Rules and Regulations

Federal Register
Vol. 72, No. 25
Wednesday, February 7, 2007

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

NUCLEAR REGULATORY COMMISSION

10 CFR Part 72

RIN 3150–AH93

List of Approved Spent Fuel Storage Casks: NUHOMS HD® Addition; Correction

AGENCY: Nuclear Regulatory Commission.

ACTION: Correcting amendment.

SUMMARY: This document corrects a final rule appearing in the **Federal Register** on December 11, 2006 (71 FR 71463) to add the NUHOMS® HD cask system to the list of approved spent fuel storage casks. This action is necessary to correct an erroneous date.

DATES: *Effective Date:* January 10, 2007.

FOR FURTHER INFORMATION CONTACT: Jayne McCausland, telephone 301–415–6219, Office of Federal and State Materials and Environmental Management Programs, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

SUPPLEMENTARY INFORMATION: On December 11, 2006 (71 FR 71463), Certificate of Compliance 1030 was added to the list of approved spent fuel storage casks. The December 11, 2006, document contained an incorrect Certificate Expiration Date. This document corrects that date.

List of Subjects in 10 CFR Part 72

Administrative practice and procedure, Criminal penalties, Manpower training programs, Nuclear materials, Occupational safety and health, Penalties, Radiation protection, Reporting and recordkeeping requirements, Security measures, Spent fuel, Whistleblowing.

■ Accordingly, 10 CFR part 72 is corrected by making the following correcting amendment.

PART 72—LICENSING REQUIREMENTS FOR THE INDEPENDENT STORAGE OF SPENT NUCLEAR FUEL, HIGH-LEVEL RADIOACTIVE WASTE AND REACTOR-RELATED GREATER THAN CLASS C WASTE

■ 1. The authority citation for 10 CFR part 72 continues to read as follows:

Authority: Secs. 51, 53, 57, 62, 63, 65, 69, 81, 161, 182, 183, 184, 186, 187, 189, 68 Stat. 929, 930, 932, 933, 934, 935, 948, 953, 954, 955, as amended, sec. 234, 83 Stat. 444, as amended (42 U.S.C. 2071, 2073, 2077, 2092, 2093, 2095, 2099, 2111, 2201, 2232, 2233, 2234, 2236, 2237, 2238, 2282); sec. 274, Pub. L. 86–373, 73 Stat. 688, as amended (42 U.S.C. 2021); sec. 201, as amended, 202, 206, 88 Stat. 1242, as amended, 1244, 1246 (42 U.S.C. 5841, 5842, 5846); Pub. L. 95–601, sec. 10, 92 Stat. 2951, as amended by Pub. L. 102–486, sec. 7902, 106 Stat. 3123 (42 U.S.C. 5851); sec. 102, Pub. L. 91–190, 83 Stat. 853 (42 U.S.C. 4332); secs. 131, 132, 133, 135, 137, 141, Pub. L. 97–425, 96 Stat. 2229, 2230, 2232, 2241, sec. 148, Pub. L. 100–203, 101 Stat. 1330–235 (42 U.S.C. 10151, 10152, 10153, 10155, 10157, 10161, 10168); sec. 1704, 112 Stat. 2750 (44 U.S.C. 3504 note); sec. 651(e), Pub. L. 109–58, 119 Stat. 806–810 (42 U.S.C. 2014, 2021, 2021b, 2111).

Section 72.44(g) also issued under secs. 142(b) and 148(c), (d), Pub. L. 100–203, 101 Stat. 1330–232, 1330–236 (42 U.S.C. 10162(b), 10168(c), (d)). Section 72.46 also issued under sec. 189, 68 Stat. 955 (42 U.S.C. 2239); sec. 134, Pub. L. 97–425, 96 Stat. 2230 (42 U.S.C. 10154). Section 72.96(d) also issued under sec. 145(g), Pub. L. 100–203, 101 Stat. 1330–235 (42 U.S.C. 10165(g)). Subpart J also issued under secs. 2(2), 2(15), 2(19), 117(a), 141(h), Pub. L. 97–425, 96 Stat. 2202, 2203, 2204, 2222, 2224 (42 U.S.C. 10101, 10137(a), 10161(h)). Subparts K and L are also issued under sec. 133, 98 Stat. 2230 (42 U.S.C. 10153) and sec. 218(a), 96 Stat. 2252 (42 U.S.C. 10198).

■ 2. In § 72.214, Certificate of Compliance 1030 is corrected by revising the Certificate Expiration date to read as follows:

§ 72.214 List of approved spent fuel storage casks.

* * * * *

Certificate Number: 1030.

* * * * *

Certificate Expiration date: January 10, 2027.

* * * * *

Dated at Rockville, Maryland, this 1st day of February 2007.

For the Nuclear Regulatory Commission.

Michael T. Lesar,

Federal Register Liaison Officer.

[FR Doc. E7–2035 Filed 2–6–07; 8:45 am]

BILLING CODE 7590–01–P

FEDERAL ELECTION COMMISSION

11 CFR Part 100

[Notice 2007–3]

Political Committee Status

AGENCY: Federal Election Commission.

ACTION: Supplemental Explanation and Justification.

SUMMARY: In November 2004, the Federal Election Commission (''FEC'') adopted new regulations codifying when an organization's solicitations generate ''contributions'' under the Federal Election Campaign Act (''FECA'' or ''the Act''), and consequently, require that organization, regardless of tax status, to register as a political committee with the FEC. Additionally, the Commission substantially revised its allocation regulations to require the costs of voter drives, certain campaign advertisements, and a political committee's general administrative costs be paid for in whole or in substantial part with funds subject to FECA's limits, prohibitions, and reporting requirements. Pursuant to *Shays* v. *FEC*, 424 F. Supp. 2d 100 (D.D.C. 2006) (*''Shays II''*), the Commission is publishing a supplemental Explanation and Justification to provide a more detailed explanation of (a) The basis for the measures it adopted and (b) the reasons it declined to revise the regulatory definition of ''political committee'' to single out organizations exempt from Federal taxation under section 527 of the Internal Revenue Code (''527 organizations'') for increased regulation. This document also discusses several recently resolved administrative matters that provide considerable guidance to all organizations regarding the receipt of contributions, making of expenditures, and political committee status.

EFFECTIVE DATE: February 7, 2007.

FOR FURTHER INFORMATION CONTACT: Mr. J. Duane Pugh Jr., Acting Assistant General Counsel, or Ms. Margaret G. Perl, Attorney, 999 E Street, NW.,

Washington, DC 20463, (202) 694–1650 or (800) 424–9530.

SUPPLEMENTARY INFORMATION:

Explanation and Justification

On November 23, 2004, following an extensive rulemaking process, the Commission adopted new regulations to ensure that organizations that participate in Federal elections conduct their activities in compliance with Federal law. This rulemaking generated an extraordinary amount of public engagement on the issue of when organizations should have to register with and report their activities to the FEC. The Commission received and considered over 100,000 written comments, including comments from approximately 150 Members of Congress, many political party organizations, hundreds of non-profit organizations, as well as academics, trade associations, and labor organizations. Additionally, the Commission heard testimony from 31 witnesses during two days of public hearings on April 14 and 15, 2004.[1]

At the end of this process, the Commission amended its regulations in two significant ways. First, the Commission adopted a regulation codifying when an organization's solicitations generate ''contributions'' under FECA, and consequently, may require an organization to register as a political committee with the FEC. Second, the Commission substantially revised its allocation regulations to require that voter drives and campaign ads that target Federal elections, as well as a substantial portion of a political committee's administrative costs, be paid for with funds subject to Federal limits, prohibitions, and reporting requirements. *See Final Rules on Political Committee Status, Definition of Contribution, and Allocation for Separate Segregated Funds and Nonconnected Committees,* 69 FR 68056, 68056–63 (Nov. 23, 2004) (*''2004 Final Rules''*); *see also* 11 CFR 100.57 and 106.6. The *2004 Final Rules* also explained the Commission's decision not to re-define the terms ''political committee'' in 11 CFR 100.5 and ''expenditure'' in 11 CFR 100.110 through 100.154, including the Commission's decision not to establish a separate political committee definition singling out 527 organizations.[2] *See 2004 Final Rules*, 69 FR at 68063–65. The 2004 Final Rules took effect January 1, 2005. *Id.* at 68056.

In 2004, an action was brought before the U.S. District Court of the District of Columbia challenging the Commission's decision not to revise the regulatory definition of ''political committee.'' *See Shays II*, 424 F. Supp. 2d at 114–17.[3] Plaintiffs sought a court order directing the Commission to promulgate a rule specifically addressing the political committee status of all 527 organizations. *Id.* at 116. The district court rejected the plaintiffs' request to order the Commission to commence a new rulemaking, concluding that nothing in FECA, Congress's most-recent amendments in the Bipartisan Campaign Reform Act of 2002 (''BCRA''),[4] or the Supreme Court's decision in *McConnell* v. *FEC*, 540 U.S. 93 (2003), required the Commission to adopt such rules. *Shays II*, 424 F. Supp. 2d at 108. Case law, the *Shays II* court explained, demonstrates ''that a statutory mandate is a crucial component to a finding that an agency's reliance on adjudication [is] arbitrary and capricious.'' *Id.* at 114. The district court found, however, that the Commission ''failed to present a reasoned explanation for its decision'' not to regulate 527 organizations specifically by virtue of their status under the Internal Revenue Code, and remanded the case to the Commission ''to explain its decision or institute a new rulemaking.'' *Id.* at 116–17.

