



FEDERAL ELECTION COMMISSION
Washington, DC 20463

RECEIVED
FEDERAL ELECTION
COMMISSION
SECRETARIAT

2009 DEC 17 A 10:14

MEMORANDUM

AGENDA ITEM
For Meeting of: 12-17-09

December 17, 2009

TO: The Commission

FROM: Thomasenia P. Duncan *TPD*
General Counsel

Rosemary C. Smith *RCS/by RMK*
Associate General Counsel

Robert M. Knop *RMK*
Assistant General Counsel

Neven F. Stipanovic *NFS*
Attorney

SUBMITTED LATE

SUBJECT: Draft Notice of Proposed Rulemaking -- *EMILY's List v. FEC*

Attached is a draft Notice of Proposed Rulemaking ("NPRM") to implement the D.C. Circuit Court's decision in *EMILY's List v. FEC*, 581 F.3d 1 (D.C. Cir. 2009). The draft NPRM proposes to remove Commission Regulations at 11 CFR 100.57 and 106.6(c) and 106.6(f).

We have been asked that this draft be placed on the agenda for December 17, 2009.

Attachment

1 **FEDERAL ELECTION COMMISSION**

2 **11 CFR Parts 100 and 106**

3 **[Notice 2009 - >]**

4 **Funds Received in Response to Solicitations; Allocation of Expenses by Separate**
5 **Segregated Funds and Nonconnected Committees**

6 **AGENCY:** Federal Election Commission.

7 **ACTION:** Notice of Proposed Rulemaking.

8 **SUMMARY:** The Federal Election Commission (“Commission”) proposes
9 removing its rules regarding funds received in response to
10 solicitations. The Commission also proposes removing two
11 additional rules regarding the allocation of certain expenses by
12 separate segregated funds and nonconnected committees. The
13 United States District Court for the District of Columbia ordered
14 that these rules are vacated, in accordance with a Court of Appeals
15 decision. Further information is provided in the supplementary
16 information that follows.

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

20 **ADDRESSES:** All comments must be in writing, must be addressed to Mr. Robert
21 M. Knop, Assistant General Counsel, and must be submitted in
22 either e-mail, facsimile, or paper copy form. Commenters are
23 strongly encouraged to submit comments by e-mail to ensure

1 timely receipt and consideration. E-mail comments must be sent to
2 emilyslistrepeal@fec.gov. If e-mail comments include an
3 attachment, the attachment must be in either Adobe Acrobat (.pdf)
4 or Microsoft Word (.doc) format. Faxed comments must be sent to
5 (202) 219-3923, with paper copy follow-up. Paper comments and
6 paper copy follow-up of faxed comments must be sent to the
7 Federal Election Commission, 999 E Street, NW., Washington, DC
8 20463. All comments must include the full name and postal
9 service address of the commenter or they will not be considered.
10 The Commission will post all comments on its Web site after the
11 comment period ends.

12
13 **FOR FURTHER**
14 **INFORMATION**
15 **CONTACT:**

Mr. Robert M. Knop, Assistant General Counsel, or Mr. Neven F.
Stipanovic, Attorney, 999 E Street, NW., Washington, DC 20463,
(202) 694-1650 or (800) 424-9530.

18 **SUPPLEMENTARY**
19 **INFORMATION:**

20 On September 18, 2009, the United States Court of Appeals for the D.C. Circuit
21 (“D.C. Circuit Court”) ruled that 11 CFR 100.57, 106.6(c), and 106.6(f) violated the First
22 Amendment of the United States Constitution. See EMILY’s List v. FEC, 581 F.3d 1
23 (D.C. Cir. 2009). The court also ruled that 11 CFR 100.57 and 106.6(f), as well as one
24 provision of 106.6(c), exceeded the Commission’s authority under the Federal Election
25 Campaign Act (“Act”). See id. At the direction of the D.C. Circuit Court, the United

1 States District Court for the District of Columbia ordered that these rules are vacated.
2 See Final Order, EMILY’s List v. FEC, No. 05-0049 (D.D.C. Nov. 30, 2009). The
3 Commission now proposes to remove these rules from its regulations.

