Federal Election Commission

Annual Report 2006

Federal Election Commission
Washington, DC 20463



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FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

OFFICE OF THE CHAIRMAN

June 30, 2007

The President of the United States
Members of The United States Senate
Members of The United States House of Representatives

Dear Mr. President, Senators and Representatives:

We are pleased to submit for your information the 32nd Annual Report of the Federal Election Commission. The *Annual Report 2006*, which supplements the FEC's Fiscal Year 2006 *Performance and Accountability Report*, describes the Commission's efforts in the last calendar year to enforce and defend the campaign finance law, monitor and disclose campaign finance activity and encourage voluntary compliance with the law through policy guidance and educational outreach programs.

Throughout the year, the Commission worked to make the agency more efficient and responsive to the needs of the public and the regulated community. As highlighted in this report, the FEC's enforcement program reached a milestone in 2006 with the Commission's negotiation of a record $6.2 million in civil penalties for violations involving significant legal issues. The Commission also continued its work to provide clear guidance to the regulated community with an ambitious schedule of rulemakings and advisory opinions and a number of policy statements intended to clarify the Commission's position with regard to the enforcement of certain aspects of the law. The advisory opinion process itself offered a venue for innovation during the year, with the Commission's introduction of a new, expedited process for responding to time-sensitive requests. As this report documents, the agency continues to demonstrate through all of its programs its commitment to providing the highest level of service to the electorate.

We are very pleased at this opportunity to share with all of our stakeholders our progress in 2006 and hope that you will find this annual report to be a useful summary of the Commission's efforts to implement the Federal Election Campaign Act.

Respectfully,

Robert D. Lenhard

Chairman

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Executive Summary

Enforcing the Law

Perhaps the most noteworthy of the Federal Election Commission's (FEC's) accomplishments during 2006 occurred in its enforcement of the Federal Election Campaign Act (the Act). The Commission closed a total of 315 enforcement cases and resolved its cases faster and more efficiently than ever. By year's end, the Commission had negotiated a record $6.2 million in civil penalties for violations that involved significant legal issues, including activity by certain Section 527 organizations and corporate contributions. See Chapter 1 for details.

Interpreting the Law and Encouraging Compliance

While its improvements in enforcement were certainly among the highlights of 2006, the Commission's long-standing commitment to preventing violations by providing clear policy guidance, disclosure and educational outreach to the regulated community continued to be a source of pride for the agency as well. The Commission completed seven rulemakings addressing complex provisions of the Bipartisan Campaign Reform Act (BCRA), issued 29 advisory opinions (AOs) offering guidance on a variety of key issues, instituted an expedited process for handling time-sensitive AO requests and issued several policy statements to clarify the Commission's intentions with respect to enforcing certain provisions of the law. In disclosure, the agency processed and reviewed 78,000 financial disclosure filings comprising 3.9 million pages of data disclosing $2.7 billion in spending. While budgetary constraints limited the Commission's educational outreach, the agency hosted seven compliance workshops, updated several brochures and published monthly supplements to its campaign guides as well as the *Record* newsletter. All of those publications and more was made available on the FEC's web site, which averaged nearly 11,000 visitors a day during the 2006 election year, an increase of more than 3,500 over the 2005 non-election year average. The Commission's efforts to encourage compliance are detailed in Chapter 2.

Defending the Law

Several of the rulemakings the Commission completed during 2006 arose from court decisions involving provisions of BCRA. While the Commission's litigation staff successfully defended the vast majority of the Commission's regulations implementing the statute, courts required the agency to revise some rules and to provide additional rationale for others. Other significant 2006 court decisions involved political committee status, the ability of certain nonprofit corporations to finance electioneering communications and the constitutionality of the Millionaires' Amendment. Details on these and other key cases appear in Chapter 3.

Administering Public Funding

Having completed five of the 2004 Presidential audits during 2006, the Commission began to focus its attention on the public funding of the 2008 Presidential race. Lagging participation in the $3 tax checkoff that funds the program, combined with inflation-adjusted payments for the major party conventions and nominees and open races for the parties' nominations, could result in a significant funding shortfall in 2008. That potential shortfall—among other factors—has led some candidates to consider bypassing the public funding system entirely. Historically, candidates have occasionally chosen not to accept primary matching funds but, to date, no major party nominee has ever rejected general election funding. The Commission has, for many years, recommended that Congress take action to ensure the solvency of the public funding program or to adopt an alternative approach to Presidential campaign financing. Without legislative action, the 2008 election could be the last for the existing system. The Commission's 2006 actions regarding public funding are summarized in Chapter 4.