The Commission did not appeal the district court's ruling. Instead, the Commission is issuing this supplemental Explanation and Justification to explain its decision not to use tax law classifications as a substitute for making determinations of political committee status under FECA, as construed by the courts. By adopting a new regulation under which any organization may be required to register as a political committee and by tightening the rules governing how political committees fund activity for the purpose of influencing Federal elections, the Commission has acted to prevent circumvention not by just 527 organizations, but by groups of all kinds. As further explained, the Commission's decision not to single out 527 organizations is entirely consistent with the statutory scheme, Supreme Court precedent, and Congressional action regarding 527 organizations. Political committee status, whether articulated in FECA, Supreme Court interpretations of FECA, or the Commission's regulations, must be applied and enforced by the Commission through a case-by-case analysis of a specific organization's conduct. Existing regulations, bolstered by the adoption of the *2004 Final Rules,* leave the Commission with a very effective mechanism for addressing claims that organizations of any tax status should be registered as political committees under FECA. The Commission's recent enforcement experience confirms this conclusion.

Parts A and D of this document explain the framework for establishing political committee status under FECA, as interpreted by the Supreme Court. Parts B and C explain why reliance on a group's tax exempt status under section 527 of the Internal Revenue Code cannot substitute for an analysis of the group's conduct. Part E discusses the new and amended rules the Commission adopted in 2004, which codified an additional trigger for political committee status and increased the Federal funding requirements to participate in certain election-related activities. Finally, Part F describes the significance of several recently resolved enforcement matters that illustrate the sufficiency of the legal basis for the Commission's political committee status determinations.

A. FECA Provides a Specific, Conduct-Based Framework for Establishing Political Committee Status

Since its enactment in 1971, FECA has placed strict limits and source prohibitions on the contributions received by organizations that are defined as political committees. Under the Act, an organization's conduct has always been the basis for determining whether it is required to register and abide by the Act's requirements as a political committee. Likewise, since its enactment in 1971, the determination of political committee status has taken place on a case-by-case basis. FECA defines a ''political committee'' as ''any committee, club, association, or other group of persons which receives

[1] The comments and transcripts of the public hearing are available at *http://www.fec.gov/law/RulemakingArchive.shmtl* under ''Political Committee Status (2004)''.

[2] Under the Internal Revenue Code, a 527 organization is ''a party, committee, association, fund, or other organization (whether or not incorporated) organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for an exempt function.'' 26 U.S.C. 527(e)(1). The ''exempt function'' of 527 organizations is the ''function of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization,'' or the election or selection of presidential or vice presidential electors. 26 U.S.C. 527(e)(2). Virtually all political committees that register with the Commission under FECA are also tax exempt under section 527 of the Internal Revenue Code, including political party committees, authorized campaign committees of candidates, separate segregated funds, and nonconnected committees. *See* 11 CFR 1005.

[3] Documents related to this litigation are available at *http://www.fec.gov/law/litigation_CAA_Alpha.shtml#shays_04*.

[4] Pub. L. 107–155, 116 Stat. 81 (Mar. 7, 2002).

contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year.'' *See* 2 U.S.C. 431(4)(A). FECA further defines the terms ''contribution'' and ''expenditure,'' limiting these terms to those receipts and disbursements made ''for the purpose of influencing any election for Federal office.'' 2 U.S.C. 431(8) and (9). Commission regulations first promulgated in 1975 essentially repeat FECA's definition of ''political committee.'' 11 CFR 100.5(a).[5]

Congress has not materially amended the definition of ''political committee'' since the enactment of section 431(4)(A) in 1971, nor has Congress at any time since required the Commission to adopt or amend its regulations in this area. Indeed, in 2002, when Congress made sweeping changes in campaign finance law pursuant to BCRA, it left the definition of ''political committee'' undisturbed and political committee status to be determined on a case-by-case basis.

To address constitutional concerns raised when FECA was adopted, the Supreme Court added two additional requirements that affect the statutory definition of political committee. First, the Supreme Court held, when applied to communications made independently of a candidate or a candidate's committee, the term ''expenditure'' includes only ''expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office.'' *Buckley* v. *Valeo*, 424 U.S. 1, 44, 80 (1976).[6] Second, the Supreme Court mandated that an additional hurdle was necessary to avoid Constitutional vagueness concerns; only organizations whose ''major purpose'' is the nomination or election of a Federal candidate can be considered ''political committees'' under the Act. *Id.* at 79. The court deemed this necessary to avoid the regulation of activity ''encompassing both issue discussion and advocacy of a political result.'' *See, e.g.*, *Buckley*, 424 U.S. at 79; *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 262 (1986) (*''MCFL''*).

Neither BCRA, *McConnell*, nor any other legislative, regulatory, or judicial action has eliminated (1) The Supreme Court's express advocacy requirement for expenditures on communications made independently of a candidate or (2) the Court's major purpose test. In its 2003 *McConnell* decision, the Supreme Court implicitly endorsed the major purpose framework to uphold BCRA's regulation of political party activity against vagueness concerns. *See McConnell*, 540 U.S. at 170 n.64 (''This is particularly the case here, since actions taken by political parties are presumed to be in connection with election campaigns. *See Buckley*, 424 U.S. at 79, 96 S. Ct. 612 (noting that a general requirement that political committees disclose their expenditures raised no vagueness problems because the term 'political committee' 'need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate * * *')'').

McConnell also addressed the *Buckley* expenditure framework, finding, ''the express advocacy limitation, in both the expenditure and disclosure contexts, was the product of statutory interpretation rather than a constitutional command.'' *McConnell*, 540 U.S. at 191–92. However, the Court made it clear that FECA continued to contain the express advocacy limitation as to expenditures on communications made independently of a candidate, because Congress, in enacting BCRA, modified the limitation only insofar as it applied to ''electioneering communications.'' The Court found:

> Since our decision in *Buckley*, Congress' power to prohibit corporations and unions from using funds in their treasuries to finance advertisements expressly advocating the election or defeat of candidates has been firmly embedded in our law * * * Section 203 of BCRA amends [2 U.S.C. 441b(b)(2)] to extend this rule, which previously applied only to express advocacy, to all 'electioneering communications' covered by the definition of that term in [2 U.S.C. 434(f)(3)].

McConnell, 540 U.S. at 203–04.

Congress did not amend the definition of expenditure in BCRA, and in fact, specified that ''electioneering communications'' are not expenditures under the Act. 2 U.S.C. 434(f)(1) and (2) (treating electioneering communications as ''disbursements''). Accordingly, while BCRA, as interpreted by *McConnell*, did not extend *Buckley's* express advocacy limitation to the regulation of ''electioneering communications,'' it also did not alter that limitation as to expenditures on communications made independently of a candidate. Absent future Congressional action altering the definition of ''expenditure,'' the Supreme Court's limitation of expenditures, on communications made independently of a candidate, to ''express advocacy'' continues to apply.

Therefore, determining political committee status under FECA, as modified by the Supreme Court, requires an analysis of both an organization's specific conduct—whether it received $1,000 in contributions or made $1,000 in expenditures—as well as its overall conduct—whether its major purpose is Federal campaign activity (*i.e.*, the nomination or election of a Federal candidate). Neither FECA, its subsequent amendments, nor any judicial decision interpreting either, has substituted tax status as an acceptable proxy for this conduct-based determination.

The Commission has promulgated regulations defining in detail what constitutes a ''contribution'' and an ''expenditure.'' *See* 11 CFR 100.51 to 100.94 and 100.110 to 100.155. Many administrative actions, including the recently resolved actions against several 527 organizations that are described in Part F below, include substantial investigations and case-by-case analyses and determinations of whether a group's fundraising generated ''contributions'' and whether payments for its communications made independently of a candidate constituted ''expenditures,'' as alternative prerequisites to a determination that a group is a political committee, prior to any consideration of the group's major purpose. Additional regulations defining ''contribution'' and ''expenditure'' would not obviate the need for a case-by-case investigation and determination in a Commission enforcement proceeding. Neither would a regulation defining ''major purpose'' that singled out 527 organizations, as the *Shays II* plaintiffs seek, obviate the need for case-by-case investigations and determinations in the Commission's enforcement process regarding the organization's major purpose.

B. Section 527 Tax Status Does Not Determine Whether an Organization Is a Political Committee Under FECA

527 organizations are so named for section 527 of the Internal Revenue Code, a section that exempts certain activities from taxation. An organization's election of section 527

[5] *See* H.R. Doc. No. 97–293, at 7–8 and 29–30 (1975) addressing 11 CFR 100.14 (1976), which was recodified as 11 CFR 100.5 in 1980. *See* 45 FR 15080 (Mar. 7, 1980).

