

AGENDA DOCUMENT NO. 12-80



FEDERAL ELECTION COMMISSION
Washington, DC 20463

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AGENDA ITEM

MEMORANDUM

For Meeting of 12-6-12

TO: The Commission
FROM: Steven T. Walther *St. Walther*
DATE: November 29, 2012
SUBJECT: Limited Liability Partnerships – Notice of Proposed Rulemaking

I request that the attached draft of the subject Notice of Proposed Rulemaking be placed on the agenda for the December 6, 2012, Open Session.

Attachment

1 **FEDERAL ELECTION COMMISSION**

2 **11 CFR Part 110**

3 **[Notice 2012->>]**

4 **Limited Liability Partnerships**

5 **AGENCY:** Federal Election Commission.

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

7 **SUMMARY:** The Commission is proposing new rules addressing the treatment
8 of limited liability partnerships (“LLPs”) for purposes of the
9 Federal Election Campaign Act (“FECA” or the “Act”). LLPs are
10 created under State law and share certain characteristics with both
11 partnerships and corporations. The Commission is considering
12 treating all LLPs that have opted for Federal corporate tax
13 treatment pursuant to the Internal Revenue Service’s “check the
14 box” provisions, as corporations for purposes of the Act. The
15 Commission has made no final decision on the issues presented in
16 this rulemaking. Further information is provided in the
17 supplementary information that follows.

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

21 **ADDRESSES:** All comments must be in writing. Comments may be submitted
22 electronically via the Commission’s website at
23 <http://www.fec.gov/fosers/>. Commenters are encouraged to submit

1 comments electronically to ensure timely receipt and
2 consideration. Alternatively, comments may be submitted in paper
3 form. Paper comments must be sent to the Federal Election
4 Commission, Attn.: Robert M. Knop, Assistant General Counsel,
5 999 E Street, NW., Washington, DC 20463. All comments must
6 include the full name and postal service address of the commenter,
7 and of each commenter if filed jointly, or they will not be
8 considered. The Commission will post comments on its Web site
9 at the conclusion of the comment period.

10 **FOR FURTHER**
11 **INFORMATION**
12 **CONTACT:**

Mr. Robert M. Knop, Assistant General Counsel, or
13 Mr. Anthony T. Buckley, Attorney, 999 E Street, NW.,
14 Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

15 **SUPPLEMENTARY**
16 **INFORMATION:**

The Federal Election Campaign Act, as amended, contains
17 restrictions and prohibitions on contributions made for the purpose of influencing Federal
18 elections. Partnerships, like individuals, may make contributions of up to \$2,500 per
19 candidate per election to Federal office; \$30,800 aggregate per calendar year to national
20 party committees; and \$5,000 aggregate per calendar year to other political committees.¹
21 2 U.S.C. 441a(a)(1).

22 The Act prohibits corporations from making contributions in connection with a
23 Federal election. 2 U.S.C. 441b(a). Instead, corporations may use their general treasury
24 monies to establish separate segregated funds (“SSFs”) and solicit contributions from

¹ Contributions to candidates’ authorized committees and national party committees are indexed for inflation. 2 U.S.C. 441a(c).

1 their restricted classes to their SSFs.² 2 U.S.C. 441b(b)(2)(C); 11 CFR 114.5(b), (g). The
2 SSF may then make contributions subject to the Act’s contribution limitations, as well as
3 expenditures. An SSF has the same contribution limitations as individuals and
4 partnerships, except that an SSF that is a multicandidate political committee may make
5 contributions of up to \$5,000 per candidate per election to Federal office; \$15,000
6 aggregate per calendar year to national party committees; and \$5,000 aggregate per
7 calendar year to other political committees.³

8 Partnerships are included in the Act’s definition of “person” but are not otherwise
9 specifically addressed. The Commission’s regulation addressing partnerships is currently
10 found at 11 CFR 110.1(e). This regulation requires that partnership contributions be
11 attributed to the partnership and to each partner,⁴ either: (1) in direct proportion to his or
12 her share of the partnership profits; or (2) by agreement of the partners, as long as only
13 the profits of the partners to whom the contribution is attributed are reduced and these
14 partners’ profits are reduced (or losses increased) in proportion to the contribution
15 attributed to each of them. 11 CFR 110.1(e)(1), (2)(i)-(ii). Unlike corporations, this
16 regulation does not contemplate partnerships forming SSFs.