AGENCY STRUCTURE AND MISSION

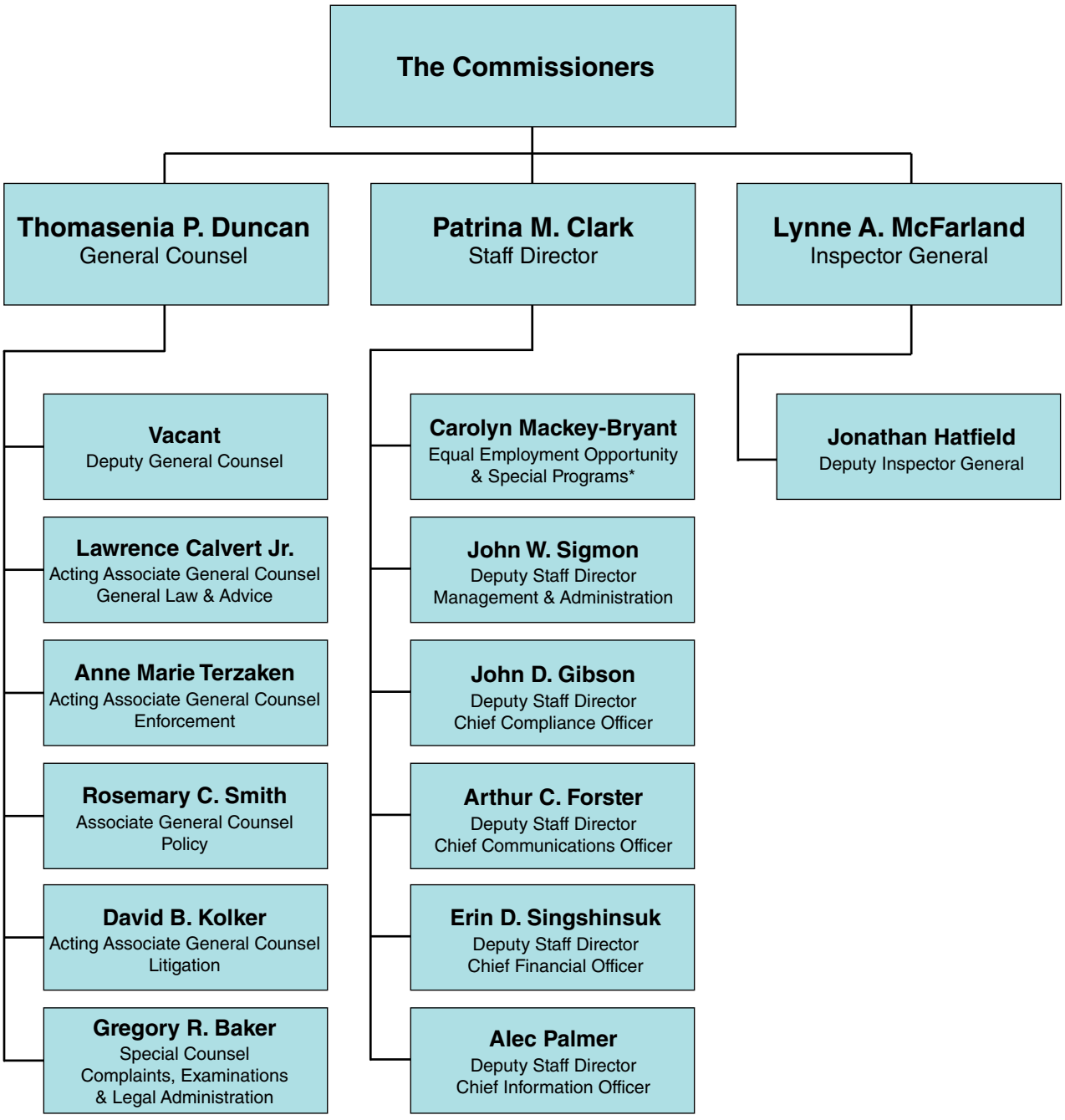
Agency Structure and Mission

The FEC is the independent regulatory agency responsible for interpreting, administering, enforcing and defending the Federal Election Campaign Act (FECA or the Act). As part of this task, the Commission promulgates regulations implementing the Act's requirements and issues advisory opinions (AOs) that respond to inquiries from those affected by the law. Additionally, the Commission has jurisdiction over the civil enforcement of the Act. Finally, Commission attorneys handle civil litigation arising out of any legal actions brought by or against the Commission.

The agency is structured to foster bipartisan decision-making. Its work is directed by six Commissioners appointed by the President with the advice and consent of the Senate. By law, no more than three Commissioners can be members of the same political party. Each member serves a six-year term and two seats are subject to appointment every two years. The Commissioners meet regularly to formulate policy and to vote on significant legal and administrative matters. At least four votes are required for any official Commission action. The Commission's balanced bipartisan structure leaves open the possibility of a tied vote. Because enforcement matters can only proceed with a majority vote, effective enforcement is, in part, dependent upon the Commission's ability to reach a consensus. In the 11-year period from 1995-2006, the Commission voted 8,127 times and reached a tie vote on enforcement matters only 105 times, or 1 percent of overall votes for that period. In fact, the Commission unanimously approved action on 83 percent of enforcement actions considered during the period.

The Office of the General Counsel and the Office of the Staff Director support the Commissioners in accomplishing the FEC's mission.

FIGURE 1:
Organizational Structure of the FEC



* The Director for Equal Employment & Opportunity reports to the Staff Director for management and administrative purposes; however, has direct reporting authority to the Commission on all EEO matters.

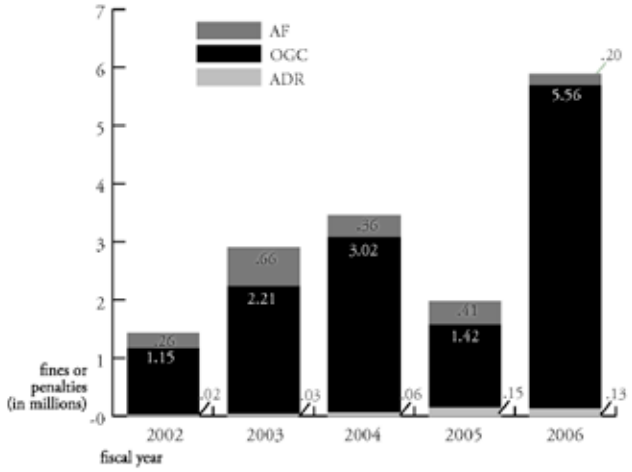
Chapter One
Enforcing the Law

During 2006, the Commission negotiated substantial civil penalties for significant violations of federal election laws and did so more quickly than ever. By any measure, it was a watershed year for the Commission's enforcement program.

The U.S. Treasury collected more than $6.2 million in civil penalties from FEC enforcement actions, which is more than double the total amount of penalties of any other single year in the agency's 31-year history. In fact, nearly a quarter of all FEC enforcement cases with penalties over $100,000 (12 of 49) were concluded in 2006.

One of those cases netted the largest single civil penalty in agency history—$3.8 million, paid by Federal Home Loan Mortgage Corporation (Freddie Mac) for prohibited corporate activity. The Commission also settled cases against three Section 527[1] groups that agreed to pay almost $630,000 in penalties for failing to register and file disclosure reports as federal political committees and comply with restrictions placed on political committees during the 2004 Presidential campaign. While these large penalties involving significant legal issues garnered most of the headlines, the Commission's enforcement program also dramatically improved its efficiency. The average number of days for cases to be completed declined for the third straight year, making 2006 the agency's fastest and most efficient year for the processing of complaints.

FIGURE 2:
Compliance fines quintupled from $1.5 million in FY02 to $5.56 million in FY06



Standard Enforcement Process

The FEC has exclusive jurisdiction over civil enforcement of the federal campaign finance laws. Generally, enforcement cases are generated through complaints filed by the public, referrals from other federal and state agencies and the FEC's own internal monitoring procedures.[2] Whether initiated by outside complaint or internal referral, the most complex and legally significant enforcement matters, or matters under review (MURs), are handled by the Enforcement Division of the Office of General Counsel (OGC).

The Enforcement Division:

- Recommends to the Commission whether to find "reason to believe" that the Act has been violated, a finding that formally initiates an investigation;
- Investigates potential violations of the Act by requesting, subpoenaing, and reviewing documents and interviewing and deposing witnesses; and

[1] Named for a section of the Internal Revenue Code that exempts some of its activities from taxation, a 527 organization is a political organization. Some are required to register with the FEC as "political committees," others are not.

[2] Under 2 USC §437g, the Commission may also investigate possible violations based on a news article or similar published account. In addition, a person or entity who believes he may have committed a violation may bring the matter *sua sponte* to the Commission's attention.

• Conducts settlement negotiations on behalf of the Commission, culminating in conciliation agreements with respondents.

Based on the results of its investigations, OGC recommends to the Commission whether to find "probable cause" to believe the Act has been violated. The agency must attempt to resolve enforcement matters through conciliation. If conciliation fails, however, the Commission may bring suit against a respondent in federal district court.

As noted above, one MUR resolved during 2006 yielded the largest civil penalty in agency history. The $3.8 million penalty resulted from Freddie Mac's prohibited use of corporate resources to facilitate campaign fundraising events and to collect and forward political contributions to federal candidates. The Commission found that Freddie Mac had illegally contributed to political committees using corporate funds and used other company resources to facilitate additional contributions.

Late in the year, the Commission announced significant conciliation agreements with several Section 527 organizations whose involvement in the 2004 Presidential elections had raised questions concerning the legal parameters of unregistered entities' involvement in federal elections. The Swiftboat Veterans and POWs for Truth, the League of Conservation Voters 527 and 527II and MoveOn.org Voter Fund, collectively paid almost $630,000 for failing to register and file disclosure reports as federal political committees and accepting contributions in violation of federal limits and source prohibitions.

