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FEDERAL ELECTION COMMISSION  
Washington, DC 20463

January 25, 2001

**MEMORANDUM**

**AGENDA ITEM**

For Meeting of: 2-08-01

**TO:** The Commission

**THROUGH:** James A. Pehrkon  
Staff Director

**FROM:** Lois G. Lerner *JL*  
Acting General Counsel

N. Bradley Litchfield *NBL*  
Associate General Counsel

Rosemary C. Smith *RCS*  
Assistant General Counsel

Rita A. Reimer *RAR*  
Attorney

**SUBJECT:** Advance Notice of Proposed Rulemaking on the Definition of "Political Committee"

As directed by the Regulations Committee, the Office of General Counsel is circulating the attached Advance Notice of Proposed Rulemaking, which seeks comment on several proposed revisions to the definition of "political committee" found in the Commission's regulations. The proposed revisions fall into two categories: (1) possible revisions to the definitions of "contribution" and "expenditure" that trigger political committee status; and (2) ways in which a "major purpose" test could be incorporated into the rules.

A Commission vote is required to approve the attached ANPRM for publication in the *Federal Register*.

Attachment

1 **FEDERAL ELECTION COMMISSION**

2 **11 CFR Part 100**

3 **[Notice 2001 - >]**

4 **Definition of Political Committee**

5 **AGENCY:** Federal Election Commission.

6 **ACTION:** Advance Notice of Proposed Rulemaking.

7 **SUMMARY:** The Federal Election Campaign Act, with certain exceptions,  
8 defines "political committee" as any group of persons that receives  
9 more than \$1,000 in contributions or makes more than \$1,000 in  
10 expenditures during a calendar year. The Commission is seeking  
11 comments on whether to revise the definition of "political  
12 committee" contained in its regulations to include more explicit  
13 descriptions of activities that will result in those funds being  
14 considered contributions or expenditures. The Commission is also  
15 examining whether and how to incorporate the concept of "major  
16 purpose" into the definition of "political committee." The  
17 Supreme Court has stated that the term "political committee" need  
18 only encompass organizations that are under the control of  
19 candidates or the major purpose of which is the nomination or  
20 election of a candidate. Please note that the Commission has not  
21 yet decided what, if any, revisions it will make to its rules in this  
22 area. Further information is provided in the supplementary  
23 information that follows.

1 **DATES:** Comments must be received on or before [insert date sixty days  
2 after date of publication in the Federal Register]. The Commission  
3 will determine at a later date whether to hold a public hearing on  
4 this Notice. If a hearing is held, its date and time will be published  
5 in the Federal Register.

6 **ADDRESSES:** All comments should be addressed to Rosemary C. Smith,  
7 Assistant General Counsel, and must be submitted in either written  
8 or electronic form. Written comments should be sent to the  
9 Federal Election Commission, 999 E Street, NW, Washington, DC  
10 20463. Faxed comments should be sent to (202) 219-3923, with  
11 printed copy follow-up. Electronic mail comments should be sent  
12 to [polcomms@fec.gov](mailto:polcomms@fec.gov) and must include the full name, electronic  
13 mail address and postal service address of the commenter.  
14 Electronic mail comments that do not contain the full name,  
15 electronic mail address and postal service address of the  
16 commenter will not be considered. The public hearing will be held  
17 in the Commission's public hearing room, 999 E St. N.W., 9<sup>th</sup>  
18 Floor.

19 **FOR FURTHER**  
20 **INFORMATION**  
21 **CONTACT:**

Ms. Rosemary C. Smith, Assistant General Counsel, or Ms. Rita A.  
22 Reimer, Attorney, 999 E Street N.W., Washington, DC 20463,  
23 (202) 694-1650 or (800) 424-9530.

1 **SUPPLEMENTARY**

2 **INFORMATION:** The Federal Election Commission is publishing this Advance

3 Notice of Proposed Rulemaking ("ANPRM") seeking comments on whether to revise the  
4 Commission's rules at 11 CFR 100.5 that define the term "political committee."

5 Section 431(4) of the Federal Election Campaign Act, 2 U.S.C. 431 *et seq.*,  
6 ("FECA" or "the Act"), which contains the statutory definition of "political committee,"  
7 is divided into three parts. Paragraph (A) states that a political committee is "any  
8 committee, club, association, or other group of persons which receives contributions  
9 aggregating in excess of \$1,000 during a calendar year or which makes expenditures  
10 aggregating in excess of \$1,000 during a calendar year." Paragraphs (B) and (C) state that  
11 separate segregated funds established under section 441b(b) of the FECA are political  
12 committees, and that local committees of a political party are also political committees  
13 for FECA purposes under certain circumstances. This statutory definition is incorporated  
14 into section 100.5 of the Commission's regulations.

15 The Act defines "contribution" as "any gift, subscription, loan, advance, or  
16 deposit of money or anything of value made by any person for the purpose of influencing  
17 any election for federal office." 2 U.S.C. 431(8)(a)(i). An "expenditure" is defined as  
18 "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything  
19 of value, made by any person for the purpose of influencing any election for federal  
20 office." 2 U.S.C. 431(9)(a)(i).

21 The Commission is seeking comment on the scope and meaning of the "major  
22 purpose" test, which first appeared in the Supreme Court's discussion of the definition of  
23 "political committee" in Buckley v. Valeo, 424 U.S. 1 (1976) ("Buckley"). In Buckley,

1 the Supreme Court noted that section 431(4)(A) as written could be construed to define  
2 “political committee” solely in terms of the amount of annual contributions received and  
3 expenditures made, and thus “could be interpreted to reach groups engaged purely in  
4 issue discussion.” 424 U.S. at 79. In dicta, the Court set forth criteria to prevent a  
5 potentially overbroad interpretation of “political committee”: “To fulfill the purpose of  
6 the Act [the term ‘political committee’] need only encompass organizations that are under  
7 the control of a candidate or the major purpose of which is the nomination or election of a  
8 candidate.” Id.

