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4 **MEMORANDUM**

AGENDA ITEM
For Meeting of: 8-19-04

SUBMITTED LATE

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7 TO: The Commission
8
9 THROUGH: James A. Pehrkon *JAP*
10 Staff Director
11
12 FROM: Lawrence H. Norton *LHN*
13 General Counsel
14 Rosemary C. Smith *RCS*
15 Associate General Counsel
16 Mai T. Dinh *MTD*
17 Assistant General Counsel
18 J. Duane Pugh Jr. *JDP*
19 Senior Attorney
20 Richard T. Ewell *RTE*
21 Attorney
22 Robert M. Knop *RMK*
23 Attorney
24 Margaret G. Perl *MGP*
25 Attorney
26
27 SUBJECT: Draft Final Rules for Political Committee Status

28
29 The Commission undertook this rulemaking to determine whether changes are
30 appropriate in the regulations that bear on when an organization must register with the
31 Commission as a political committee and when its activities are for the purpose of
32 influencing Federal elections, and therefore constitute expenditures or contributions. In
33 particular, the rulemaking sought to account for interpretations of the Federal Election

1 Campaign Act of 1971, as amended (2 U.S.C. 431-55) (“FECA” or “the Act”), the
2 Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002)
3 (“BCRA”), in *McConnell v. FEC*, 540 U.S. 93, 124 S. Ct. 619 (2003).

4 The attached draft Final Rules represent the Office of General Counsel’s
5 recommendation as to how the Commission should amend its current regulations in four
6 areas: first, what statements and activities should be considered in determining whether
7 an organization’s major purpose is to influence Federal elections; second, when funds
8 received in response to certain solicitations should be treated as contributions; third,
9 when certain communications are expenditures for the purpose of influencing a Federal
10 election; and finally, how separate segregated funds and nonconnected committees
11 should allocate their administrative costs, generic voter drives, and public
12 communications that refer to a political party.

13 In developing the draft Final Rules, this Office was guided by four main
14 principles. First, the draft Final Rules are intended to give clear guidance to persons
15 engaged in political activity so that they will know with a high degree of certainty
16 whether their activities are subject to Commission regulation. Second, recognizing that
17 no rule can be tailored with pinpoint precision, we designed the draft Final Rules to cover
18 organizations that indisputably ought to be covered, but at the same time not to sweep too
19 broadly. For example, the major purpose test concerning 527 organizations in draft
20 section 100.5(a)(3) through (6) recognizes that while the primary purpose of 527
21 organizations is to engage in political activity, not all 527 organizations focus on Federal
22 elections. In addition to exempting certain 527 organizations that concentrate mostly on
23 non-Federal elections or selection or appointment to non-elected offices, the Commission

1 would look beyond the act of registering as a 527 organization and also examine certain
2 activities of the 527 organization to determine whether its major purpose is to influence
3 Federal elections. Third, the draft Final Rules reflect settled applications of law, as
4 reflected in court decisions and the Commission's handling of enforcement matters.
5 Finally, we sought to make existing regulations more straightforward so that they are
6 easier to understand and administer.

7 With respect to the final principle, the draft Final Rules would, where possible,
8 minimize administrative burdens, and avoid a number of problems raised by commenters.
9 Unlike the rules proposed in the Notice of Proposed Rulemaking (“NPRM”),¹ the draft
10 Final Rules do not include any look-back provision that would require an organization to
11 document retroactively its prior compliance with FECA’s amount limits and source
12 prohibitions as required by 11 CFR 102.5(b)(1). They do not apply the “promote,
13 support, attack or oppose” standard to any organization that is not a political committee
14 or has not already demonstrated that its major purpose is influencing Federal elections.
15 They do not expand the scope of voter drives that qualify as expenditures based on the
16 likely preferences of the potential voters. Nor do they employ fixed-dollar amounts in
17 determining an organization’s purpose, which was a feature of the proposed rules that
18 drew heavy criticism. Instead, they establish practical bright lines to ensure that
19 organizations can predict with a high level of certainty how the Commission will view
20 their various activities, while still providing for a measure of flexibility in appropriate
21 circumstances.

¹ See “Political Committee Status,” Notice of Proposed Rulemaking, 69 Fed. Reg. 11,736 (Mar. 11, 2004).

1 **I. Major Purpose Test**

2 The Act defines “political committee” as any committee, club, association, or
3 other group of persons that receives “contributions” or makes “expenditures” aggregating
4 in excess of \$1,000 during a calendar year. 2 U.S.C. 431(4)(A). In *Buckley v. Valeo*, 424
5 U.S. 1 (1976), the Supreme Court, in order to avoid vagueness, narrowed the Act’s
6 references to “political committee” to prevent their “reach [to] groups engaged purely in
7 issue discussion.” 424 U.S. at 79. The Court concluded that “[t]o fulfill the purpose of
8 the Act [the words ‘political committee’] need only encompass organizations that are
9 under the control of a candidate or the major purpose of which is the nomination or
10 election of a candidate.”² *Id.*

11 Although the Commission and courts have for years viewed the major purpose of
12 an organization as a functional component of any determination of whether an
13 organization is a political committee under the Act, this test has never been explicitly set
14 out in Commission regulations. Also, there are relatively few closed enforcement matters
15 from which the regulated community can gain understanding of the Commission’s
16 application of the major purpose test. This Office believes it is advisable for the
17 Commission to promulgate a “major purpose” rule to address certain issues regarding the
18 scope and application of this judicial construct. These issues include (1) which types of
19 campaign activity counts toward a group’s major purpose, and whether these are limited
20 to only Federal activity or may include non-Federal activity; (2) whether and how “major

² In *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (“*MCFL*”), the Supreme Court noted that the “central organizational purpose” of MCFL, a non-profit advocacy corporation, was issue advocacy, and therefore it did not meet the *Buckley* definition of a political committee, *i.e.*, it was not controlled by a candidate nor did it have as its major purpose the nomination or election of a candidate. 479 U.S. at 252 n.6. The *MCFL* Court also noted, however, that should the organization’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.” 479 U.S. at 262.

1 purpose” may be demonstrated through an examination of the group’s fundraising and/or
2 spending; (3) whether and how “major purpose” may be demonstrated through a group’s
3 public statements; and (4) whether and how a group’s decision to file for a Federal tax
4 exemption under section 501(c)(4) or 527 of the Internal Revenue Code affects its “major
5 purpose” under FECA.

6 Draft paragraph (a)(1) of section 100.5 sets forth a two-part test to determine
7 whether a committee, club, association, or other group of persons has formed a “political
8 committee.” The essence of the draft regulation, however, is contained in draft
9 paragraphs (a)(2) through (a)(6). Paragraph (a)(2) presents three ways in which any
10 organization would satisfy the “major purpose” test, and paragraphs (a)(3) through (a)(6)
11 establish an additional way that 527 organizations may satisfy the “major purpose” test.
12 Draft paragraph (a)(6) addresses 527 organizations that have both Federal and non-
13 Federal accounts.

14 **A. Nomination or Election of Any Federal Candidate**

15 The *Buckley* major purpose requirement—“the major purpose of which is the
16 nomination or election of a candidate”—could be read literally to apply to all
17 organizations that focus on nominating or electing either Federal or non-Federal
18 candidates. *Buckley*, 424 U.S. at 79. This Office has drafted the Final Rules, however, to
19 reflect a different interpretation of this language in *Buckley*. Because the Court was
20 providing a narrowing gloss on a term of art, “expenditure,” that by definition
21 encompasses activity that is for the purpose of influencing *Federal* elections, we draw
22 significant meaning from the context in which the word “candidate” was interpreted by
23 the Court. The word “candidate” was defined in that statute construed by the Court in

1 *Buckley* to mean “candidate for Federal office.” See 2 U.S.C. 431(b) (1976) (*reprinted in*
2 *Buckley*, 424 U.S. at 145). Thus, we read *Buckley* to require that an organization have as
3 its major purpose the nomination or election of any *Federal* candidate. This reading is
4 consistent with the subsequent decisions of the District of Columbia District Court in
5 *FEC v. Malenick*, 310 F. Supp.2d 230 (D.D.C. 2004) and *FEC v. GOPAC, Inc.*, 917 F.
6 Supp. 851 (D.D.C. 1996).³ Moreover, FECA focuses almost entirely on elections for
7 Federal office.