[6] The Supreme Court applies a different analysis to coordinated expenditures. *See Buckley,* 424 U.S. at 46–47 (''They argue that expenditures controlled by or coordinated with the candidate and his campaign might well have virtually the same value to the candidate as a contribution and would pose similar dangers of abuse. yet such controlled or coordinated expenditures are treated as contributions rather than expenditures under the Act.''). *Cf.* AO 2006–20 Unity '08 (finding monies spent on ballot access through petition drives by an organization supporting only two candidates, both yet to be selected, one for the office of President of the United States and one for the office of Vice President, are expenditures).

tax status is not sufficient evidence in itself that the organization satisfies FECA and the Supreme Court's contribution, expenditure, and major purpose requirements. As stated by a commenter, ''All that 527 status means is that the organization is exempt from federal income tax to the extent it spends political income on political activities * * * All federal political committees registered with the FEC are 527 organizations. So are the Republican National Committee and the Democratic National Committee. So are John Kerry for President, Inc. and Bush-Cheney '04, Inc. So is every candidate's campaign committee right down to school board and dogcatcher.'' Thus, virtually all political committees are 527 organizations. It does not necessarily follow that all 527 organizations are or should be registered as political committees.

The IRS's requirements for an organization to be entitled to the tax exemption under section 527 are based on a different and broader set of criteria than the Commission's determination of political committee status. *See* note 2 above. Section 527 exempts political organizations from tax on ''exempt function'' income, where the Internal Revenue Code would impose tax on such activity when conducted by other non-profit organizations, such as groups organized under section 501(c)(4) (social welfare organizations), 501(c)(5) (labor organizations), and 501(c)(6) (business leagues). *See* 26 U.S.C. 527(c)(1) and (f)(1). Accordingly, the definition of ''exempt function'' is central to the reach of section 527. ''Exempt function'' is defined as the ''function of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization, or the election of Presidential or Vice-Presidential electors.'' 26 U.S.C. 527(e)(2).

By definition, 527 organizations may engage in a host of State, local, and non-electoral activity well outside the Commission's jurisdiction. As noted by several commenters, the broad range of groups availing themselves of the 527 exemption include, but are not limited to the following: All Federal, State, and local candidate campaign committees and party entities; Federal, State, and local political action committees; caucuses and associations of State or local public officials; newsletter funds operated by Federal, State, and local public officials; funds set up to pay ordinary business expenses of a public officeholder; political party officer committees; and groups seeking to influence the appointment of judicial and executive branch officials. A forthcoming tax law article states:

> Once section 527 is placed in proper context, it becomes clear that the tax law is not a very good mechanism for differentiating between election-focused and ideological groups. Because of its unique policies and idiosyncrasies, the tax law has an exceptionally broad definition of ''political organization,'' one that has the potential to capture ideological as well as partisan organizations. Furthermore, section 527 should not be understood to convey any real tax benefits to organizations that self-identify. Accordingly, the reformers' mission to use section 527 as a campaign finance instrument is misguided.

Gregg D. Polsky, *A Tax Lawyer's Perspective on Section 527 Organizations*, 28 Cardozo L. Rev. (forthcoming Feb. 2007).

The IRS has specifically determined that exempt function activity can include disbursements for Federal electoral activity that does not constitute express advocacy. IRS Revenue Ruling 2004–6 states (at 4): ''[w]hen an advocacy communication explicitly advocates the election or defeat of an individual to public office, the expenditure clearly is for an exempt function under [section] 527(e)(2). However, when an advocacy communication relating to a public policy issue does not explicitly advocate the election or defeat of a candidate, all the facts and circumstances need to be considered to determine whether the expenditure is for an exempt function under [section] 527(e)(2).'' Rev. Rul. 04–6, 2004–1 C.B. 328. Accordingly, the IRS structure presumes section 527 organizations will engage in non-express advocacy activities. Indeed, organizations could easily qualify for 527 status without ever making expenditures for express advocacy. However, as discussed above, that activity is outside of the Commission's regulatory scope under *Buckley's* express advocacy limitation for expenditures on communications made independently of a candidate. *See Buckley*, 424 U.S. at 44; *see also* 2 U.S.C. 431(8) and (9) (defining contribution and expenditure as ''for the purpose of influencing any election for Federal office'').

The IRS ''facts and circumstances'' test, if applied to FECA, clearly would violate the Supreme Court's Constitutional parameters, established in *Buckley*, and reiterated in *MCFL* and *McConnell*, that campaign finance rules must avoid vagueness. See *Buckley*, 424 U.S. at 40–41; MCFL, 479 U.S. at 248–49; *McConnell*, 540 U.S. at 103. Because the tax code definitions arise in the context of a grant of exemption, which is viewed as a form of subsidy to the organization, a lower level of scrutiny is applied than when the government regulates or prohibits outright certain types of speech. *See, e.g., Regan* v. *Taxation With Representation*, 461 U.S. 540, 549–50 (1983) (upholding limitation on lobbying by 501(c)(3) organizations); *Christian Echoes Nat'l Ministry, Inc.* v. *United States*, 470 F.2d 849, 857 (10th Cir. 1972) (upholding 501(c)(3) ban on campaign intervention). As one commenter noted:

> The Internal Revenue Code (IRC) and its accompanying regulations offer several different tests for what constitutes political activity for tax-exempt organizations (including 527 organizations), but all of these tests boil down to a vague ''facts and circumstances'' standard. While constitutionally adequate * * * for the enforcement of tax laws, the inherent uncertainty created by such a contextual, subjective standard renders it wholly inadequate to the task of providing a predictable standard for those required to comply with [F]ederal election law * * * FECA regulates core political speech and imposes criminal penalties for violations. Thus, FECA is especially intolerant of vague standards. As the court explained in *Buckley*: ''Due process requires that a criminal statute provide adequate notice to a person of ordinary intelligence that his contemplated conduct is illegal, for 'no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.' When First Amendment rights are involved, an even 'greater degree of specificity' is required.''

As stated by a commenter, ''While IRC political *organizations* and FECA political *committees* seem to have some similarities, [section] 527 'exempt function' activity is much broader than the activity that defines FECA political committees. Consequently, IRS regulations provide no guidance for FEC rulemaking.'' In fact, neither FECA, as amended, nor any judicial decision interpreting it, has substituted tax status for the conduct-based determination required for political committee status.

As discussed further below in Part F, the Commission's enforcement experience illustrates the inadequacy of tax classification as a measure of political committee status. The Commission recently completed six matters, including five organizations that were alleged to have failed to register as political committees.[7] The

[7] *See* Press Release, Federal Election Commission, FEC Collects $630,000 in Civil Penalties from Three 527 Organizations (Dec. 13, 2006), available at *http://www.fec.gov/press/press2006/20061213murs.html*; Press Release, Federal Election Commission, Freedom Inc. Pays $45,000 Penalty for Failing to Register as Political Committee (Dec. 20, 2006), available at *http://www.fec.gov/press/*

Commission reached conciliation agreements with five of these organizations—four 527 organizations and one 501(c)(4) organization—in which the organizations did not contest the Commission's determination that they had violated FECA by failing to register as political committees. *See* Matters Under Review (''MURs'') 5511 and 5525 (Swiftboat Veterans and POWs for Truth (''Swiftboat Vets'')); 5753 (League of Conservation Voters 527 and 527 II (''League of Conservation Voters'')); 5754 (MoveOn.org Voter Fund); 5492 (Freedom, Inc.). In the sixth matter, the Commission determined that a 527 organization was not a political committee under the statutory requirements, and dismissed the matter. *See* MUR 5751 (The Leadership Forum). The Commission has demonstrated through the finding of political committee status for a 501(c)(4) organization and the dismissal of a complaint against a 527 organization, that tax status did not establish whether an organization was required to register with the FEC. Rather, the Commission's findings were based on a detailed examination of each organization's contributions, expenditures, and major purpose, as required by FECA and the Supreme Court.

Courts have cautioned the Commission against assuming ''the compatibility of the IRS's enforcement * * * and FECA's requirements.'' *See Shays* v. *FEC*, 337 F. Supp. 2d 28, 128 (D.D.C. 2004) (*''Shays I''*). The Commission is instead obligated to perform a detailed review of differences in tax and campaign finance law provisions rather than adopting the former as a proxy for the latter. *Id.* The U.S. District Court recently reminded the Commission: ''It is the FEC, not the IRS, that is charged with enforcing FECA.'' *Shays I*, 337 F. Supp. 2d at 126. The detailed comparison of the Internal Revenue Code and FECA provisions required by *Shays I* demonstrates that the ''exempt function'' standard of section 527 is not co-extensive with the ''expenditure'' and ''contribution'' definitions that trigger political committee status. Therefore, the use of the Internal Revenue Code classification to interpret and implement FECA is inappropriate.

C. Congress Has Consistently Affirmed the Existing Statutory Framework and Specifically Refused To Require All 527 Organizations To Register as Political Committees

While Congress has repeatedly enacted legislation governing 527 organizations, it has specifically rejected every effort, including those by some of the *Shays II* plaintiffs,[8] to classify organizations as political committees based on section 527 status. In refusing to enact such legislation, Congress fully recognized that some 527 organizations not registered with the Commission were, and would continue to be, involved with Federal elections. Nevertheless, in each instance in which Congress regulated 527 organizations, whether through amendments to the Internal Revenue Code or FECA, it (a) Chose not to address the political committee status of these organizations, (b) left the reporting obligations in the hands of the IRS, and (c) did not direct the Commission to adopt revised regulations.

