



FEDERAL ELECTION COMMISSION
Washington, DC 20463

FEDERAL ELECTION
COMMISSION
SECRETARIAT

2010 MAR -5 P 4: 03

AGENDA ITEM

For Meeting of 03-11-10

MEMORANDUM

SUBMITTED LATE

TO: The Commission

FROM: Thomasenia P. Duncan *JPD*
General Counsel

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

Robert M. Knop *RMK*
Assistant General Counsel

Neven F. Stipanovic *NFS*
Attorney */ by RMK*

Joshua S. Blume *JSB*
Attorney

SUBJECT: Draft Final Rule – *EMILY's List v. FEC*

Attached are draft Final Rules and an Explanation and Justification that would implement the D.C. Circuit Court's decision in *EMILY's List v. FEC*, 581 F.3d 1 (D.C. Cir. 2009), by removing Commission regulations at 11 CFR 100.57 and 106.6(c) and 106.6(f).

We request that this draft be placed on the agenda for March 11, 2010.

Attachment

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

FEDERAL ELECTION COMMISSION

11 CFR Parts 100 and 106

[Notice 2010 - XX]

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

AGENCY: Federal Election Commission.

ACTION: Final Rules.

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

DATES: Effective: [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION 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.

SUPPLEMENTARY INFORMATION:

1 The Commission is revising its regulations to conform to the decision of the
2 United States Court of Appeals for the District of Columbia Circuit in EMILY’s List v.
3 FEC, 581 F.3d 1 (D.C. Cir. 2009). On September 18, 2009, the court ruled that 11 CFR
4 100.57, 106.6(c), and 106.6(f) violated the First Amendment of the United States
5 Constitution. See EMILY’s List v. FEC, 581 F.3d 1 (D.C. Cir. 2009). The court also
6 ruled that 11 CFR 100.57 and 106.6(f), as well as one provision of 106.6(c), exceeded the
7 Commission’s authority under the Federal Election Campaign Act (“Act”). See id. At
8 the direction of the Court of Appeals, the United States District Court for the District of
9 Columbia ordered that these rules are vacated. See Final Order, EMILY’s List v. FEC,
10 No. 05-0049 (D.D.C. Nov. 30, 2009).

11 The Commission published a Notice of Proposed Rulemaking (“NPRM”) on
12 December 29, 2009, in which it sought public comment on the proposed removal of rules
13 at 11 CFR 100.57, 106.6(c), and 106.6(f). See Notice of Proposed Rulemaking on Funds
14 Received in Response to Solicitations; Allocation of Expenses by Separate Segregated
15 Funds and Nonconnected Committees, 74 FR 68720 (Dec. 29, 2009) (“NPRM”). The
16 comment period closed on January 28, 2010. The Commission received two comments
17 on the proposed rules, one of which was a comment from the Internal Revenue Service
18 (“IRS”) stating that the proposed rules did not conflict with Internal Revenue Code or
19 IRS regulations. The comments are available on the Commission’s website at
20 http://www.fec.gov/law/law_rulemakings.shtml#emilyslistrepeal.

21 For the reasons explained below, the Commission has decided to delete the rules
22 at 11 CFR 100.57, 106.6(c), and 106.6(f). The Commission’s final rules are identical to
23 the proposed rules in the NPRM.

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

6 **Explanation and Justification**

7 **I. Deletion of 11 CFR 100.57 – Funds Received in Response to**
8 **Solicitations**
9

10 The Commission promulgated 11 CFR 100.57 to specify when funds received in
11 response to solicitations are considered to be contributions for purposes of the Act.
12 Under paragraph (a) of section 100.57, funds provided in response to a communication
13 were treated as contributions if the communication indicated that any portion of the funds
14 received would be used to support or oppose the election of a clearly identified Federal
15 candidate. Paragraph (b)(1) of section 100.57 provided that all funds received in
16 response to a solicitation described in section 100.57(a) that referred to both a clearly
17 identified Federal candidate and a political party, but not to any non-Federal candidates,
18 had to be treated as contributions. Paragraph (b)(2) stated that if a solicitation described
19 in section 100.57 referred to at least one clearly identified Federal candidate and one or
20 more clearly identified non-Federal candidate, then at least fifty percent of the funds
21 received in response to the solicitation had to be treated as contributions. Paragraph (c)
22 of section 100.57 provided an exception for certain solicitations for joint fundraisers
23 conducted between or among authorized committees of Federal candidates and the
24 campaign organizations of non-Federal candidates.

1 The Commission is removing section 100.57 in its entirety from its regulations
2 because the Court of Appeals held that section 100.57 is unconstitutional and that it
3 exceeded the Commission’s statutory authority under the Act. See EMILY’s List v. FEC,
4 581 F.3d 1 (D.C. Cir. 2009). Accordingly, the District Court ordered that
5 11 CFR 100.57 is vacated. See Final Order, EMILY’s List v. FEC, No. 05-0049 (D.D.C.
6 Nov. 30, 2009).

7 The Commission received one comment on the proposal to remove section
8 100.57. That commenter agreed with the Commission that 11 CFR 100.57 should be
9 removed in its entirety.