8 The attached draft Final Rules at 11 CFR 100.5(a)(1)(i) therefore incorporate the
9 *Buckley* test by requiring an organization to have “as its major purpose the nomination or
10 election of one or more candidates *for Federal office*.” (Emphasis added). Consequently,
11 the functional tests in paragraphs (a)(2), as well as the additional standard for 527
12 organizations in paragraphs (a)(3) through (a)(6), which are discussed below, are based
13 on the Federal/non-Federal distinction.

14 Under the draft Final Rules prepared by this Office, a committee, club,
15 association, or other group of persons will satisfy the major purpose test by either
16 publicly declaring that the purpose of the group is to influence Federal elections or by
17 spending or receiving money for certain specific purposes. This reflects the common
18 sense notion that the way any group demonstrates its purpose is either through what it
19 says or what it does. We conclude that these avowed purpose and monetary tests should
20 apply in the same way to all committees, clubs, associations, or other groups of persons,
21 regardless of how they are structured for tax purposes.

³ The Supreme Court’s subsequent decisions in *MCFL* and *McConnell* shed little light on this distinction.

1 **B. Public Statements of an Organization’s Purpose**

2 In drafting the proposed final rules, this Office reasoned that it is eminently fair to
3 impute the purpose of an organization, and therefore the purpose for which it gathers and
4 uses funds, from how the organization describes itself to the public. To avoid concerns
5 about the reliability of informal communications and misstatements by lower-level
6 employees, the proposed rule focuses only on communications authorized by the
7 organization’s decision-makers, such as statements of its officers and high-level
8 employees, and its formal filings with government agencies. All of these
9 communications are firmly within the group’s control. If an organization represents itself
10 to its supporters, or to State or Federal agencies, or the general public, as being formed to
11 elect or defeat candidates for Federal office, it makes little sense for the Commission to
12 allow the group to avoid political committee status simply by asserting a different major
13 purpose upon inquiry by the Commission.

14 The courts have made clear that an organization can satisfy the major purpose test
15 through its public statements of purpose. In *FEC v. Malenick*, 310 F. Supp.2d at 234-35,
16 the D.C. District Court reiterated its previous determination that an organization may
17 evidence its “major purpose” through its own materials and statements. *See id.* (citing
18 *FEC v. GOPAC*, 917 F. Supp. at 859 (“organization’s [major] purpose may be evidenced
19 by its public statements of its purpose or by other means”).) In *Malenick*, the district
20 court noted the organization’s announced “goal” of supporting the election of Republican
21 Party candidates for Federal office and its efforts to get prospective donors to consider
22 supporting Federal candidates. 310 F. Supp.2d at 235.

1 Paragraph (a)(2)(i) of the draft section 100.5 flows from this established case law,
2 as well as past Commission experience. Because the documents or statements must be of
3 sufficient weight to “demonstrate” the organization’s major purpose, the draft Final Rules
4 would not capture stray assertions or “puffing” by organization officials. Thus, the draft
5 Final Rules are more tailored than the rules proposed in the NPRM and rely on an
6 organization’s statements of legal significance. At the same time, the Commission would
7 retain discretion to assess the proper weight to be placed on particular statements and
8 whether they in fact demonstrate the major purpose of the organization.

9 **C. Percentage of Disbursements**

10 In addition to the avowed purpose test discussed above, this Office believes that
11 “major purpose” can and should be based on a percentage of an entity’s disbursements.
12 Both the Supreme Court and lower courts recognize that an organization’s disbursement
13 of its own funds is a meaningful indicator of the organization’s major purpose. *See*
14 *MCFL*, 479 U.S. at 262 (“should MCFL's independent spending become so extensive that
15 the organization's major purpose may be regarded as campaign activity, the corporation
16 would be classified as a political committee”); *FEC v. GOPAC*, 917 F. Supp. at 859.

17 We conclude that an organization’s “major” purpose should be measured
18 conservatively. Thus, the attached draft 11 CFR 100.5(a)(2)(ii) would require that the
19 percentage of spending on certain Federal election-related activities must be greater than
20 50% of the organization’s annual non-administrative, non-overhead disbursements.
21 Under this approach, an organization may have only one major purpose that is greater
22 than 50% of its overall purpose.

1 This Office is concerned that an alternative approach that would attempt to
2 characterize “major purpose” as the activity that represents the greatest percentage of the
3 overall disbursements, even if under 50%, would be complex and confusing. It would
4 necessitate difficult line drawing and create debate about appropriate categories for
5 specific activities and expenses. For example, an organization might theoretically have
6 ten separate purposes, with 19% of its disbursements made for the purpose of influencing
7 Federal elections. However, this organization’s major purpose could be influencing
8 Federal elections if the other disbursements are classified for particular purposes (*e.g.*,
9 9% influencing the election of State Candidate A, 9% influencing the election of State
10 Candidate B, 9% influencing the election of Mayoral Candidate C, *etc.*), but the major
11 purpose of the organization might be characterized as “influencing State and local
12 elections” if those three classes of disbursements are grouped together.

13 There are two critical components of the 50% disbursement test in the attached
14 draft Final Rules. The first component is a list of specific types of disbursements
15 counting toward the 50% threshold. The second component is the period of time during
16 which the percentage of disbursements would be measured.

17 **1. Categories of Disbursements**

18 The four categories of disbursements are contributions made by an organization,
19 costs of soliciting contributions, independent expenditures, and electioneering
20 communications. Proposed 11 CFR 100.5(a)(2)(ii)(A) through (D). This focuses on
21 communications and direct payments to candidates, and each of these specific categories
22 of Federal election spending is readily apparent and therefore not difficult to aggregate
23 and track.

1 This Office believes that electioneering communications should be used as an
2 indicator of a Federal major purpose and that such use would not be inconsistent with any
3 statutory provisions. Electioneering communications affect Federal elections because of
4 both their timing and their targeting to the relevant electorate. This impact provides a
5 reasonable basis for the Commission to consider electioneering communications as an
6 indicator of Federal major purpose.

7 In including electioneering communications in the list of measured disbursements,
8 we have attempted to avoid any perceived inconsistency with the statutory provision that
9 permits organizations to establish separate bank accounts to collect donations used to pay
10 for electioneering communications. *See* 2 U.S.C. 434(f)(2)(E). We also recognize the
11 unique characteristics of electioneering communications and believe that electioneering
12 communications alone should not be the basis of finding major purpose. Thus, the draft
13 Final Rules state that electioneering communications would not, without more,
14 demonstrate the major purpose of an organization. Consequently, an organization that
15 makes electioneering communications from a separate bank account established
16 specifically to fund electioneering communications would not become a political
17 committee without any other action. In addition, we recommends that the Commission
18 consider the funds in the separate electioneering communications bank account as part of
19 the organization's overall spending in determining whether it has crossed the 50%
20 threshold in the draft Final Rules.

21 By limiting the use of electioneering communications in the 50% major purpose
22 test in the manner described above, the draft Final Rules address the argument that
23 including electioneering communications would obviate the statutory provisions

1 permitting separate bank accounts to limit reporting. Organizations would remain free to
2 make electioneering communications without triggering political committee status as
3 long as they did not engage in other activities that, taken together with the electioneering
4 communications, evidence a purpose to influence a Federal election.

5 **2. Time Period for Measuring 50% Test**

6 The second critical component is the time period during which the aggregation of
7 the four types of payments is measured. The draft Final Rules would calculate the
8 percentage of disbursements based on any preceding twelve-month period. To minimize
9 the potential administrative burden of ongoing calculations, an organization would only
10 need to calculate its disbursement percentage once every quarter, rather than every week
11 or every month. Although this approach would require organizations to monitor their
12 disbursements on an ongoing basis, it would allow for a more accurate reflection of the
13 organization's activities during election and non-election years than the much-criticized
14 four-year lookback proposal included in the NPRM. The four-year lookback proposal is
15 not included in the draft Final Rules.

16 **D. Percentage of Contributions Received**

17 Although established organizations may readily demonstrate their major purpose
18 through disbursements, the major purpose of some newly formed organizations may not
19 be clear from their disbursements or statements of purpose alone. Furthermore, some
20 organizations may spend the majority of a twelve-month period, particularly during a
21 non-election year, gathering money for Federal election purposes without making any
22 significant disbursements. Because the major purpose of such groups would nevertheless
23 be the nomination or election of candidates for Federal office, we have concluded that it

1 is appropriate for the rule to include the amount of contributions received as a percentage
2 of all receipts as an indication of the organization's purpose. *See* draft 11 CFR
3 100.5(a)(2)(iii). As with the disbursements test, the total amount of contributions
4 received must exceed 50% of the organization's total receipts during any twelve-month
5 period to meet the major purpose test. Similar to the disbursements test, this twelve
6 month period would also be measured quarterly to reduce potential administrative
7 burdens.