4 **I. Proposed Deletion of 11 CFR 100.57 – Funds Received in Response to**
5 **Solicitations**

6
7 The Commission regulation at 11 CFR 100.57 went into effect on
8 January 1, 2005. See Political Committee Status, Definition of Contribution, and
9 Allocation for Separate Segregated Funds and Nonconnected Committees, 69 FR 68056
10 (Nov. 23, 2004). Under paragraph (a) of section 100.57, funds provided in response to a
11 communication are treated as contributions if the communication indicates that any
12 portion of the funds received would be used to support or oppose the election of a clearly
13 identified Federal candidate. Paragraph (b)(1) of section 100.57 provides that all funds
14 received in response to a solicitation described in section 100.57(a) that refers to both a
15 clearly identified Federal candidate and a political party, but not to any non-Federal
16 candidates, have to be treated as contributions. Paragraph (b)(2) states that if a
17 solicitation described in section 100.57 refers to at least one clearly identified Federal
18 candidate and one or more clearly identified non-Federal candidate, then at least fifty
19 percent of the funds received in response to the solicitation has to be treated as
20 contributions. Paragraph (c) of section 100.57 provides an exception for certain
21 solicitations for joint fundraisers conducted between or among authorized committees of
22 Federal candidates and the campaign organizations of non-Federal candidates.

23 The Commission proposes removing section 100.57 from its regulations because
24 the D.C. Circuit Court held that this rule is unconstitutional and that it exceeded the
25 Commission’s statutory authority under the Act. See EMILY’s List v. FEC, 581 F.3d 1

1 (D.C. Cir. 2009). Moreover, as explained above, the D.C. District Court has ordered that
2 11 CFR 100.57 is vacated. See Final Order, EMILY’s List v. FEC, No. 05-0049 (D.D.C.
3 Nov. 30, 2009).

4 **II. Proposed Deletion of 11 CFR 106.6(c) and 106.6(f) – Allocation of**
5 **Expenses Between Federal and Non-Federal Activities by Separate**
6 **Segregated Funds and Nonconnected Committees**
7

8 At the same time that the Commission adopted 11 CFR 100.57, the Commission
9 substantially revised its allocation rules at 11 CFR 106.6. See Political Committee
10 Status, Definition of Contribution, and Allocation for Separate Segregated Funds and
11 Nonconnected Committees, 69 FR 68056 (Nov. 23, 2004). The revised rule at
12 11 CFR 106.6(c) requires nonconnected committees and separate segregated funds
13 (SSFs) to use at least fifty percent Federal funds to pay for administrative expenses,
14 generic voter drives, and public communications that refer to a political party, but not to
15 any Federal or non-Federal candidates.¹ The Commission also added a new paragraph (f)
16 to section 106.6, which specifies that nonconnected committees and SSFs must pay for
17 public communications and voter drives that refer to both Federal and non-Federal
18 candidates using a percentage of Federal funds proportionate to the amount of the
19 communication that is devoted to the Federal candidates. Id.

20 The Commission proposes removing paragraphs (c) and (f) from section 106.6
21 because the D.C. Circuit Court held that these provisions are unconstitutional. See
22 EMILY’s List v. FEC, 581 F.3d 1 (D.C. Cir. 2009). Moreover, as explained above, the

¹ Section 106.6(a) defines a non-connected committee as “any committee which conducts activities in connection with an election but which is not a party committee, an authorized committee of any candidate for federal election, or a separate segregated fund.” A separate segregated fund is a political committee established, administered, or financially supported by a corporation or labor organization. 2 U.S.C. 441b(b)(2)(C); 11 CFR 114.1(a)(2)(iii). A generic voter drive includes voter identification, voter registration, and get-out-the-vote drives, or any other activities that urge the general public to register, vote or support candidates of a particular party or associated with a particular issue, without mentioning a specific candidate. 11 CFR 106.6(b)(1)(iii).

1 D.C. District Court ordered that paragraphs (c) and (f) of section 106.6 are vacated. See
2 Final Order, EMILY’s List v. FEC, No. 05-0049 (D.D.C. Nov. 30, 2009).

