Pursuant to LCvRs 7(h) and 56.1, Plaintiff EMILY's List hereby submits the following statement of material facts as to which there is no genuine issue, to accompany its Motion for Summary Judgment pursuant to Fed. R. Civ. P. 56. This is a facial challenge under the Administrative Procedure Act, 5 U.S.C. § 500 et seq., and the First Amendment to the United States Constitution, to regulations promulgated by the Federal Election Commission ("FEC" or "the Commission").

1. EMILY's List ("EMILY's List" or "the Committee") is a political organization whose purpose is to recruit and fund viable women candidates; to help them build and run effective campaign organizations; and to mobilize women voters to help elect progressive candidates across the country.

2. EMILY's List is a nonconnected committee that is registered with, and reports to, the Commission. It maintains a federal account that accepts only funds from sources and in amounts permissible under federal campaign law: $5,000 a year from
federally permissible sources, such as individuals or FEC-registered political action committees.

3. EMILY's List also raises and disburses funds for the purpose of influencing state and local elections. For this purpose, it maintains a nonfederal account. This account accepts funds from sources, and in amounts, not permissible under federal campaign finance law.

4. EMILY's List reports its nonfederal receipts and disbursements to the Internal Revenue Service ("IRS") in accordance with I.R.C. § 527(j). All of EMILY's List's disclosure reports, whether to the FEC or the IRS, are publicly available on those agencies' respective websites.

5. Since its organization twenty years ago, EMILY's List has helped to elect at least sixty Democratic women to Congress, eleven to the U.S. Senate, seven to governorships, and 215 to other state and local offices. These numbers represent only the successful candidates actively supported by the Committee. Thousands more—including many more statewide and state legislative candidates—have received funds, advice and other forms of lawful support from EMILY's List.

6. In the 2005-2006 election cycle, the proportion of EMILY's List's time, energy and funds committed to nonfederal elections will increase dramatically. With no presidential election in 2006, and thirty-four gubernatorial elections over the next two years, the Committee will focus more on gubernatorial and state legislative races, and other nonfederal candidates. In 2005, for instance, EMILY's List plans to assist state legislative candidates up for election in Virginia and New Jersey: there are no regularly scheduled federal elections in 2005, anywhere in the country.

7. Like other national political organizations, EMILY's List conducts a number of activities, such as voter identification, voter registration, get-out-the-vote and generic voter mobilization activities, which affect both federal and nonfederal
elections. In addition, EMILY’s List has certain fixed administrative and overhead costs, such as rent, salaries, supplies, and the like.

8. For many years, the FEC provided for an "allocation" procedure to ensure that a political committee paid for those particular expenses attributable to federal elections with federal funds, and those particular expenses attributed to state and local elections with state funds. Fixed overhead costs were paid with both federal and state funds, on a ratio approximating the level of federal versus nonfederal activities undertaken by the committee.

9. For example, until the adoption of the new rules effective January 1, 2005, the regulation governing the allocation of administrative and generic voter drives expenses was based on the "funds expended" method. Purely federal activity was paid for out of the federal account; purely nonfederal activity was paid for out of the nonfederal account. Payment for administrative expenses and for generic voter drives – that is, voter drives that did not refer to particular candidates – were made using funds from both accounts. Political committees paid the costs for administrative expenses and generic voter drives on the basis of the ratio of its direct support of federal candidates to its direct support of all candidates, federal and nonfederal. The rule called for precision in calculating and adjusting this ratio during an election cycle, requiring political committees to revise the ratio as required by its actual record of supporting both federal and nonfederal candidates.

10. The result of this allocation scheme was that the payment of generic expenses such as communications urging party-wide support and administrative expenses – activities designed to further the overall goal of an organization – reflected the share of that organization's goal devoted to federal elections. Organizations that focused overwhelmingly on federal elections paid for these activities almost entirely with federal funds. And organizations such as EMILY's List, which spend at least as much
time and money on nonfederal elections as on federal elections, paid for these activities with a mix of funds that reflected the organization's actual dual purpose.

11. The changes in the allocation rules were the result of an administrative proceeding established primarily to address organizations alleged to have been established to influence only the 2004 Presidential election but using soft money for this purpose.

12. The first step toward the rulemaking occurred with the filing of an advisory opinion request with the FEC, aiming to place restriction on a specific political committee, America Coming Together ("ACT"), that was operating as a multiple-purpose political committee but was alleged by some to have been created solely to oppose President Bush’s candidacy for reelection in 2004.

13. The opinion request aimed at ACT was filed by a new, paper organization named Americans For a Better Country ("ABC") that had neither raised nor spent any funds – and has not to this day – but represented supporters of President Bush’s reelection.