The two League of Conservation Voters groups funded door-to-door and phone canvassing activities that expressly advocated the election of Senator John Kerry and the defeat of President Bush. MoveOn.org Voter Fund produced television advertisements targeted to Presidential battleground states aimed at defeating President Bush, and its solicitations for

FIGURE 3:
Enforcement action cases opened from FY04 to FY06 increased substantially

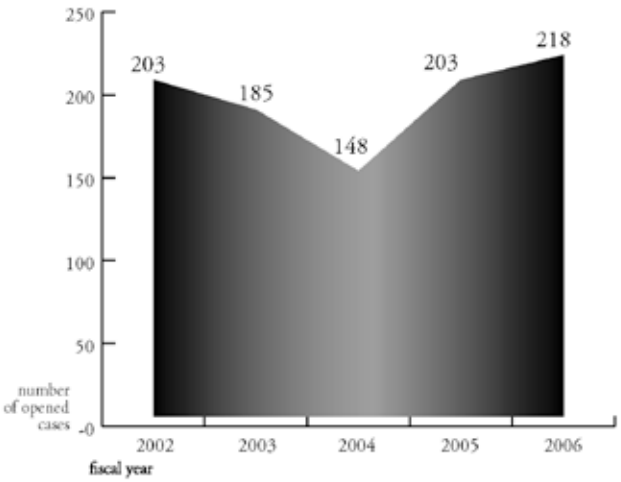
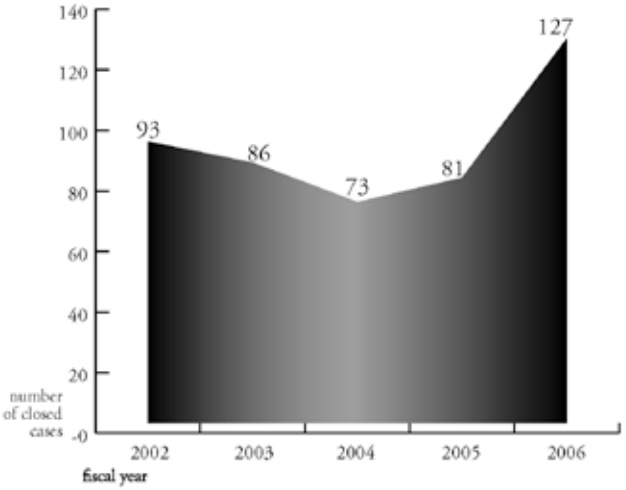


FIGURE 4:
In FY06, OGC increased the number of cases closed by 37 percent over cases closed in FY02



funds clearly indicated that the funds received would be used to defeat President Bush in the 2004 general election. Swiftboat Veterans and POWs for Truth produced advertisements and sent out direct mail pieces attacking Senator Kerry and expressly advocating his defeat. All three groups have agreed to cease violating the Act, to file reports disclosing their 2004 election cycle activity and to register with the Commission as political committees if they engage in similar conduct in the future.

The Commission also secured substantial civil penalties in cases involving other provisions of the campaign finance law. For example, James Treffinger, the James Treffinger for Senate Committee and its treasurer, paid civil penalties totaling $171,000 for receipt of excessive contributions that should have been refunded, redesignated or reattributed. In addition, the respondents used contributions that should have been refunded to pay the candidate's legal fees.

Another significant agreement reached during the year involved J. Edgar Broyhill, II, the Broyhill for Congress committee and its treasurer for failing to file in a timely manner the notification forms required by the Millionaires' Amendment.[3] Specifically, Mr. Broyhill and his committee failed to file the required notifications within 24 hours of Mr. Broyhill making a series of personal loans that triggered personal spending notices related to the Millionaires' Amendment. The respondents agreed to pay a $71,000 civil penalty for violating the applicable reporting requirements.

[3] Under the so-called "Millionaires' Amendment," a candidate whose opponent's personal campaign spending exceeds certain threshold amounts may qualify for increased limits on individual contributions and, during the general election, increased coordinated party expenditures, as well.

Administrative Fine and Alternative Dispute Resolution Programs

As supplements to the standard enforcement process, the Alternative Dispute Resolution (ADR) program offers a process for negotiating the settlement of cases and the Administrative Fine Program handles late filing and failure to file disclosure reports.

A permanent Commission program since 2002, ADR resolves cases outside the formal enforcement process. Instead, cases are settled through informal negotiation between the FEC and the respondent. Agreements typically involve smaller civil penalties, but require respondents to take specific steps to prevent repeat infractions.

The Administrative Fine Program promotes timely filing by assessing civil money penalties for committees that file reports and notices late or fail to report at all. Not only has the program significantly increased the timeliness of committee filings, but it has enabled the Commission to devote its enforcement resources to more substantive violations.

In sum, the FEC closed 315 enforcement matters in 2006 (including Administrative Fine and Alternative Dispute Resolution cases), the largest number since 2001. At year's end, the total in civil penalties collected by the Commission in 2006 was $6,262,052, with $5,925,800 from enforcement cases, $136,299 through its Alternative Dispute Resolution program, and $201,953 from Administrative Fines.

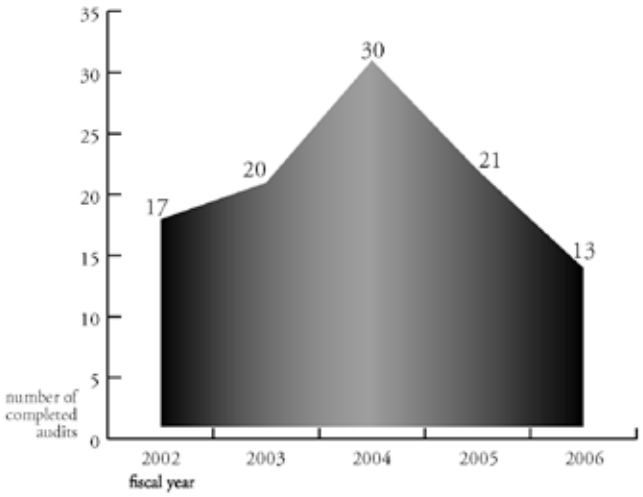
Audit

Mandatory audits of publicly funded Presidential campaigns have traditionally required a large portion of the Audit Division's resources and, therefore, relatively few audits of non-Presidential candidates were completed. Over the past several years, the Audit Division has worked to develop a stand-alone audit program for non-Presidential committees each election cycle to increase the audit presence in the regulated community. With the increased use of computer technology, the streamlining of audit procedures, a divisional reorganization and the addition of modest staff resources, the non-Presidential audit program is making significant progress. In 2006, the Audit

Division issued 11 interim audit reports and 18 total final audit reports[4] on campaign committees, political parties and other political committees.

The Commission believes that an increased audit presence not only contributes to the Commission's enforcement efforts but also encourages voluntary compliance among the regulated community. Furthermore, the broader scope of the audit presence provides the Commission with information that can be used to refine internal procedures and regulation.

