

candidate PACs and Leadership PACs are not specifically mentioned, the legislative history indicates that 2 U.S.C. 441i(e)(1) is intended to prohibit Federal officeholders and candidates from soliciting any funds for these committees that do not comply with FECA's source and amount limitations.") Therefore Federal candidates will not violate BCRA merely by establishing and raising money for their leadership PACs within the amount limitations and source prohibitions of FECA and BCRA.

3. Other Concerns

Two commenters, a leadership PAC and a joint comment from leadership PACs and Members of the House of Representatives, stated that their support of challengers helped those candidates who are often at a fundraising disadvantage when compared to incumbents.² One commenter argued that leadership PAC support for open seat candidates is sometimes critical to the viability of these candidates. Another commenter urged that the rule should be clear to "encourage and validate" the important role of these committees. This same commenter argued that leadership PACs should be encouraged as an avenue for Federal officeholders to support local and State parties and candidates in a manner that is disclosed to the Commission. This commenter also noted the importance of leadership PACs in their role of replacing the loss of non-Federal funds due to BCRA.

In response to the commenters arguing that BCRA precludes the result of the final rule issued today, the Commission concludes that BCRA's structure and wording answer these concerns. BCRA contemplates Federal candidate control of unauthorized committees. Otherwise, there would be no need to apply "hard money" limits. 2 U.S.C. 441i(e)(1). Thus, BCRA cannot be read generally to prohibit leadership PACs or to require that they be affiliated with a candidate's authorized committee. To the contrary, had Congress believed it was mandating a *per se* rule of affiliation between the two types of committees, BCRA would have gone further to require that contributions to those committees be aggregated with contributions to the candidate's authorized committee. BCRA requires no such aggregation.

² One commenter cited the Commission recent approval of campaign payment of candidate's salaries under certain circumstances as recognition of the importance of challengers receiving adequate funds.

IV. Final Rule

In previous advisory opinions and compliance matters, the Commission has examined leadership PACs whose activities were significantly intertwined with the activities of a Federal candidate's authorized committee. In such circumstances, the Commission had two competing, but equally valid, theories it could pursue. The Commission could consider whether the leadership PAC's actions made it affiliated with the authorized committee, or the Commission could consider the committees unaffiliated and determine whether the leadership PAC made in-kind contributions to the authorized committee. The Commission has declined in several instances to find that a leadership PAC was affiliated with a candidate's authorized committee, even where it was apparent that the committees were controlled by the same person. See affiliation factors at 11 CFR 100.5(g). Instead, the Commission exercised its discretion to determine that a leadership PAC made in-kind contributions to the related Federal candidate's campaign. Nonetheless, the Commission maintained its discretion to pursue either of the two competing approaches. In making these findings, the Commission typically found that committees formed by a candidate to further his or her campaign were affiliated; those formed for other purposes were not.

New § 100.5(g)(5) clarifies the relationship between an authorized committee and a leadership PAC by removing the possibility that a candidate's authorized committee can be affiliated with an entity that is not an authorized committee, even if the candidate established, financed, maintained, or controlled that entity.

In promulgating this final rule, the Commission has considered the 25-year history of Commission enforcement and policy precedent (see, e.g., Advisory Opinions 1978–12, 1984–46, 2003–12; MURs 1870, 2897 and 3740) and the comments received in response to the NPRM. Alternatives A and B, with *per se* affiliation factors, would have been too rigid and overbroad. They would have created a basis for affiliation in situations where interaction between an authorized committee and a leadership PAC would not merit such designations if those interactions were undertaken by committees where neither committee was authorized in writing by the candidate. Although Alternative C reflects the Commission's historic approach to leadership PACs, it suggests that the Commission would examine

them on a case-by-case basis. While the Commission has discretion to pursue either an affiliation or in-kind contributions analysis under FECA on a case-by-case basis when considering the circumstances surrounding leadership PACs, the Commission has decided, as a matter of policy, to adopt the in-kind contribution analysis as a rule of general applicability as they pertain to leadership PACs. See *Michigan v. EPA*, 268 F.3d 1075, 1087 (D.C. Cir. 2001) (discussing agency's discretion to choose rulemaking or case-by-case adjudicative procedure, citing *SEC v. Chenery*, 332 U.S. 174, 203 (1947) and *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 543 (1978)).

This decision does not affect affiliation between an authorized committee and any joint fundraising committee under 2 U.S.C. 432(e)(3)(ii) and 11 CFR 102.13(c)(1). Nor does it affect the ability of a national committee of a political party to be designated as the principal campaign committee of that party's presidential candidate under 2 U.S.C. 432(e)(3)(i) and 11 CFR 102.13(c)(2). Nor does this rule allow a leadership PAC to provide support to the Federal candidate or officeholder with whom it is associated in amounts different than those available to other similar political committees. Rather, a leadership PAC's provision of funds, goods, or services to any authorized committee will be treated as a contribution as defined in 2 U.S.C. 431(8), and thus limited to the amount at either 2 U.S.C. 441a(a)(1)(A) or 441a(a)(2)(A) per election, depending on whether the leadership PAC has attained multicandidate committee status, unless the activity falls within an exception to the definition of "contribution" or "expenditure," or is a fair market value exchange of goods or services for the usual and normal charge. See also 2 U.S.C. 431(8).

The Commission considered the issue of whether its treatment of leadership PACs comports with the purpose of the affiliation rule: the protection of contribution limitations. In adopting new § 100.5(g)(5), the Commission is applying the affiliation rule separately to distinct types of political committees to enforce different contribution limits. Typically, committees that become affiliated already operate under similar limitations on the amounts of contributions that they can make and accept. The fact of affiliation simply means that they now share one common limitation. One of the complications in affiliating authorized committees with leadership PACs is that these types of committees are subject to different