MEMORANDUM

TO: The Commission

FROM: Thomasenia P. Duncan
General Counsel

Rosemary C. Smith
Associate General Counsel

Amy L. Rothstein
Assistant General Counsel

Stacey J. Shin
Attorney

SUBJECT: Draft Notice of Proposed Rulemaking on the Use of Campaign Funds for Donations to Non-Federal Candidates and Any Other Lawful Purpose

Attached is a draft Notice of Proposed Rulemaking ("NPRM") that proposes to add two additional uses of campaign funds to the list of permissible non-campaign uses at 11 CFR 113.2, pursuant to Section 301 of the Consolidated Appropriations Act, 2005. Congress amended 2 U.S.C 439a by adding (1) donations to non-Federal candidates, and reinstating (2) any other lawful purpose that does not convert campaign funds to personal use. This draft NPRM proposes to conform the Commission regulations accordingly.

We request that this draft be placed on the agenda for July 12, 2007.

Attachment
FEDERAL ELECTION COMMISSION

11 CFR Part 113

[Notice 2007- ]

Use of Campaign Funds for Donations to Non-Federal Candidates and Any Other Lawful Purpose Other Than Personal Use

AGENCY: Federal Election Commission.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: The Federal Election Commission requests comments on a proposed revision to its rules regarding the use of campaign funds. The proposed revision would add to the current list of permissible uses of campaign funds in Commission regulations: (1) donations to non-Federal candidates; and (2) any other lawful purpose other than personal use. This change would conform the provision with those in the Federal Election Campaign Act, as amended ("the Act"). The Commission has made no final decision on the issues presented in this rulemaking. Further information is provided in the supplementary information that follows.

DATES: Comments must be received on or before [INSERT DATE 30 DAYS AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: All comments must be in writing, must be addressed to Ms. Amy L. Rothstein, Assistant General Counsel, and must be submitted in either e-mail, facsimile, or paper copy form. Commenters are
strongly encouraged to submit comments by e-mail to ensure
timely receipt and consideration. E-mail comments must be sent to
439aNPRM@fec.gov. If e-mail comments include an attachment,
the attachment must be in either Adobe Acrobat (.pdf) or Microsoft
Word (.doc) format. Faxed comments must be sent to (202) 219-
3923, with paper copy follow-up. Paper comments and paper copy
follow-up of faxed comments must be sent to the Federal Election
Commission, 999 E Street, NW, Washington, DC 20463. All
comments must include the full name and postal service address of
the commenter or they will not be considered. The Commission
will post comments on its website after the comment period ends.

FOR FURTHER
INFORMATION
CONTACT: Ms. Amy L. Rothstein, Assistant General Counsel, or Ms. Stacey J.
Shin, Attorney, 999 E Street, NW, Washington, DC 20463, (202)
694-1650 or (800) 424-9530.

SUPPLEMENTARY
INFORMATION: Section 313 of the Federal Election Campaign Act of 1971, as
amended ("the Act"), sets forth permissible uses of contributions accepted by candidates
and donations received by individuals to support their activities as Federal officeholders.
(This section is codified at 2 U.S.C. 439a and will be referred to hereafter as "Section
439a.") Section 439a(a) provides that candidates may use contributions, and individuals
holding Federal office may use donations, for: (1) expenditures in connection with the
candidate’s or individual’s campaign for Federal office; (2) ordinary and necessary
expenses incurred in connection with duties of the individual as a Federal officeholder;
(3) contributions to an organization described in section 170(c) of the Internal Revenue Code; (4) transfers, without limitation, to a national, State, or local committee of a political party; (5) donations to State and local candidates subject to the provisions of State law; and (6) any other lawful purpose, unless such purpose constitutes personal use of contributions or donations. See 2 U.S.C. 439a(a).

Part 113 of the Commission’s regulations implements section 439a. Section 113.2 tracks the first four permissible uses of campaign funds and funds donated to a Federal officeholder as set out in the Act (to defray Federal campaign expenses; to pay ordinary and necessary expenses incurred in connection with the duties of a Federal officeholder; to make donations to organizations described in section 170(c) of the Internal Revenue Code; and to transfer such funds without limitation to any national, State, or local political party committee). See 11 CFR 113.2. The Commission is initiating this rulemaking to add to section 113.2 the last two permissible uses regarding donations to non-Federal candidates, and donations for any other lawful purpose other than personal use.