FIGURE 5:
Number of non-Presidential audits completed in 2006. The decline is due in part to the growing complexity of Presidential audits



[4] Audits of non-Presidential committees are also referred to as Title 2 audits, while audits of Presidential committees are also known as Title 26 audits. In 2006, the Audit Division completed 13 Title 2 and five Title 26 audits.

Chapter Two
Interpreting the Law and Encouraging Compliance

Regulations

Congressional action, judicial decisions, petitions for rulemaking and other changes in campaign finance law or practices may necessitate that the Commission update or create new regulations. Consequently, the Commission undertakes rulemakings to revise existing campaign finance rules and to promulgate new ones. In 2006, the Commission completed seven highly complex and resource-intensive rulemakings.

Background

Proposed rules are published in the *Federal Register,* on the FEC's web site and on Regulations.gov to provide an opportunity for members of the public and the regulated community to submit written comments and to testify at public hearings held at the Commission, when appropriate. The Commission considers public comments and testimony and deliberates over the final rules in agency open meetings. The text of final rules and the corresponding Explanation and Justification (E&J) are published in the *Federal Register* and sent to the House of Representatives and Senate once they have been approved.

In 2006, the Commission focused much of its time and resources on completing revisions to its regulations to comport with court decisions in the *Shays v. FEC* litigation. The court remanded certain regulations to the agency for further action, concluding that the Commission either needed to provide additional explanation for its actions or make substantive changes to its regulations to fully reflect Congressional intent. After considering public comments and testimony, the Commission issued the final rules detailed below:

Revised Definition of "Agent"

The Commission voted to retain the current definitions of "agent" and explained that the current definitions, which include only "actual authority," either express or implied, best reflect the intent and purposes of FECA. Furthermore, after examining its pre- and post-BCRA enforcement record, the Commission determined that excluding "apparent authority" from the definitions of agent had not allowed circumvention of the Act nor led to actual or apparent corruption.

Final Rules on Definition of FEA

The Commission approved final rules that retain the current definitions of federal election activity (FEA) for voter registration and modify the definition of get-out-the-vote (GOTV) activity as well as clarify that those definitions exclude mere encouragement to register and/or vote. To provide guidance to the regulated community, the Commission provided in the E&J several specific examples of what does and does not constitute "voter registration activity." The final rules also modify the definition of voter identification to include acquisition of voter lists and to clarify the application of the FEA time periods. Finally, the exception from the definitions of GOTV and voter identification for associations of nonfederal candidates was removed. The revised rules took effect March 24, 2006.

Interim Final Rule

In order to exclude from federal regulation certain voter identification and GOTV activities that are conducted solely in connection with nonfederal elections, the Commission promulgated an interim final rule that exempts certain activities and communications from the definition of FEA when they are in connection with a nonfederal election held on a date separate from the date of any federal election. This exception allows such nonfederal activities to be financed with a properly allocated mix of federal and nonfederal funds. The interim final rule took effect March 24, 2006, but will expire on September 1, 2007.

Final Rules on Solicit and Direct

Final rules issued by the Commission revise the definition of "solicit" to encompass written and oral communications, construed as reasonably understood in the context in which they are made, that contain a clear message asking, requesting or recommending, explicitly or implicitly, that another person make a contribution, donation, transfer of funds, or otherwise provide something of value. Similarly, the revised definition of "direct" means to guide, directly or indirectly, a person who has expressed an intent to make a contribution, donation, transfer of funds, or otherwise provide anything of value by identifying a candidate, political committee or organization for the receipt of such funds or things of value. The final rules became effective on April 19, 2006.

Final Rule on Coordinated Communications

The Commission addressed the *Shays* court's concerns regarding the "content prong" of the three-pronged coordinated communications test by gathering quantitative data concerning the timing of television advertising run by Presidential, Senate and House candidates during the 2004 election cycle. After receiving comments and public testimony, the Commission published final rules that retain the existing content prong but modify the pre-election time frame in which certain communications will be considered coordinated. The rules establish separate time frames for communications referencing political parties, congressional and Presidential candidates. The rules also create safe harbors for endorsements, solicitations for tax-exempt 501(c) organizations and the use of publicly available information in creating, producing or distributing a communication. The final rules took effect on July 10, 2006.

Internet Final Rules

The Commission received more than 800 public comments in connection with this rulemaking, the majority of which urged limited regulation of Internet activity. In response to comments and testimony received at two public hearings held in June 2005, the Commission approved regulations that include only paid Internet advertising in the definition of "public communication" while excluding from regulation unpaid Internet communications such as blogs, e-mail and a person's own web site. The final rules also modify the scope of the Commission's disclaimer requirements and make clear that the "media exemption"[1] covers qualified online publications. The final rules took effect on May 12, 2006.

Contribution Limits between Authorized Committees

The Commission approved regulations that implement an earlier statutory increase in the limit on contributions from one federal campaign to another from $1,000 to $2,000 per election. The amount was not indexed for inflation. No notice or comment period was required as the regulations simply restate the language of the Act. The final rules took effect on September 20, 2006.

Electioneering Communications Grassroots Lobbying Exemption

The Commission approved a Notice of Disposition ending its consideration of a rulemaking petition that sought to exempt certain "grassroots lobbying" communications from the electioneering communication (EC) rules. The Notice clarified that while the Commission decided not to initiate a rulemaking at that time, it may consider doing so in the future. The Commission considered but did not approve a draft interim final rule that would have exempted certain radio and television communications from the definition of electioneering communication provided they were "grassroots lobbying communications." Currently, such communications are subject to funding restrictions and disclosure requirements if they otherwise satisfy the EC definition. The Notice of Disposition announcing the Commission's decision not to proceed with a rulemaking at this time appeared in the *Federal Register* on September 5, 2006.

Advisory Opinions

Another way in which the Commission encourages compliance with the Act is by issuing advisory opinions (AOs) to clarify how the statute and regulations apply to real-life situations brought to the Commission by candidates, political committees and others in the regulated community. The FEC received 38 complete AO requests and issued 29 AOs in 2006 offering guidance to political committees and candidates on a variety of key issues.

Background

The Office of General Counsel (OGC) prepares a draft opinion, which the Commissioners discuss and vote on usually during a public meeting. A draft opinion must receive at least four favorable votes to be approved. During 2006, the Commission placed special emphasis on expediting its processing and consideration of AO requests. The Act allows the agency 60 days to respond to most requests, but a few time-sensitive matters may qualify for 20-day

[1] Costs incurred by media entities in covering or carrying news stories, editorials and commentary are exempt from the definitions of "contribution" or "expenditure" unless the facility is owned or controlled by a political committee or candidate.

review. Excluding the few cases in which the Commission sought additional information and requesters waived the 60-day response requirement, the agency's average response time during 2006 was just 43 days. Some opinions were issued within as little as two weeks and, in one extraordinary case, just 12 days after receipt.

The most notable 2006 AOs are summarized below.

AO 2005-16 (Fired Up): Media Exemption

In AO 2005-16, the Commission found that a limited liability company engaged primarily in online activity qualified as a press entity, and its webs sites were the online equivalent of a newspaper, magazine or other periodical publication. The company retained editorial control, produced many of the stories that appear on the web sites and exercised day-to-day control over all content. Thus, the company qualifies as a press entity and costs incurred to cover or carry news stories, commentary or editorials on its web sites do not constitute "expenditures" or "contributions" by the company.

