 and the funds expended method under former 11 CFR 106.6 for public communications that refer to a party and to specific Federal candidates. Advisory Opinion 2003–37 is hereby superseded. The candidate-driven approach for these voter drives and public communications, coupled with the removal of the funds expended method in favor of a flat percentage method, reduces the amount of recordkeeping, tracking, and calculating that SSFs and nonconnected committees must do to allocate properly administrative expenses, and to pay properly for voter drives, and public communication costs under 11 CFR 106.6.

The revised 11 CFR 106.6 allocation regulations should reduce the burden of compliance on SSFs and nonconnected committees. Incorporation of certain voter drives and public communications into 11 CFR 106.6 provides more specific guidance to committees that conduct such activity. The Commission believes that these final rules best resolve the problems with the former allocation scheme revealed through reviewing past FEC reports and the issues raised by the commenters on the NPRM.

Effective Date

Many commenters on the NPRM argued that any changes made effective before the general election on November 2, 2004 would cause great disruption to political committees and other organizations. Taking into account the statutorily mandated waiting period before a regulation may be effective under the Administrative Procedure Act, these regulations could not be effective until after the November 2, 2004 general election. To provide an orderly phase-in of the new rules and transition from one election cycle to the next election cycle, the Commission is establishing January 1, 2005 as the effective date for all amendments and additions to 11 CFR parts 100, 102, 104 and 106. This effective date allows affected political committees to ''close out'' the 2003–2004 election cycle by making final adjustments to their section 106.6(c) ratios and any final transfers of money between Federal, non-Federal, and allocation accounts. It also provides sufficient time for all those affected to make whatever internal changes necessary to comply with the new rules.

Other Proposals

The NPRM proposed several additional new and revised rules, including changes to the definitions of ''political committee'' and ''expenditure.'' Other than the Final Rules that follow, the Commission is not promulgating any of the proposed rules. The NPRM also raised many issues in the narrative describing the proposed rules. The Commission cautions that no

[3] Because section 106.6 of the Commission's regulations applies only to separate segregated funds and non-connected committees, the final rules do not apply to the activities of other types of political committees, including state and local party committees, which are subject to separate allocation rules. *See* 11 CFR 300.30 to 300.33 (establishing allocation rules for state and local party committees).

[4] The Commission notes that State law may also govern communications referring to non-Federal candidates.

inferences should be made as to the Commission's position on any of the issues that are not discussed in this document or on any of the proposed rules that are not adopted as final rules. Discussed below are some of the proposals from the NPRM that the Commission did not adopt. As noted above, the Commission received many comments on the NPRM. The comments related to proposed rules that the Commission did not adopt are not specifically described and addressed in this document.

Proposed 11 CFR 100.5—Political Committee (2 U.S.C. 431(4), (5), (6))

Under current law, 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. *See* 2 U.S.C. 431(4)(A); 11 CFR 100.5(a). Nearly three decades ago, the Supreme Court narrowed the Act's references to ''political committee'' in order to prevent their ''reach [to] groups engaged purely in issue discussion.'' *Buckley* v. *Valeo,* 424 U.S. 1, 79 (1976). The Court concluded that ''[t]o fulfill the purpose of the Act [the words ''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.'' *Id.*

The NPRM proposed four alternatives for revisions to the definition of a ''political committee'' in 11 CFR 100.5(a). NPRM at 11743–49 and 11756–57. The proposed alternatives differed mainly in whether, and if so, how, the definition of ''political committee'' should include a test to determine an organization's ''major purpose.''

The Commission received tens of thousands of comments addressing these proposals and the various individual components of the proposed ''major purpose'' tests. Many commenters supported the idea of incorporating a major purpose test into the definition of ''political committee'' and offered a variety of alternatives for what the test should be. In contrast, many other commenters opposed all of the proposals set forth in the NPRM and expressed concerns about the potential impact of the proposed rules on non-electoral speech. Several provisions in BCRA, such as those barring the use of corporate funds for electioneering communications but permitting the use of unlimited individual funds for that purpose, were cited for the proposition that an overly broad rule defining ''political committee'' would conflict with the structure Congress established in BCRA.

