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 Final Rules on the Use of Campaign Funds for Donations to Non-Federal Candidates and Any Other Lawful Purpose

Attached is a draft Final Rule that adds two additional uses of campaign funds to the list of permissible non-campaign uses at 11 CFR 113.2. The Consolidated Appropriations Act of 2005 amended 2 U.S.C 439a by adding (I) donations to non-Federal candidates, and reinstating (2) any other lawful purpose that does not convert campaign funds to personal use. This draft Final Rule conforms the Commission regulations to 2 U.S.C 439a, as revised.

We request that this draft be placed on the agenda for September 24, 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: Final Rules and Transmittal of Rules to Congress.

SUMMARY: The Federal Election Commission is revising its rules regarding

the use of campaign funds by candidates and other individuals.

The revision adds 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 conforms the provision with those in the

Federal Election Campaign Act, as amended ("the Act"). Further

information is provided in the supplementary information that

follows.

EFFECTIVE DATE: [INSERT DATE 30 DAYS AFTER THE DATE OF

PUBLICATION IN THE FEDERAL REGISTER].

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\(^1\) accepted by candidates and donations\(^2\) received by individuals to support their activities as Federal officeholders. Section 313 is codified at 2 U.S.C. 439a and is 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).

Section 113.2 of the Commission’s regulations implements Section 439a by tracking the permissible uses of campaign funds and funds donated to a Federal officeholder. The Commission initiated this rulemaking to add to section 113.2 the two recently enacted permissible uses regarding donations to non-Federal candidates, and donations for any other lawful purpose other than personal use. See the Consolidated Appropriations Act of 2005.\(^3\) The Commission notes that before 2002, the Act and

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\(^1\) A "contribution" is a payment, service or anything of value given to a person for the purpose of influencing a Federal election. See 11 CFR 100.52(a). “Contributions” are subject to the limits and prohibitions of the Act.

\(^2\) A "donation" is a payment, service or anything of value given to a person other than a "contribution." See 11 CFR 300.2(e).

Commission regulations had permitted the use of campaign funds for “any other lawful purpose” other than personal use. The Bipartisan Campaign Reform Act of 2002 (“BCRA”), deleted “any other lawful purpose” from Section 439a and set forth four permissible uses of campaign funds.

As noted above, however, the “any other lawful purpose” provision was restored to Section 439a through the Consolidated Appropriations Act of 2005. At that time, Congress also added donations to State and local candidates as permissible uses of campaign funds. These changes to the Act prompted this rulemaking.

The Commission published a Notice of Proposed Rulemaking (“NPRM”) on July 19, 2007, in which it sought comment on proposed revisions to 11 CFR 113.2. See Notice of Proposed Rulemaking for Use of Campaign Funds for Donations to Non-Federal Candidates and Any Other Lawful Purpose Other Than Personal Use, 72 FR 39583 (July 19, 2007). The comment period closed on August 20, 2007. The Commission received one written comment from the Internal Revenue Service, which stated that “the proposed rules do not pose a conflict with the Internal Revenue Code or the regulations thereunder.”

Accordingly, the Commission has decided to revise its rules governing the use of campaign funds to 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. These changes are identical to those proposed in the NPRM.

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TRANSMISSION OF FINAL RULES TO CONGRESS

Under the Administrative Procedure Act, 5 U.S.C. 553(d), and the Congressional Review of Agency Rulemaking Act, 5 U.S.C. 801(a)(1), agencies must submit final rules to the Speaker of the House of Representatives and the President of the Senate and publish them in the Federal Register at least 30 calendar days before they take effect. The final rules that follow were transmitted to Congress on _______, 2007.

EXPLANATION AND JUSTIFICATION

1. 11 CFR 113.2(d) – Donations to State and local candidates

Section 439a(a)(5) of the Act expressly permits Federal candidates and officeholders to donate their campaign funds to State and local candidates. The Commission is amending 11 CFR 113.2 accordingly, by adding a new paragraph (d), which permits Federal candidates and officeholders to donate campaign funds from their authorized committees to “State and local candidates subject to the provisions of State law.”

2. 11 CFR 113.2(e) – Any other lawful purpose

The Commission is amending 11 CFR 113.2 by inserting a new paragraph (e), which states 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) follows 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 notes that this change to the Act had the effect of superseding the analysis in Advisory Opinion 2003-26 (Voinovich), in which the Commission concluded that after BCRA deleted the “any other lawful purpose” provision from Section 439a, campaign funds
could be used only for those non-campaign purposes that were specifically enumerated in
Section 439a. The change also had the effect of superseding, in part, Advisory Opinion
2004-03 (Dooley), to the extent that Advisory Opinion 2004-03 placed certain limits on
an authorized committee that had converted into a multicandidate committee and its use,
for any lawful purpose, of funds that had been received when the committee was an
authorized committee.

Certification of No Effect Pursuant to 5 U.S.C. 605(b) (Regulatory Flexibility Act)
The Commission certifies that the attached final rule does not 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 affected by this 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
final rule affects 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 are affected by this final rule is not substantial.
The final rule also does not impose any additional restrictions or increase the
costs of compliance for authorized committees. Instead, the final rule provides
authorized committees with additional options for using campaign funds, which track the
recent changes to 2 U.S.C. 439a(a). The final rule does 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 final rule does 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 is amending Subchapter A of Chapter I of Title 11 of the Code of Federal Regulations as follows:

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

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

2. Section 113.2 is amended by:
   a. Adding paragraph (d); and
   b. Redesignating paragraphs (e) and (f) as paragraphs (f) and (g) 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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   [Signature]

   Robert D. Lenhard
   Chairman
   Federal Election Commission

DATED: ____________________________
BILLING CODE: 6715-01-U