9 The Supreme Court returned to the Buckley Court’s “major purpose” concept in  
10 FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986) (“MCFL”). In MCFL,  
11 the Court concluded, inter alia, that the prohibition on expenditures by corporations  
12 contained in another provision of the FECA, section 441b, had to be construed narrowly  
13 to avoid overbreadth problems and could not constitutionally be applied to independent  
14 expenditures made by incorporated issue advocacy organizations with certain essential  
15 features. Id. at 263-64. However, the MCFL Court also said that “should [such an  
16 organization’s] independent spending become so extensive that the organization’s major  
17 purpose may be regarded as campaign activity, the corporation would be classified as a  
18 political committee.” Id. at 262.

19 While the Supreme Court has yet to revisit the “major purpose” test, there have  
20 been lower court decisions that have done so. These decisions will be addressed in the  
21 “major purpose” portion of this document. There may be further judicial developments in  
22 this area of the law during the course of this rulemaking. Any such developments will  
23 obviously have an impact on any regulations to be promulgated by the Commission.

1 Ways in which a "major purpose" test could be incorporated into the regulations defining  
2 "political committee" are discussed infra in Part II.

3 The Commission is also seeking comment on the extent to which the "express  
4 advocacy" requirement for independent expenditures should be incorporated into the  
5 "political committee" definition. In limiting the reach of the FECA's corporate  
6 independent expenditure ban at 2 U.S.C. 441b, the MCFL Court reiterated and expanded  
7 in application what it had held in Buckley, that the "term 'expenditure' encompassed  
8 'only funds used for communications that expressly advocate the election or defeat of a  
9 clearly identified candidate.'" Id. at 248-49, quoting Buckley, 424 U.S. at 80. Ways in  
10 which the "express advocacy" requirement could be incorporated into the regulations  
11 defining "political committee" are discussed infra in Part II.

12 Becoming a political committee as defined in the FECA has recordkeeping and  
13 reporting consequences. Generally, groups that are not political committees, such as  
14 partnerships and other unincorporated associations, are treated as other persons under the  
15 Act, and are subject to minimal reporting obligations. See 2 U.S.C. 434(c), 11 CFR  
16 109.2. In contrast, political committees are subject to a more extensive set of  
17 recordkeeping and reporting requirements. See 2 U.S.C. 432, 434 11 CFR Parts 102,  
18 104. In addition, political committees are subject to contribution limits and prohibitions.  
19 See 2 U.S.C. 441a(a), (f) and (h).

## 20 I. Definitions of "Political Committee," "Contribution" and "Expenditure"

21 Paragraph (a) of section 100.5 follows the statutory definition of "political  
22 committee" by providing that any committee, club, association, or other group of persons  
23 that receives contributions aggregating in excess of \$1000 during a calendar year is a

1 political committee, except as set out in 11 CFR 100.5(b), (c), and (d). Paragraph (b)  
2 indicates that any separate segregated fund established under 2 U.S.C. 441b(b)(2)(C) is a  
3 political committee without any dollar thresholds. Paragraph (c) indicates that local  
4 committees of a political party are themselves political committees if they exceed either  
5 of the \$1,000 thresholds or if they engage in \$5,000 in exempt activity during a calendar  
6 year. See 11 CFR 100.7(b)(9), (15), (17); 11 CFR 100.8(b)(10), (16), (18). Paragraph (d)  
7 indicates that an individual's principal campaign committee or authorized committee  
8 becomes a political committee when that individual becomes a candidate under 11 CFR  
9 100.3.

10 Comments are sought on several proposed amendments to the definitions of  
11 "contribution" and "expenditure" that the Commission is considering incorporating into  
12 the definition of "political committee" at 11 CFR 100.5. One approach would be to  
13 establish more objective criteria, even bright line rules, for activities that fall within the  
14 regulatory definitions of "contribution" and "expenditure," respectively. Possible criteria  
15 are described below. This would alert organizations planning to spend more than the  
16 statutory thresholds on these activities that they will have to become, or establish, a  
17 political committee in compliance with the FECA. Please note that, if these objective  
18 criteria are included in the rules, money spent on these activities will count against the  
19 FECA's contribution limits and, if sufficient amounts are contributed or expended, they  
20 will also trigger the FECA's reporting requirements.

21 A. Contribution Definition

22 The Commission seeks comments on revising paragraph 100.5(a) by adding six  
23 new descriptions to the definition of "contribution." These new descriptions may

1 include:

2 (1) Money, services or any other thing of value received as the result of a  
3 solicitation, the express purpose of which was to raise money to influence federal  
4 elections. This provision would codify Commission precedents. Under this provision, a  
5 solicitation that in express terms states that money given as a result of the solicitation will  
6 be used to support or defeat one or more candidates for federal office would make  
7 moneys received as a result "contributions." Political committee status would follow  
8 regardless of how the money received was ultimately spent if total contributions or  
9 expenditures exceed \$1,000.

10 (2) Money, services or anything of value received from a political committee  
11 organized pursuant to 11 CFR 100.5(b), (c), or (d), except money, services or anything of  
12 value received by an organization qualifying for tax exempt status pursuant to 26 U.S.C.  
13 501(c)(3).<sup>1</sup> This new provision would, for example, prevent national party committees  
14 from funneling money into groups that may not report their disbursements and receipts.  
15 Again, an examination of how the money was ultimately spent would be unnecessary to  
16 determine political committee status.