10 **II. Deletion of 11 CFR 106.6(c) and 106.6(f) – Allocation of Expenses**
11 **Between Federal and Non-Federal Activities by Separate Segregated**
12 **Funds and Nonconnected Committees**
13

14 The Commission promulgated 11 CFR 106.6 to provide separate segregated funds
15 (SSFs) and nonconnected committees making disbursements in connection with both
16 Federal and non-Federal elections with instructions as to how to allocate their
17 administrative expenses and costs for combined Federal and non-Federal activities. The
18 rule at 11 CFR 106.6(c) required nonconnected committees and SSFs to use at least fifty
19 percent Federal funds to pay for administrative expenses, generic voter drives, and public
20 communications that referred to a political party, but not to any Federal or
21
22

1 non-Federal candidates.¹ Paragraph (f) of section 106.6 specified that nonconnected
2 committees and SSFs had to pay for public communications and voter drives that referred
3 to both Federal and non-Federal candidates using a percentage of Federal funds
4 proportionate to the amount of the communication that was devoted to the Federal
5 candidates. See id.

6 The Commission is now removing paragraphs (c) and (f) from section 106.6
7 because the Court of Appeals held that these provisions are unconstitutional. See
8 EMILY's List v. FEC, 581 F.3d 1 (D.C. Cir. 2009). Accordingly, the District Court
9 ordered that paragraphs (c) and (f) of section 106.6 are vacated. See Final Order,
10 EMILY's List v. FEC, No. 05-0049 (D.D.C. Nov. 30, 2009).

11 The Commission sought public comment on whether the Court of Appeals'
12 decision extends to SSFs as well as to nonconnected committees. See EMILY's List
13 NPRM at 68721. The Commission noted that section 106.6's allocation rules, including
14 paragraphs (c) and (f), apply to nonconnected committees and to SSFs. See id. EMILY's
15 List is a non-profit non-connected political committee, not an SSF. The EMILY's List
16 decision stated that "this case concerns the FEC's regulation of non-profit entities that are
17 not connected to a . . . for-profit corporation." See EMILY's List, 581 F.3d at 8.
18 Moreover, in footnote 7 of the decision, the court stated: "In referring to non-profit
19 entities, we mean non-connected non-profit corporations . . . as well as unincorporated

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 non-profit groups. ‘Non-connected’ means that the non-profit is not a . . . committee
2 established by a corporation or labor union.” See id. n.7. The Commission asked
3 whether these aspects of the opinion provided any basis for treating SSFs differently from
4 the non-connected committee at issue in the EMILY’s List case. See EMILY’s List
5 NPRM at 68721. Alternatively, the Commission asked whether the court’s order
6 vacating 11 CFR 106.6(c) and (f) is so clear that the Commission has no discretion to do
7 anything but repeal those provisions in their entirety. *Id.*

8 The Commission received one comment on this issue. That commenter agreed
9 with the Commission’s proposal to remove paragraphs (c) and (f) from section 106.6.
10 The commenter argued that the EMILY’s List decision applies to SSFs as well as to
11 nonconnected committees. According to the commenter, the Court of Appeals ruled that
12 the regulations were invalid in their entirety and the court did not provide any exception
13 for SSFs. The commenter further noted that paragraphs (c) and (f) of section 106.6
14 applied to both SSFs and to nonconnected committees, and that these regulations were
15 challenged on their face. Accordingly, the court’s reasoning applies with equal force to
16 SSFs as to nonconnected committees. As to the court’s statement in footnote 7, the
17 commenter argued that this statement was simply a description of how the term “non-
18 profit entities” was to be used in the opinion because the term “non-profit entities” does
19 not appear in the Act. However, the explanation of the court’s terminology did not limit
20 the reach of the decision.

21 The Commission agrees with the commenter that the court’s holding applies to
22 SSFs as well as to nonconnected committees. Although the court defined the term non-
23 profit entities as not including SSFs, the court explicitly ordered the District Court to

1 “vacate the challenged regulations,” referring to section 106.6(c) and section 106.6(f) in
2 their entirety. The court’s order provides no exception for SSFs. Accordingly, the
3 Commission is removing paragraphs (c) and (f) in their entirety.

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

5
6 The Commission certifies that the attached final rules will not have a significant
7 economic impact on a substantial number of small entities. Few, if any, small entities
8 will be affected by these final rules, which apply to Federal candidates and their
9 campaign committees, political committees of political parties, nonconnected
10 committees, and separate segregated funds. Candidates, party committees, separate
11 segregated funds, and nonconnected committees are not “small entities” under
12 5 U.S.C. 601. They are not independently owned and operated because they are not
13 financed and controlled by a small identifiable group of individuals; rather, they rely on
14 contributions from a variety of persons to fund committee activities. However, to the
15 extent that any committees might be considered “small entities,” it is also the case that
16 the final rules do not add any new substantive provisions to the current regulations, but
17 instead remove existing regulations pursuant to a Federal court order that they be vacated.
18 Accordingly, removing these regulations will not have a significant impact on a
19 substantial number of small entities.

20 **List of Subjects**

21 11 CFR Part 100

22 Elections.

23 11 CFR Part 106

1 Campaign Funds, Political committees and parties, Reporting and recordkeeping
2 requirements.

3 For the reasons set out in the preamble, subchapter A of chapter I of title 11 of the
4 Code of Federal Regulations is amended as follows:
5
6

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

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

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

10 § 100.57 [Removed and Reserved]

11 2. Section 100.57 is removed and reserved.
12

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

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

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

16 § 106.6 Allocation of expenses between federal and non-federal activities by separate
17 segregated funds and nonconnected committees.

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

19 On behalf of the Commission,
20

21 _____
22 Matthew S. Petersen
23 Chairman
24 Federal Election Commission
25

26 DATED: _____

27 BILLING CODE: 6715-01-P
28