



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

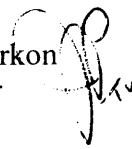
RECEIVED  
FEDERAL ELECTION  
COMMISSION  
SECRETARIAT


2004 JAN 12 A 11: 28


MEMORANDUM


JAN 12 2004

TO: The Commission

THROUGH: James A. Pehrkon   
Staff Director

FROM: Lawrence H. Norton   
General Counsel

James A. Kahl   
Deputy General Counsel

Rosemary C. Smith   
Acting Associate General Counsel

SUBJECT: Rulemaking Priorities

**AGENDA ITEM**  
For Meeting of: 01-15-04  
**SUBMITTED LATE**

In consultation with the Regulations Committee, the Office of General Counsel has prepared the attached list of rulemaking priorities for Commission consideration, including a timetable for the most urgent of these.

Top Priority Projects

- 527 Organizations and Political Committee Status:** In light of *McConnell v. FEC*, the rules at 11 CFR 100.5 need to be reexamined regarding the determination as to when 527 organizations and other groups become political committees. To provide guidance to affected organizations as soon as feasible, OGC recommends that the Commission set March 4 (Thursday) as the date for consideration of an NPRM. Following a 30-day public comment period, this Office recommends holding a public hearing on April 14 or 16 (Friday). The target date for completion of final rules would be prior to Memorial Day.
- Inaugural Committees:** Section 308 of BCRA requires inaugural committees to file reports of donations with the Commission, which the Commission must make public within 48 hours of receipt. This section prohibits inaugural committees from accepting donations from foreign nationals. The Commission's reporting rules and foreign national rules should be amended to reflect section 308. The Forms Committee may wish to examine whether a new form should be developed for this purpose. OGC anticipates bringing an NPRM forward for Commission consideration on March 25. We do not anticipate the need for a

public hearing. After a 30-day public comment period, final rules can be ready for Commission consideration in June.

3. **BCRA Provisions Invalidated or Altered by *McConnell v. FEC***: OGC believes it should be a top priority to repeal or rework several portions of the rules implementing invalidated provisions of BCRA. First, the Supreme Court invalidated section 213 of BCRA, the “party committee choice provision”. This section restricted the ability of political party committees to make coordinated expenditures after they had made independent expenditures, and *vice versa*. Accordingly, the regulations at 11 CFR 109.35 implementing that provision must be repealed. Second, section 323(d) bars national, state, and local party committees from contributing or donating any funds whatsoever to tax exempt organizations. The *McConnell* decision supplied a narrowing construction that limits this ban to soft money donations by these party committees. The Commission’s regulations at 11 CFR 300.11, 300.37, 300.50 and 300.51 follow the statutory wording, and need to be amended to reflect the narrowing construction. Lastly, the Supreme Court struck section 318 of BCRA banning contributions and donations by minors to candidates and party committees. The rules at 11 CFR 110.19 implement this provision, as well as the Commission’s longstanding requirements to ensure that contributions by minors are made knowingly and voluntarily using their own funds. This rule needs to be reworked. OGC expects that an NPRM on these three topics can be prepared by July.

4. **Public Disclosure, FOIA and Privacy Act Rules**: In light of the D.C. Circuit Court decision in *AFL-CIO v. FEC*, the rules at 11 CFR 4.4(a) and 5.4(a) need to be revised to determine those materials the Commission can and should disclose as a matter of course at the close of enforcement, ADR and administrative fines matters. The Commission adopted interim disclosure policies though a vote taken on December 11, 2003. Consideration of the petition for rulemaking filed by the Campaign Legal Center, the National Voting Rights Institute, the Center for Responsive Politics, and Democracy 21 can be folded into this rulemaking. Additionally, some updating is needed to the FEC’s Privacy Act and FOIA regulations at 11 CFR parts 1 and 4, respectively, to ensure that they reflect the current state of the law. OGC expects that an NPRM can be prepared by mid-summer.

### **Second Priority Rulemakings**

OGC recommends that the following rulemakings be treated as second priority. We have not prepared timetables for these. Some of these potential rulemakings are dependent upon action by Congress or another agency before we can proceed.