17 (3) Money, services or anything of value received by an organization that is  
18 expressly authorized by its charter, constitution, bylaws, articles of incorporation or other  
19 organizational document(s) to engage in activities for the purpose of influencing federal  
20 elections. This paragraph would allow for an objective inquiry into the purposes of an

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<sup>1</sup> 26 U.S.C. 501(c)(3) provides federal tax exemption to a charitable organization, so long as it "does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office."



1 organization. Under this element, if an organization wanted to influence federal elections,  
2 it would have to register as a separate political committee to do so.

3 This paragraph would be limited to groups that specifically state in their  
4 organizational documents that they may influence federal elections. Thus, groups whose  
5 enabling documents authorize them to engage in "any lawful purpose" or similarly broad  
6 language would not become political committees solely on the basis of this provision in  
7 the absence of a specific election-influencing proviso.

8 (4) Money, services or anything of value received by an organization that is  
9 controlled by a federal candidate, his or her principal campaign committee, or any other  
10 committee authorized by a federal candidate pursuant to 11 CFR 100.5(f)(1),<sup>2</sup> other than  
11 as an organization qualifying for tax exempt status pursuant to 26 U.S.C. 501(c)(3) or  
12 (c)(4)<sup>3</sup> or an organization whose exclusive purpose is the election or nomination of that  
13 candidate for state or local office. This provision would remove the guise of  
14 independence from groups set up by candidates, or by their campaign staff or their agents,  
15 to assist the candidates' aims, and would focus the Commission's inquiry into the issue of  
16 "control" by the candidate.

17 This proposal is intended to clarify when the relationship between a candidate or

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<sup>2</sup> Paragraph 100.5(f)(1) defines "authorized committee" as the principal campaign committee or any other political committee authorized by a candidate to receive contributions or make expenditures on behalf of such candidate, which has not been disavowed under 11 CFR 100.3(a)(3).

<sup>3</sup> Social welfare organizations registered with the IRS under 26 U.S.C. 501(c)(4) may work in political candidate elections, but only as long as that activity remains secondary to their primary, non-political work. They may also establish separate segregated funds ("SSF") that engage in political activity, and qualify as political committees for FECA purposes under 2 U.S.C. 441b(b)(2)(C) and 11 CFR 100.5(b).

1 candidate's committee and another organization becomes so close that funds given to the  
2 organization become "for the purpose of influencing" an election. However, it would  
3 exclude organizations that have a merely incidental relationship to a candidate, e.g., that  
4 share a common vendor or a staffer, and organizations that are bona fide charities or  
5 social welfare groups. For purposes of this paragraph, "controlled" would mean  
6 substantial participation in the organization's decision-making regarding the  
7 organization's activities or disbursements.

8 (5) Money, services, or anything of value received by an organization that  
9 claims tax exempt status pursuant to 26 U.S.C. 527 and does not restrict its activities to  
10 influencing or attempting to influence elections to state or local public office or office in a  
11 political organization. If an organization claims 527 status and does not confine its  
12 activities to state, local or intra-party elections, it is acknowledging that it is an  
13 organization that is "influencing or attempting to influence the selection . . . of any  
14 individual to any Federal . . . office." 26 U.S.C. 527(e)(2). This proposal would  
15 complement Public Law ("P.L.") 106-230 and would subject 527 organizations that  
16 influence federal elections to FECA's reporting requirements for political committees,  
17 rather than the reporting requirements of P.L. 106-230. See 26 U.S.C. 527(a)(i)(6), and  
18 discussion of 527 organizations, infra.

19 (6) Payments or costs deemed to be in-kind contributions for general public  
20 political communications, pursuant to 11 CFR 100.23. This provision would incorporate  
21 the Commission's recently-promulgated coordination rules. 65 FR 76138 (Dec. 6, 2000).

1            B. Expenditure Definition

2            The Commission also seeks comments on revising paragraph (a) of section 100.5  
3 by adding five new elements to the definition of "expenditure." These new elements  
4 would include:

5            (1) Payments or costs associated with the organization's solicitation of money or  
6 any other thing of value, where the solicitation appeals to donors by stating that donations  
7 will be used to influence a federal election. This proposal would follow the first  
8 additional element of the revised definition of "contribution," supra.

9            (2) Payments or costs deemed to be coordinated expenditures for general public  
10 political communications, pursuant to 11 CFR 100.23. This provision would incorporate  
11 the Commission's recently-promulgated coordination rules. 65 FR 76138 (Dec. 6, 2000).

12            (3) Payments or costs associated with any general public political communication  
13 that refers to a candidate for federal office and has been tested to determine its probable  
14 impact on the candidate preference of voters. This proposal would provide an objective  
15 basis for determining if an otherwise independent "issue ad" was in reality undertaken for  
16 the purpose of influencing voters' preferences with respect to one or more federal  
17 candidates. The term "general public political communication" would have the same  
18 meaning as in 11 CFR 100.23: it will include communication "made through a  
19 broadcasting station (including a cable television operator), newspaper, magazine,  
20 outdoor advertising facility, mailing or any electronic medium, including the Internet or  
21 on a web site, with an intended audience of over one hundred people." 11 CFR  
22 100.23(e)(1).