1. Congress Amended the Internal Revenue Code To Create a Reporting Scheme for 527 Organizations That are Not Political Committees Under FECA

In 2000, Congress passed a bill requiring section 527 organizations that are not required to register as political committees under FECA to register and report their financial activity with the IRS. *See* 26 U.S.C. 527(i)(6), (j)(5)(A); Public Law 106–230 (2000). Congress ordered the IRS to disclose this information publicly on a searchable database within 48 hours of receipt, requirements matching the FEC's disclosure obligations. *See* 26 U.S.C. 527(k); 2 U.S.C. 434(a)(11)(B) and 438a.[9] At the same time, Congress considered, but rejected, alternative bills that would have explicitly required the Commission to regulate all 527 organizations. *See, e.g.*, H.R. 3688, 106th Cong. (2000); S. 2582, 106th Cong. (2000); *see also* H.R. Rep. No. 106–702 (2000). The alternative House bill was co-sponsored by two of the *Shays II* plaintiffs. Additionally, Congress took no other action to otherwise alter the statutory framework for determining political committee status.

In 2002, Congress modified the section 527 reporting requirements to exempt organizations that were exclusively involved in State and local elections from having to report with the IRS. *See* 26 U.S.C. 527(i)(5)(C), (j)(5)(C); Income Tax Notification and Return Requirements—Political Committees Act, Public Law 107–276, 116 Stat. 1929 (2002). Those 527 organizations that were involved in Federal elections, but that did not qualify as ''political committees'' under FECA, continued to have to report their activities to the IRS. *See* Public Law 107–276. This legislation was passed only a few months after BCRA, which, as discussed below, did not change the requirements for political committee status of 527 organizations. As stated by a commenter, ''Congress explicitly recognized the differences in intent and scope between the Internal Revenue Code and the Federal Election Campaign Act when it drafted two separate statutes to address the respective subjects; if Congress had intended the two bodies of law to be congruous, Congress would have passed congruous provisions at the outset.'' If, as some commenters suggested, all 527 organizations not exclusively involved in State and local elections are required by FECA to register as political committees, then the 2002 amendments to 26 U.S.C. 527 would have meant that no 527 organizations would continue to report to the IRS. Such an interpretation of the two statutes would effectively nullify the statutory requirement to report to the IRS.

These two provisions were passed, as noted by a commenter, ''[a]gainst a widely publicized backdrop of news reports concerning non-federal [section] 527 groups,'' yet, ''Congress required these organizations * * * to register and report with the IRS * * * Congress was well aware that [section] 527 organizations that were not political committees could affect Federal as well as other elections.'' The legislative history of the 2000 amendment confirms the commenter's assessment:

> These enhanced disclosure and reporting rules are intended to make no changes to the present-law substantive rules regarding the extent to which tax-exempt organizations are permitted to engage in political activities. Thus, the Committee bill is not intended to alter the involvement of such organizations in the political process, but rather it is intended to shed sunlight on these activities so that the general public can be informed as to the types and extent of activities in which such organizations engage.

H.R. Rep. No. 106–702, at 14 (2000). Senator Lieberman, a principal author of the legislation, stated, ''nor does [the bill] force any group that does not currently have to comply with FECA or disclose information about itself to do

press2006/20061220mur.html; Press Release, Federal Election Commission, FEC Completes Action on Two Enforcement Cases (Dec. 22, 2006), available at *http://www.fec.gov/press/press2006/20061222mur.html.*

[8] In *Shays II*, the case filed by Representatives Shays and Meehan was consolidated with a similar case filed by Bush-Cheney '04 challenging the Commission's 2004 rulemaking. *See Shays II*, 424 F. Supp. 2d at 104–05.

[9] *See* IRS Political Organization Disclosure database, *available at http://forms.irs.gov/politicalOrgsSearch/search/basicSearch.jsp.*

either of those things.'' *See* Statement of Sen. Lieberman, 146 Cong. Rec. S5996 (June 28, 2000). Representative Archer stated, ''[T]his bill does nothing but require disclosure. It does not change anything as to how much money can be given or how it can be used, any of those other substantive things in the law.'' *See* Statement of Rep. Archer, 146 Cong. Rec. H5285 (June 27, 2000).

A rule hinging on section 527 tax status could frustrate this separate reporting scheme created by Congress in the 2000 and 2002 amendments to section 527. It could also have the effect of reducing disclosure. If a rule singled out 527 organizations, those entities could then either shift the same election-related conduct to a related section 501(c)(4) organization that shares common management, or perhaps even reorganize as a section 501(c)(4) organization in order to avoid a rule that singled out 527 organizations.[10] Several commenters predicted that 527 organizations would do so. Because section 501(c)(4) of the Internal Revenue Code requires almost no disclosure of receipts and disbursements, migration of political conduct to section 501(c)(4) groups would reduce the amount of information disclosed to the public.[11]

2. BCRA Amended FECA and Addressed Federal Activity of 527 Organizations Without Requiring Political Committee Registration

In BCRA, Congress directly addressed the Federal activity of unregistered 527 organizations, but again, declined to take any other action to regulate 527 organizations as political committees or otherwise alter the existing political committee framework. BCRA prohibits national, State and local political parties from soliciting for, or donating to ''an organization described in section 527 of [the Internal Revenue] Code (*other than a political committee*, a State, district, or local committee of a political party, or the authorized campaign committee of a candidate for State or local office).'' *See* 2 U.S.C. 441i(d)(2) (emphasis added). This provision explicitly confirms Congress's intent to retain separate regimes for those 527 organizations that must register with the Commission as political committees and those 527 organizations that are not required to register as political committees. Furthermore, if Congress had believed that all 527 organizations (other than those operating at the State level) were political committees, this BCRA prohibition would be superfluous.

BCRA also included a limited exception from the prohibition on corporations making electioneering communications for 527 organizations (and 501(c)(4) organizations), as long as they were funded exclusively from individual contributions. *See* 2 U.S.C. 441b(c)(2). This exception was altered by the Wellstone amendment to BCRA, codified at 2 U.S.C. 441b(c)(6), which strictly limited the scope of the exception. Although the exception was amended, this provision illustrates Congress's knowledge that 527 organizations were raising funds outside FECA's individual contribution limits and source prohibitions to produce communications that referenced Federal candidates. And BCRA makes two explicit determinations: electioneering communications are not themselves ''expenditures'' (even when conducted by 527 organizations) and such communications may not be paid for with corporate or labor union funds during specific pre-election periods. Had Congress determined that such communications constituted expenditures that required registration as a political committee, the reporting requirements and funding restrictions for the electioneering communications provisions would have been duplicative and meaningless. Yet, Congress chose to leave in place its decisions in 2000 and 2002 that some 527 organizations should report their activities to the IRS, rather than register with the FEC.

BCRA's legislative history further confirms Congress's recognition that 527 organizations (as well as 501(c)(4) organizations) could engage in some Federal campaign activity and yet not have to register as political committees. In defending BCRA's approach to 527 organizations, Senator Snowe stated:

> [S]ome of our opponents have said that we are simply opening the floodgates in allowing soft money to now be channeled through these independent groups for electioneering purposes. To that, I would say that this bill would prohibit members from directing money to these groups to affect elections, so that would cut out an entire avenue of solicitation for funds, not to mention any real or perceived ''quid pro quo.''

See Statement of Sen. Snowe, 148 Cong. Rec. S2136 (Mar. 20, 2002). Senator Wellstone noted that 527 and 501(c)(4) groups ''already play a major role in our elections'' and acknowledged that soft money would shift from political parties to these organizations. *See* Statement of Sen. Wellstone, 147 Cong. Rec. S2846–47 (Mar. 26, 2001). Senator Breaux stated that 501(c)(4) and 527 organizations would continue to be able to raise unrestricted money to be used in Federal elections. *See* Statement of Sen. Breaux, 147 Cong. Rec. S2885–86 (Mar. 26, 2001). Senator McConnell, who led the opposition to the passage of BCRA, was clear on this point as well: ''this bill will greatly weaken the parties and shift those resources to outside groups that will continue to engage in issue advocacy, as they have a constitutional right to do, with unlimited and undisclosed soft money.'' *See* Statement of Sen. McConnell, 148 Cong. Rec. S2160 (Mar. 20, 2002). As stated in a comment from a Governor who is also a former Member of Congress:

> That perceived evil, the direct personal involvement of [F]ederal and party officials in the raising of ''soft money'' funds, is not present with respect to donations made to non-profit organizations—whether organized under section 527 or under section 501(c) of the Internal Revenue Code—acting *independently* from any [F]ederal officeholder, candidate or political party. Congress did not choose, in BCRA, to impose limits on those desiring to provide financial support to such non-profit organizations. Congress was well aware of the existence and activities of non-political committee 527 organizations and yet the BCRA did not elect to address such organizations other than to impose a prohibition on [F]ederal officeholders actively participating in the solicitation of funds for such groups.

Based on this history of Congressional action regarding section 527 and the enactment of BCRA, the Commission concludes that changing the regulatory definition of ''political committee'' to rely explicitly upon section 527 tax status would not be consistent with the Commission's statutory authority. The Commission reaches this conclusion regarding the scope of its regulatory authority because Congress previously considered and rejected bills that would have changed the political committee status of 527 organizations. *See FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000) (''[A] specific policy embodied in a later federal statute should control our construction of the [earlier] statute, even though it ha[s] not been expressly amended.''

[10] As commenters noted, a 501(c)(4) organization may engage in the same political campaign activities as a 527 organization, as long as these activiteis do not constitute the 501(c)(4) organization's ''primary purpose'' as determined by the IRS.