3 In an abundance of caution with respect to the notice and comment requirements
4 under the Administrative Procedure Act, 5 U.S.C. § 552 *et. seq.*, the Commission seeks
5 public comments on how best to effectuate the courts’ opinion and order in EMILY’S
6 List. The Commission invites comment on whether the D.C. Circuit Court’s opinion is
7 subject to a reading that the ruling, as well as the district court’s order that the rules are
8 vacated, is limited only to non-profit, non-connected entities.

9 Thus, the Commission invites public comment on whether the D.C. Circuit
10 Court’s decision extends to SSFs as well as to nonconnected committees. The section
11 106.6 allocation rules, including paragraphs (c) and (f), apply to nonconnected
12 committees and to SSFs. EMILY’s List is a non-profit non-connected political
13 committee, not an SSF. The EMILY’s List decision stated that “this case concerns the
14 FEC’s regulation of non-profit entities that are not connected to a . . . for-profit
15 corporation.” (Emphasis in original). See EMILY’s List, 581 F.3d at 8. Moreover, in
16 footnote 7 of the decision, the court stated: “In referring to non-profit entities, we mean
17 non-connected non-profit corporations . . . as well as unincorporated non-profit groups.
18 ‘Non-connected’ means that the non-profit is not a . . . committee established by a
19 corporation or labor union.” Id. n.7. Does the EMILY’s List analysis provide any basis
20 for treating SSFs differently from the non-connected committee at issue in the EMILY’s
21 List case?

22 Alternatively, the Commission seeks comment on whether the court’s statutory
23 analysis should be read as not depending on the type of entity involved, but rather on the

1 nature of the expenses that the entity incurs. See e.g., EMILY's List, 581 F.3d at 21-22.
2 Moreover, even under the constitutional analysis, could the court's rationale reasonably
3 be read to apply to SSFs as well as nonconnected committees? For example, the D.C.
4 Circuit Court's opinion seems to rely more on the distinction between parties and other
5 entities than the corporate status of those other entities.

6 The Commission invites comments on the merits of these two alternative
7 readings. In short, the Commission seeks comments as to whether the allocation
8 provisions in paragraphs (c) and (f) of section 106.6 should be removed in their entirety,
9 or revised so as not to apply to nonconnected committees but to continue to apply to
10 SSFs. Alternatively, is the court's order vacating 11 CFR 106.6(c) and (f) so clear that
11 the Commission has no discretion to do anything but repeal those provisions in their
12 entirety?

13 Please note that the Commission intends to initiate a separate rulemaking
14 regarding other potential changes to its regulations, such as conforming changes to the
15 remaining portions of 11 CFR 106.6 and other changes to 11 CFR 102.5. The
16 Commission invites comment regarding what other changes to its regulations it should
17 consider implementing in order to conform to the D.C. Circuit Court's ruling.

18

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

2 The Commission certifies that the attached proposed rule, if promulgated, would
3 not have a significant economic impact on a substantial number of small entities. The
4 basis for this certification is that few, if any, small entities will be affected by this
5 rulemaking. The Commission is proposing to remove regulations that a Federal court
6 ordered vacated. Accordingly, removing these regulations would not have a significant
7 impact on a substantial number of small entities.

8 **List of Subjects**

9 11 CFR Part 100

10 Elections.

11 11 CFR Part 106

12 Campaign Funds, Political committees and parties, Reporting and recordkeeping
13 requirements.

14

1 For the reasons set out in the preamble, subchapter A of chapter I of title 11 of the
2 Code of Federal Regulations is proposed to be amended as follows:

3

4 **PART 100 – SCOPE AND DEFINITIONS (2 U.S.C. 431)**

5 1. The authority citation for part 100 continues to read as follows:

6 Authority: 2 U.S.C. 431, 434, 438(a)(8), and 439a(c).

7 § 100.57 [Removed and Reserved]

8 2. Section 100.57 is removed and reserved.

9 **PART 106 - ALLOCATIONS OF CANDIDATE AND COMMITTEE ACTIVITIES**

10 3. The authority citation for part 106 continues to read as follows:

11 Authority: 2 U.S.C. 438(a)(8), 441a(b), 441a(g).

12 4. In § 106.6, paragraphs (c) and (f) are removed and reserved.

13

14

On behalf of the Commission,

15

16

17

Steven T. Walther

18

Chairman

19

Federal Election Commission

20

21 DATED: _____

22 BILLING CODE: 6715-01-U

23