1           (4) Payments or costs associated with any general public political communication  
2 that refers to a candidate for federal office, where the intended audience has been selected  
3 based on its voting behavior. Like the previous element, this would provide an objective  
4 basis for determining that a communication to a targeted group of people, such as those  
5 residing in a specific area, had the purpose of influencing voters' preferences with respect  
6 to a particular candidate. Under this scenario, a link would have been established  
7 between the communication and the selection of the intended audience.

8           (5) Payments made to a commercial vendor for a service or product with the  
9 express understanding that the service or product be designed to influence one or more  
10 federal elections. This provision would rely on an organization's objective  
11 representations of purpose in the acquisition of goods or services to establish political  
12 committee status.

13           The Commission also seeks comments on adding new paragraph (a)(3) to section  
14 100.5. This paragraph would provide that, notwithstanding any other provision of  
15 11 CFR 100.5, a business organized for profit that provides goods or services to others at  
16 their usual and normal charge would not be considered a political committee. This  
17 savings clause would prevent political consultants and commercial vendors operating at  
18 the direction of their clients from becoming political committees if, for example, a vendor  
19 or consultant provides money up front to another vendor as an agent of a political  
20 committee with the express instruction that the service provided be for the purpose of  
21 influencing a federal election. Also, since vendors receive money from political  
22 committees organized under 11 CFR 100.5(b), (c), and (d) and are for-profit

1 organizations, without this exemption they would be considered political committees  
2 under proposed paragraph 100.5(a)(1)(ii).

3 If these new descriptions of “contribution” and “expenditure” are adopted, the  
4 Commission could add cross references in 11 CFR 100.7 and 100.8 to the new language  
5 in 11 CFR 100.5(a), to alert readers that they need to also consult section 100.5.  
6 Alternatively, the Commission could limit the impact of the proposed amendments to  
7 11 CFR 100.5 to political committees, thus leaving the current definitions of  
8 “contribution” and “expenditure” in 11 CFR 100.7 and 100.8 unchanged.

9 An alternative approach would be to locate the proposed new objective criteria in  
10 the generally applicable definitions of “contribution” and “expenditure” found at 11 CFR  
11 100.7 and 100.8, respectively. The Commission invites comments on which of these  
12 approaches is appropriate, as well as whether they comport with constitutional safeguards  
13 and the Commission’s statutory authority. No decision on whether to proceed further will  
14 be made until after the comment period has concluded.

## 15 II. The “Major Purpose” Test

### 16 A. Case Law

17 As explained above, the Buckley Court stated that the overbreadth of the general  
18 definition of “political committee” at 2 U.S.C. 431(4)(A) could be avoided if the  
19 definition were limited to “those organizations that are under the control of a candidate or  
20 the major purpose of which is the nomination or election of a candidate.” 424 U.S. at 79.  
21 Similarly, in MCFL, the Supreme Court noted that an organization that would otherwise  
22 be exempt from FECA’s requirements would be classified as a political committee if its  
23 “independent spending becomes so extensive that the organization’s major purpose may

1 be regarded as campaign activity.” 479 U.S. at 262. Several lower court decisions have  
2 also addressed the “major purpose” test.

3 In FEC v. GOPAC, 917 F.Supp. 851, 859, 862 (D.D.C. 1996), a federal district  
4 court interpreted the FECA to reach only groups that “received and/or expended \$1,000  
5 or more and had as their major purpose the election of a particular candidate or candidates  
6 for federal office.” The court held that an “organization’s purpose may be evidenced by  
7 its public statements of its purpose or by other means, such as its expenditures in cash or  
8 in kind to or for the benefit of a particular candidate or candidates.” The Commission did  
9 not appeal the district court’s opinion. Other courts have endorsed a different approach.

10 In Akins v. FEC, 101 F.3d 731 (D.C. Cir. 1997) (en banc) (“Akins”), a group of  
11 former ambassadors, congressmen, and government officials argued that the American  
12 Israel Public Affairs Committee (“AIPAC”), an organization they considered to be a  
13 political committee, had failed to register with the Commission or file campaign  
14 disclosure reports. In 1989, the year in which the challenged activity took place, AIPAC  
15 had a budget of about \$10 million. The Commission determined that AIPAC likely had  
16 made campaign contributions exceeding the \$1,000 FECA threshold, but concluded that  
17 there was not probable cause to believe AIPAC was a political committee because its  
18 campaign-related activities were only a small portion of its overall activities and,  
19 therefore, not its major purpose.

20 The Court of Appeals for the District of Columbia Circuit concluded that an  
21 organization should be considered a political committee once it exceeds the \$1,000  
22 contribution level, even though its major purpose is not campaign-related activity. Id. at

1 741-42. The court reasoned that the major purpose test becomes relevant only where  
2 independent expenditures are involved.

3 While the Supreme Court granted certiorari in the Akins case, it avoided ruling on  
4 this issue. Finding that “a considered determination of the scope of the statutory  
5 exemption that Congress enacted to address membership communication would helpfully  
6 inform our consideration of the ‘major purpose’ test,” the Court declined to rule on the  
7 test’s scope or meaning. 524 U.S. 1, 29 (1998). The Court suggested that a broader  
8 interpretation of the “membership exception” could affect its evaluation of whether  
9 Buckley’s narrowing interpretation of what constitutes a political committee is necessary  
10 in all contexts. Id. at 28. In light of the Commission adopting membership  
11 communication regulations that substantially expanded the number of organizations that  
12 could take advantage of the membership exception without triggering political committee  
13 status, see 11 CFR 100.8(b)(4)(iv), 114.1(e), the Commission seeks comments on  
14 whether a less restrictive reading of Buckley is appropriate and necessary to promote  
15 fuller disclosure of campaign activity.