8 **E. Fixed Dollar Amount Test Not Included**

9 The NPRM proposed one alternative in which an organization could satisfy the
10 major purpose test by spending more than \$50,000 on a combination of specified types of
11 disbursements. *See* proposed 100.5(a)(1)(iii), 69 Fed. Reg. 11736, 11756-57 (Mar. 11,
12 2004). A similar \$10,000 threshold was also proposed as a component of a public
13 statements test. *Id.* at 11,756.

14 The draft Final Rules do not incorporate any test relying on a fixed dollar
15 threshold. While a fixed dollar threshold might accurately measure whether a significant
16 amount of resources are devoted to a particular purpose, it is not a clear indication of an
17 organization's major purpose because it offers no insight into the proportion of overall
18 activity that such spending represents. As a number of commenters indicated, this test
19 would be easily satisfied by large organizations for which \$50,000 is a small percentage
20 of disbursements, and for that reason it would not accurately reflect the purpose of the
21 larger portion of disbursements. At the same time, this approach would be under-
22 inclusive with respect to organizations that have budgets of under \$50,000, but whose
23 sole purpose is the nomination or election of candidates for Federal office.

1 **F. 527 Organizations**

2 By definition, 527 organizations are entities that have as their primary purpose
3 the “influencing or attempting to influence the selection, nomination, election, or
4 appointment of any individual to any Federal, State, or local public office or office in a
5 political organization, or the election of Presidential or Vice-Presidential electors.” 26
6 U.S.C. 527(e). An entity organized as a tax-exempt 527 group can avoid taxes on its
7 income that might otherwise apply to its election-related activities. While all current
8 nonconnected political committees are 527 organizations, not all 527 organizations are
9 registered as political committees with the Commission. A number of 527 organizations
10 are focused on non-Federal elections or non-elected positions such as judgeships.

11 The NPRM proposed an approach under which 527 organizations, not specifically
12 exempt by the proposed rule, would satisfy the major purpose element of political
13 committee status. *See* Alternatives 2-A and 2-B, 69 Fed. Reg. 11,736 at 11,757.
14 Congress and the Commission have acknowledged tax status as an appropriate basis for
15 line drawing in a number of different areas. For example, the Commission exempted
16 501(c)(3) organizations, as a class, from the definition of “electioneering
17 communication” in 11 CFR 100.29. Congress has also drawn distinctions between 527
18 organizations and other organizations, including 501(c) organizations. In apparent
19 recognition of the primary purpose of 527 organizations, Congress prohibited political
20 party committees from soliciting funds or making or directing donations to *any* 527
21 organization. 2 U.S.C. 441i(d)(2). However, when Congress addressed solicitations for
22 and donations to 501(c) organizations it only applied the restrictions with respect to a
23 narrower group of 501(c) organizations “that make expenditures or disbursements in

1 connection with an election for Federal office (including expenditures or disbursements
2 for Federal election activity).” 2 U.S.C. 441i(d)(1).

3 A number of commenters argued that 527 status should not be a basis for
4 determining major purpose, observing that these organizations also engage in activities
5 that are not intended to influence elections. The draft Final Rules respond to this
6 concern in two ways: by requiring evidence of *Federal* activity in addition to 527 status
7 in 11 CFR 100.5(a)(3) and (a)(4) and by exempting groups whose activities are unrelated
8 to Federal elections in 11 CFR 100.5(a)(5). Furthermore, the mere fact that 527
9 organizations engage in activities that, while permissible, are tangential to the exempt
10 purpose of the organization does not reveal a different major purpose for the
11 organization.

12 This Office believes that it is advisable to clarify when 527 organizations are
13 required to register as political committees for two reasons. First, because all existing
14 nonconnected political committees are 527 organizations, focusing on these organizations
15 ensures that this rulemaking will have a predictable effect on existing organizations and
16 will not cause committees that currently register and report to the Commission as
17 political committees to cease doing so. Such a result would be contrary to the purposes
18 of the Act. Second, an organization’s decision to avail itself of 527 status is inherently
19 indicative of its choice to engage principally in electoral activity. It remains for the
20 Commission to determine whether the organization’s predominant focus is on Federal
21 elections or some other election, selection, nomination or appointment.

22 We do not, however, recommend that status as a 527 organization, by itself,
23 should satisfy the major purpose test. Rather, the draft Final Rules reflect an approach

1 whereby status as a 527 organization, only when coupled with evidence demonstrating a
2 focus on Federal candidates, would satisfy this test. Draft 11 CFR 100.5(a)(3) would
3 establish a separate 50% disbursement test for 527 organizations in existence for longer
4 than one year, while draft paragraph (a)(4) provides a nearly identical test that differs
5 only in that it applies a different time period for measuring the disbursements of 527
6 organizations in existence for less than one year. In addition, draft 11 CFR 100.5(a)(5)
7 exempts specific categories of 527 organizations from the additional 527 organization
8 rules.

9 Thus, while the draft Final Rules would capture organizations whose activities are
10 unquestionably Federal in nature, they are tailored to leave outside the scope of the rule
11 those groups that may engage in a small amount of activity focused on Federal elections.
12 This represents a distinct departure from the *per se* rule proposed in the NPRM that
13 would have determined that all 527 organizations satisfied the major purpose test by
14 virtue of their tax status, unless specifically excepted. *See* Alternatives 2-A and 2-B, 69
15 Fed. Reg. 11,736 at 11,757. Finally, in addition to the major purpose test specifically for
16 527 organizations, those organizations could satisfy the avowed purpose, percentage of
17 disbursements, or percentage of contributions tests in draft section 100.5(a)(2) as an
18 alternative means of satisfying the major purpose test.

19 **1. Rationale for a 50% test for 527 organizations.**

20 This Office views an organization's disbursement of funds as one reliable and
21 Supreme Court-approved measure of that organization's purpose. The draft Final Rules
22 therefore include a test that employs clear lines to establish a nexus between a group's
23 disbursements and Federal candidates to warrant the conclusion that the purpose of the

1 527 organization is to influence *Federal* elections. For the same reasons explained above
2 in reference to the generally applicable 50% test, this Office recommends a 50% test to
3 ensure that influencing *Federal* elections is an organization's *major* purpose, rather than
4 simply a substantial or significant purpose. Once a 527 organization directs more than
5 50% of its non-overhead, non-administrative disbursements to activities related to
6 Federal candidates, the major purpose of that group is clearly more focused on Federal
7 elections than other elections.

8 The proposed 50% test for 527 organizations is different than the 50% test
9 applicable to all organizations in 11 CFR 100.5(a)(2)(ii). While both tests focus on terms
10 that are already clearly defined, the 527 test focuses on a broader set of activities in light
11 of the implicit purpose of 527 organizations to influence elections or nominations.

12 **2. Components of the 50% test for 527 organizations.**

13 The 50% test for 527 organizations looks at five types of disbursements, which
14 overlap with the categories of disbursements used by the 50% test for all organizations.
15 The first two are contributions made to Federal candidates and solicitations for
16 contributions, which provide two obvious indications of involvement in Federal elections.
17 Therefore, the draft Final Rules include contributions made and direct solicitation costs
18 as components of the 50% test for 527 organizations. Both of these components are also
19 included in the separate 50% test for all organizations. *See* draft 11 CFR 100.5(a)(2)(ii).

20 The 50% test for 527 organizations would also include expenditures as its third
21 component indicating activity intended to influence a Federal election. Draft 11 CFR
22 100.5(a)(3)(iii). Expenditures are, by definition, payments or gifts of money or anything
23 of value "made for the purpose of influencing any election for Federal office." 2 U.S.C.

1 431(9); 11 CFR 100.111(a). As such, a 527 organization’s expenditures reflect its
2 attempt to influence *Federal* elections and such activity is an appropriate measure of the
3 organization’s purpose.

4 The fourth type of disbursement in the 50% test for 527 organizations is payments
5 for communications that refer to a clearly identified candidate for Federal office. Given
6 the election-influencing purpose of 527 organizations, it is reasonable to view
7 communications that reference a clearly identified Federal candidate as one indication
8 that the elections the organization intends to influence are Federal elections. As a bright
9 line standard, it gives clear notice to 527 groups that are not currently registered as
10 political committees.