17 The Act and Commission regulations do not distinguish between types of
18 partnerships. Under the IRS “check the box” rules, the IRS provides equal treatment for
19 limited liability companies (“LLCs”) and LLPs. See 26 CFR 301.7701-3(c)(1)(i). An

² A corporation’s “restricted class” consists of the corporation’s executive and administrative personnel, its stockholders and their families. 2 U.S.C. 441b(b)(4); 11 CFR 114.1(c) and 114.5(g).

³ These contribution amounts are not indexed for inflation.

⁴ No portion of such contribution may be made from the profits of a corporation that is a partner or from any other person who is otherwise prohibited from making Federal Contributions. See 11 CFR 110.1(e).

1 LLP is a form of general partnership that provides partners⁵ with protection against
2 personal liability for certain partnership obligations, just as shareholders of a corporation
3 may generally be protected against personal liability for corporate obligations. Both
4 forms of business entity may opt for treatment as an association, and consequently for
5 corporate tax treatment, without regard to State law status. Id. A partnership that opts
6 for treatment as an association “contributes all of its assets and liabilities to the
7 association in exchange for stock in the association, and immediately thereafter, the
8 partnership liquidates by distributing the stock of the association to its partners.” 26 CFR
9 301.7701-3(g)(1)(i).

10 The Commission proposes to revise its rules on partnerships so that LLPs opting
11 for association treatment (“Corporate LLPs”) would be treated as corporations in 11 CFR
12 part 114. Corporate LLPs would no longer themselves be able to make contributions or
13 to attribute them to their partners. Instead, Corporate LLPs could establish SSFs that
14 could solicit contributions from their restricted classes, and would be able to use those
15 funds to make contributions to candidates and political committees. In contrast, LLPs
16 that do not “check the box” pursuant to the Internal Revenue Service’s provisions would
17 be able to make contributions and those contributions would continue to be attributed to
18 the partnership and its partners.⁶

19 On July 28, 2008, the Commission considered an advisory opinion request from
20 Holland & Knight LLP (“Holland & Knight”) asking whether it should be treated as a
21 corporation with the ability to establish an SSF. See Advisory Opinion 2008-05 (Holland
22 & Knight). Holland & Knight was an LLP organized under Florida State law that elected

⁵ Such partners could include individuals, as well as limited partners, general partners, LLPs, LLCs or corporations.

⁶ These partners must be permissible sources under the Act. See note 4, above.

1 to classify itself as an association taxable as a corporation for Federal tax purposes
2 pursuant to 26 CFR 301.7701-3. The Commission concluded that in the absence of
3 Commission regulations otherwise governing the treatment of LLPs, the requestor was a
4 partnership for the purposes of the Act, because the requestor was organized and operated
5 as an LLP, and not as a corporation, under State law. See Advisory Opinion 2008-05
6 (Holland & Knight) at 3.

7 **I. Proposed 11 CFR 110.21 Partnerships.**

8 The Commission proposes to move its current partnership provision from current
9 11 CFR 110.1(e) to new 11 CFR 110.21. This new section would combine the
10 Commission’s current partnership rule with a rule addressing the treatment of Corporate
11 LLPs. Accordingly, paragraph (e) of section 110.1 would be removed and reserved.

12 Proposed section 110.21 would be similar in significant respects to current
13 11 CFR 110.1(e). Paragraph (a) of proposed 11 CFR 110.21 would provide that all
14 partnerships except Corporate LLPs shall attribute a contribution by the partnership to
15 both the partnership and each individual partner. Paragraph (b) of proposed 11 CFR
16 110.21 would contain the requirement in current 110.1(e) that the amount limitations
17 apply to partnership contributions, except for Corporate LLPs.

18 Proposed paragraph (c) would set forth rules addressing Corporate LLPs.
19 Paragraph (c)(1) would define “limited liability partnership,” as “a business entity that is
20 recognized as a limited liability partnership under the laws of the State in which it is
21 established.” Paragraph (c)(2) would state that an LLP that elects to be treated as a
22 corporation by the Internal Revenue Service shall be considered a corporation for

1 purposes of 11 CFR Parts 100, 113, 114, 115 116 and 9034,⁷ except that its restricted
2 class shall consist solely of those persons who receive stock in the association, as well as
3 their families.