16 In declaring North Carolina’s “political committee” definition unconstitutional,  
17 the Fourth Circuit in North Carolina Right to Life, Inc. v. Bartlett, 168 F.3d 705, 712 (4<sup>th</sup>  
18 Cir. 1999) read Buckley to limit narrowly the FECA’s definition of “political committee”  
19 to “includ[e] only those entities that have as a major purpose engaging in express  
20 advocacy in support of a candidate . . . by using words such as ‘vote for,’ ‘elect,’  
21 ‘support,’ ‘vote against,’ ‘defeat,’ or ‘reject.’” Consequently, North Carolina’s definition

1 of "political committee,"<sup>4</sup> which, like the FECA definition, included organizations that  
2 "influence or attempt to influence the result of an election" (a "classic form of issue  
3 advocacy"), was "unconstitutionally vague and overbroad." *Id.* at 713.

4 In North Carolina Right to Life, Inc. v. Leake, 108 F.Supp.2d 498 (E.D. N.C.  
5 2000) ("NCRL"), a federal district court upheld a North Carolina statute revised in light  
6 of Bartlett that, in contrast to the FECA, defines "political committee" as, inter alia, a  
7 group that has "a major purpose to support or oppose the nomination or election of one or  
8 more candidates." N.C.G.S. § 163-278.6(14)(d). The state law further provides that a  
9 group is presumed to have a "major purpose" of supporting or opposing one or more  
10 candidates if its contributions and expenditures total over \$3,000 during an election cycle.  
11 However, the state statute further provides that the presumption can be rebutted "by  
12 showing that the contributions and expenditures giving rise to the presumption were not a  
13 major part of activities of the organization during the election cycle." *Id.*<sup>5</sup> The  
14 Commission is seeking comments on whether a similar approach should be employed at  
15 the federal level. Should the Commission amend the definition of "political committee"  
16 at 11 CFR 100.5 to contain a rebuttable presumption that groups that have a major  
17 purpose of supporting or opposing one or more federal candidates are presumed to be  
18 political committees for purposes of these rules?

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<sup>4</sup> Prior to Bartlett, North Carolina defined "political committee" as "a combination of two or more individuals, or any person, committee, association, or organization, the primary purpose of which is to support or oppose any candidate or political party or to influence or to attempt to influence the result of an election."

<sup>5</sup> It should be noted that the court also held that an "express advocacy" component was not constitutionally required of North Carolina's "political committee" definition.



1           In Florida Right to Life, Inc. v. Mortham, No. 98-770-CIV-ORL-19A (M.D. Fla.,  
2 Dec. 15, 1999), a federal district court declared Florida's "political committee" definition  
3 "unconstitutionally overbroad" because its reach was not limited to "organizations whose  
4 major purpose is engaging in 'express advocacy,' as that term is defined in Buckley v.  
5 Valeo, 424 U.S. 1, 42-44 (1976)." Slip op. at 12, 17.

6           In South Carolina Citizens for Life, Inc. v. Davis, C.A. No. 3:00-124-19 (D. S.C.  
7 Sept. 11, 2000), the federal district court in South Carolina declared (without analysis)  
8 South Carolina's "political committee" definition (i.e., group of persons that spends more  
9 than \$500 to "influence the outcome of an elective office") unconstitutional as applied to  
10 the plaintiff and permanently enjoined the defendants from enforcing it against the  
11 plaintiff's "issue and express advocacy activities." The court's order preliminarily  
12 enjoining the statute at issue did so because of its application to issue advocacy and  
13 because of the seriousness of the plaintiff's claim that its proposed express advocacy was  
14 so insignificant (less than 20 percent of its disbursements) that the "major purpose" test  
15 would exempt it from the requirements of the statute.

16 B. Alternatives That Would Incorporate "Major Purpose" into the Text of the Rules

17           Comments are sought as to several ways, which are described below, the major  
18 purpose test for political committee status could be applied to these entities. Please note  
19 that specific regulatory language that could be used to implement the various alternatives  
20 is not attached.

21 Alternative 1: Percentage of Disbursements

22           One way to define "major purpose" would consider an organization to be a  
23 political committee if at least 50% of that organization's disbursements are made for the

1 purpose of influencing federal and non-federal elections. Comments are sought on  
2 whether a higher or lower percentage might be more appropriate in particular  
3 circumstances. For example, an organization may spend 30% or 40% of its total  
4 disbursements on election-related activity, while its other disbursements are used for a  
5 wide range of purposes. Under these circumstances, election-related activity could still  
6 be considered that organization's major purpose, even though most of its spending went  
7 for other purposes. This could also be true if, for example, an organization made 30% of  
8 its disbursements for electoral activity, and no more than 25% for any other purpose.

#### 9 Alternative 2: Percentage of Time and Disbursements

10 Another approach would evaluate not only an organization's receipts and  
11 disbursements, but also the amount of time spent by its paid and unpaid staff. Both time  
12 and money would be divided among certain broad groupings, such as electoral, lobbying  
13 and educational activity. The organization's possible status as a political committee  
14 could be determined in several different ways. For example, a determination could be  
15 made as to whether the group devoted over 50% of either its time or its monetary  
16 resources to electoral activity and thus became a political committee. Alternatively, once  
17 these ratios are determined, if the combined share of time and money spent on elections is  
18 larger than that for either lobbying or education, the organization's major purpose could  
19 be considered to influence elections. The Commission seeks comments on these  
20 alternatives, as well.