11 The fifth and final component of the 50% test focuses on payments for voter
12 mobilization activities commonly referred to as types I and II Federal election activities
13 (“FEA”): Voter registration activity (11 CFR 100.24(b)(1)), voter identification (11 CFR
14 100.24(b)(2)(i)), generic campaign activity (11 CFR 100.24(b)(2)(i)), and get-out-the-
15 vote efforts (11 CFR 100.24(b)(2)(iii)). However, this category of disbursement would
16 not include payments for activities that qualify as non-partisan voter drives under 11 CFR
17 100.133. BCRA included circumstances whereby Federal election activities are subject
18 to regulation and thus deemed to have some influence on Federal elections under certain
19 circumstances. Including FEA in the 50% test is consistent with the FEA provisions in
20 BCRA that apply to party committees. By exempting non-partisan voter drives from the
21 scope of FEA, the draft Final Rules would tailor the FEA concepts to activities that are
22 related to Federal elections for purposes of determining Federal major purpose.
23 Furthermore, this draft rule is narrowly tailored to ensure that it would not capture groups

1 whose voter identification, voter registration and get-out-the-vote efforts are aimed at
2 elections in which no Federal candidates are on the ballot.

3 **3. Time Measurements for 50% test for 527 organizations.**

4 The draft rules for 527 organizations require new organizations that have not yet
5 existed for a full twelve-month period to measure the applicable disbursements as a
6 percentage of quarterly spending, rather than annual spending. The general 50% test for
7 all organizations does not include a quarterly disbursement test in order to avoid broadly
8 sweeping in activity by 501(c) organizations or other non-527 groups where one or two
9 quarters might not accurately reflect the major purpose of the organization. Any
10 examination of the election-focused 527 organizations, however, warrants closer
11 attention. The quarterly test for the group's first year will ensure that 527 organizations
12 do not avoid political committee status by dissolving without consequence after a full
13 year of political activity related to Federal elections, or simply delaying the consequence
14 of political committee status during an entire election year.

15 **4. Application of 50% Test to 527 Organizations With Multiple**
16 **Accounts.**

17 In some instances, one 527 organization might make disbursements from several
18 separate accounts. Draft 11 CFR 100.5(a)(6) clarifies how the 50% tests set forth in draft
19 11 CFR 100.5(a)(3) and (a)(4) would apply to these organizations. Under the draft Final
20 Rules, a 527 organization with multiple accounts satisfies the major purpose test if any
21 one of its accounts satisfies the applicable 50% test. This clarification prevents 527
22 organizations from circumventing the 50% tests by manipulating or creating various
23 accounts simply to avoid the 50% threshold and thereby avoid political committee status.

1 For example, assume that 527 Organization X operates with \$20,000 in disbursements
2 from its Federal Account A and \$5,000 in disbursements from its Non-Federal Account
3 B. If Organization X disburses \$12,000 of the \$20,000 from Account A for contributions
4 and independent expenditures, and disburses all \$5,000 from Account B for non-Federal
5 purposes, the result would be that Organization X has as its major purpose the
6 nomination or election of a candidate for Federal election regardless of the disbursements
7 made from Account B. Organization X may continue to use its Non-Federal Account for
8 non-Federal election purposes. All disbursements, contributions, expenditures, and
9 transfers by the 527 organization in connection with any Federal election shall be made
10 from its Federal account. *See* 11 CFR 102.5(a)(1)(i).

11 **II. Expenditures**

12 In addition to adding a “major purpose” test to the definition of “political
13 committee,” the NPRM also proposed several additions to the definition of a fundamental
14 term in FECA, “expenditure.” Here, in the draft Final Rules, this Office recommends one
15 carefully crafted amendment to the definition of “expenditure.” As the discussion below
16 illustrates, this change proposed to the rules defining “expenditure” depends on the
17 adoption of the changes proposed for the “major purpose” standard.

18 **Section 100.115 – Certain PASO Communications**

19 As noted above, FECA defines “expenditure” to include a payment for a
20 communication that is “made . . . for the purpose of influencing any election for Federal
21 office.” 2 U.S.C. 431(9)(A)(i). We propose to include in the definition of “expenditure”
22 payments for communications that promote, support, attack or oppose (“PASO”)⁴ a

⁴ “PASO” has emerged as a convenient acronym for “promote, support, attack or oppose.” While “PSAO” would mirror the order of the words in the statute, it is not as easy to pronounce.

1 clearly identified candidate for Federal office, but only when made by Federal political
2 committees and unregistered groups that meet the major purpose test. If a Federal
3 political committee—whose major purpose, by definition, is influencing elections—pays
4 for a communication that PASOs a clearly identified Federal candidate, then it is logical
5 to conclude that the payments for that communication were made for the purpose of
6 influencing the election of that candidate, and therefore are “expenditures.” In order for
7 this conclusion to apply to Federal political committees’ first \$1,000 of expenditures,
8 draft section 100.115 would also apply to nascent political committees, which are
9 unregistered groups that meet *Buckley’s* “major purpose” test as incorporated into draft
10 11 CFR 100.5(a)(1)(ii).

11 The PASO standard is found in BCRA, and is applied primarily to political party
12 committees and candidates as part of Federal Election Activity. 2 U.S.C. 431(20)(A)(iii).
13 But Congress also applied the PASO standard to the activity of nonprofits and other
14 organizations. For example, BCRA bars party committees from soliciting funds for, or
15 making or directing donations to, nonprofits that make expenditures or disbursements for
16 FEA, which includes public communications that PASO a Federal candidate. 2 U.S.C.
17 431(20)(A)(iii) and 441i(d)(1). BCRA also directed the Commission not to exempt any
18 communications that PASO a clearly identified Federal candidate from the electioneering
19 communication provisions. 2 U.S.C. 434(f)(3)(B)(iv). Finally, BCRA also included the
20 PASO standard in the “back-up” definition of “electioneering communications,” which,
21 had the primary definition been invalidated, would have applied to persons other than
22 political committees. 2 U.S.C. 434(f)(3)(A)(ii). Although the Supreme Court upheld the
23 primary definition of “electioneering communications” in *McConnell*, the back-up

1 definition reflects Congress' view of PASO as a workable, constitutionally sufficient
2 standard for persons other than political party committees and candidates. In sum, BCRA
3 did not confine its use of the PASO standard to political parties.

4 Nonetheless, the proposed use of the PASO standard has caused some to question
5 the clarity of the phrase and whether it provides sufficient guidance to the public on
6 which communications may be subject to regulation. Ideally, any regulation
7 implementing the statutory definition of "expenditure" as applied in the vital area of
8 communications would avoid any such concerns as it accomplishes two objectives:
9 giving effect to the full scope of the statute, and providing a clear line between
10 communications that are expenditures and those that are not.

11 The PASO standard withstood constitutional vagueness challenges. *McConnell*,
12 124 S.Ct. at 675 n.64. While the outer limits of the standard will be addressed by the
13 Commission and the courts, sharpening understanding of the term's application, the
14 Commission has already begun the process of providing contours to the PASO standard
15 as it is used in the statute's definition of the third type of FEA. The Commission has
16 provided examples of communications that PASO and others that do not in two Advisory
17 Opinions (AOs 2003-25 (Weinzapfel) and 2003-37 (ABC)). The Commission's
18 resolution of other pending advisory opinion requests may well shed additional light on
19 this subject.

20 Confining the PASO standard to Federal political committees and unregistered
21 groups with the major purpose of nominating or electing Federal candidates would
22 address concerns about the clarity of the PASO standard. Federal political committees
23 "by their very nature . . . are focused on the influencing of Federal elections," as the

1 Commission recently observed in an advisory opinion. AO 2003-37 at 3. There, the
2 Commission expressly relied on political committees’ “major purpose” as their crucial
3 feature in defeating any vagueness concerns that might arise from using PASO as the
4 content standard for expenditures in the context of communications. *See* AO 2003-37 at
5 3 (stating: “[a]s organizations whose ‘major purpose is the nomination or election of a
6 candidate,’ political committees do not raise the same concerns about vagueness that may
7 arise in other contexts when interpreting the definition of ‘expenditure’”). Draft section
8 100.115 follows from these conclusions by applying the standard to both Federal political
9 committees and to unregistered organizations so long as they satisfy the major purpose
10 test.⁵ In both cases, the organizations—the registered political committee and the group
11 that satisfies the “major purpose” test proposed here—are “in the business” of influencing
12 Federal elections and their communications demonstrably have that purpose and effect.