AO 2006-4 (Tancredo): Ballot Initiatives

In AO 2006-4, the Commission determined that the principal campaign committee of a federal candidate may donate funds to a state ballot initiative committee. However, the proposed donations of 25 or 50 percent of the ballot initiative committee's total receipts would constitute "financing" by a federal candidate and as such, the ballot initiative committee would be subject to the soft money fundraising ban that applies to federal candidates and their campaigns.

AO 2006-10 (EchoStar): Charitable Solicitations

In AO 2006-10, the Commission ruled that certain Public Service Announcements (PSAs) that feature federal candidates and are created and broadcast by a corporation qualify for the charitable solicitation exemption to the definition of coordinated communications because the PSAs promote and solicit donations to charitable organizations and do not include campaign materials or expressly advocate the election or defeat of a federal candidate. The PSAs do not mention a political party, campaign, or election, nor do the PSAs solicit contributions for any political campaign or committee. The ads also would be aired outside of the candidate's jurisdiction or more than 90 days before a Congressional election or more than 120 days before a Presidential election.

AO 2006-11 (Washington Democratic State Central Committee): Attribution

In AO 2006-11, the Commission concluded that at least half the cost of mass mailings that expressly advocate the election of one clearly-identified federal candidate and other generically-referenced candidates must be attributed to the named federal candidate, even if the space attributable to that candidate is less than that attributable to the generically referenced party candidates. If the space devoted to the named federal candidate exceeds the space devoted to the generically referenced candidates, the costs attributed to the named federal candidate must exceed 50 percent and reflect at least the relative proportion of space devoted to that candidate.

AO 2006-15 (TransCanada): Foreign Subsidiaries

The Commission ruled in AO 2006-15 that wholly-owned domestic subsidiaries of a foreign corporation may donate funds in connection with state and local elections, subject to state law, as long as no foreign national participates in decision-making regarding the making of such donations and the funds used do not come from a foreign national. The subsidiaries must use a reasonable accounting method to show that each subsidiary has sufficient funds in its account to make donations, other than funds given or loaned by its foreign national parent corporation and will ensure that no foreign national has any decision-making authority concerning the making of donations or disbursements in connection with state or local elections.

AO 2006-20 (Unity 08): Political Committee Status

In AO 2006-20, the Commission determined that Unity 08 must register as a political committee once it receives more than $1,000 in contributions or makes more than $1,000 in expenditures. The Commission found that in promoting itself through petition drives to obtain ballot access, Unity 08 is promoting its Presidential and Vice-Presidential candidates,

and any expenses incurred by Unity 08 for this purpose constitute expenditures. Additionally, because Unity 08 has publicly stated that its main goal is the nomination and election of a Presidential and Vice-Presidential candidate in 2008, the Commission concluded that Unity 08 satisfies the "major purpose" standard set forth in *Buckley v. Valeo.*[2]

AOs 2006-21 (Cantwell), 2006-25 (Kyle) and 2006-6 (Busby): Millionaires' Amendment

In AOs 2006-21 and 2006-25, the Commission held that a candidate's expenditures from personal funds made before the primary election will not trigger the Millionaires' Amendment for a general election opponent. Under the Amendment, the personal spending thresholds apply separately to the primary and general elections. However, in the general election, any personal funds contributed by the candidates to their campaign committees during the primary that are available for use in the general election will count towards the personal spending thresholds for the general election.

In AO 2006-6, the Commission ruled that candidates running in California's 50th District "special general election" must count all personal spending from the beginning of the election cycle to the date of the special general election as expenditures for that election. Under state law, if a special general election runoff is necessary, it will be held on the same day as the regularly-scheduled California primary election. Given that fact, candidates running in both of those elections must count personal spending between the date of the special general and the runoff/primary date as expenditures for both the special general and the primary.

AO 2006-22 (Wallace): Legal Services

In AO 2006-22, the Commission ruled that the payment of compensation to employees of an incorporated law firm for legal services provided free of charge to the principal campaign committee of a federal candidate would be an impermissible corporate contribution. The services provided by the firm (specifically, an *amicus* brief pertaining to ballot ineligibility) did not qualify for the "legal and accounting" exemption because they were not provided solely for purposes of compliance with the Act nor did the services constitute uncompensated individual volunteer activity.

AO 2006-24 (Republican and Democratic Senatorial Committees): Recount Expenses

In AO 2006-24, the Commission concluded that funds raised and spent by a federal candidate or state party committee to pay recount expenses resulting from the general election are *not* contributions or expenditures but *are* subject to the amount limitations, source prohibitions and reporting requirements of the Act. As such, those funds are not aggregated with contributions to the candidate for the general election nor are they subject to the aggregate biennial contribution limit. A state party may also pay attorney's fees or litigation costs of a federal candidate involved in a recount from these funds. Candidates, state and national party officials may all be involved in strategy and planning regarding recounts.

AO 2006-29 (Bono): Coordination

In AO 2006-29, the Commission ruled that an unincorporated convention and visitors authority did not make a coordinated in-kind contribution to a federal candidate when it paid for an infomercial that featured the federal candidate because the infomercial failed to satisfy the "content' prong of the three-prong coordinated communications test. Specifically, the infomercial did not qualify as an electioneering communication or a public communication that republishes or distributes campaign materials, did not contain express advocacy and did not air in the candidate's congressional district within 90 days of an election.

AO 2006-30 (ActBlue): Earmarking

The Commission advised a nonconnected political committee in AO 2006-30 that it may solicit and accept earmarked contributions on behalf of prospective candidates for the Democratic Party's nomination for President in 2008, even though the individuals have not formally declared their candidacy with the

[2] Beginning with its decision in *Buckley*, the Supreme Court has held only organizations whose "major purpose" is the nomination or election of a federal candidate can be considered "political committees" under the Act. See also *FEC v. MCFL* and *McConnell v. FEC*.

FEC. If those individuals do not become candidates by a certain date, the committee may instead forward the contributions to a national political party committee, provided that the contributor is clearly informed of this possibility. In either case, the committee must report all earmarked contributions on its report to the Commission and must provide all necessary information to the recipient prospective candidate or party committee. The Commission advised that listing individuals the committee considers to be "serious" prospective candidates on its web site does not constitute exercising "direction or control" and therefore, the nonconnected committee's contribution limits would not be affected by the earmarked contributions.

Policy Initiatives

In 2006, the Commission issued several new policy statements in order to clarify its practices and improve transparency in the FEC's operations. Among these were proposals to permit oral hearings in certain enforcement cases, to clarify and encourage self-reporting of violations, to offer guidance on disclosure efforts including descriptions for the purpose of disbursements, and to outline the requirements to show "best efforts" to obtain and report financial information by treasurers of committees.

Policy Statement on Initial Stage of Enforcement Process

The Commission approved a policy statement that clarifies the various actions the Commission may take when beginning the enforcement process. The Commission will find "reason to believe" in situations where there is enough evidence to warrant an investigation and where the alleged violation is serious enough to require an investigation or immediate conciliation. Previously, the Commission used the finding "reason to believe, but take no further action" when the Commission found a basis for investigating or attempting to conciliate but declined to investigate or conciliate. The Commission has determined that "dismissals" or "dismissals with admonishment" are clearer explanations about the Commission's intentions than "reason to believe but take no further action."