[11] Only 501(c)(4) organizations with $25,000 or more in annual gross receipts must file annual tax returns with the IRS. *See* 26 U.S.C. 6012(a)(6); Judith Kindell & John Francis Reilly, *Election Year Issues:* IRS Exempt Organizations Continuing Professional Education Text at 444, 470–71 (2002), *available at http://www.irs.gov/charities/nonprofits/article/0,,id=155031,00.html* (last visited Jan. 31, 2007). The required annual return (Form 990) includes a line for total amount of ''direct and indirect political expenditures'' without requiring any further breakdown of the expenditure amount. *See* IRS Form 990 Line 81a. Individual donors need not be disclosed by 501(c)(4) organizations.

(*quoting United States* v. *Estate of Romani*, 523 U.S. 517, 530–31 (1998))).

Furthermore, when Congress revises a statute, its decision to leave certain sections unamended constitutes at least acceptance, if not explicit endorsement, of the preexisting construction and application of the unamended terms. *See Cook County, Illinois* v. *United States ex rel. Chandler*, 538 U.S. 119, 132 (2003); *Cottage Sav. Ass'n* v. *Comm'r*, 499 U.S. 554, 561–62 (1991); *Asarco Inc.* v. *Kadish*, 490 U.S. 605, 632 (1989).

During the 2004 rulemaking, the Commission received a comment signed by 138 Members of the House of Representatives, and a similar comment signed by 19 Senators. Both comments stated, ''the proposed rules before the Commission would expand the reach of BCRA's limitations to independent organizations in a manner wholly unsupported by BCRA or the record of our deliberations on the new law.'' The comment submitted by the House Members further stated:

> More generally, the rulemaking is concerned with new restrictions on ''527'' organizations, primarily through the adoption of new definitions of an ''expenditure.'' Congress, of course, did not amend in BCRA the definition of ''expenditure'' or, for that matter, the definition of ''political committee.'' Moreover, while BCRA reflects Congress' full awareness of the nature and activities of ''527s,'' it did not consider comprehensive restrictions on these organizations like those in the proposed rules. There has been absolutely no case made to Congress, or record established by the Commission, to support any notion that tax-exempt organizations and other independent groups threaten the legitimacy of our government when criticizing its policies. We believe instead that more, not less, political activity by ordinary citizens and the associations they form is needed in our country.[12]

In upholding BCRA, the Supreme Court was also well aware that BCRA's new provisions would not reach all interest group Federal political activity. The *McConnell* Court observed that, unlike political parties, ''[i]nterest groups, however, remain free to raise soft money to fund voter registration, [get-out-the-vote] activities, mailings, and broadcast advertising (other than electioneering communications).'' *McConnell*, 540 U.S. at 187–88.

Finally, at least two new bills requiring 527 organizations to register as political committees were recently considered in Congress. *See, e.g.*, H.R. 513, 109th Cong. (2006); S. 2828, 108th Cong. (2004). The introduction and consideration of these bills, including one supported by two of the *Shays II* plaintiffs, demonstrates Congress's and these plaintiffs' recognition that Congress has not acted in this area. As with all past Congressional attempts to regulate all 527s as political committees, Congress did not adopt these bills, or any other bills altering the political committee framework. While the Commission is authorized to regulate in order to give substance to otherwise ambiguous provisions, ''[a] regulation, however, may not serve to amend a statute, or to add to the statue something which is not there.'' *See Iglesias* v. *United States*, 848 F.2d 362, 366 (2d Cir. 1988) (citations omitted).

Thus, Congressional action regarding 527 organizations provides no basis for the Commission to revise FECA and the Supreme Court's requirements for political committee status by creating a separate political committee definition singling out 527 organizations. Rather, the Commission's decision to reject proposed rules based on section 527 tax status is consistent with all past Congressional action addressing 527 organizations.

D. Applying the Major Purpose Doctrine, a Judicial Construct Established Thirty Years Ago, Requires a Case-by-Case Analysis of an Organization's Conduct

The *Shays II* court expressed concern that, in the absence of a regulation regarding the major purpose doctrine, the Commission was not providing clear guidance to groups as to when they must register as a political committee. *See Shays II*, 424 F. Supp. 2d at 115. Applying the major purpose doctrine, however, requires the flexibility of a case-by-case analysis of an organization's conduct that is incompatible with a one-size-fits-all rule.

The Supreme Court has held that, to avoid the regulation of activity ''encompassing both issue discussion and advocacy of a political result'' only organizations whose major purpose is Federal campaign activity can be considered political committees under the Act. *See, e.g., Buckley*, 424 U.S. at 79; *MCFL*, 479 U.S. at 262. Thus, the major purpose test serves as an additional hurdle to establishing political committee status. Not only must the organization have raised or spent $1,000 in contributions or expenditures, but it must additionally have the major purpose of engaging in Federal campaign activity.

The Supreme Court has made it clear that an organization can satisfy the major purpose doctrine through sufficiently extensive spending on Federal campaign activity. *See MCFL*, 479 U.S. at 262 (explaining that a section 501(c)(4) organization could become a political committee required to register with the Commission if its ''independent spending become[s] so extensive that the organization's major purpose may be regarded as campaign activity'').

An analysis of public statements can also be instructive in determining an organization's purpose. *See, e.g., FEC* v. *Malenick*, 310 F. Supp. 2d 230, 234–36 (D.D.C. 2004) (court found organization evidenced its major purpose through its own materials which stated the organization's main goal of supporting the election of the Republican Party candidates for Federal office and through efforts to get prospective donors to consider supporting Federal candidates); *FEC* v. *GOPAC*, Inc., 917 F. Supp. 851, 859 (D.D.C. 1996) (''organization's [major] purpose may be evidenced by its public statements of its purpose or by other means''); Advisory Opinion 2006–20 (Unity 08) (organization evidenced its major purpose through organizational statements of purpose on Web site). Because such statements may not be inherently conclusive, the Commission must evaluate the statements of the organization in a fact-intensive inquiry giving due weight to the form and nature of the statements, as well as the speaker's position within the organization.

The Federal courts' interpretation of the constitutionally mandated major purpose doctrine requires the Commission to conduct investigations into the conduct of specific organizations that may reach well beyond publicly available advertisements. *See, e.g., Malenick*, 310 F. Supp. 2d at 234–36 (examining organizations' materials distributed to prospective donors). The Commission may need to examine statements by the organization that characterize its activities and purposes. The Commission may also need to evaluate the organization's spending on Federal campaign activity, as well as any other spending by the organization. In addition, the Commission may need to examine the organization's fundraising appeals.

Because *Buckley* and *MCFL* make clear that the major purpose doctrine requires a fact-intensive analysis of a group's campaign activities compared to its activities unrelated to campaigns, any rule must permit the Commission

[12] The Commission also received a comment signed by 14 members of the Congressional Hispanic Caucus who opposed the proposed changes to the regulations based on possible adverse effects on grassroots voter mobilization efforts. This comment is available at *http://www.fec.gov/pdf/nprm/political_comm_status/mailed/57.pdf.*

the flexibility to apply the doctrine to a particular organization's conduct. After considering these precedents and the rulemaking record, the Commission concluded that none of the competing proposed rules would have accorded the Commission the flexibility needed to apply the major purpose doctrine appropriately. Therefore, the Commission decided not to adopt any of the proposed amendments to section 100.5.[13]

However, even if the Commission were to adopt a regulation encapsulating the judicially created major purpose doctrine, that regulation could only serve to limit, rather than to define or expand, the number or type of organizations regarded as political committees. The major purpose doctrine did not supplant the statutory ''contribution'' and ''expenditure'' triggers for political committee status, rather it operates to limit the reach of the statute in certain circumstances.

Moreover, any perceived shortcomings with the enforcement process identified by the Shays II court would not be remedied by a change in the regulatory definition of ''political committee.'' [14] Any revised rule adopted by the Commission would still have to be interpreted and applied through the very same statutory enforcement procedures as currently exist. In fact, all of the rules proposed in 2004 would have required that factual determinations be made through the enforcement process. *See, e.g.*, proposed 11 CFR 100.5(a)(2)(iv), *Notice of Proposed Rulemaking on Political Committee Status*, 69 FR 11736, 11748, 11757 (Mar. 11, 2004) (exemptions limited to 527 organizations that are formed ''solely for the purpose of'' supporting a non-Federal candidate or influencing selection of individuals to non-elective office). Even if the Commission had simply adopted a rule in 2004 that listed the factors considered in determining an organization's major purpose, the rule would still have had to be enforced through investigations of the specific statements, solicitations, and other conduct by particular organizations. Furthermore, any list of factors developed by the Commission would not likely be exhaustive in any event, as evidenced by the multitude of fact patterns at issue in the Commission's enforcement matters considering the political committee status of various entities (''Political Committee Status Matters''). *See, e.g.*, MURs 5511 and 5525 (Swiftboat Vets); 5753 (League of Conservation Voters); 5754 (MoveOn.org Voter Fund); 5492 (Freedom, Inc.); 5751 (Leadership Forum).