Many commenters questioned whether new rules were necessary or appropriate at this time and suggested that *Buckley's* ''major purpose'' language might be better addressed by Congress or the Supreme Court. A joint comment from hundreds of 501(c) organizations contended that the Commission has not obtained access to the types of comprehensive reports that Congress has at its disposal, and the Commission is therefore poorly positioned at this time to assess properly the operations of the variety of organizations that might be affected by new regulations.

Some observed that Congress did not address political committee status in BCRA even though Congress appeared to be fully aware that some groups were operating outside FECA's registration and reporting requirements as well as its limitations and prohibitions. These commenters found it significant that Congress had recently focused on 527 organizations in 2000 and 2002 when it added and revised IRS-based reporting requirements for many of these organizations. According to the commenters, Congress consciously did not require 527 organizations to register with the Commission as political committees.

There were additional concerns raised about the constitutional and practical issues relating to the ''major purpose'' test. Some commenters noted that the ''major purpose'' test is not a statutory trigger for political committee status, but rather a court-created protection to avoid over-reach of the triggers for political committee status actually contained in the FECA. Many commenters argued that a ''major purpose'' test would chill constitutionally protected speech, some expressing the view that the boundaries of the test would be inherently vague and thus force organizations to curtail permissible activities. Other commenters expressed concern about the practical difficulties they perceived in implementing a test intended to ascertain a group's ''purpose.'' For instance, a number of commenters similarly expressed concern that the ''major purpose'' test set out in the NPRM might unfairly categorize organizations as political committees based on a few statements or organizational documents where those statements and documents might not accurately convey the actual purpose of the organization. Other commenters also asserted that the Commission's determinations of an organization's purpose would often result in intrusive investigations into the private internal workings of an organization. Another commenter feared that any definition of ''political committee'' potentially encompassing nonprofit organizations would force them to choose between accepting foundation funds or corporate donations and advocating ballot questions as a part of the organization's overall activity.

In addition, arguments were made that the Commission would be in a better position to address the issue of political committee status after monitoring the behavior of various organizations during at least one election cycle following the enactment of BCRA. A number of commenters asserted that it would be improper for the Commission to add a new ''major purpose'' test without sufficient data demonstrating the existence of corruption or the appearance of corruption to justify the new regulations.

After evaluating these comments, the Commission considered two separate draft Final Rule approaches that would have revised the definition of ''political committee.'' Each of these approaches incorporated modified portions of the rules proposed in the NPRM. Each approach included a ''major purpose'' test, but the tests were different in purpose and operation. *See* draft 11 CFR 100.5(a), Agenda Document 04–75, at 37–41, and draft 11 CFR 100.5(a), Agenda Document 04–75–A, at 2–3 (Aug. 19, 2004 meeting).

The draft Final Rules in Agenda Document 04–75 would have incorporated one construction of the *Buckley* test into the definition of ''political committee'' in 11 CFR 100.5(a) by requiring an organization to have ''as its major purpose the nomination or election of one or more candidates *for Federal office.*'' *See* draft 11 CFR 100.5(a)(1)(ii) of Agenda Document 04–75 (emphasis added); *see also Buckley,* 424 U.S. at 79. Draft paragraph (a)(2) presented three ways in which any organization could have satisfied that test: (1) By publicly declaring that the purpose of the group is to influence Federal elections; (2) by spending more than 50% of its funds on certain specified activities; or (3) by receiving more than 50% of its funding through ''contributions,'' as defined in 2 U.S.C. 431(8) and 11 CFR Part 100, Subpart B. These draft Final Rules would have also established an additional test whereby 527 organizations could satisfy the ''major purpose'' test through the application of a broader 50% disbursements test.