#### 21 1. Volunteer Activity

22 Under Alternative 2, the Commission also seeks comments on how, if at all,  
23 organizations should value volunteer activity in making this calculation. Volunteer

1 activity may become significant in situations where, for example, an organization spends  
2 only a small amount of money on election-related activity, but uses the money to recruit  
3 and train groups of volunteers to canvass neighborhoods, run phone banks, or sponsor  
4 other volunteer activity that has a substantial impact on the campaign. On the other hand,  
5 volunteer activity is exempt from the FECA's definition of "contribution." 2 U.S.C.  
6 431(8)(B)(i), 11 CFR 100.7(b)(3); but see 11 CFR 100.7(a) for qualifications and  
7 exceptions. Thus, it can be argued that the value of such activity should not be included  
8 in any "major purpose" computation.

## 9 2. Time for the Computation

10 A related issue is, what period of time should be used in assessing major purpose?  
11 Should it be an election cycle, a calendar year, a calendar quarter, or some other period?  
12 Using a quarterly basis would cover those situations where an organization engaged in  
13 substantial lobbying and educational efforts and only nominal campaign activity during  
14 the first three quarters of an election year, but put massive resources into a campaign  
15 during the last quarter in which the election was held. However, the statutory framework  
16 of the Act is such that it may be necessary to use a calendar year in computing this  
17 activity. Please note that once an organization qualifies as a political committee, it retains  
18 that status until it terminates. See 11 CFR 102.3 (termination of registration) and 11 CFR  
19 102.4 (administrative termination).

## 20 Alternative 3: Percentage of Disbursements Spent on Communications 21 Containing Express Advocacy

22 In contrast to Alternatives 1 and 2, the Commission is considering a substantially  
23 narrower approach to determining an organization's major purpose. Under Alternative 3,

1 the organization would compare its total disbursements to only the amount it spends on  
2 general public political communications that expressly advocate the election or defeat of  
3 clearly identified candidates (i.e., "independent expenditures," 2 USC 431(17)) and any  
4 contributions, 2 USC 431(8). This approach is consistent with MCFL, which reiterated  
5 and expanded the scope of the express advocacy requirement to section 441b of the Act:  
6 "[In Buckley], the Court held that the term 'expenditure' encompassed 'only funds used  
7 for communications that expressly advocate the election or defeat of a clearly identified  
8 candidate.' . . . . We therefore hold that an expenditure must constitute 'express  
9 advocacy' in order to be subject to the prohibition of § 441b." 479 U.S. at 248-49,  
10 quoting Buckley, 424 U.S. at 80.

11 This approach also follows Fourth Circuit's reading of Buckley in Bartlett,  
12 Mortham and Davis, *supra*, and other cases.

13 In Colorado Right to Life, Inc. v. Davidson, No. 99-1414, 2000 WL 1902427, at  
14 \*14 (10<sup>th</sup> Cir., Dec. 26, 2000), the Tenth Circuit declared a state statute defining "political  
15 committee" unconstitutional as applied to plaintiffs. The definition encompassed groups  
16 that "associated themselves for the purpose of making independent expenditures," i.e., on  
17 communications unambiguously referring to candidates. The court read Buckley and its  
18 progeny for the rule that "communications that do not contain express words advocating  
19 the election or defeat of a particular candidate are deemed issue advocacy, which the First  
20 Amendment shields from regulation." *Id.* at \*7.

21 In Iowa Right to Life Committee, Inc. v. Williams, No. 4-98-CV-10399, slip op.  
22 at 17 (S.D. Iowa, Oct. 23, 1998), a federal district court preliminarily enjoined Iowa's  
23 definition of "political committee," which encompassed committees that spend in excess

1 of \$500 for the “purpose of supporting or opposing a candidate for public office,” because  
 2 the “plain meaning of the phrase can be interpreted to include issue advocacy.” The court  
 3 had read Buckley as holding that the “government may not regulate funds spent to publish  
 4 communications that contain what is generally referred to as ‘issue advocacy.’” *Id.* at 8  
 5 n.3.

6 In Virginia Soc’y for Human Life, Inc. v. Caldwell, 152 F.3d 268 (4<sup>th</sup> Cir. 1998),  
 7 the Fourth Circuit held that a constitutionally narrow construction of Virginia’s “political  
 8 committee” definition was not readily apparent because the statutory language  
 9 encompassed groups that spend money “for the purpose of influencing the outcome of  
 10 any election” and thus necessarily applied to “materials which simply describe a  
 11 candidate’s voting record in the hopes of influencing people’s votes, that is, issue  
 12 discussion.”<sup>6</sup>