The Commission may dismiss a matter when it concludes that a violation did occur, but the violation is of minor significance. In such a matter, the Commission will send a letter admonishing the respondent. If available information provides no basis for proceeding with the matter, the Commission will find "no reason to believe." Such a finding occurs when the complaint, the response by the respondent and any publicly available information, taken together, fail to suggest that a violation has occurred.[3]

Pilot Program for Probable Cause Hearings

The Commission proposed a pilot program that would permit respondents in enforcement matters to request a Commission hearing before it considers whether there is probable cause to believe that a violation of the Act or Commission regulations has occurred.

Under the program, any respondent who reaches the "probable cause determination" stage of the enforcement process may submit a request for a hearing with his or her brief to the Commission. The request would state why the hearing was being requested and what issues the respondent expects to address. The request for a hearing is optional and the respondent's decision as to whether or not to request a hearing will not influence the Commission's decision as to a probable cause finding. The program can be modified or terminated at any time during the eight month period by the approval of a majority of the Commission.[4]

Policy Statement on Self-Reporting of Campaign Finance Violations

The Commission proposed an enforcement policy designed to encourage political committees and other persons to self-report possible violations of

[3] The final policy statement was published in the March 16, 2007 *Federal Register* (72 FR 12545) and is posted on the FEC website at http://www.fec.gov/law/cfr/ej_compilation/2007/notice_2007-6.pdf.

[4] The final policy statement was published in the February 16, 2007 *Federal Register* (72 FR 7551) and is posted on the FEC website at www.fec.gov/law/cfr/ej_compilation/2007/notice_2007-4.pdf.

the Act. These self-reported violations— also known as *sua sponte* submissions—are generally resolved more quickly and result in lower civil penalties than matters arising by other means, such as complaints or the Commission's own review of reports. The proposed policy seeks to increase the number of *sua sponte* submissions in order to expedite the enforcement process and decrease the number of litigation and enforcement matters that the Commission must address. The policy details the various factors the Commission may consider in deciding how to proceed regarding *sua sponte* submissions. The factors include the nature of the violation, the extent of corrective action (including new self-governance measures taken by the respondent), and the level of cooperation and disclosure with the Commission once the violation has been reported. Based on its consideration of these factors, the Commission may choose to reduce the amount of the civil money penalty it would otherwise have sought in the enforcement process. Additionally, a limited number of cases of self-reported violations may be subject to an expedited "Fast-Track Resolution," which may be granted at the Commission's discretion.[5]

Policy Statement on Purpose of Disbursement

Under the Act, political committees and other FEC filers must provide a brief description of the purpose of certain disbursements they make, and that description must be sufficiently specific to provide a clear reason for the payment. Commission regulations provide examples of acceptable and unacceptable descriptions, but the list is not exhaustive, and Commission staff often encounters "purpose of disbursement" entries that are not listed in the regulations. Therefore, in order to provide further guidance to filers and to encourage consistency between filers, the proposed guidance offers general rules of thumb and also lists specific "purpose of disbursement" descriptions that are generally acceptable and others that are generally not acceptable.[6]

Proposed Rules and Policy Statement on Best Efforts

Under the Act, if a political committee treasurer demonstrates that best efforts have been used to obtain, maintain and submit required information, the committee's report or records will be considered in compliance. During 2006, the Commission issued a policy statement and an NPRM that would apply the best efforts defense to obtaining, maintaining and submitting all required information under the Commission's regulations, not just contributor identification. The Commission also issued an NPRM proposing to incorporate a best efforts defense into the administrative fine program for late filers. To show that it used best efforts to file in a timely manner, a committee would need to demonstrate that unforeseen circumstances beyond its control caused the tardiness and the report was filed within 24 hours after those circumstances were resolved. The proposed regulations list examples of circumstances that may be considered "unforeseen" and beyond the control of the committee, including a failure of Commission computers, Commission-provided software or the Internet and severe weather or other disaster-related incidents. The NPRM also lists examples of circumstances that may not be considered "unforeseen" and beyond the control of the committee including vendor or contractor problems, inexperience, illness or unavailability of committee staff and a failure of committee computers.[7]

Policy Statement on Payroll Deduction Recordkeeping

The separate segregated fund (SSF) of corporations, labor organizations, and trade associations must maintain payroll deduction records allowing

[5] The final policy statement was published in the April 5, 2007 Federal Register (72 FR 16695) and is posted on the FEC website at www.fec.gov/law/cfr/ej_compilation/2007/notice_2007-4.pdf.

[6] The final policy statement was published in the January 9, 2007 *Federal Register* (72 FR 887) and is posted on the FEC website at www.fec.gov/law/policy/purposeofdisbursement/notice_2006-23.pdf.

[7] The final rule was published in the March 29, 2007 Federal Register (72 FR 14662) and is posted on the FEC website at www.fec.gov/law/policy/bestefforts/notice_2006-21.pdf.

the Commission to determine whether the source and amount of contributions are accurately reported. In the past, the Commission has required original signed payroll deduction authorizations (PDAs) as proof that an SSF had fulfilled its recordkeeping requirements. The policy statement announced that the Commission no longer intends to require original PDAs as the sole proof that a committee has fulfilled its recordkeeping requirements. The statement also explains that other evidence may be acceptable, including records of the transmittal of funds from employers or collecting agents, such as spreadsheets, computerized records, wire transfer records, or other written or electronic records.

Policy Statement on Embezzlement

The Commission also requested public comment on a proposed enforcement policy regarding reporting errors that result from a misappropriation of funds. A companion document lists additional steps that political committees can take to guard against embezzlement and unintentional reporting errors. Under the proposed policy, committees that implement certain minimum safeguards would not be held liable if a subsequent misappropriation led to reporting errors. The Commission's proposal responds to a recent increase in the number of enforcement cases involving misappropriation of committee funds, often by committee employees. Some of these proposals include regular account reconciliations and the separation of accounting duties.

Disclosure, Review and Outreach

The Commission's efforts to promote compliance are not limited to promulgating regulations, responding to AO requests and issuing policy statements. The agency's disclosure, reports analysis and educational outreach programs also play significant roles in that process.

Disclosure

Making available to the public the campaign finance reports disclosing the sources and amounts of funds used to finance federal elections is one of the most important of the FEC's duties. Through its website, the Commission makes the financial disclosure reports of all federal political committees accessible to the general public. This easy online access to reports provides an added incentive for the regulated community to comply with the campaign finance law.

During 2006, the Commission received and processed nearly 78,000 financial disclosure filings, the equivalent of 3.9 million pages of financial data, disclosing about $2.7 billion in spending related to federal elections. When a committee files its FEC report on paper, the Commission's Office of Public Records ensures that a copy is available for public inspection within 48 hours at the FEC's headquarters. Simultaneously, the FEC Public Disclosure Division enters the information disclosed in the report into the FEC computer database. Campaign finance reports filed electronically are made available to the public within 24 hours, if not immediately.