The other set of draft Final Rules that the Commission considered, but did not

adopt, would have incorporated a different construction of *Buckley's* major purpose test into the definition of ''political committee'' in 11 CFR 100.5(a). This test would have focused on whether an organization's major purpose was the ''election of one or more *Federal or non-Federal* candidates.'' *See* draft 11 CFR 100.5(a)(1)(ii) of Agenda Document 04–75–A (emphasis added). Coupled with the Commission rule allowing a political committee to report only its Federal activity, this was designed to prevent groups from avoiding political committee status altogether because a majority of the campaign activity is non-Federal. The major purpose test would have been satisfied in one of two ways. Under draft 11 CFR 100.5(a)(2), an organization described in section 527 of the Internal Revenue Code (a ''527 organization'') would have satisfied the ''major purpose'' test just by virtue of its having registered with the Internal Revenue Service under 26 U.S.C. 527, unless covered by one of five enumerated exceptions. All other organizations would have been subject to the previously existing standards for determining their major purpose. *See* draft 11 CFR 100.5(a)(4) of Agenda Document 04–75–A.

The comments raise valid concerns that lead the Commission to conclude that incorporating a ''major purpose'' test into the definition of ''political committee'' may be inadvisable. Thus, the Commission has decided not to adopt any of the foregoing proposals to revise the definition of ''political committee.'' As a number of commenters noted, the proposed rules might have affected hundreds or thousands of groups engaged in non-profit activity in ways that were both far-reaching and difficult to predict, and would have entailed a degree of regulation that Congress did not elect to undertake itself when it increased the reporting obligations of 527 groups in 2000 and 2002 and when it substantially transformed campaign finance laws through BCRA. Furthermore, no change through regulation of the definition of ''political committee'' is mandated by BCRA or the Supreme Court's decision in *McConnell*. The ''major purpose'' test is a judicial construct that limits the reach of the statutory triggers in FECA for political committee status. The Commission has been applying this construct for many years without additional regulatory definitions, and it will continue to do so in the future.

Proposed 11 CFR 100.34, 100.115, 100.133, 100.149, 114.4—Voter Drive Provisions

The NPRM proposed to define a new term, ''partisan voter drive,'' in proposed 11 CFR 100.34, to revise the exemption from the ''expenditure'' definition for nonpartisan voter drives in proposed 11 CFR 100.133, and to specify that the costs for partisan voter drives are ''expenditures'' in proposed 11 CFR 100.115. Corresponding changes were also proposed for 11 CFR 100.149 and 114.4. *See* NPRM at 11740–41, 11757, and 11760.

In its consideration of Final Rules, the Commission considered a different version of these rules. Under this proposal, draft 11 CFR 100.115 would have specified that costs for certain Federal election activities would have been ''expenditures'' when incurred by political committees or a 527 organization. *See* draft 11 CFR 100.115, Agenda Document No. 04–75–A, at 4 (Aug. 19, 2004 meeting). The exemption from the ''expenditure'' definition for nonpartisan voter drives also would have been revised to state that voter drives that PASO a Federal candidate, a non-Federal candidate, or a political party can not be considered ''nonpartisan'' exempt voter drives. *See* draft 11 CFR 100.133, Agenda Document No. 04–75–A, at 4–5 (Aug. 19, 2004 meeting). The Commission rejected a motion to approve draft 11 CFR 100.115 and revisions to current 11 CFR 100.133. The Commission determined that the changes and additions to the allocation rules in 11 CFR 106.6 related to voter drives that are described above sufficiently address these issues at this time, and therefore the new and revised voter drive rules in proposed sections 100.34, 100.115, 100.133, 100.149, and 114.4 are not needed.

Proposed 11 CFR 100.116—Certain Public Communications

FECA defines ''expenditure'' to include a payment for a communication that is ''made * * * for the purpose of influencing any election for Federal office.'' 2 U.S.C. 431(9)(A)(i). The NPRM proposed to include in the definition of ''expenditure'' payments for communications that PASO any candidate for Federal office or that promote or oppose any political party. *See* proposed 11 CFR 100.116, NPRM at 11741–42 and 11757.