4 The Commission seeks comment on whether it is appropriate to promulgate these
5 rules governing Corporate LLPs, which are modeled after the Commission’s LLC rules at
6 11 CFR 110.1(g). Paragraph 110.1(g) treats any business entity that is recognized as an
7 LLC under the laws of the State in which it was established and that elects to be treated
8 as a corporation for IRS purposes, as a corporation for purposes of the contribution
9 prohibitions of the Act. The Commission issued that rule after receiving several advisory
10 opinion requests over a relatively short period of time on the status of LLCs. See
11 Advisory Opinions 1995-11 (Hawthorn) (Commission concluded that a Virginia LLC
12 was neither a corporation nor a partnership under the Act and Commission regulations
13 and that LLC could make contributions), 1996-13 (Townhouse Associate) (same for a
14 DC LLC), 1997-04 (Eckert Seamans Cherin & Mellott, LLC) (same for a Pennsylvania
15 LLC), 1997-17 (Nixon) (Commission concluded that Federal candidate principal
16 campaign committee was generally not prohibited from accepting contributions from
17 Missouri LLCs), 1998-11 (Patriot Holdings) (Commission concluded that California LLC
18 with Federal contactor subsidiaries could generally still make contributions with LLC
19 funds), and 1998-15 (Fitzgerald for Senate) (Commission concluded that Federal

⁷ Through these references, a Corporate LLP would be treated consistently as a corporation with respect to all its activities that are subject to the Act and Commission regulations.

1 candidate principal campaign committee was generally not prohibited from accepting
2 contributions from Illinois LLCs).⁸

3 **II. Payment of LLP SSF Expenses; Soliciting Contributions from the Restricted**
4 **Class**

5 The Commission seeks comment on two issues presented by the proposed rules.
6 First, the Act permits corporations to pay the administrative, establishment, and
7 solicitation costs of their SSFs without those payments being considered contributions by
8 the corporations to the SSFs. 2 U.S.C. 441b(b)(2)(C). Would it be appropriate for a
9 Corporate LLP to pay these costs? If so, the Commission anticipates that these payments
10 would come from earned assets contributed by the partnership to the newly created
11 association, as described above. Should these payments in turn be attributed among the
12 individual partners, either by explicit agreement or in proportion to their partnership
13 share? Does FECA permit partners to pay more than \$5,000 per year, which is the limit
14 on contributions by individuals to SSFs?

15 The second issue concerns the solicitation of contributions and, specifically, what
16 constitutes a Corporate LLP's restricted class. Solicitations for contributions to a
17 corporation's SSF may be made at any time only to the corporation's restricted class.
18 The restricted class of a corporation consists of its executive and administrative personnel
19 and their families; and the corporation's stockholders and their families. 2 U.S.C.
20 441b(b)(4)(A)(i); 11 CFR 114.5(g)(1). "Executive or administrative personnel" includes
21 "individuals employed by a corporation or labor organization who are paid on a salary,

⁸ These advisory opinions were explicitly superseded by the Commission in 1999 when it promulgated the LLC rules at 11 CFR 110.1(g). See Explanation and Justification, Treatment of Limited Liability Companies Under the Federal Election Campaign Act, 64 FR 37397, 98 (Jul. 12, 1999), available at www.fec.gov/law/cfr/ej_compilation/1999/1999-10_LLCS.pdf. Advisory opinions are available on the Commission's website at www.fec.gov/searchao.

1 rather than hourly, basis and who have policymaking, managerial, professional, or
2 supervisory responsibilities.” 2 U.S.C. 441b(b)(7); 11 CFR 114.1(c).