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<sup>6</sup> Numerous other courts, while not addressing the constitutionality of “political committee” definitions, have addressed the application of the express advocacy requirement. See Perry v. Bartlett, 231 F.3d 155, 160 (4<sup>th</sup> Cir. 2000); Vermont Right to Life, Inc. v. Sorrell, 221 F.3d 376, 386 (2d Cir. 2000); Iowa Right to Life Comm., Inc. v. Williams, 187 F.3d 963, 968-70 (8th Cir. 1999); FEC v. Christian Action Network, Inc., 110 F.3d 1049, 1051 (4th Cir. 1997); Maine Right To Life Comm., Inc. v. FEC, 98 F.3d 1 (1st Cir. 1996); Faucher v. FEC, 928 F.2d 468, 472 (1st Cir. 1991); FEC v. Central Long Island Tax Reform Immediately Comm., 616 F.2d 45, 53 (2d Cir. 1980) (*en banc*); Kansans for Life, Inc. v. Gaede, 38 F. Supp.2d 928 (D. Kan. 1999); Right to Life of Mich., Inc. v. Miller, 23 F. Supp.2d 766 (W.D. Mich. 1998); Planned Parenthood Affiliates of Mich., Inc. v. Miller, 21 F. Supp.2d 740 (E.D. Mich. 1998); Right To Life of Dutchess County, Inc. v. FEC, 6 F. Supp.2d 248 (S.D. N.Y. 1998); Clifton v. FEC, 927 F. Supp. 493, 496 (D. Me. 1996), *aff’d on other grounds*, 114 F.3d 1309 (1st Cir. 1997); FEC v. Survival Educ. Fund, Inc., 1994 WL 9658, at \*3 (S.D. N.Y. Jan. 12, 1994), *aff’d in part and rev’d in part on other grounds*, 65 F.3d 285 (2d Cir. 1995); FEC v. Colorado Republican Fed. Campaign Comm., 839 F.Supp. 1448, 1456 (D. Colo. 1993), *rev’d on other grounds*, 59 F.3d 1015 (10th Cir. 1995), *vacated on other grounds*, 519 U.S. 604 (1996); West Virginians For Life, Inc. v. Smith, 919 F.Supp. 954, 959 (S.D. W.Va. 1996); FEC v. NOW, 713 F.Supp. 428 (1989); FEC v. AFSCME, 471 F. Supp. 315, 317 (D. D.C. 1979); Washington State Republican Party v. State Public Disclosure Comm’n,

1           The Commission invites comment on other possible content standards that could  
2 be used for communications.

3           Alternative 4: Dollar Amount of Campaign Activity

4           As discussed above, the Akins case illustrated that it is possible for a group to  
5 spend millions of dollars in direct candidate support that nevertheless represents only a  
6 small percentage of its overall financial activity. Thus, under any of the alternatives set  
7 out above, its “major purpose” might not be the election of candidates and it would  
8 therefore not be a political committee. Consequently, the Commission seeks comments  
9 on establishing a \$50,000 threshold for political committee status. If an organization  
10 exceeds this amount in election activity, or alternatively in express advocacy  
11 communications, it will automatically be deemed to have a major purpose of influencing  
12 federal elections. Thus, it will be a political committee, even if \$50,000 represents a  
13 small percentage of its total disbursements for all activities. Comments are also sought  
14 on a higher or lower threshold amount than \$50,000.

15 III. Section 527 Organizations and Recent Statutory Changes

16           Section 527 of the Internal Revenue Code (“I.R.C.”) grants beneficial tax  
17 treatment to political organizations, commonly called “527 organizations,” that meet the  
18 qualifications set forth below. Organizations that qualify as FECA political committees  
19 qualify as 527 organizations, and thus are able to take advantage of this beneficial tax

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141 Wash.2d 245, 4 P.3d 888 (2000); Elections Bd. Of Wisconsin v. Wisconsin Mfrs. & Commerce, 227 Wis.2d 650, 597 N.W.3d 721 (1999); Osterberg v. Peca, 12 S.W.3d 31, 50-52 (Tex. 2000); Brownsburg Area Patrons Affecting Change v. Baldwin, 714 N.E.2d 135 (Ind. 1999); State v. Proto, 526 A.2d 1297, 1310-11 (Conn. 1987); Richey v. Tyson, 120 F.Supp.2d 1298, 1310-12 (S.D. Ala. 2000); Chamber of Commerce of the United States v. Moore, No. 00-228ws (S.D. Miss. Nov. 2, 2000).

1 treatment.<sup>7</sup> Other 527 organizations, however, are alleged to have engaged in substantial  
2 political activity that fails to trigger the FECA registration and reporting requirements,  
3 and contribution restrictions.

4 The I.R.C. at section 527(e)(1) defines “political organization” as “a party,  
5 committee, association, fund, or other organization (whether or not incorporated)  
6 organized and operated primarily for the purpose of directly or indirectly accepting  
7 contributions or making expenditures, or both, for an exempt function.” “Exempt  
8 function” is defined at I.R.C. section 527(e)(2) to include “the function of influencing or  
9 attempting to influence the selection, nomination, election, or appointment of any  
10 individual to any Federal, State, or local public office or office in a political organization,  
11 or the election of Presidential or Vice-Presidential electors, whether or not such  
12 individual or electors are selected, nominated, elected or appointed.”

13 This definition is on its face substantially broader than the FECA definition of  
14 “political committee.” Moreover, beginning in 1996, the Internal Revenue Service  
15 (“IRS”) has issued a series of private revenue rulings holding that activities such as  
16 circulating voting records, voter guides, and “issue advocacy” communications – those  
17 that do not expressly advocate the election or defeat of a clearly identified candidate – fall  
18 within the “exempt function” category under I.R.C. section 527(e)(2). Private Rulings  
19 9652026 (Oct. 1, 1996), 9808037 (Nov. 21, 1997), and 199925051 (March 29, 1999). As  
20 knowledge of these rulings became more widespread, the number of 527 organizations is  
21 thought to have increased substantially, with a concomitant increase in their spending on

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<sup>7</sup>Section 527 organizations are taxed only on their investment income. 26 U.S.C. 527(f).

1 federal elections. See Hill, "Probing the Limits of Section 527 to Design a New  
2 Campaign Finance Vehicle," Tax Notes, Jan. 17, 2000, at 387-88.

3       Until recently, section 527 organizations that did not qualify as political  
4 committees under the FECA filed no registration statements or informational material  
5 with the Commission or the IRS. Moreover, since section 527 taxes only investment  
6 income earned by these organizations, see 26 U.S.C. 527(f), and many earn no such  
7 income, they are not required to file tax returns with the IRS. Thus, unless they qualified  
8 as FECA committees, or voluntarily disclosed this information, little was known about  
9 their funding or activities.