The amount of information disclosed on campaign finance reports has grown dramatically—by December 2004, more than 28 million pages of information dating back to 1972 were available for public review. Despite the increase in activity reported to the Commission, the Public Disclosure Division continues to improve upon efficient processing of reports.

Review

In addition to making campaign finance reports available to the public, the Commission also works to ensure that the information disclosed is accurate and complete. The Commission's Reports Analysis Division (RAD) reviews all reports to track compliance with the law and to ensure that the public record provides a full and accurate representation of campaign finance activity. If a RAD analyst sees an apparent violation or has questions about information disclosed on a report, the analyst may send a request for additional information to the committee's treasurer. If the committee is able to correct the error or otherwise resolve the analyst's concerns, it will often be able to avoid an enforcement action. Analysts are also available to answer treasurers' technical reporting questions through the FEC's toll-free information line.

RAD has made significant improvements in the timeliness of the review of financial disclosure reports. In fact, RAD reviewed 14 percent more reports in 2006 than during 2004. This additional improvement is particularly noteworthy given that the amount of disbursements in Congressional elections increased by approximately $284 million from 2004 to 2006.

Outreach

Throughout 2006, the Commission continued to promote voluntary compliance with the law by educating committees about the law's requirements. In February, the Commission held a regional conference in Tampa, Florida, where Commissioners and staff explained how the Act applies to House and Senate campaigns, political party committees and corporations, labor organizations, trade associations, membership organizations and their respective PACs. The workshops specifically addressed recent changes to campaign finance law and focused on fundraising and reporting rules. While budgetary constraints prevented the Commission from conducting its typical schedule of conferences during 2006, the agency did offer a variety of educational workshops on campaign finance at its headquarters in Washington, DC. In May, Commissioners and staff conducted one-day seminars on fundraising and reporting for federal candidates and political party committees. In addition, each week in June Commission staff hosted roundtable workshops to review revisions to Commission regulations and other legal developments. Finally, in early September, the agency hosted a workshop on general election filing requirements.

The agency also expanded its educational offerings on the web to include online presentations, a hypertext version of the E&J for all FEC regulations and a Tips for Treasurers page that features weekly updates available by RSS (really simple syndication) feed. The RSS technology allows committee treasurers and other interested individuals to receive automatic updates on information provided on the Tips for Treasurers page, without having to visit the FEC's web site.

The Commission also tested a new e-mail distribution program aimed at improving customer service while simultaneously saving tax dollars. The program will, among other things, allow the agency to get time-sensitive information to the regulated community more quickly and more efficiently than ever before, and thereby improve compliance.

Chapter Three
Defending the Law

Litigation

In fulfilling its statutory mission, the Commission often finds itself in the midst of a delicate balancing act. On one hand, the Commission must administer, interpret and enforce the Federal Election Campaign Act which the Supreme Court has said serves a compelling government interest. On the other hand, the Commission must remain mindful of the constitutional freedom of speech and association, and the practical implication of its actions. During 2006, these tensions between valid governmental interests and certain constitutional guarantees were keenly evident in the significant litigation involving the Commission.

Shays v. FEC (Shays I)

On July 15, 2005, the U.S. Court of Appeals for the DC Circuit upheld the appealed portion of the district court's decision in *Shays v. FEC* that invalidated several Commission regulations implementing BCRA, finding that some of the agency's regulations either failed to follow Congressional intent or did not comply with the Administrative Procedures Act for promulgating regulations. After the D.C. Circuit declined to rehear the appeal *en banc*, the Commission announced that it would expedite work on the affected regulations and complete the necessary revisions in time to be effective during the 2006 election cycle. The Commission began promulgating new regulations in 2005 at a rapid pace and, by July 2006, the Commission had concluded all rulemakings and approved final rules in response to the *Shays* decision. For more information on the final rules, see the "Regulations" section above.

Shays v. FEC (Shays III)

Shortly after the Commission promulgated new regulations in response to the decision in *Shays I ,* U.S. Representatives Christopher Shays and Martin Meehan (the Plaintiffs) filed a complaint in district court challenging certain regulations once again. The Plaintiffs claim that the rules regarding coordinated communications, FEA and solicitations by federal candidates and officeholders at state party fundraising events do not comply with the judgment in *Shays I* or with BCRA and allege the FEC did not adequately explain and justify its actions. The Plaintiffs have asked the court to declare the referenced regulations to be contrary to law, arbitrary and capricious, and an abuse of discretion and also ask the court to enjoin the operation of the regulations and order the Commission to commence expedited rulemaking proceedings. The case was pending at year's end.

Shays v. FEC (Shays II)

In November 2004, the Commission issued final rules that require organizations to treat more of their receipts as contributions[1] and to use a greater percentage of federal funds for certain allocable expenses. While these rules could trigger registration as "political committees" for some groups, the Commission did not directly modify its definition of that term. Rather, the Commission decided that it would continue to construe the definition of "political committee" on a case-by-case basis. Christopher Shays, Martin Meehan and Bush-Cheney '04, Inc. (the Plaintiffs) filed suit and argued that the Commission's decision to continue deciding case-by-case whether a group is a "political committee," as defined in FECA, was arbitrary and capricious. They also argued that the Commission should be compelled to issue a new rule.

The district court rejected plaintiffs' contention that selecting adjudication rather than rulemaking was an abuse of discretion. Nevertheless, the court remanded the case to the FEC and ruled that the Commission must either provide a more expansive explanation and justification for its decision to review the political committee status of unregistered organizations on a case-by-case basis or issue a new regulation. In response to the district court decision, the Commission published a supplemental E&J in the *Federal Register* on February 7, 2007 to explain its approach (72 FR 5595). The supplement explains that determining political committee status under the Act, as interpreted by the Supreme Court in *Buckley v. Valeo*, requires an analysis of both an organization's specific conduct (whether it received $1,000 in

[1] Generally, once such funds exceed $1,000, the group is required to register with the FEC as a political committee.

contribution or made $1,000 in expenditures) as well as overall conduct (whether its major purpose is federal campaign activity). An organization's status as a Section 527 organization is insufficient evidence of its major purpose.

The supplemental E&J also highlights the sufficiency of the 2004 revised regulations as demonstrated by the recent enforcement matters settled against the Swiftboat Veterans for Truth, the League of Conservation Voters, the Leadership Forum, and Freedom, Inc. In each of these matters, the Commission conducted a thorough investigation of all aspects of the organization's statements and activities to determine if the organization exceeded the $1,000 threshold for contributions or expenditures and whether the organization's major purpose was federal campaign activity. These matters are significant because they demonstrate that an organization may satisfy the political committee status threshold based on how the organization raises funds and illustrate well the Commission's application of the major purpose doctrine to the conduct of particular organizations.

FEC v. Club for Growth

In response to a complaint filed by the Democratic Senatorial Campaign Committee, the Commission found reason to believe that the Club for Growth, Inc. (the Club) accepted contributions and made expenditures in excess of the $1,000 registration threshold, and violated the Act by failing to register as a political committee. Following the Commission's vote finding probable cause to believe and unsuccessful conciliation efforts, the FEC filed an enforcement lawsuit in district court on September 19, 2005. The Club moved to dismiss the complaint based on several alleged procedural violations of the Act.