E. The 2004 Final Rules Clarify and Strengthen the Political Committee Determination Consistent With the FECA and Supreme Court Framework

To best ensure that organizations that participate in Federal elections use funds compliant with the Act's restrictions, the Commission decided in the 2004 rulemaking to adopt two broad anti-circumvention measures. The first expands the regulatory definition of ''contribution'' to capture funds solicited for the specific purpose of supporting or opposing the election of a Federal candidate. *See* 11 CFR 100.57. An organization that receives more than $1,000 of such funds is required to register as a political committee. The second rule places limits on the non-Federal funds a registered political committee may use to engage in certain activity, such as voter drives and campaign advertisements, which has a clear Federal component. *See* 11 CFR 106.6. The combined effect of these two rules significantly curbs the raising and spending of non-Federal funds in connection with Federal elections, in a manner wholly consistent with the existing political committee framework. The effect of these changes on 527 organizations has already been remarked. *See* Paul Kane, *''Liberal 527s Find Shortfall,''* Roll Call (Sept. 25, 2006) (''a change in FEC regulations curtailed a huge chunk of 527 money because, after the 2004 elections, the commission issued a ruling that said all get-out-the-vote efforts in Congressional races had to be financed with at least 50 percent federal donations, those contributions that are limited to $5000 per year to political action committees'').

1. The Commission Adopted a New Regulation That Requires Organizations To Register as Political Committees Based on Their Solicitations

While Supreme Court precedent places strict parameters on the breadth of the definition of expenditure, Supreme Court precedent provides greater deference to contribution restrictions. *See FEC* v. *Beaumont,* 539 U.S. 146, 161 (U.S. 2003) (upholding the constitutionality of FECA's corporate contribution prohibition as applied to a non-profit advocacy corporation and noting: ''Going back to *Buckley,* restrictions on political contributions have been treated as merely 'marginal' speech restrictions subject to relatively complaisant review under the First Amendment, because contributions lie closer to the edges than to the core of political expression.'') (citations omitted). Other judicial precedent specifically permits a broader interpretation of when an organization has solicited contributions. In *FEC* v. *Survival Educ. Fund, Inc.,* 65 F.3d 285 (2d Cir. 1995) (*''SEF''*), the appellate court held that a mailer solicited ''contributions'' under FECA when it left '' no doubt that the funds contributed would be used to advocate President Reagan's defeat at the polls, not simply to criticize his policies during the election year.'' *Id.* at 295. The Commission's new rule at 11 CFR 100.57 codifies the *SEF* analysis. Section 100.57(a) states that if a solicitation ''indicates that any portion of the funds received will be used to support or oppose the election of a clearly identified Federal candidate,'' then all money received in response to that solicitation must be treated as a ''contribution'' under FECA. *See 2004 Final Rules,* 69 FR at 68057–58.

When an organization receives $1,000 or more in contributions, including those that are defined under new section 100.57(a), the organization will meet the statutory definition of a ''political committee.'' An organization that triggers political committee status through the receipt of such contributions is required to register the committee with the Commission, report all receipts and disbursements, and abide by the contribution limitations and source prohibitions.

Thus, section 100.57 codifies a clear, practical, and effective means of determining whether an entity, regardless of tax status, is participating in activity designed to influence Federal elections, and, therefore, may be required to register as a political committee.

[13] Many prominent 527 organizations in 2004 were registered political committees with Federal and non-Federal accounts. A new rule addressing major purpose would not have required these organizations to change their structures. The more relevant questions for these organizations was whether particular expenses could lawfully be paid with non-Federal funds from a non-Federal account, which was sometimes a connected 527 organization not registered with the Commission, and whether non-Federal funds could be raised through solicitations that referred to clearly identified Federal candidates. New section 100.57 and revised section 106.6, as discussed below in Part E, address these questions.

[14] As described in Part F, below, the Commission has resolved several enforcement matters that involve 527 organizations alleged to have unlawfully failed to register as political committees. The Commission further notes that it has concluded action on the vast majority of the 2004-cycle cases on its docket and posted record enforcement figures in 2006. *See* Press Release, Federal Election Commission, FEC Posts Record Year, Collecting $6.2 Million in Civil Penalties, *available at http://www.fec.gov/press/press2006/20061228summary.htmlprocess.*

In addition, the new regulation contains a prophylactic measure at section 100.57(b) to prevent circumvention of the solicitation rule by registered political committees operating both Federal and non-Federal accounts under the Commission's allocation rules. Section 100.57(b) requires that at least 50%, and as much as 100%, of the funds received in response to a solicitation satisfying the requirements of section 100.57(a) be treated as FECA contributions, regardless of references to other intended uses for the funds received. *See* 11 CFR 100.57(b)(1) and (2); *2004 Final Rules,* 69 FR at 68058–59. Therefore, section 100.57(b) prevents a political committee from adding references to non-Federal candidates or political parties to its solicitation materials in order to claim that most or all of the funds received are for non-Federal purposes, and therefore, not ''contributions'' under FECA. The regulation has the additional advantage of prohibiting registered political committees from raising donations not subject to the limitations from individual contributors or from prohibited sources using solicitation materials that focus on influencing the election of Federal candidates.

Moreover, the costs of these solicitations must be paid for with a corresponding proportion of Federal funds. For example, if 100% of the funds received from a solicitation would be treated as contributions under section 100.57(b)(1), then 100% of the costs of that solicitation must be paid with Federal funds. *See* 11 CFR 100.57(b); 11 CFR 106.1(a)(1); 11 CFR 106.6(d)(1); 11 CFR 106.7(d)(4).

In sum, section 100.57 codifies a broad method of establishing political committee status with strong anti-circumvention protections, providing clear guidance to the regulated community that any organization, regardless of tax status, may be required to register as a political committee based on its solicitations.

2. The Commission Adopted Anti-Circumvention Measures Requiring That Campaign Ads and Voter Turn Out Efforts be Paid for With at Least 50% Federal Funds and as Much as 100% Federal Funds

The *2004 Final Rules* also include a comprehensive overhaul of the Commission's allocation regulations, which govern how corporate and labor organization PACs and nonconnected committees split the costs of Federal and non-Federal activities such as campaign ads and voter turnout efforts. *See* 11 CFR 106.6. Under Commission regulations, a registered political committee that participates in both Federal and non-Federal elections is permitted to maintain both Federal and non-Federal accounts, containing funds that comply, respectively, with Federal and State restrictions. *See* 11 CFR 102.5(a).

Because many activities that an organization may undertake will have both a Federal and non-Federal component (such as a voter drive where both the Federal candidate and the non-Federal candidate are appearing on the ballot), previous Commission regulations had permitted the committee to develop an allocation percentage based on a ratio of Federal expenditure to Federal and non-Federal disbursements. This allocation percentage would govern how payments for all activity of the organization would be split between the two accounts.

Several commenters claimed that some registered political committees were relying on these former allocation rules to pay for Federal campaign ads and voter turnout efforts that could influence the 2004 Federal elections almost entirely with non-Federal funds. BCRA's Congressional sponsors, including two of the *Shays II* plaintiffs, argued that the previous allocation requirements ''allow[ed] for absurd results'' and that ''[t]he Commission must revise its allocation rules to require a significant minimum hard money share for spending on voter mobilization in a federal election year.''

Several campaign finance reform groups, including counsel to two of the *Shays II* amici, urged the Commission to curb these perceived abuses. At the time, they stated it was ''essential for the Commission to take this action as part of the [2004] rulemaking process.''

The *2004 Final Rules* directly resolve these concerns by establishing strict new Federal funding requirements for registered political committees, as well as for entities that conduct activity through both registered Federal accounts and unregistered non-Federal accounts. The new rules require these groups to: (a) Use a minimum of 50% Federal funds to pay for get-out-the-vote drives that do not mention a specific candidate, as well as public communications that refer to a political party without referring to any specific candidates, and administrative costs; (b) use 100% Federal funds to pay for public communications or voter drives that refer to one or more Federal candidates, but no non-Federal candidates; and (c) for public communications or voter drives that refer to both Federal and non-Federal candidates, use a ratio of Federal and non-Federal funds based on the time and space devoted to each Federal candidate as compared to the total space devoted to all candidates. *See* 11 CFR 106.6(c); *2004 Final Rules,* 69 FR at 68061–63; 11 CFR 106.6(f). Notably, the Commission's new allocation and contribution regulations are the subject of pending litigation, where the Commission is charged not with being too lenient, but being too restrictive. *See EMILY's List* v. *FEC* (Civil No. 05–0049 (CKK)) (D.D.C. summary judgment briefing completed July 18, 2005).[15]

An additional change to the regulation will also significantly shift political committees towards a greater use of Federal funds. The new regulations require an organization to pay at least 50% of its administrative costs with funds from the Federal account. This regulatory adjustment will curtail longstanding complaints that the Commission's allocation regulations have permitted non-Federal funds to substantially subsidize the overhead and day-to-day operations of the organization's Federal activity.

The revisions to section 106.6 prevent registered political committees from fully funding campaign advertisements and voter drives primarily designed to benefit Federal candidates with non-Federal funds simply by making a passing reference to a non-Federal candidate.