This difference between the Commission’s regulations and the Act resulted from amendments to the Act by the Bipartisan Campaign Reform Act of 2002 (“BCRA”)\(^1\) and the Consolidated Appropriations Act of 2005.\(^2\) Prior to the passage of BCRA, the Act and Commission regulations permitted the use of campaign funds for “any other lawful purpose” other than personal use. In BCRA, Congress deleted “any other lawful purpose”.

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purpose” from section 439a and retained only four permissible uses of campaign funds.

The Commission amended its regulation accordingly.\(^3\)

Congress later amended section 439a again, in the Consolidated Appropriations Act of 2005, by reinstating “any other lawful purpose” and adding donations to State and local candidates as permissible uses of campaign funds. These changes to the Act have prompted this rulemaking.

I. **Donations to State and local candidates**

Section 439a(a)(5) of the Act expressly permits Federal candidates and officeholders to donate contributions accepted and other monies received to State and local candidates. The Commission proposes to amend 11 CFR 113.2 accordingly, by adding a new paragraph (d), which would permit Federal candidates and officeholders to donate campaign funds from their authorized committees to “State and local candidates subject to the provisions of State law.” The Commission seeks comment on this proposed revision.

II. **Any other lawful purpose**

The Commission also proposes to amend 11 CFR 113.2 by inserting a new paragraph (e), which would state that campaign funds “may be used for any other lawful purpose, unless such use is personal use under 11 CFR 113.1(g).” New paragraph (e) would follow current section 439a(a)(6) of the Act, which permits the use of campaign funds “for any other lawful purpose,” unless the funds are converted by any person to personal use. The Commission seeks comment on this proposed revision to the regulation. The Commission notes that this change to the statute has the effect of

\(^3\) Disclaimers, Fraudulent Solicitation, Civil Penalties, and Personal Use of Campaign Funds, Final Rule, 67 FR 76962, 76970-75 and 76978-79 (Dec. 13, 2002).
superseding the analysis in Advisory Opinions 2003-26 (Voinovich) and 2004-03 (Dooley).

**Certification of No Effect Pursuant to 5 U.S.C. 605(b) (Regulatory Flexibility Act)**

The Commission certifies that the attached proposed rule would not, if promulgated, have a significant economic impact on a substantial number of small entities. The basis for this certification is that any individuals and not-for-profit entities that would be affected by this proposed rule are not “small entities” under 5 U.S.C. 601. The definition of “small entity” does not include individuals, but classifies a not-for-profit enterprise as a “small organization” if it is independently owned and operated and not dominant in its field. 5 U.S.C. 601(4). The proposed rule would affect authorized committees, which are not independently owned and operated because they are not financed and controlled by a small identifiable group of individuals. Authorized committees are financed by contributions from a large number of persons and controlled by the candidate and the candidate's campaign employees and volunteers. To the extent that any authorized committees might be considered “small organizations,” the number that would be affected by this proposed rule is not substantial.

The proposed rule also would not impose any additional restrictions or increase the costs of compliance for authorized committees. Instead, the proposed rule would provide authorized committees with additional options for using campaign funds. The proposed rule would not impose an undue burden upon authorized committees because they are already required to report the use of campaign funds to the Commission.

Therefore, the attached proposed rule, if promulgated, would not have a significant economic impact on a substantial number of small entities.
List of Subjects

11 CFR Part 113

Campaign funds.
PART 113 – USE OF CAMPAIGN ACCOUNTS FOR NON-CAMPAIGN PURPOSES

For the reasons set out in the preamble, the Federal Election Commission proposes to amend Subchapter A of Chapter I of Title 11 of the Code of Federal Regulations as follows:

1. The authority citation for Part 113 would continue to read as follows:

   Authority: 2 U.S.C. 432(h), 438(a)(8), 439a, 441a.

2. Section 113.2 would be amended by:

   a. Redesignating paragraphs (e) and (f) as paragraphs (f) and (g); and
   b. Revising paragraph (d) and adding new paragraph (e) to read as follows:

§ 113.2 Permissible non-campaign use of funds (2 U.S.C. 439a).

   *   *   *   *   *

   (d) May be donated to State and local candidates subject to the provisions of State law; or

   (e) May be used for any other lawful purpose, unless such use is personal use under 11 CFR 113.1(g).

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Robert D. Lenhard
Chairman
Federal Election Commission

DATED: ________________
BILLING CODE: 6715-01-U