13 Confining the PASO standard to Federal political committees and unregistered
14 groups with the major purpose of nominating or electing candidates would also protect
15 social welfare groups from concerns about whether their communications meet the PASO
16 standard. Because such groups, if operating appropriately, would not satisfy any of the
17 “major purpose” tests we propose in draft 11 CFR 100.5(a), the PASO standard would
18 not apply to such groups under draft section 100.115.

19 Specifying in a regulation that payments for a Federal political committee’s
20 communications that PASO a clearly identified Federal candidate are expenditures will
21 provide political committees with the certainty inherent to a codified regulation. That

⁵ Because ABC was already a Federal political committee, this issue was not before the Commission in Advisory Opinion 2003-37.

1 certainty will only increase as the Commission continues to flesh out the meaning of
2 PASO.

3 **III. Contributions**

4 As noted above, this Office recommends one addition to the regulatory definition
5 of “contribution” in 11 CFR part 100, subpart B. We believe the addition would be
6 consistent with the statutory standard in reaching payments made for the purpose of
7 influencing Federal elections. This addition has several exceptions to avoid sweeping too
8 broadly.

9 **Section 100.57-- Funds Received in Response to Solicitations**

10 Draft section 100.57 would be a new rule that explains when funds received in
11 response to solicitations must be treated as “contributions” under FECA. Draft section
12 100.57 would classify all funds provided in response to a communication as Federal
13 contributions if the communication indicates that any portion of the funds received will
14 be used to support or oppose the election of a clearly identified Federal candidate.

15 The draft rule’s focus on the planned use of funds leaves the group issuing the
16 communication with complete control over whether its communications would trigger
17 draft section 100.57. For example, a group might issue a solicitation that could be
18 summarized as conveying the following:

19 “The President wants to cut taxes again, but his opponent, Senator
20 Hamilton, wants to raise them. Our group has been fighting for lower
21 taxes since 1960, and we will fight for the President’s tax cuts. Send us
22 money for our important work.”
23

24 Because this solicitation does not indicate that any funds received will be used to support
25 or oppose the election of any candidates, any funds received in response would not be

1 “contributions” under draft section 100.57. In contrast, a solicitation that would trigger
2 the draft rule might read as follows:

3 “The President wants to cut taxes again, but his opponent, Senator
4 Hamilton, wants to raise them. Our group has been fighting for lower
5 taxes since 1960, and we will fight to give the President four more years
6 to work on these tax cuts. Send us money for our important work.”
7

8 Because this solicitation would indicate that the funds received would be used to support
9 the election of a Federal candidate, any funds received in response to this solicitation
10 would be “contributions” under the proposed rule.

11 Most organizations devote careful attention to the content of their
12 communications with potential donors. These communications are commonly the
13 cornerstone of the relationship between a group and its donors, and their effectiveness is
14 vital to almost all organizations. Many groups’ solicitations will say nothing of an
15 electoral objective (*i.e.*, that any funds provided in response to the solicitation will be
16 used to support or oppose the election of Federal candidates). Communications that do
17 so, however, plainly seek funds “for the purpose of influencing Federal elections.” Thus,
18 the draft rule appropriately concludes that such funds meet the definition of
19 “contributions” under FECA.

20 The standard in draft section 100.57 is based on the Commission’s recent
21 conclusion in the ABC Advisory Opinion, *see* AO 2003-37 at 15 and 20, and it draws
22 support from a 1995 decision of the United States Court of Appeals for the Second
23 Circuit. *FEC v. Survival Education Fund, Inc.*, 65 F.3d 285 (2d Cir. 1995). In that case,
24 the court found that a July 1984 letter from nonprofit issue advocacy groups solicited
25 “contributions” under FECA because it included a statement “That . . . leaves no doubt
26 that the funds contributed would be used to advocate President Reagan’s defeat at the

1 polls, not simply to criticize his policies during the election year.” *Id.* at 295. According
2 to the court, the critical statement from the mailing was the following: “your special
3 election-year contribution today will help us communicate your views to hundreds of
4 thousands of members of the *voting public*, letting them know why Ronald Reagan and
5 his anti-people policies *must* be stopped.” *Id.* at 289 and 295 (first emphasis added by
6 court, second in original). The Second Circuit reached this conclusion despite the
7 inclusion in the letter of a suggestion that the funds would be used for issue advocacy.
8 The mailing included the following statement: “Here is my contribution . . . to help bring
9 the message of nuclear disarmament, nonintervention, and economic justice to the voting
10 public between now and November 1.” *Id.* at 289. The mailing described in *FEC v.*
11 *Survival Education Fund* would trigger section 100.57(a), if promulgated, and would
12 require the group issuing the mailing to treat all the funds received in response to the
13 mailing as “contributions” under FECA.

14 Draft section 100.57 includes two exceptions to ensure that this new rule would
15 not sweep beyond its intended scope. The first would exclude any solicitations from
16 joint fundraisers operated under current 11 CFR 102.17. *See* draft 11 CFR 100.57(a).
17 The second would provide that if the costs of a solicitation are allocable under 11 CFR
18 106.1, 106.6 or 106.7 because the solicitation also refers to at least one clearly identified
19 non-Federal candidate, only 50% of the proceeds of the solicitation need to be considered
20 Federal contributions. *See* draft 11 CFR 100.57(b)(2). For clarity, the draft rule would
21 also state that a solicitation that meets draft section 100.57(a) and refers to a political
22 party so that its costs are allocable under 11 CFR 106.6 or 106.7 is nonetheless subject to

1 the rule that all of its proceeds are “contributions” under FECA. *See* draft 11 CFR
2 100.57(b)(1).

3 **IV. Allocation of Expenses Between Federal and Non-Federal Activities by**
4 **Separate Segregated Funds and Nonconnected Committees**

5 Over the past ninety days, this Office has examined information regarding how
6 the current allocation system under current 11 CFR 106.6 has worked in the past ten
7 years by reviewing past FEC filings from separate segregated funds (“SSFs”) and
8 nonconnected committees. We have also considered the public comments received in
9 response to the allocation proposals in the NPRM. Based on a review of this information,
10 and a consideration of the policy rationales for various proposed changes to the allocation
11 regime in section 106.6, we present the attached draft Final Rules with the following key
12 features:

- 13 • The draft Final Rules would remove the “funds expended” ratio from 11 CFR
14 106.6(c) and replace it with a 50% flat minimum percentage;
- 15 • The draft Final Rules would apply the flat 50% ratio to administrative and generic
16 voter drive expenses as well as to a newly added category of allocable expenses –
17 public communications that refer to a political party but do not refer to any clearly
18 identified Federal or non-Federal candidates; and
- 19 • The draft Final Rules would provide for allocation of certain public
20 communications that refer to both political parties and clearly identified
21 candidates based upon whether the candidates are Federal, non-Federal, or both.

22 **A. Allocation Ratios for Administrative Expenses and Generic Voter**
23 **Drives (11 CFR 106.6(c))**

1 Under current section 106.6, SSFs and nonconnected committees that allocate
2 administrative expenses and the costs of generic voter drives must do so using the “funds
3 expended” method: a ratio of “Federal expenditures” to “total Federal and non-Federal
4 disbursements” made during the two-year election cycle.⁶ These committees are required
5 to estimate and report this ratio at the beginning of each Federal election cycle (on
6 Schedule H1 of FEC Form 3X) based on either their Federal and non-Federal
7 disbursements in a prior comparable election cycle or on their reasonable prediction of
8 their disbursements for the current election cycle. 11 CFR 106.6(c)(1). The ratio must be
9 adjusted and reported during the election cycle to reflect the committees’ actual
10 disbursements. 11 CFR 106.6(c)(2).

11 Based on a review of past FEC filings by SSFs and nonconnected committees,
12 and the public comments received on the NPRM, this Office recommends fundamentally
13 changing these allocation rules by removing the funds expended method for calculating
14 the allocation ratios for administrative and generic voter drive expenses. Instead, the
15 draft Final Rules would establish a flat minimum 50% percentage for allocation of these
16 costs for reasons stated below.

17 **1. Replacing the “funds expended” ratio method with a flat**
18 **percentage**

19 In examining public disclosure reports filed by SSFs and nonconnected
20 committees, we discovered that very few committees choose to allocate their

⁶ The “Federal expenditures” in the numerator of the allocation ratio is limited to amounts contributed to or otherwise spent on behalf of specific Federal candidates. *See* 11 CFR 106.6(c)(1). Similarly, the “total Federal and non-Federal disbursements” in the denominator is limited to amounts contributed to or otherwise spent on behalf of specific Federal and non-Federal candidates. *Id.* In AO 2003-37, the Commission stated that both the numerator and the denominator must include PASO communications.