14. On February 19, 2004, the Commission issued Advisory Opinion 2003-37. In this opinion, the Commission restructured the allocation formulas, requiring allocating committees to pay entirely with federal funds for any public communication that "promotes, supports, attacks, or opposes" federal candidates. The Commission also built this requirement into the formulas for calculating allocations, so that any communication of this kind – promoting, supporting, attacking or opposing a federal candidate – would be included in the tally of "direct" federal candidate support used to determine the federal share of allocated expenses.

15. The Commission's Office of General Counsel later described this advisory opinion as a "substantial reinterpretation of the 'allocation' rules" that "looks an awful lot like a regulation." See FEC Agenda Doc. No. 04-48, at 7 (May 11, 2004).
16. On March 11, the Commission issued a wide-ranging proposal of new regulations. See Political Committee Status, 69 Fed. Reg. 11,736 (proposed Mar. 11, 2004). While the regulations addressed a variety of topics, they were structured along two primary lines meant to address the concerns raised about the two types of organizations under attack in the presidential election. First, the regulations targeted section 527 organizations that were not registered with the FEC. Second, the regulations addressed "allocating committees": entities – such as EMILY's List – that were registered with the Commission, but that had nonfederal accounts as well.

17. The proposed rules, through a revised definition of the FECA term "political committee," see 2 U.S.C. § 431(4)(A), required all section 527 organizations that were considered to participate in federal elections in any manner to register with and report to the Commission. The proposed rules also codified the changes to the allocation system first addressed in Advisory Opinion 2003-37, including inclusion of the "promotes, supports, attacks, or opposes" standard. The proposed rules further treated as federal contributions those funds received in response to a fundraising solicitation expressly advocating the election or defeat of federal candidates.

18. The Commission set what the FEC’s General Counsel aptly described as "a highly accelerated schedule for this important and far-reaching rulemaking, targeting approval of final rules just two months after publication of the NPRM." FEC Agenda Doc. No. 04-48, at 4. Comments were due by April 9, and public hearings with thirty-one witnesses were held on April 14 and 15.

19. Even with fewer than 30 days to address the "important and far-reaching rulemaking," more than 100,000 comments were submitted, "far exceeding the number of comments received in connection with any of the rulemakings to implement BCRA." Id. at 8. This was the first and last noticed opportunity for members of the public to comment on the rulemaking.
20. The only portions of the proposed rules that received significant comment were those targeting section 527 organizations that did not register and report with the FEC, both because that was both the impetus and focus of the proceeding, and because the new allocation regulations tracked changes already present in Advisory Opinion 2003-37.


22. On August 17, EMILY's List, among others, wrote a letter to the Commission noting that "the new proposed rules . . . provide for substantially different allocation rules for separate segregated funds and non-connected committees." The letter requested that the FEC publish the draft final rules for new comment, due to the magnitude of the changes, and postpone consideration of them until afterward.

23. The FEC did not respond to this letter.

24. During the Commission meeting of August 19, Commissioner McDonald called for the new draft rules to be submitted for a sixty-day comment period. This motion failed by a 3-3 vote. See FEC Agenda Doc. No. 04-77, at 8 (Sept. 9, 2004) (minutes of Aug. 19, 2004 meeting).

25. The final rules, approved on October 28, did not include a revised definition of "political committee," and did not address unregistered 527 organizations.

26. Moreover, the new rules focused not on whether communications "promoted, supported, attacked, or opposed" candidates, but whether they referred to candidates.

27. In addition, the allocation system for administrative expenses and voter drives was reduced to a system of threshold amounts. For example, a public communication that referred to a political party, but to no clearly identified candidates at all, had to be financed with no less than fifty percent federally regulated funds. The new rules took
no account of a political committee’s operating history or actual record of involvement in supporting federal and nonfederal candidates.

28. The final rules also contained a new definition of "contribution" unlike that contained in the proposed rules, which defined contributions as funds received in response to a solicitation that "indicates that" any portion of the funds will be used to "support or oppose" federal candidates.


Respectfully submitted,

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<tr>
<th>Dated May 16, 2005</th>
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<tbody>
<tr>
<td>Robert F. Bauer (D.C. Bar No. 938902)</td>
<td></td>
</tr>
<tr>
<td>Ezra W. Reese (D.C. Bar No. 487760)</td>
<td></td>
</tr>
<tr>
<td>PERKINS COIE LLP</td>
<td></td>
</tr>
<tr>
<td>607 Fourteenth Street, N.W.</td>
<td></td>
</tr>
<tr>
<td>Washington, D.C. 20005-2011</td>
<td></td>
</tr>
<tr>
<td>(202) 628-6600</td>
<td></td>
</tr>
<tr>
<td>Attorneys for EMILY's List</td>
<td></td>
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</tbody>
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