F. Since the 2004 Rulemaking, the Commission's Enforcement Actions Demonstrate the Application and Sufficiency of the FECA Political Committee Framework, and Provide Considerable Guidance Addressing When Groups Must Register as Political Committees

The Commission has applied FECA's definition of ''political committee,'' together with the major purpose doctrine, in the recent resolution of a number of administrative enforcement Matters involving 527 organizations and other groups. *See* MURs 5511 and 5525 (Swiftboat Vets); 5753 (League of Conservation Voters); 5754 (MoveOn.org Voter Fund); 5751 (The Leadership Forum); 5492 (Freedom, Inc.).[16] In each of these Political Committee Status Matters, the Commission conducted a thorough investigation of all aspects of the organization's statements and activities to determine first if the organization exceeded the $1,000

[15] Material related to this litigation can be found at *http://www.fec.gov/law/litigation_related.shtml#emilyslist_dc.*

[16] Documents related to these and other Commission MURs cited in this Explanation and Justification are available at *http://eqs.nictusa.com/eqs/searcheqs.*

statutory and regulatory threshold for expenditures or contributions in 2 U.S.C. 431(4)(A) and 11 CFR 100.5(a), and then whether the organization's major purpose was Federal campaign activity. The settlements in the Political Committee Status Matters are significant because they are the first major cases after the Supreme Court's decision in *McConnell* to consider the reach of the definition of ''express advocacy'' when evaluating an organization's disbursements for communications made independently of a candidate to determine if the expenditure threshold has been met. They are also significant because they demonstrate that an organization may satisfy the political committee status threshold based on how the organization raises funds, and that the Commission examines fundraising appeals based on the plain meaning of the solicitation, not the presence or absence of specific words or phrases. Finally, the Political Committee Status Matters illustrate well the Commission's application of the major purpose doctrine to the conduct of particular organizations.

As discussed in detail below, in these and other matters, the Commission provides guidance to organizations about both the expenditure and the contribution paths to political committee status under FECA, as well as the major purpose doctrine. Any organization can look to the public files for the Political Committee Status Matters and other closed enforcement matters, as well as advisory opinions and filings in civil enforcement cases, for guidance as to how the Commission has applied the statutory definition of ''political committee'' together with the major purpose doctrine. The public documents available regarding the 527 settlements in particular provide more than mere clarification of legal principle; they provide numerous examples of actual fundraising solicitations, advertisements, and other communications that will trigger political committee status. These documents should guide organizations in the future as they formulate plans and evaluate their own conduct so they may determine whether they must register and report with the Commission as political committees. To the extent uncertainty existed, these 527 settlements reduce any claim of uncertainty because concrete factual examples of the Commission's political committee status analysis are now part of the public record.

1. The Expenditure Path to Political Committee Status

In the Swiftboat Vets and League of Conservation Voters Matters, the Commission analyzed whether the organizations' advertising, voter drives and other communications ''expressly advocated'' the election or defeat of a clearly identified Federal candidate under the two definitions of that term in 11 CFR 100.22.[17] The Commission applied a test for express advocacy that is not only limited to the so-called ''magic words'' such as ''vote for'' or ''vote against,''[18] but also includes communications containing an ''electoral portion'' that is ''unmistakable, unambiguous, and suggestive of only one meaning'' and about which ''reasonable minds could not differ as to whether it encourages actions to elect or defeat'' a candidate when taken as a whole and with limited reference to external events, such as the proximity to the election.[19] The Commission was able to apply the alternative test set forth in 11 CFR 100.22(b) free of constitutional doubt based on *McConnell's* statement that a ''magic words'' test was not constitutionally required, as certain Federal courts had previously held. Express advocacy also includes exhortations ''to campaign for, or contribute to, a clearly identified candidate.'' *FEC* v. *Christian Coalition,* 52 F. Supp. 2d 45, 62 (D.D.C. 1999) (explaining why *Buckley,* 424 U.S. at 44 n.52, included the word ''support,'' in addition to ''vote for'' or ''elect,'' in its list of examples of express advocacy communication). Thus, if the organization spent more than $1,000 on a communication meeting either test for express advocacy, then the statutory threshold of expenditures was met.

The Commission determined that Swiftboat Vets met the threshold for ''expenditures'' because it spent over $1,000 for fundraising communications that ''expressly advocated'' the election or defeat of a clearly identified Federal candidate under 11 CFR 100.22(a). In addition, Swiftboat Vets spent over $1,000 for television advertisements, direct mailings and a newspaper advertisement that contained express advocacy under 11 CFR 100.22(b).[20]

The Commission also determined that two League of Conservation Voter 527 organizations met the expenditure threshold because they spent more than $1,000 on door-to-door canvassing and telephone banks where the scripts and talking points for canvassers and callers expressly advocated the defeat of a Federal candidate under 11 CFR 100.22(a). In addition, the League of Conservation Voters 527s spent more than $1,000 for a mailer expressly advocating a Federal candidate's election under both definitions in 11 CFR 100.22(a) and (b).[21]

2. The Contribution Path to Political Committee Status

With regard to the $1,000 threshold for ''contributions,'' the Commission examined fundraising appeals from each organization in the Swiftboat Vets, League of Conservation Voters and MoveOn.org Voter Fund matters and determined that if any of the solicitations clearly indicated that the funds received would be used to support or defeat a Federal candidate, then the funds received were given ''for the purpose of influencing'' a Federal election and therefore constituted ''contributions'' under FECA. *See SEF.* The Commission examined the entirety of the solicitations and did not limit its analysis to the presence or absence of any particular words or phrases. If any solicitations meeting the test set forth in *SEF* resulted in more than $1,000 received by the organization, then the statutory threshold for contributions was met.

Swiftboat Vets received more than $1,000 in response to several e-mail and Internet fundraising appeals and a direct mail solicitation clearly indicating that the funds received would be used to the defeat of a Federal candidate, which meant these funds were ''contributions'' under FECA.[22] Similarly, the League of

[17] In these Matters, the Commission used its enforcement process to develop the factual record of what advertisements the organizations ran, when and where they ran, and how much they cost, and to reach the legal conclusions of whether the regulatory standards were satisfied. Thus, even when the Commission codifies a legal standard in its regulations, the enforcement process is the vehicle for determining how that legal standard should be applied in a particular case.

[18] Under 11 CFR 100.22(a), a communication contains express advocacy when it uses phrases such as ''vote for the President,'' ''re-elect your Congressman,'' or ''Smith for Congress,'' or uses campaign slogans or words that in context have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidates, such as posters, bumper stickers, or advertisements that say, ''Nixon's the One,'' ''Carter '76,'' ''Reagan/Bush,'' or ''Mondale!''.

[19] 11 CFR 100.22(b). The Commission also recently resolved another administrative action based on a determination that a 501(c)(4) organization's communications satisfied the ''express advocacy'' definition in section 100.22(b). *See* MUR 5634 (Sierra Club, Inc.).

[20] *See* MUR 5511 Conciliation Agreement, at paragraphs 23–28.

[21] *See* MUR 5753 Conciliation Agreement, at 8–9.

[22] *See* MUR 5511 Conciliation Agreement, at paragraphs 18–21.

Conservation Voters 527s each received more than $1,000 in response to mailed solicitations, telephone calls, and personal meetings with contributors where the organizations clearly indicated that the funds received would be used to defeat a Federal candidate, which also meant these funds were ''contributions'' under FECA.[23] Finally, MoveOn.org Voter Fund received more than $1,000 in response to specific fundraising e-mail messages that clearly indicated the funds received would be used to defeat a Presidential candidate, which constituted ''contributions'' under FECA.[24]

3. Application of the Major Purpose Doctrine

After determining that each organization in the Swiftboat Vets, League of Conservation Voters, and MoveOn.org Voter Fund matters had met the threshold for contributions or expenditures in FECA and Commission regulations, the Commission then investigated whether each organization's major purpose was Federal campaign activity. The Commission examined each organization's fundraising solicitations, the sources of its contributions, and the amounts received. The Commission considered public statements as well as internal documents about an organization's mission. Each organization's full range of campaign activities was evaluated, including whether the organization engaged in any activities that were not campaign related.

Recently resolved matters reflect the comprehensive analysis required to determine an organization's major purpose. Swiftboat Vets' major purpose was campaign activity, as evidenced by: (1) Statements made to prospective donors detailing the organization's goals; (2) public statements on the organization's Web site; (3) statements in a letter from the organization's Chairman thanking a large contributor; (4) statements by a member of the organization's Steering Committee on a news program; and (5) statements in various fundraising solicitations. The organization's activities also evidenced its major purpose as over 91% of its reported disbursements were spent on advertisements directed to Presidential battleground States and direct mail attacking or expressly advocating the defeat of a Presidential candidate, and the organization has effectively ceased active operations after the November 2004 election.[25]

The League of Conservation Voters 527s' major purpose was campaign activity as demonstrated through: (1) Statements made in the organizations' solicitations; (2) statements in organizational planning documents, such as a ''National Electoral Strategic Plan 2004''; (3) public statements endorsing Federal candidates; and (4) statements in letters from the organizations' President describing the organizations' activities. The organizations' budget also evidenced its major purpose of campaign activity because 50–75% of the political budget for the organizations was intended for the Presidential election.[26]

MoveOn.org Voter Fund's major purpose was campaign activity as evidenced by statements regarding its objectives in e-mail solicitations. MoveOn.org Voter Fund's activities also demonstrated its major purpose of campaign activity. MoveOn.org Voter Fund spent over 68% of its total 2004 disbursements on television advertising opposing a Federal candidate in Presidential battleground states; the only other disbursements from MoveOn.org Voter Fund in 2004 were for fundraising, administrative expenses, and grants to other political organizations. MoveOn.org Voter Fund spent nothing on State or local elections. Lastly, MoveOn.org Voter Fund has effectively ceased active operations after the November 2004 election.[27]

527 organizations are not the only groups whose major purpose is Federal campaign activity. The Commission recently conciliated a MUR with a 501(c)(4) organization, Freedom Inc., which had failed to register and report as a political committee despite conducting Federal campaign activity during the 2004 election cycle. *See* MUR 5492. Freedom Inc. made more than $1,000 in expenditures for communications that expressly advocated a Federal candidate's election under section 100.22(a), and it conceded that its major purpose was campaign activity.