3 If Corporate LLPs are treated as corporations, and a Corporate LLP formed an
4 SSF, then it follows that the SSF would be allowed to make solicitations at any time for
5 contributions only to the Corporate LLP’s restricted class. The Commission’s proposed
6 rule defines a Corporate LLP’s restricted class solely as those persons who receive stock
7 in the association, as described above, as well as members of their families.⁹ Should the
8 Commission expand the pool of persons who would be within a Corporate LLP’s
9 restricted class to include certain persons who fit within the Act’s definition of “executive
10 and administrative personnel?” Using a law firm as an example, there may be managing
11 partners, senior partners and junior partners, associates, contract attorneys, and attorneys
12 “of counsel,” all having at least “professional responsibilities.” Should they all be
13 included within the restricted class? What administrative personnel, if any, should be
14 included? Again, using a law firm as an example, there may be office managers,
15 administrative managers of practice groups, legal secretaries, paralegals, paralegal
16 managers, human resources managers, recruiters, and other professionals.

17 Does the structure of a Corporate LLP lend itself to determining “executive and
18 administrative personnel?” If it does not, is it appropriate to treat Corporate LLPs as
19 corporations? Assuming the Commission can identify general characteristics of positions
20 within a Corporate LLP that would qualify as part of the “executive and administrative
21 personnel,” should the Commission issue general rules stating that persons holding
22 positions with certain characteristics are part of the Corporate LLP’s restricted class?

⁹ Any contribution to the SSF could only come from permissible sources under the Act. See note 4, above.

1 The Commission seeks comment on these and other possible approaches to
2 address, if at all, the treatment of Corporate LLPs for purposes of the Act, as well as any
3 other aspect of this rulemaking.

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

5 The Commission certifies that the attached proposed rules, if adopted, would not
6 have a significant economic impact on a substantial number of small entities. The basis
7 for this certification is that the proposed rules modify how limited liability partnerships
8 may operate pursuant to Federal campaign finance laws. The only economic impact
9 attributable to these proposed rules would be the costs incurred by limited liability
10 partnerships that wish to establish and administer separate segregated funds. This
11 activity is entirely voluntary and any costs associated with it would fall only on entities
12 choosing to establish and administer a separate segregated fund. Therefore, the attached
13 proposed rule would not have a significant impact on a substantial number of small
14 entities.

1 **List of Subjects**

2 11 CFR Part 110

3 Campaign funds, Political candidates, Political committees and parties.

1 For the reasons set out in the preamble, Subchapter A, Chapter 1 of Title 11 of the
2 Code of Federal Regulations is amended to read as follows:

3 **PART 110 – CONTRIBUTION AND EXPENDITURE LIMITATIONS AND**
4 **PROHIBITIONS**

5 1. The authority citation for Part 110 would continue to read as follows:

6 Authority: 2 U.S.C. 431(8), 431(9), 432(c)(2), 437d, 438(a)(8), 441a, 441b, 441d,
7 441e, 441f, 441g, 441h and 36 U.S.C. 510.

8 2. In section 110.1, paragraph (e) would be removed and reserved.

9 3. New section 110.21 would be added to read as follows:

10 **§110.21 Partnerships.**

11 (a) All partnerships, except LLPs governed by paragraph (c) of this section, shall
12 attribute a contribution by the partnership to both the partnership and each individual
13 partner –

14 (1) In direct proportion to his or her share of the partnership profits, according
15 to instructions that the partnership shall provide to the political committee
16 or candidate; or

17 (2) By agreement of the partners, as long as—

18 (i) Only the profits of the partners to whom the contribution is
19 attributed are reduced (or losses increased), and

20 (ii) These partners' profits are reduced (or losses increased) in
21 proportion to the contribution attributed to each of them.

22 (b) A contribution by a partnership made in accordance with paragraph (a) of this
23 section shall not exceed the limitations on contributions in 11 CFR 110.1 (b), (c), and (d).

1 No portion of any such contribution may be made from the profits of a corporation that is
2 a partner.

3 (c) Contributions by limited liability partnerships (“LLP”)

4 (1) A limited liability partnership is a business entity that is recognized as a
5 limited liability partnership under the laws of the State in which it is
6 established.

7 (2) An LLP that elects to be treated as a corporation by the Internal Revenue
8 Service shall be considered a corporation for purposes of 11 CFR Parts
9 100, 113, 114 115, 116, and 9034, except that its restricted class shall
10 consist solely of those persons who receive stock in the association
11 pursuant to Internal Revenue Service rules, as well as their families.

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On behalf of the Commission,

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Caroline C. Hunter

17

Chair

18

Federal Election Commission

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DATED: _____

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BILLING CODE: 6715-01-P