In its consideration of Final Rules, the Commission considered and rejected two different versions of this rule. One version of this rule would have applied to public communications that PASO a clearly identified candidate for Federal office or that PASO a political party, but only when made by a political committee or 527 organizations. *See* draft 11 CFR 100.116, Agenda Document No. 04–75–A, at 4 (Aug. 19, 2004 meeting). The second version of this rule would have been limited to communications that PASO a clearly identified candidate, but only when made by Federal political committees and unregistered groups that meet *Buckley's* ''major purpose'' test, which was the subject of another draft rule discussed above. *See* draft 11 CFR 100.115, Agenda Document No. 04–75, at 19–23 and 42 (Aug. 19, 2004 meeting).

The Commission did not adopt a rule addressing this subject. Without the ''major purpose'' rules, the rules addressing PASO communications could not have been adopted in the forms considered by the Commission.

Proposed 11 CFR 100.155—Allocated Amounts

The NPRM proposed a new regulation that would have specifically stated that when costs are properly allocable between a Federal account and a non-Federal account, the costs that must be paid by a Federal account are ''expenditures'' under FECA, and the costs that may and in fact are paid by a non-Federal account are not ''expenditures'' under FECA. The proposed regulation was linked to proposed 11 CFR 100.115 and 100.116 regarding PASO communications and voter drives. *See* NPRM at 11757. The Commission considered a version of this regulation that was broader than the version in the NPRM, in that it would have extended this principle to any non-Federal funds disbursed pursuant to allocation rules at 11 CFR 106.1, 106.6, 106.7, or 300.33. *See* draft 11 CFR 100.155, Agenda Document No. 04–75–A, at 5 (Aug. 19, 2004 meeting). For the reasons that the Commission did not adopt draft 11 CFR 100.115 and 100.116 in Agenda Document No. 04–75–A, it also did not adopt draft 11 CFR 100.155.

Proposed 11 CFR Part 102, Subpart A—Conversion Rules

The NPRM included proposed rules to address how organizations that become political committees after operating for some time as non-political committee organizations would demonstrate that they used Federally permissible funds to pay for expenditures made before becoming political committees. The proposed rules would have included a new subpart A in 11 CFR part 102. *See* NPRM at 11749–53, 11757–59. The

proposed rules would have required a new political committee to convert funds received during the two years prior to the time the organization became a political committee into Federal funds in an amount equal to the amount of its expenditures during the same time period. To do so, the new political committee would have been required to contact recent donors, make certain disclosures, and seek the donors' consent to use the funds for the purpose of influencing Federal elections. *See* NPRM at 11757–59.

The Commission received numerous comments in response to these proposed changes. Although one commenter supported the proposed rules, most commenters who addressed this topic expressed broad opposition to the proposals. Several commenters especially disagreed with the proposed rules that would have required political committees to look back at past activity and repay debts of Federal money for activities completed up to two years before the organizations became political committees. Some commenters also opposed the specific two-step conversion process in the proposed rules, including the requirement to contact and obtain permission from past donors and the 60-day deadline for converting funds to Federal funds.

In response to these comments and the Commission's further consideration of the issued raised by the proposed rules, the Commission has decided not to promulgate final rules establishing subpart A of 11 CFR part 102.

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

The Commission certifies that the final rules do not have a significant economic impact on a substantial number of small entities.

The final rules amend the Commission's definition of ''contribution'' to include funds received in response to certain communications that are not expressly included in the Commission's prior definition of ''contribution.'' For political committees, whether a receipt qualifies as a ''contribution'' determines whether it is subject to amount limitations and source prohibitions for Federal funds imposed by FECA. For organizations that are not political committees, whether a receipt is a ''contribution'' may affect whether the organization is a political committee. New section 100.57 does not, however, limit the overall amount of money that may be raised or spent on electoral activity. The rule in new section 100.57 is carefully tailored to reach communications that seek funds ''for the purpose of influencing Federal elections,'' and includes a limited exception for communications that refer to a non-Federal candidate, and a complete exception for joint fundraising efforts between or among authorized committees of Federal and non-Federal candidates. Therefore, any economic impact on Federal and non-Federal candidate committees, some of which might qualify as small entities, is not significant.

