

amount limitations for making and receiving contributions. Requiring them to abide by a single contribution limit means choosing a limitation that is not intended for one of those committees.³ Consequently, it is logical to view an authorized committee and a leadership PAC as separate committees, and transactions between them that benefit the authorized committee as contributions and not as a basis to find them affiliated.

Further, the consequences of new 11 CFR 100.5(g)(5) with respect to leadership PAC contribution limits are no different after the promulgation of this rule than before. Leadership PACs operating as unauthorized political committees—that is, political committees whose purpose is to support more than one Federal candidate—may receive up to \$5000 per year from individuals, other persons, and multicandidate committees, and once they qualify as multicandidate committees, may contribute up to \$5000 per candidate per election. *See* 2 U.S.C. 432(e)(3), 441a(a)(1)(C) and 441a(a)(2)(A); 11 CFR 110.1(d) and 110.2(b). Although such leadership PACs are not exposed to the consequences of affiliation with authorized committees, leadership PACs may still be deemed affiliated with other unauthorized committees. *See* 11 CFR 100.5(g)(2), (3), and (4); *see also* Advisory Opinion 1990–16 (where the Commission found that a committee organized under State law and devoted to supporting candidates for election to State and local office, that had previously been the campaign committee of the State's then-governor, was affiliated with a Federal political committee that had been organized by the governor and that had as its purpose supporting candidates for Federal office). Thus, the rule in new 11 CFR 100.5(g)(5) provides no new avenue for circumventing the separate contribution limitations applicable to authorized and unauthorized committees.

The Commission concludes that since its first examination of leadership PACs, these committees cannot be assumed to be acting as authorized committees. Rather, these PACs are worthy of the same treatment as other unauthorized committees that operate without

presumptions as to their status. To the extent that leadership PACs are used to pay for costs that could and should otherwise be paid for by a candidate's authorized committee, such payments are in-kind contributions, subject to the Act's contribution limits and reporting requirements.

The Commission also concludes that in instances when leadership PAC activity results in an in-kind contribution to a candidate, Commission regulations adequately regulate such activity. 11 CFR 100.52(a) and (d), 109.20, 109.21, 109.23, 109.37; *see* MUR 5376 (Campaign America/Quayle); Report of the Audit Division on Bauer for President 2000, Inc., FEC Agenda Doc. No. 02–37, dated May 8, 2002 (considered in the Open Sessions on May 16, 2002 and May 23, 2002) (recommendations with respect to Campaign for Working Families PAC); MUR 3367 (Committee for America/Haig). These regulations, which define “contribution” and which address coordinated activities, will serve to ensure that leadership PACs are not used improperly to support the “associated” candidate's campaign.

The final rule at 11 CFR 100.5(g)(5) properly places the enforcement focus on the activity at issue. To support the proposition that rules governing in-kind contributions properly capture this activity, the Commission need look no further than its recently-issued final rule “to treat certain expenses incurred by multicandidate committees as in-kind contributions benefiting publicly funded Presidential candidates.” *Final Rules on Public Financing of Presidential Candidates and Nominating Conventions*, 68 FR 47386, 47407 (Aug. 8, 2003); 11 CFR 9034.10; 11 CFR 110.2(l). Although that rule was aimed at a somewhat different range of activity, the explanation and justification stated, “For other situations not addressed [in the new regulations governing pre-candidacy activity with a nexus to a Presidential campaign], including when expenditures are paid for by multicandidate committees after candidacy, the general provisions describing in-kind contributions at 11 CFR 100.52(a) and (d), 109.20, 109.21, 109.23, and 109.37 would apply.” *Final Rules on Public Financing of Presidential Candidates and Nominating Conventions*, 68 FR at 47407. The Commission intends symmetry between its regulations with respect to leadership PACs and its new rules applicable to certain pre-candidacy activity benefiting Presidential candidates by multicandidate committees.

The Commission also noted that the final rules in the *Public Financing of Presidential Candidates and Nominating Conventions*, 68 FR at 47408, “in no way address situations where the Commission determines that the multicandidate political committee and the candidate's principal campaign committee are affiliated under 11 CFR 100.5(g)(4).” With the new rule, the Commission has decided to examine these situations with a contribution analysis, instead of an affiliation analysis.

By its terms, new 11 CFR 100.5(g)(5) also applies to entities that are not political committees. Recently, the Commission examined the situation of a State ballot initiative committee that had been established by a Federal candidate and officeholder, but was not a registered Federal committee. AO 2003–12. The Commission found that the relationship between the ballot initiative committee and the Federal candidate and officeholder was sufficiently similar to the relationship between a traditional leadership PAC and its connected Federal candidate to warrant treating the Federal candidate and officeholder and the ballot initiative committee in the same manner as the Commission had historically treated leadership PACs for affiliation purposes. Therefore, under new 11 CFR 100.5(g)(5), the Commission would not examine the transactions between the Federal candidate and officeholder and the ballot initiative committee to determine whether the ballot initiative committee is affiliated with the Federal candidate and officeholder's authorized committee. Rather, the Commission would analyze the facts to determine whether the ballot initiative committee made an in-kind contribution to the Federal candidate and officeholder. Furthermore, the Commission will continue to use the affiliation factors in 11 CFR 300.2(c) to determine whether the Federal candidate and officeholder or his agent directly or indirectly established or finance or maintained or controlled the ballot initiative committee for purposes of the restrictions on the solicitation, receipt, transfer or disbursement of non-Federal funds in 2 U.S.C. 441i(e).

V. Effect on Previous Advisory Opinions

As the Commission noted earlier, these new rules merely codify the discretion the Commission has exercised when the question of affiliation between an authorized committee and an unauthorized committee has come before it in the past. Thus, the final rules supersede

³ Indeed, the NPRM sought comment on which of the two separate contribution limitations applicable to authorized and unauthorized committees should obtain in the event the Commission determined such committees would be affiliated. The one commenter who addressed this question believed that the FECA allowed the Commission no discretion in this matter, and that the lower contribution limits applicable to the authorized committee would have to be applied to the leadership PAC.