1 administrative and generic voter drive expenses under section 106.6. Anecdotal evidence
2 suggests that some committees, including those that allocate, are confused as to how the
3 funds expended ratio should be calculated and adjusted throughout the cycle. In addition,
4 calculating and adjusting the funds expended ratio may pose an administrative burden to
5 some committees, particularly those with limited resources, because compliance requires
6 committees to monitor continually their Federal expenditures and non-Federal
7 disbursements, compare their current spending to the ratio reported at the start of the
8 election cycle, and then adjust the ratio to reflect their real-world behavior. Adding to
9 that burden is the requirement that committees must transfer funds within 60 days
10 whenever they adjust their funds expended ratio. The confusion and administrative
11 burden associated with the funds expended method may explain why, historically,
12 committees have not adjusted their allocation ratios during an election cycle, or from
13 election cycle to election cycle.

14 Approximately 10 commenters addressed the specific allocation proposals in the
15 NPRM. Generally speaking, these commenters were not supportive of the allocation
16 system in current section 106.6 and agreed that some change to the current system is
17 needed. In fact, two commenters recommended completely revamping the allocation
18 scheme by removing the funds expended method.

19 In the NPRM, the Commission proposed to use a “funds expended method plus a
20 minimum percentage” approach in calculating the allocation ratio. One commenter
21 argued that this approach would be very burdensome for political committees. Given the
22 complexity of current section 106.6 and the confusion regarding the proper application of
23 this rule exhibited by some SSFs and nonconnected committees, and the administrative

1 burden of compliance, the Commission should strive to simplify, not further complicate,
2 the allocation system. Thus, this Office does not recommend that the Commission retain
3 the funds expended method in any form.

4 Instead, a flat minimum percentage would make the allocation scheme easier to
5 understand and apply, while preserving the overall rationale underlying allocation. The
6 flat minimum percentage would eliminate the requirement—and, thus, the accompanying
7 burdens—of calculating the ratio and monitoring it continuously for accuracy.
8 Furthermore, the Commission’s experience with State and local party allocation ratios in
9 11 CFR 106.7 and 300.33 indicates that flat minimum allocation ratios are easier for
10 committees to comprehend and for the Commission to administer. A flat minimum
11 Federal percentage will also result in less complex, less intrusive, and speedier
12 enforcement actions, thereby enhancing compliance with the law. Finally, committees
13 would retain the flexibility to allocate more than the flat minimum percentage of these
14 expenses to their Federal account if that is in the best interests of their organization.
15 Consequently, this Office recommends that the Commission replace the funds expended
16 method of allocation with a flat minimum allocation percentage.

17 **2. The new 50% Federal funds requirement**

18 Neither FECA nor any court decision dictates how the Commission should
19 determine appropriate allocation ratios. In fact, at least one court has recognized that the
20 Commission has the authority to establish the Federal funds percentage for administrative
21 and generic voter drive expenses it deems best. *See Common Cause v. FEC*, 692 F.
22 Supp. 1391, 1396 (D.D.C. 1987). For the reasons stated below, we recommend that the
23 Commission establish the flat minimum percentage at 50%.

1 A 50% allocation ratio recognizes that SSFs and nonconnected committees are
2 “dual purpose” in that they engage in both Federal and non-Federal election activities.
3 These committees have registered as *Federal* political committees with the FEC,
4 therefore, this Office believes that these dual purpose committees should not pay for
5 administrative expenses, generic voter drives and public communications that refer to a
6 political party with more non-Federal funds than Federal funds. However, the 50%
7 figure also recognizes that some Federal SSFs and nonconnected committees conduct a
8 significant amount of non-Federal activity in addition to the committees’ Federal
9 spending. This Office believes this approach is preferable to importing percentages used
10 in other contexts for other dissimilar entities, such as the old national party committee
11 ratios repealed by BCRA or the current ratios applicable to State and local party
12 committees, as suggested in the NPRM.

13 **3. Impact of these changes on SSFs and nonconnected committees**

14 The past decade of FEC filings indicate that most SSFs and nonconnected
15 committees do not allocate under section 106.6(c). In fact, fewer than 2% of all
16 registered non-party political committees have filed H1 and H4 schedules allocating
17 administrative and generic voter drive expenses under section 106.6(c) in each election
18 cycle since these regulations were made effective in 1991. Any SSF or nonconnected
19 committee that is not allocating under section 106.6 is presumably already using 100%
20 Federal funds for these expenses, except where those expenses are paid by other entities
21 in accordance with the Act and Commission regulations, such as an SSF’s connected
22 organization paying its administrative expenses. Thus, only a small fraction of SSFs and

1 nonconnected committees would be affected by removing the funds expended method
2 and replacing it with a flat percentage in section 106.6.

3 Even for those SSFs and nonconnected committees that are currently allocating,
4 the impact of the draft Final Rules will not be substantial. Our review of past FEC filings
5 shows that currently almost half of these committees are already paying for these
6 expenses with at least 50% Federal funds under the current system. These committees
7 would not need to adjust their payments under the 50% flat percentage method in the
8 draft Final Rules. Moreover, the actual dollar amounts of non-Federal funds that were
9 spent in past cycles on administrative and generic voter drive expenses under section
10 106.6(c), and which would have to be partially replaced with Federal funds under the
11 draft Final Rules, is relatively low. With the exception of one or two committees per
12 cycle whose spending is out of line with other SSFs and nonconnected committees, the
13 draft Final Rules would affect each committee by requiring only a minimal increase in
14 Federal funds expended. Additionally, these amounts are not high compared to total
15 disbursements from these committees' Federal accounts in an election cycle (and would
16 be even smaller if disbursements from non-Federal accounts are taken into
17 consideration). Thus, the draft Final Rules would not impose a significant fundraising
18 burden on these committees.

19 Most commenters on the NPRM argued that any changes made effective before
20 the general election on November 2, 2004 would cause great disruption to committees
21 and other organizations. Responding to these concerns, the draft Final Rules amending
22 section 106.6 would not take effect until January 1, 2005. This delayed effective date
23 would significantly lessen the burden on SSFs and nonconnected committees and would

1 allow for an orderly phase-in of the new rules in two ways. First, the committees may
2 “close out” the 2003-2004 election cycle by making final adjustments to their section
3 106.6(c) ratios and any final transfers of money between Federal, non-Federal, and
4 allocation accounts. Then, committees may start fresh in January 2005 with the new
5 rules requiring at least 50% Federal funds for these expenses. Second, this delayed
6 effective date provides over four months for the affected committees to make whatever
7 internal changes are necessary to comply with the new rules.

8 **B. Allocation of Public Communications that Refer to Political Parties,**
9 **or Both Political Parties and Candidates (11 CFR 106.6(f))**

10 In addition to applying a flat 50% minimum allocation percentage for
11 administrative expenses and generic voter drives, the draft Final Rules specifically
12 address three types of communications by SSFs and nonconnected committees, as
13 described in draft section 106.6(b)(4) through (6).⁷ The draft Final Rules would apply to
14 public communications, as defined in 11 CFR 100.26, that refer to:

- 15 • A political party, but do not refer to a clearly identified Federal or non-
16 Federal candidate (106.6(b)(4));
- 17 • A political party and one or more clearly identified Federal candidates, but
18 do not refer to any clearly identified non-Federal candidates (106.6(b)(5));
19 and
- 20 • A political party and one or more clearly identified non-Federal candidates,
21 but do not refer to any clearly identified Federal candidates (106.6(b)(6)).

⁷ In a further effort to simply the allocation rules, the draft Final Rules collapse the two sets of the costs to be allocated in section 106.6(b)(1) and (2) into a single list applicable to both SSFs and nonconnected committees. The revised list still makes clear that SSFs may have the costs of administrative expenses and fundraising programs paid by their connected organization.