The final rules also revise the Commission's rules regarding the allocation of certain disbursements between a political committee's Federal account and non-Federal account. Thus, these revisions affect only some political committees. As discussed in the *Explanation and Justification* for revised 11 CFR 106.6(c), a review of the past ten years of public disclosure reports filed with the FEC revealed that few current political committees allocate their administrative expenses and generic voter drives under former 11 CFR 106.6, and among those political committees, many already use 50% or more as their Federal allocation ratio. Although the new section 106.6(f) requires Federal funds be used for certain public communications and voter drive activities by political committees, the final rule does not limit the overall amount of money that political committees may raise and spend on such activity. Consequently, the final rules' changes are unlikely to have a significant economic impact on 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, Political committees and parties, Reporting and recordkeeping requirements.

■ For the reasons set out in the preamble, the Federal Election Commission amends subchapter A of chapter 1 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 continues to read as follows:

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

■ 2. Section 100.57 is added to subpart B to read as follows:

§ 100.57 Funds received in response to solicitations.

(a) *Treatment as contributions.* A gift, subscription, loan, advance, or deposit of money or anything of value made by any person in response to any communication is a contribution to the person making the communication if the communication indicates that any portion of the funds received will be used to support or oppose the election of a clearly identified Federal candidate.

(b) *Certain allocable solicitations.* If the costs of a solicitation described in paragraph (a) of this section are allocable under 11 CFR 106.1, 106.6 or 106.7 (consistent with 11 CFR 300.33(c)(3)) as a direct cost of fundraising, the funds received in response to the solicitation shall be contributions as follows:

(1) If the solicitation does not refer to any clearly identified non-Federal candidates, but does refer to a political party, in addition to the clearly identified Federal candidate described in paragraph (a) of this section, one hundred percent (100%) of the total funds received are contributions.

(2) If the solicitation refers to one or more clearly identified non-Federal candidates, in addition to the clearly identified Federal candidate described in paragraph (a) of this section, at least fifty percent (50%) of the total funds received are contributions, whether or not the solicitation refers to a political party.

(c) *Joint fundraisers.* Joint fundraising conducted under 11 CFR 102.17 shall comply with the requirements of paragraphs (a) and (b) of this section except that joint fundraising between or among authorized committees of Federal candidates and campaign organizations of non-Federal candidates is not subject to paragraph (a) or (b) of this section.

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

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

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

■ 4. Section 102.5 is amended by revising paragraph (a)(1)(i) to read as follows:

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

(a) * * *

(1) * * *

(i) Establish a separate Federal account in a depository in accordance with 11 CFR part 103. Such account shall be treated as a separate Federal political committee that must comply with the requirements of the Act including the registration and reporting requirements of 11 CFR parts 102 and 104. Only funds subject to the prohibitions and limitations of the Act shall be deposited in such separate Federal account. *See* 11 CFR 103.3. All disbursements, contributions, expenditures, and transfers by the committee in connection with any Federal election shall be made from its Federal account, except as otherwise permitted for State, district and local party committees by 11 CFR part 300 and paragraph (a)(5) of this section. No transfers may be made to such Federal account from any other account(s) maintained by such organization for the purpose of financing activity in connection with non-Federal elections, except as provided by 11 CFR 300.33, 300.34, 106.6(c), 106.6(f), and 106.7(f). Administrative expenses for political committees other than party committees shall be allocated pursuant to 11 CFR 106.6(c) between such Federal account and any other account maintained by such committee for the purpose for financing activity in connection with non-Federal elections. Administrative expenses for State, district, and local party committees are subject to 11 CFR 106.7 and 11 CFR part 300; or

* * * * *

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

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

Authority: 2 U.S.C. 431(1), 431(8), 431(9), 432(i), 434, 438(a)(8) and (b), 439a, 441a, and 36 U.S.C. 510.

■ 6. Section 104.10 is amended by revising the introductory text in paragraph (b) and paragraph (b)(1) 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, generic voter drives, and certain public communications 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 generic voter drives and public communications that refer to any political party.* In each report disclosing a disbursement for administrative expenses, generic voter drives, or public communications that refer to any political party, but do not refer to any clearly identified candidates, as described in 11 CFR 106.6(b)(1)(i), (b)(1)(iii) and (b)(1)(iv), as applicable, the committee shall state the allocation ratio to be applied to each category of activity according to 11 CFR 106.6(c).