5. **Administrative Fines**: The 2004 Omnibus Appropriations bill includes an extension of the Administrative Fines program until the end of 2005. Once this legislation is passed and signed into law, 11 CFR 111.30 must be amended to implement this extension. There will be a gap in the coverage of the administrative fines program.

6. **Overnight Delivery**: The 2004 Omnibus Appropriations bill also includes a provision that treats reports mailed by an overnight delivery service the same as reports mailed by certified/registered, first-class mail. These reports will be considered filed on the date of delivery to the overnight delivery service (except for pre-election reports) regardless of

when they arrive at the Commission's offices. Once this legislation is passed and signed into law, 11 CFR 100.19 and 104.5(e) will need to be amended to reflect this change.

7. **Ethics Rules:** This rulemaking, which was begun in 2003, seeks to revise and update the current regulations on the ethical conduct of Commission employees, including Commissioners. On December 22, 2003, OGC sent a revised draft of supplemental rules to the Office of Government Ethics and is awaiting their response. Once we hear back, this Office can finalize the NPRM.

8. **Promulgation of Software Standards for Filing Reports:** Section 306 of BCRA requires the Commission to develop standards for the filing of electronic information, to develop software meeting those standards and make it available to each person required to file electronically with the Commission, and to post all filed information on the Internet as soon as practicable. Section 306 also places mandatory requirements on vendors (developing software that complies with the standards promulgated by the Commission). Section 306 also increases the scope of persons subject to mandatory electronic filing requirements, requiring "each candidate for Federal office" to use compliant software once it is made available. As time permits, OGC is working with the Information Technology Division regarding the legal and technological considerations for implementing this provision of BCRA.

9. **Bundling:** OGC has been consulting with the Regulations Committee as to various alternatives for revising the conduit and intermediary rules at 11 CFR 110.6. As time permits, we will continue to examine possible ways to ensure greater disclosure of bundlers.

#### Other Rulemakings:

10. **Executed Contracts to Make Certain Communications:** Sections 201 and 212 of BCRA provide for the reporting of executed contracts to make electioneering communications and independent expenditures. In promulgating the implementing rules at 11 CFR 104.4, 104.20, and 109.10 the Commission expressed legal and practical concerns regarding pre-distribution disclosure, and therefore construed BCRA to require this reporting only after the communications were actually aired or otherwise publicly disseminated. As time permits, OGC is considering whether the *McConnell* decision makes it necessary or advisable to require the reporting of these obligations before the communications are broadcast or distributed.

11. **FCC Database on Electioneering Communications:** On October 23, 2002, the Commission published interim final rules at 11 CFR 100.29(b)(6) and (7) regarding information available on the FCC's website as to whether certain broadcast, cable and satellite communications may be received by at least 50,000 persons. Since that time, the FCC has been actively working on its database, and is currently reviewing the query system to ensure the accuracy of its results. Once the FCC's database is online, the FEC's rules may be made permanent.

12. **Millionaire's Amendment:** The rules at 11 CFR part 400 are interim final rules. Once we have seen how they play out during the 2004 elections, we will be able to assess

what, if any, changes are advisable for the final final rules. OGC does not expect to proceed with this rulemaking until next year.

**13. America's Community Bankers Petition for Rulemaking:** This petition for rulemaking seeks to reverse the Commission's regulation at 11 CFR 114.8(e)(3). This rule bars the use of payroll deductions for contributions to a trade association's SSF by member corporations' executive and administrative personnel. The Commission received 29 public comments. OGC is in the process of reviewing and summarizing these comments and will make a recommendation as time permits.

**14. Candidate Debate Petition for Rulemaking:** In April 2002, the Commission received a Petition for Rulemaking from a number of corporations owning and operating news organizations, television stations, newspapers, cable channels and other media ventures, and media trade associations. The petition asked the Commission to repeal its rules at 11 CFR 110.13 on the sponsorship of candidate debates and the determination of the candidates to participate in the debates. The Commission received comments on the petition during the BCRA rulemakings but deferred final action at that time. This Office does not believe a new rulemaking is warranted, and is preparing a Notice of Disposition as time permits.

**Recommendation:**

The Office of General Counsel recommends that the Commission approve the rulemaking priorities set forth above.