1 The draft Final Rules would also direct SSFs and nonconnected committees to use
2 the time/space allocation method in section 106.1 for public communications that refer to
3 a political party, to at least one clearly identified Federal candidate, and to at least one
4 clearly identified non-Federal candidate. *See* draft section 106.6(f)(3). These sections
5 differ from the approach in Advisory Opinion 2003-37, which requires political
6 committees to allocate public communications that promote, support, attack, or oppose
7 political parties and Federal candidates. The draft Final Rules, instead, incorporate the
8 “refer to a clearly identified candidate” standard, which should be easy for SSFs and
9 nonconnected committees to understand and comply with. Given the Federal election-
10 influencing purpose of SSFs and nonconnected committees, it is reasonable to view their
11 communications referring to a political party and/or a clearly identified Federal candidate
12 as an indication that the elections these Federal committees intend to influence are
13 Federal elections.

14 First, public communications that refer to a political party without referring to any
15 clearly identified Federal or non-Federal candidates would be subject to the new 50% flat
16 minimum percentage in draft 11 CFR 106.6(c). Similar to the administrative expenses
17 and generic voter drives (which may refer to a party) also allocated under section
18 106.6(c), these references solely to a political party are inherently influencing both
19 Federal and non-Federal elections. Therefore, the 50% Federal funds requirement
20 reflects the dual nature of the communication. As with other expenses under draft section
21 106.6(c), an SSF or nonconnected committee could choose to allocate more than 50% of
22 the costs of any such public communication to its Federal account, if it wished to do so.

1 Second, where the public communications refer to a political party, and either a
2 Federal or non-Federal candidate, but not both, this Office views these communications
3 as “candidate-driven:” the Federal or non-Federal nature of the political party reference
4 is determined by whether the clearly identified candidates in the communication are
5 Federal or non-Federal. Thus, public communications that refer to a political party and
6 only clearly identified Federal candidate(s) would be required to be paid for with 100%
7 Federal funds. *See* draft section 106.6(f)(1). Permitting these communications to be paid
8 for with some non-Federal funds based on a cursory reference to a political party would
9 invite circumvention of the intent of the allocation scheme.

10 In contrast, public communications that refer to a political party and only clearly
11 identified non-Federal candidate(s) could be paid for with 100% non-Federal funds. *See*
12 draft section 106.6(f)(2). SSFs and nonconnected committees would again be free to pay
13 for these communications referring to non-Federal candidates partly or entirely with
14 Federal funds, but would not be required to do so. Finally, public communications that
15 refer to a political party and to both Federal and non-Federal candidates would be subject
16 to time/space allocation under current 11 CFR 106.1 without regard to the portion
17 referring to the party. *See* draft section 106.6(f)(3).

18 The draft Final Rules are simpler than the approach taken in Advisory Opinion
19 2003-37, which required a combined application of the time/space allocation method
20 under 11 CFR 106.1 and the funds expended method under 11 CFR 106.6 for most of
21 these mixed public communications. Instead of this complicated two-step methodology,
22 draft section 106.6(f) would be easier for SSFs and nonconnected committees to apply to
23 their communications. The candidate-driven approach for these public communications,

1 coupled with the removal of the funds expended method in favor of a flat percentage
2 method, reduces the amount of recordkeeping, tracking, and calculations that SSFs and
3 nonconnected committees would be required to do to properly allocate administrative,
4 generic voter drive, and public communication expenses under 11 CFR 106.6.

5 The revised 11 CFR 106.6 allocation regulations would reduce the burden of
6 compliance on SSFs and nonconnected committees and better serve the original intent of
7 the allocation system. Incorporation of certain public communications into the allocation
8 regulation provides guidance to committees that make such communications. This Office
9 believes that these draft Final Rules best resolve the problems with the current allocation
10 scheme revealed through reviewing past FEC filings when considering the issues raised
11 by the commenters on the NPRM.

12 **V. Severability of the draft Final Rules**

13 This Office recommends that the Commission adopt the draft Final Rules as a
14 whole because they would operate most effectively that way.⁸ Should the Commission
15 decide to approve only some of the draft Final Rules, we have identified two draft
16 sections that could operate independently and therefore could be adopted separately, even
17 if the Commission does not adopt all of the draft final regulations.

18 First, draft section 100.57, concerning funds received in response to solicitations
19 that indicate the funds received will be used to support a Federal candidate's election,
20 could operate independently of the other changes in the draft Final Rules. Those other
21 changes would not directly affect what funds a recipient must consider contributions.

⁸ Should the Commission adopt the draft Final Rules, we request authority to prepare the necessary substantive and conforming changes in 11 CFR Parts 102, 104 and 106, including 11 CFR 102.5.

1 Second, the proposed changes to the allocation system in draft section 106.6 could
2 stand alone. With or without the proposed changes to the major purpose test or to the
3 definitions of “expenditure” or “contribution,” the allocation scheme in section 106.6 will
4 continue to operate, and the recommended changes to the allocation regulations in section
5 106.6 do not depend on adoption of the other draft Final Rules.

6 Unlike the draft Final Rules pertaining to solicitation and allocation, the draft
7 Final Rules on major purpose and PASO communications are dependent on each other.
8 Whether a PASO communication is an expenditure depends on whether the person
9 making the PASO communication is a political committee or meets one of the major
10 purpose tests. This also affects whether PASO communications count towards the \$1,000
11 expenditure threshold for political committee status. Consequently, the draft Final Rules
12 on major purpose and PASO communications should be considered together.
13 Furthermore, the various components of the major purpose rule are inter-dependent and
14 their separation could lead to inconsistent or anomalous results.

15 **RECOMMENDATION**

16 The Office of General Counsel recommends that the Commission approve the
17 attached draft Final Rules and direct the Office of General Counsel to draft the
18 Explanation and Justification for Commission approval.

19

1 **PART 100 – SCOPE AND DEFINITIONS (2 U.S.C. 431)**

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

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

4 2. In section 100.5, paragraph (a) is revised to read as follows:

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

6 Political Committee means any group ~~meeting one of the following conditions:~~
7 described in paragraphs (a), (b), (c), (d) or (e) of this section.

8 (a) (1) Non-connected committees. Except as provided in ~~41 CFR~~
9 ~~100.5~~paragraphs (b), (c), and (d) of this section, political committee means
10 any committee, club, association, or other group of persons ~~which that:~~

11 (i) During one calendar year, receives contributions aggregating in
12 excess of \$1,000 or ~~which makes expenditures aggregating in~~
13 excess of \$1,000; ~~and during a calendar year is a political~~
14 committee.

15 (ii) Has as its major purpose the nomination or election of one or more
16 candidates for Federal office.

17 (2) Major purpose. A committee, club, association or other group of persons,
18 including 527 organizations, has the nomination or election of one or more
19 candidates for Federal office as its major purpose if it satisfies any of the
20 following conditions:

21 (i) Statements of the committee, club, association or other group of
22 persons, demonstrate that its major purpose is to nominate, elect,

1 or defeat, one or more candidates for Federal office so long as the
2 statements are:

3 (A) Contained in organizational documents, which include but
4 are not limited to charters and bylaws;

5 (B) On the official website of the committee, club, association
6 or other group of persons;

7 (C) Contained in a filing with a government agency;

8 (D) Contained in fundraising solicitations;

9 (E) Contained in public communications, as defined in 11 CFR
10 100.26; or

11 (F) Public statements made by or on behalf of any officer,
12 director, executive director, or partner, or the equivalent of
13 any of these positions, of the committee, club, association
14 or other group of persons;

15 (ii) During any twelve-month period, as calculated on a quarterly
16 basis, more than fifty percent [50%] of the total disbursements of
17 the committee, club, association or other group of persons,
18 excluding disbursements for administrative and overhead
19 expenses, is composed of any combination of the following funds,
20 but not entirely from funds in paragraph (a)(2)(ii)(D) of this
21 section:

22 (A) Contributions (including coordinated expenditures and other
23 in-kind contributions);

- 1 (B) Direct costs of soliciting contributions;
- 2 (C) Independent expenditures, as defined in 11 CFR 100.16; and
- 3 (D) Payment for an electioneering communication, as defined
- 4 in 11 CFR 100.29; or

5 (iii) During any twelve-month period, as calculated on a quarterly basis,
6 more than fifty percent [50%] of the total receipts of the committee,
7 club, association or other group of persons is composed of
8 contributions.