* * * * *

PART 106—ALLOCATIONS OF CANDIDATE AND COMMITTEE ACTIVITIES

■ 7. The authority citation for part 106 continues to read as follows:

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

■ 8. Section 106.6 is amended by:

■ a. Removing the words ''(c) and (d)'' from paragraph (a) and adding in their place the words ''(c), (d), and (f)'';

■ b. Removing the words ''or (b)(1)(i)'' from paragraphs (a) and (e) introductory text;

■ c. Removing the citation ''102.5(b)(1)(ii)'' from paragraph (a) and adding in its place the citation ''102.5(a)(1)(ii)''; and

■ d. Revising paragraphs (b) and (c) and adding paragraph (f) to read as follows:

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

* * * * *

(b) *Payments for administrative expenses, voter drives and certain public communications.*

(1) *Costs to be allocated.* Separate segregated funds and nonconnected committees that make disbursements in connection with Federal and non-Federal elections shall allocate expenses for the following categories of activity in accordance with paragraphs (c) or (d) of this section:

(i) Administrative expenses including rent, utilities, office supplies, and salaries not attributable to a clearly identified candidate, except that for a separate segregated fund such expenses may be paid instead by its connected organization;

(ii) The direct costs of a fundraising program or event including disbursements for solicitation of funds and for planning and administration of actual fundraising events, where Federal and non-Federal funds are collected through such program or event, except that for a separate segregated fund such expenses may be paid instead by its connected organization;

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

(iv) Public communications that refer to a political party, but do not refer to any clearly identified Federal or non-Federal candidate;

(2) *Costs not subject to allocation.* Separate segregated funds and nonconnected committees that make disbursements for the following categories of activity shall pay for those activities in accordance with paragraph (f) of this section:

(i) Voter drives, including voter identification, voter registration, and get-out-the-vote drives, in which the printed materials or scripted messages refer to, or the written instructions direct the separate segregated fund's or nonconnected committee's employee or volunteer to refer to:

(A) One or more clearly identified Federal candidates, but do not refer to any clearly identified non-Federal candidates; or

(B) One or more clearly identified Federal candidates and also refer to candidates of a particular party or associated with a particular issue, but do not refer to any clearly identified non-Federal candidates;

(ii) Voter drives, including voter identification, voter registration, and get-out-the-vote drives, in which the printed materials or scripted messages refer to, or the written instructions direct the separate segregated fund's or nonconnected committee's employee or volunteer to refer to:

(A) One or more clearly identified non-Federal candidates, but do not refer

to any clearly identified Federal candidates; or

(B) One or more clearly identified non-Federal candidates and also refer to candidates of a particular party or associated with a particular issue, but do not refer to any clearly identified Federal candidates;

(iii) Public communications that refer to one or more clearly identified Federal candidates, regardless of whether there is reference to a political party, but do not refer to any clearly identified non-Federal candidates; and

(iv) Public communications that refer to a political party, and refer to one or more clearly identified non-Federal candidates, but do not refer to any clearly identified Federal candidates.

(c) *Method for allocating administrative expenses, costs of generic voter drives, and certain public communications.* Nonconnected committees and separate segregated funds shall pay their administrative expenses, costs of generic voter drives, and costs of public communications that refer to any political party, as described in paragraphs (b)(1)(i), (b)(1)(iii) or (b)(1)(iv) of this section, with at least 50 percent Federal funds, as defined in 11 CFR 300.2(g).

* * * * *

(f) *Payments for public communications and voter drives that refer to one or more clearly identified Federal or non-Federal candidates.* Nonconnected committees and separate segregated funds shall pay for the costs of all public communications that refer to one or more clearly identified candidates, and voter drives that refer to one or more clearly identified candidates, as described in paragraphs (b)(2)(i) and (b)(2)(ii) of this section, as follows:

(1) The following shall be paid 100 percent from the Federal account of the nonconnected committee or separate segregated fund:

(i) Public communications that refer to one or more clearly identified Federal candidates, regardless of whether there is reference to a political party, but do not refer to any clearly identified non-Federal candidates, as described in paragraph (b)(2)(iii) of this section; and

(ii) Voter drives described in paragraph (b)(2)(i) of this section.