10       When the Commission first considered the possibility of a rulemaking in this  
11 area, it anticipated that one of the issues such a rulemaking might address would be  
12 treatment of section 527 organizations. Since that time, however, P.L. 106-230, 114 Stat.  
13 477, was signed into law on July 1, 2000. That law requires 527 organizations to notify  
14 the Secretary of the Treasury of their status and provide certain identifying information  
15 within 24 hours of the date on which the organization is established, 26 U.S.C.  
16 527(a)(i)(1), or 30 days after the date of enactment of the law, for those organizations in  
17 existence on July 1, 2000. 26 U.S.C. 527(d)(2). They must also disclose information on  
18 expenditures that aggregate over \$500 in a calendar year to a single person, and  
19 contributions from persons that aggregate \$200 or more during a calendar year. For  
20 additional information on this new law, see Revenue Ruling 2000-49 (Oct. 30, 2000).  
21 Please note that these statutory requirements do not apply to organizations that qualify as  
22 political committees under the FECA. 26 U.S.C. 527(a)(6), 527(j)(5)(A).



1           Despite enactment of P.L. 106-230, concern remains that Commission action is  
2 needed to clarify when an organization becomes a political committee under the FECA.  
3 While many 527 organizations are complying with the new tax law and IRS requirements,  
4 others may have changed their tax status in order to avoid having to do so. The  
5 Commission is seeking comment as to how this rulemaking should address 527  
6 organizations and organizations that are not organized under 26 U.S.C. 527.

7           The Commission also welcomes comments on any other aspect of the issues  
8 addressed in this Notice.

9   **List of Subjects**

10  11 CFR Part 100

11       Elections

1 For the reasons set out in the preamble, it is proposed to amend Subchapter A,  
2 Chapter I of title 11 of the Code of Federal Regulations to read as follows:

3 **Part 100 – Scope and Definitions (2 U.S.C. 431)**

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

5 Authority: 2 U.S.C. 431, 434(a)(11), and 438(a)(8).

6 2. Paragraph (a) of section 100.5 would be revised to read as follows:

7 **11 CFR 100.5 Political Committee (2 U.S.C. 431(4), (5), (6)).**

8 Political committee means any group meeting one of the following conditions:

9 (a) Except as provided in paragraphs (b), (c) and (d) of this section, any committee,  
10 club, association, or other group of persons that receives contributions aggregating in  
11 excess of \$1,000, or that makes expenditures aggregating in excess of \$1,000 during a  
12 calendar year is a political committee.

13 (1) The following are examples of “contributions” within the meaning of  
14 11 CFR 100.7(a):

15 (i) Money, services or any other thing of value received as the result  
16 of a solicitation, the express purpose of which was to raise money  
17 to influence federal elections;

18 (ii) Money, services or anything of value received from a political  
19 committee organized pursuant to 11 CFR 100.5(b), (c), or (d),  
20 except money, services or anything of value received by an  
21 organization qualifying for tax exempt status pursuant to 26 USC  
22 501(c)(3);

- 1 (iii) Money, services or anything of value received by an organization  
2 that is expressly authorized by its charter, constitution, bylaws,  
3 articles of incorporation or other organizational document to  
4 engage in activities for the purpose of influencing federal elections;
- 5 (iv) Money, services or anything of value received by an organization  
6 that is controlled by a federal candidate, his or her principal  
7 campaign committee, or any other committee authorized by a  
8 federal candidate pursuant to 11 CFR 100.5(f)(1). This provision  
9 shall not encompass an organization qualifying for tax exempt  
10 status pursuant to 26 USC 501(c)(3) or (c)(4) or an organization  
11 whose exclusive purpose is the election or nomination of that  
12 candidate for state or local office;
- 13 (v) Money, services, or anything of value received by an organization  
14 that claims tax exempt status pursuant to 26 U.S.C. 527 and does  
15 not restrict its activities to influencing or attempting to influence  
16 elections to state or local public office or office in a political  
17 organization; or
- 18 (vi) Payments or costs deemed to be in-kind contributions for general  
19 public political communications, pursuant to 11 CFR 100.23.
- 20 (2) The following are examples of "expenditures" within the meaning of 11  
21 CFR 100.8:
- 22 (i) Payments or costs associated with the organization's solicitation of  
23 money or any other thing of value, where the solicitation appeals to

1                   donors by stating that donations will be used to influence a federal  
2                   election;

3           (ii)    Payments or costs deemed to be coordinated expenditures for  
4                   general public political communications, pursuant to 11 CFR  
5                   100.23;

6           (iii)   Payments or costs associated with any general public political  
7                   communication that refers to a candidate for federal office and has  
8                   been tested to determine its probable impact on the candidate  
9                   preference of voters;

10          (iv)   Payments or costs associated with any general public political  
11               communication that refers to a candidate for federal office, where  
12               the intended audience has been selected based on its voting  
13               behavior; or

14          (v)    Payments made to a commercial vendor for a service or product,  
15               with the express understanding that the service or product be  
16               designed to influence one or more federal elections.

17       (3) Notwithstanding any other provision of this section, a business entity  
18           organized for profit that provides goods or services to others at the usual and  
19           normal charge for such goods or services shall not be considered a political

1 committee. Discounts may be provided as set forth in 11 CFR 9008.9(a).

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Danny L. McDonald  
Chairman  
Federal Election Commission

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14 DATED: \_\_\_\_\_  
15 BILLING CODE: 6715-01-P