9 (3) Additional rule for 527 organizations existing for one year or longer.
10 Except as provided in paragraph (a)(5) of this section, a committee, club,
11 association or other group of persons organized under Section 527 of the
12 Internal Revenue Code, 26 U.S.C. 527, has the nomination or election of
13 one or more candidates for Federal office as its major purpose if, during
14 any twelve-month period as calculated on a quarterly basis, more than fifty
15 percent [50%] of its total disbursements, excluding disbursements for
16 administrative and overhead expenses, is composed of any combination of
17 the following funds:

- 18 (i) Contributions (including coordinated expenditures and other in-kind
- 19 contributions);
- 20 (ii) Direct costs of soliciting contributions;
- 21 (iii) Expenditures;
- 22 (iv) Payments for communications that clearly identify one or more
- 23 candidates for Federal office;

1 (v) Payments for the Federal election activities described in 11 CFR
2 100.24(b)(1) and (2), that are not exempt under 11 CFR 100.133.

3 (4) Additional rule for 527 organizations existing for less than one year.
4 Except as provided in paragraph (a)(5) of this section, a committee, club,
5 association or other group of persons organized under Section 527 of the
6 Internal Revenue Code, 26 U.S.C. 527, has the nomination or election of
7 one or more candidates for Federal office as its major purpose if, during
8 any calendar quarter, more than fifty percent [50%] of its total
9 disbursements, excluding disbursements for administrative and overhead
10 expenses, is composed of any combination of the funds described in
11 paragraphs (a)(3)(i) through (v) of this section.

12 (5) Exceptions to 527 rules. Paragraphs (a)(3) and (a)(4) of this section do not
13 apply where the committee, club, association or other group of persons is
14 any of the following:

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

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

20 (iii) A committee, club, association or other group of persons that is
21 organized and operated exclusively for any of the following
22 purposes:

- 1 (A) Influencing the nomination or election of one or more
2 candidates to non-Federal offices;
- 3 (B) Influencing one or more state ballot initiatives, referenda,
4 constitutional amendments, or bond issues; or
- 5 (C) Influencing the selection or appointment of one or more
6 individuals to non-elected offices, or the nomination,
7 election, selection, or appointment of one or more
8 individuals to leadership positions within a political party.

9 (6) 527 organizations with multiple accounts. Any committee, club,
10 association or other group of persons that is organized under Section 527
11 of the Internal Revenue Code, 26 U.S.C. 527, and has more than one
12 account has the nomination or election of one or more candidates for
13 Federal office as its major purpose if the disbursements from any one
14 account, by itself, satisfy either of the tests in paragraphs (a)(3) or (a)(4) of
15 this section.

16 * * * * *

17 3. Section 100.57 is added to subpart B to read as follows:

18 **§ 100.57 Funds received in response to solicitations.**

19 (a) Treatment as contributions. Except as provided in 11 CFR 102.17, a gift,
20 subscription, loan, advance, or deposit of money or anything of value made by any
21 person in response to any communication is a contribution to the person making the
22 communication if the communication indicates that any portion of the funds received will
23 be used to support or oppose the election of a clearly identified Federal candidate.

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

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

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

14 4. Section 100.115 is added to subpart D to read as follows:

15 **§ 100.115 Certain PASO communications.**

16 A purchase, payment, distribution, loan, advance, deposit, or gift of money or
17 anything of value, made for any communication that promotes, supports, attacks, or
18 opposes a clearly identified candidate for Federal office is an expenditure when made by,
19 or on behalf of:

20 (a) A political committee, as defined in 11 CFR 100.5; or

21 (b) A committee, club, association, or other group of persons for which the
22 nomination or election of one or more Federal candidates is its major
23 purpose. See 11 CFR 100.5(a)(1)(ii).

1 **PART 106 – ALLOCATIONS OF CANDIDATE AND COMMITTEE**
2 **ACTIVITIES**

3 5. The authority citation for part 106 continues to read as follows:

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

5 6. Section 106.6 is amended by:

6 a. Removing the words “(c) and (d)” from paragraph (a) and adding in their
7 place the words “(c), (d), and (f)”;

8 b. Removing the words “or (b)(1)(i)” from paragraphs (a) and (e);

9 c. Removing the citation “102.5(b)(1)(ii)” from paragraph (a) and adding in its
10 place the citation “102.5(a)(1)(ii)”;

11 d. Revising paragraphs (b), (c), and (e)(2)(ii)(B) and adding paragraph (f) to read
12 as follows:

13 **§ 106.6 Allocation of expenses between federal and non-federal activities by**
14 **separate segregated funds and nonconnected committees.**

15 * * * * *

16 (b) Costs to be allocated ~~(1) Separate segregated funds.~~ Separate segregated funds
17 and nonconnected committees that make disbursements in connection with ~~f~~Federal and
18 non-~~f~~Federal elections shall allocate expenses for the following categories of activity:

19 (1)(i) Administrative expenses including rent, utilities, office supplies, and
20 salaries not attributable to a clearly identified candidate, ~~if such expenses~~
21 ~~are not paid by the separate segregated fund's connected organization;~~
22 except that for a separate segregated fund such expenses may be paid
23 instead by its connected organization;

1 ~~(2)(ii)~~ The direct costs of a fundraising program or event including
2 disbursements for solicitation of funds and for planning and administration
3 of actual fundraising events, where ~~f~~Federal and non-~~f~~Federal funds are
4 collected through such program or event, if such expenses are not paid by
5 the separate segregated fund's connected organization; and except that for
6 a separate segregated fund such expenses may be paid instead by its
7 connected organization;

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

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

14 ~~(5)~~ Public communications that refer to a political party, and refer to one or
15 more clearly identified Federal candidates, but do not refer to any clearly
16 identified non-Federal candidates; and

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

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

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

4 (ii) ~~The direct costs of a fundraising program or event~~
5 ~~including disbursements for solicitation of funds and for planning~~
6 ~~and administration of actual fundraising events, where Federal and~~
7 ~~non-Federal funds are collected through such program or event;~~
8 ~~and~~

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

14 (c) Method for allocating administrative expenses, and costs of generic voter drives,
15 and certain public communications. Nonconnected committees and separate segregated
16 funds shall ~~allocate~~ pay their administrative expenses, ~~and costs of generic voter drives,~~
17 ~~as described in paragraph (b) of this section, and costs of public communications that~~
18 refer to any political party, as described in paragraphs (b)(1), (b)(3), or (b)(4) of this
19 section, according to the funds expended method, described in paragraphs (c)(1) and (2)
20 as follows: with at least 50 percent Federal funds, as defined in 11 CFR 300.2(g).

21 (1) ~~Under this method, expenses shall be allocated based on the ratio of~~
22 ~~Federal expenditures to total Federal and non-Federal disbursements made~~
23 ~~by the committee during the two-year Federal election cycle. This ratio~~
24 ~~shall be estimated and reported at the beginning of each Federal election~~
25 ~~cycle, based upon the committee's Federal and non-Federal disbursements~~
26 ~~in a prior comparable Federal election cycle or upon the committee's~~
27 ~~reasonable prediction of its disbursements for the coming two years. In~~

1 calculating its Federal expenditures, the committee shall include only
2 amounts contributed to or otherwise spent on behalf of specific Federal
3 candidates. Calculation of total Federal and non-Federal disbursements
4 shall also be limited to disbursements for specific candidates, and shall not
5 include overhead or other generic costs.

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

13 * * * * *
14 (e) * * * * *
15 (2) * * * * *
16 (ii) * * * * *

17 (B) Except as provided in paragraph (d)(2) of this section or in
18 11 CFR part 102, such funds may not be transferred more
19 than 10 days before or more than 60 days after the
20 payments for which they are designated are made.

21 * * * * *
22 (f) Payments for public communications that refer to a political party and one or
23 more clearly identified Federal or non-Federal candidates. Nonconnected committees
24 and separate segregated funds shall pay for the costs of all public communications that
25 refer to a political party, except those described in paragraph (b)(4) of this section as
26 follows:

1 (1) Public communications that refer to a political party and one or more
2 clearly identified Federal candidates, but do not refer to any clearly
3 identified non-Federal candidates, as described in paragraph (b)(5) of this
4 section, shall be paid 100 percent from the Federal account of the
5 nonconnected committee or separate segregated fund.

6 (2) Public communications that refer to a political party and one or more
7 clearly identified non-Federal candidates, but do not refer to any clearly
8 identified Federal candidates, as described in paragraph (b)(6) of this
9 section, may be paid 100 percent from the non-Federal account of the
10 nonconnected committee or separate segregated fund.

11 (3) Public communications that refer to a political party, one or more clearly
12 identified Federal candidates, and also refer to one or more clearly
13 identified non-Federal candidates shall be allocated under 11 CFR 106.1
14 as expenditures or disbursements on behalf of the clearly identified
15 candidates, without regard to the portion of the communication that refers
16 to a political party.