The U.S. District Court for the District of Columbia issued a memorandum opinion and order denying the Club's motion to dismiss on June 5, 2006, finding that the FEC was in compliance with the enforcement provisions of FECA and that the agency's failure to provide timely notice of the administrative complaint constituted harmless error. The Club asked the court to certify its June 5, 2006 decision for an interlocutory appeal, which would allow the appellate court to review a lower court's decision prior to the final judgment in the case. One requirement for granting such certification is that there must be a substantial basis for a difference of opinion about the ruling. The court stated that the June 5, 2006, decision was not based on "novel and untested legal theories." Rather, the decision was based on the legal doctrine of harmless error, deference to the FEC, the plain language of the Act and settled principles of law regarding agency ratification actions. Since the Club did not show a substantial ground for difference of opinion, on October 10, 2006, the court denied the Club's motion to certify the decision for an interlocutory appeal.

Davis v. FEC

On March 30, 2006, Jack Davis, a candidate for the House of Representatives in New York, asked the U.S. District Court for the District of Columbia to declare the Millionaires' Amendment unconstitutional and to issue an injunction barring the FEC from enforcing those provisions. Mr. Davis contends that the Amendment infringes upon his First Amendment right to free speech and his Fifth Amendment right to equal protection. He also alleges that the additional disclosure requirements for self-financed candidates required by the Amendment impose an unfair burden on his right to speak in support of his own candidacy. Mr. Davis asserts that the Millionaires' provisions "dramatically tilt the field" in favor of incumbents by allowing larger contributions and by not adequately factoring in large "war chests" of campaign funds raised in previous elections in determining whether a candidate is eligible to receive contributions at an increased limit. On July 11, 2006, the district court granted the plaintiff's request that the case be heard by a three-judge panel of the U.S. Court of Appeals for the District of Columbia. The case was pending at year's end.

Christian Civic League of Maine v. FEC

In the fall of 2006, two courts ruled against the Christian Civic League of Maine (CCL) in its challenge to the ban on corporate financing of electioneering communications (ECs). On September 27, 2006, the U.S. District Court for the District of Columbia granted the FEC's partial motions to dismiss and for judgment on the pleadings, and dismissed

all other CCL claims for permanent relief as moot. On October 2, 2006, the Supreme Court dismissed as moot CCL's appeal of the district court's earlier decision from May 2006 that had denied CCL's request for temporary relief in the form of a preliminary injunction.

Under BCRA, corporate treasury funds cannot be used to finance an EC. CCL, a nonprofit 501(c)(4) corporation, wanted to use its general treasury funds to broadcast a radio ad prior to a 2006 Senate vote on a particular proposed constitutional amendment. CCL's suit contends that the EC restriction prevents it from exercising its First Amendment right to free speech. The Supreme Court upheld the EC provision in *McConnell v. FEC,* stating that, although the provision might apply to some so-called "issue ads," it is narrowly tailored to meet a compelling government interest. After *McConnell*, the Supreme Court held in *Wisconsin Right to Life v. FEC* that *McConnell* had not foreclosed all as-applied challenges to the EC provision. CCL did not broadcast its proposed ad, and the Senate voted on the legislation it referenced in early June 2006.

The district court dismissed CCL's request for a permanent injunction to prevent the FEC from applying its EC rules to CCL's proposed ad, concluding that the Senate's vote on the legislation referenced in the ad had rendered the issue moot. CCL contended that its situation fit within the "capable of repetition, yet evading review" exception to the mootness doctrine. The court disagreed, noting that CCL's claims were closely tied to the facts surrounding the spring 2006 ad, circumstances that were unlikely to recur and would not necessarily evade review even if they did recur. The court further granted defense motions for dismissal of CCL's claims about possible other ads because they were not ripe for review and were too speculative. CCL admittedly had no firm plans to create or distribute any future ads besides the spring 2006 ad. The Constitution requires an actual "case or controversy" for the court to decide, so a party's grievance cannot be solely hypothetical.

Wisconsin Right to Life v. FEC

In contrast to the district court's decision in the CCL case, another three-judge panel of the U.S. District Court for the District of Columbia granted Wisconsin Right to Life's (WRTL) motions for summary judgment, finding the EC provisions unconstitutional "as applied" to certain broadcast ads WRTL intended to run before the 2004 general elections.

WRTL originally filed suit in district court on July 28, 2004, asking the court to find the prohibition on the use of corporate funds to pay for ECs unconstitutional as applied to what it calls "grassroots lobbying" communications planned for the period before the 2004 elections. After the district court both denied WRTL's motion for a preliminary injunction and dismissed WRTL's complaint, WRTL appealed to the Supreme Court. On January 23, 2006, the Supreme Court vacated the judgment and remanded to the district court to reconsider the merits of WRTL's "as applied" challenge.

WRTL's proposed efforts during 2004 involved paying for broadcast advertisements that would air before the primary and general elections. According to WRTL, the ads would constitute *bona fide* grassroots lobbying because they express an opinion on pending Senate legislative activity, urge listeners to contact their Senators, and do not refer to any political party or support or attack any candidate. WRTL argued that the ads were not the "functional equivalent of express advocacy;" thus, there was no constitutional justification for the prohibition on corporate payments for these ads or for requiring the ads to be paid for through WRTL's political action committee. WRTL asserted that, in this instance, the EC financing restrictions unconstitutionally burdened its First Amendment rights of free speech, free association and petitioning the government.

After denying WRTL's requests for a temporary restraining order and preliminary injunction, in separate opinions issued on September 13, 2006 and December 21, 2006, the three-judge district court granted WRTL's motion for summary judgment regarding the proposed 2004 television ads, holding in each instance that it is unconstitutional to apply the Act's electioneering communication provisions to WRTL's proposed ads.

Chapter Four
Presidential Public Funding

Every Presidential election since 1976 has been financed, in part, with public funds. Public funds are provided through two programs: (1) grants given to party conventions and candidates running in the general election; and (2) matching funds given to candidates running in the party primaries. The FEC administers the public funding program by determining which candidates and committees qualify to receive the funds and in what amounts. The Secretary of the Treasury makes the payments. Committees receiving public funds must limit their spending and keep detailed records of their financial activities. After the elections, the FEC audits each publicly funded committee. If an audit reveals a committee has exceeded the spending limits or used public funds for impermissible purposes, the committee must repay the excessive or impermissible funds to the U.S. Treasury.

By the end of 2006, the Commission had completed many of the required Presidential audits from the 2004 election. As a result of audit findings, committees had reimbursed $334,109.59 to the U.S. Treasury.

Committee repayments are not returned to the Presidential Election Campaign Fund, but are simply deposited into the general treasury. That fact, combined with declining tax checkoff receipts and larger payments to eligible committees, has led to temporary funding shortfalls in recent election cycles and appears likely to do so again in 2008.

The potential shortfall and other factors have led some 2008 Presidential candidates to announce that they will opt out of the public funding program not only during the primary campaign—which has become an increasingly common practice—but also in the general election. If that occurs, the 2008 election would be the first since 1976 in which both major party nominees chose not to accept the general election grant.