4. Other FEC Actions

In addition to the Political Committee Status Matters discussed above, the Commission filed suit against another 527 organization, the Club for Growth, Inc. (''CFG''), for failing to register and report as a political committee in violation of FECA. *See FEC* v. *Club for Growth, Inc.,* Civ. No. 05–1851 (RMU) (D.D.C. Compl. pending).[28] The Commission's complaint against CFG provides further guidance to organizations regarding the prerequisites of political committee status.

The complaint shows that CFG made expenditures for candidate research, polling, and advertising, including advertising that expressly advocates the election or defeat of clearly identified candidates. (Compl. at 10–11). Additionally, CFG made solicitations indicating that funds provided would be used to support or oppose specific candidates, which means the funds received were contributions under FECA. (*Id.,* at 8–9). Finally, the complaint reflects an extensive examination of the organization, resulting in a determination that the major purpose of the organization was to influence Federal elections (*id.,* at 12), including evidence such as: CFG's statement of purpose in the registration statement submitted to the Internal Revenue Service (*id.,* at 6); other public statements indicating CFG'S purpose is influencing Federal elections (*id.,* at 6–7); CFG's use of solicitations that make clear that contributions will be used to support or oppose the election of specific Federal candidates (*id.,* at 8–9); other spending by CFG for public communications mentioning Federal candidates (*id.,* at 10–11); and the absence of any spending by CFG on State or local races (*id.,* at 10).

Just as findings of violations inform organizations as to what kinds of activities will compel registration as a Federal political committee, a Commission finding that there has been no violation clarifies those activities that will not. For example, in MUR 5751 (the Leadership Forum), the Commission made a threshold finding that there was a basis for investigating (*i.e.*, the Commission found ''Reason to Believe'') whether the Leadership Forum had failed to register as a political committee based on its 2004 election activity. The subsequent investigation revealed that the Leadership Forum's only public communications reprinted governmental voter information, without any mention of Federal or non-Federal candidates or political parties. Following the investigation, the Commission closed the matter because it found no evidence that the Leadership

[23] *See* MUR 5753 Conciliation Agreement, at 5–7.

[24] *See* MUR 5754 Conciliation Agreement, at 5–8.

[25] *See* MUR 5511 Conciliation Agreement, at paragraphs 31–36.

[26] *See* MUR 5753 Conciliation Agreement, at 9–10.

[27] *See* MUR 5754 Conciliation Agreement, at 8, and Factual & Legal Analysis, at 11–13 (Aug. 9, 2006).

[28] Complaint available at *http://www.fec.gov/law/litigation/club_for_growth_complaint.pdf.*

Forum had crossed the $1,000 threshold through expenditures or contributions. Consequently, the Commission did not undertake a major purpose analysis for the Leadership Forum.

All of these cases taken together illustrate (1) The Commission's commitment to enforcing FECA's requirements for political committee status as well as (2) the need for an examination of an organization's activities under the major purpose doctrine, regardless of a particular organization's tax status.

5. The Advisory Opinion Process

Any entity that remains unclear about the application of FECA to its prospective activities may request an advisory opinion from the Commission. *See* 2 U.S.C. 437f; 11 CFR part 112. Through advisory opinions, the Commission can further explain the application of the law and provide guidance to an organization about how the Commission would apply the major purpose doctrine to its proposed activities, and whether the organization must register as a political committee.[29]

Under FECA, the Commission is required to provide an advisory opinion within 60 days of receiving a complete written request and, in some instances, within 20 days. *See* 2 U.S.C. 437f(a); 11 CFR 112.4(a) and (b). Moreover, the Commission's legal analysis and conclusions in an advisory opinion may be relied upon not only by the requestor, but also by any person whose activity ''is indistinguishable in all its material aspects'' from the activity in the advisory opinion. *See* 2 U.S.C. 437f(c); 11 CFR 112.5(a)(2). The Commission has considered the major purpose doctrine in prior advisory opinions when assessing whether an organization is a political committee.[30]

The advisory opinion process is an effective means by which the Commission clarifies the law because it allows an entity to ask the Commission for specific advice about the factual situation with which the entity is concerned, often in advance of the entity engaging in the contemplated activities.

[29] *See* McConnell, 540 U.S. at 170 n.64 (holding portions of BCRA were not unconstitutionally vague, in part because ''should plaintiffs feel that they need further guidance, they are able to seek advisory opinions for clarification * * * and thereby 'remove any doubt there may be as to the meaning of the law''' (internal citation omitted)).

[30] *See* Advisory Opinions 2006–20 (Unity 08); 2005–16 (Fired Up); 1996–13 (Townhouse Associates); 1996–3 (Breeden-Schmidt Foundation); 1995–11 (Hawthorn Group); 1994–25 (Libertarian National Committee) and 1988–22 (San Joaquin Valley Republican Associates).

Conclusion

By adopting a new regulation by which an organization may be required to register as a political committee based on its solicitations, and by tightening the rules governing how registered political committees fund solicitations, voter drives and campaign advertisements, the *2004 Final Rules* bolstered FECA against circumvention not just by one kind of organization, but by groups of all kinds. As discussed above, the Commission's decision not to establish a political committee definition singling out 527 organizations is informed by the statutory scheme, Supreme Court precedent, and Congressional action regarding 527 organizations. Accordingly, the Commission will continue to utilize the political committee framework provided by Congress in FECA, as modified by the Supreme Court.

Pursuant to FECA and Supreme Court precedent, the Commission will continue to determine political committee status based on whether an organization (1) Received contributions or made expenditures in excess of $1,000 during a calendar year, and (2) whether that organization's major purpose was campaign activity. *See* 2 U.S.C. 431(4)(A); *Buckley,* 424 U.S. at 79; *MCFL,* 479 U.S. at 262. When analyzing a group's contributions, the Commission will consider whether any of an organization's solicitations generated contributions because the solicitations indicated that any portion of the funds received would be used to support or oppose the election of a clearly identified Federal candidate. *See* 11 CFR 100.57. Additionally, the Commission will analyze whether expenditures for any of an organization's communications made independently of a candidate constituted express advocacy either under 11 CFR 100.22(a), or the broader definition at 11 CFR 100.22(b).

As evidenced by the Commission's recent enforcement actions, together with guidance provided through publicly available advisory opinions and filings in civil enforcement cases, this framework provides the Commission with a very effective mechanism for regulating organizations that should be registered as political committees under FECA, regardless of that organization's tax status. The Commission's new and amended rules, together with this Supplemental Explanation and Justification, as well as the Commission's recent enforcement actions, places the regulated community on notice of the state of the law regarding expenditures, the major purpose doctrine, and solicitations resulting in contributions. In addition, any group unclear about the application of FECA to its prospective activities may request an advisory opinion from the Commission. *See* 2 U.S.C. 437f; 11 CFR part 112.

Dated: February 1, 2007.

Robert D. Lenhard,

Chairman, Federal Election Commission.

[FR Doc. E7–1936 Filed 2–6–07; 8:45 am]

BILLING CODE 6715–01–P

FARM CREDIT ADMINISTRATION

12 CFR Parts 611, 612, 613, 614, and 615

RIN 3052–AC15

Organization; Standards of Conduct and Referral of Known or Suspected Criminal Violations; Eligibility and Scope of Financing; Loan Policies and Operations; Funding and Fiscal Affairs, Loan Policies and Operations, and Funding Operations; Regulatory Burden; Effective Date

AGENCY: Farm Credit Administration.

ACTION: Notice of effective date.

SUMMARY: The Farm Credit Administration (FCA) published a final rule under parts 611, 612, 613, 614, and 615 on November 8, 2006 (71 FR 65383). This final rule reduces regulatory burden on the Farm Credit System by repealing or revising regulations and correcting outdated and erroneous regulations. In accordance with 12 U.S.C. 2252, the effective date of the final rule is 30 days from the date of publication in the **Federal Register** during which either or both Houses of Congress are in session. Based on the records of the sessions of Congress, the effective date of the regulations is February 1, 2007.

EFFECTIVE DATES: The regulation amending 12 CFR parts 611, 612, 613, 614, and 615, published on November 8, 2006 (71 FR 65383) is effective February 1, 2007.

FOR FURTHER INFORMATION CONTACT: Jacqueline R. Melvin, Associate Policy Analyst, Office of Policy and Analysis, Farm Credit Administration, McLean, VA 22102–5090, (703) 883–4498, TTY (703) 883–4434; or Howard I. Rubin, Senior Counsel, Office of General Counsel, Farm Credit Administration, McLean, VA 22102–5090, (703) 883–4020, TTY (703) 883–4020.

(12 U.S.C. 2252(a)(9) and (10))