(2) The following may be paid 100 percent from the non-Federal account of the nonconnected committee or separate segregated fund:

(i) Public communications that refer to a political party and one or more clearly identified non-Federal candidates, but do not refer to any clearly identified Federal candidates, as described in paragraph (b)(2)(iv) of this section; and

(ii) Voter drives described in paragraph (b)(2)(ii) of this section.

(3) Notwithstanding 11 CFR 106.1(a)(i), public communications and voter drives that refer to one or more clearly identified Federal candidates and one or more clearly identified non-Federal candidates, regardless of whether there is a reference to a political party, including those that are expenditures, independent expenditures or in-kind contributions, shall be allocated as follows:

(i) Public communications and voter drives, other than phone banks, shall be allocated based on the proportion of space or time devoted to each clearly identified Federal candidate as compared to the total space or time devoted to all clearly identified candidates, or

(ii) Public communications and voter drives that are conducted through phone banks shall be allocated based on the number of questions or statements devoted to each clearly identified Federal candidate as compared to the total number of questions or statements devoted to all clearly identified candidates.

Dated: November 18, 2004.

Bradley A. Smith,

Chairman, Federal Election Commission.

[FR Doc. 04–25946 Filed 11–22–04; 8:45 am]

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FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 327

RIN 3064–AC84

Deposit Insurance Assessments—Certified Statements

AGENCY: Federal Deposit Insurance Corporation.

ACTION: Final rule.

SUMMARY: The Federal Deposit Insurance Corporation (FDIC) is modernizing and simplifying its deposit insurance assessment regulations governing certified statements, to provide regulatory burden relief to insured depository institutions. Under the final rule, insured institutions will obtain their certified statements on the Internet via the FDIC's transaction-based e-business Web site, FDIC*connect*. Correct certified statements will no longer be signed by insured institutions or returned to the FDIC, and the semiannual certified statement process will be synchronized with the quarterly invoice process. Two quarterly certified statement invoices will comprise the semiannual certified statement and reflect the semiannual assessment amount. If an insured institution agrees with its quarterly certified statement invoice, it will simply pay the assessed amount and retain the invoice in its own files. If it disagrees with the quarterly certified statement invoice, it will either amend its report of condition or similar report (to correct data errors) or amend its quarterly certified statement invoice (to correct calculation errors). The FDIC will automatically treat either as the insured institution's request for revision of its assessment computation, eliminating the requirement of a separate filing. In addition, the FDIC will provide e-mail notification each quarter to let depository institutions know when their quarterly certified statement invoices are available on FDIC*connect*. An institution that lacks Internet access will be able request from the FDIC a one-year renewable exemption from the use of FDIC*connect*, during which it will continue to receive quarterly certified statement invoices by mail. With these amendments, the time and effort required to comply with the certified statement process will be reduced, a result of the FDIC's ongoing program under the Economic Growth and Regulatory Paperwork Reduction Act (EGRPRA) to provide regulatory burden relief to insured depository institutions.

DATES: This final rule will become effective on March 1, 2005.

FOR FURTHER INFORMATION CONTACT: Steve Wagoner, Senior Assessment Specialist, Division of Finance, (202) 416–7152; Linda A. Abood, Supervisory IT Specialist, Division of Information Resources Management, (703) 516–1202; or Christopher Bellotto, Counsel, Legal Division, (202) 898–3801, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429.

SUPPLEMENTARY INFORMATION:

I. Background

On June 8, 2004, the FDIC published in the **Federal Register**, for a 60-day comment period, a notice of proposed rulemaking with request for comment on the proposed amendments to section 327.2, the certified statement regulation. (69 FR 31922). The comment period closed on August 9, 2004. The FDIC received 22 comment letters, one from a trade organization (Independent Community Bankers of America) and 21 from depository institutions. Seventeen of the commenters generally supported the proposal and the remaining five generally opposed, although in varying