



FEDERAL ELECTION COMMISSION
Washington, DC 20463

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October 6, 2000

MEMORANDUM

AGENDA ITEM

For Meeting of: 10-12-00

TO: The Commission

THROUGH: James A. Pehrkon
Staff Director

FROM: Lawrence M. Noble
General Counsel

Bradley Litchfield
Associate General Counsel

Rosemary C. Smith
Assistant General Counsel

SUBMITTED LATE

SUBJECT: Status of Regulations – October 2000 Monthly Update

At the open meeting of November 5, 1998, the Commission directed the Office of General Counsel to prepare monthly reports on the status of regulations and to circulate the reports to the Commission on an informational basis. This memorandum provides an update regarding current rulemakings and other projects involving the Regulations Team. It reflects the rulemaking priorities approved by the Commission on July 13, 2000. See Agenda Doc. # 00-66.

Completed Projects

1. **Administrative Fines (11 C.F.R. Part 111) [Mai Dinh]**

On September 29, 1999, the FEC's FY 2000 budget legislation, Public Law 106-58, was signed into law. This statute amended 2 U.S.C. § 437g by establishing an administrative fines system for straightforward reporting violations involving non-filers and late filers. The statutory changes take effect for violations occurring between January 1, 2000 and December 31, 2001. A task force drawn from OGC Policy, Enforcement, PFESP, Litigation, RAD, and the Staff Director's Office prepared three alternative sets of procedures to implement the new program. An outside consultant was retained to advise on various issues and his report was submitted on November 30, 1999. The Task Force's recommendations regarding the alternative implementation plans were considered during

the Commission's executive sessions of February 29, March 14, March 21, May 9 and May 10, as well as in Regulations Committee meetings on March 7 and March 15. A Notice of Proposed Rulemaking was approved by the Commission on March 23 and published in the *Federal Register* on March 29. The comment period ended on April 28. Two comments were received. Final rules and an Explanation and Justification were approved by the Commission on May 11 and transmitted to Congress on May 12. They were published in the *Federal Register* on May 19. Thirty legislative days expired in the Senate on July 12 and in the House of Representatives on July 13. The E & J provided for a July 14, 2000 effective date. Thus, implementation of the program began with the July 2000 Quarterly Report due on July 15, 2000.

Rulemakings Close to Completion

2. Mandatory Electronic Filing (11 C.F.R. § 104.18) [Cheryl Fowle]

Public Law 106-58, as enacted on September 29, 1999, included amendments to 2 U.S.C. 434(a) to require mandatory electronic filing for designations, statements, and reports filed with the Commission in excess of a threshold amount to be determined by the FEC. These statutory changes take effect for reporting periods beginning after December 31, 2000. In carrying out this project, OGC worked with the Data Systems Development Division, the Reports Analysis Division, the Information Division, the Press Office, and the Public Disclosure Division. A Notice of Proposed Rulemaking was discussed by the Regulations Committee on March 15, 2000 and approved by the Commission on April 5. It was published in the April 11 *Federal Register*. Three public comments were received by the close of the comment period on May 11, 2000. OGC prepared final rules and an Explanation and Justification for Commission consideration on June 8. The Regulations Committee considered revised final rules and the E & J on June 13. The Commission approved the final rules and the E & J on June 15. These rules were transmitted to Congress on June 16 and published in the *Federal Register* on June 21. With respect to the Title 26 regulations, the thirty legislative period expired on September 20. With respect to the Title 2 rules, thirty legislative days ended in the Senate on September 12 and in the House of Representatives on September 20. This Office will circulate an Announcement of Effective Date shortly.

3. Election Cycle Reporting (11 C.F.R. § 104.3, § 104.8, and § 104.9) [Cheryl Fowle]

Public Law 106-58 also amended 2 U.S.C. 434(b) to provide for election-cycle reporting, rather than calendar-year reporting, for authorized committees of candidates. These statutory changes take effect for reporting periods beginning after December 31, 2000. In carrying out this project, OGC worked with the Data Systems Development Division, the Reports Analysis Division, the Information Division, the Press Office, and the Public Disclosure Division. This Office sent a draft Notice of Proposed Rulemaking

to the Regulations Committee on April 12. The NPRM and an addendum were approved by the Commission on April 27 and published in the May 3 *Federal Register*. The comment period ended on June 2. Three public comments were received. The Regulations Committee considered the final rules and the Explanation and Justification on June 27. OGC redrafted these documents and circulated them to the Commission on June 27. The Commission approved the final rules and the E & J on July 5. These rules were transmitted to Congress on July 6 and published in the *Federal Register* on July 11. Thirty legislative days expired in the Senate on September 26 and in the House of Representatives on October 3. We note, however, that Congress has not enacted the technical corrections to the 1999 legislation the Commission suggested. Accordingly, before proceeding with an Announcement of Effective Date, the Regulations Committee has suggested that a letter to Congress be prepared noting this situation.

Ongoing Rulemakings—Top Priority Projects

4. Coordinated and Independent Expenditures (11 C.F.R. § 100.23, § 109.1, and § 110.7) [Rita Reimer]

This project implements the Supreme Court's opinion in *Colorado Republican Federal Campaign Committee v. Federal Election Commission*, 518 U.S. 604 (1996) (holding that political parties are capable of making independent expenditures on behalf of their candidates for federal office, and that it would violate the First Amendment to subject such independent expenditures to the expenditure limits of 2 U.S.C. § 441a(d)). It was initiated in response to a Petition for Rulemaking filed by the Democratic Senatorial Campaign Committee and the Democratic Congressional Campaign Committee. A Notice of Proposed Rulemaking was published on May 5, 1997, and ten comments were received in response. The Commission held a public hearing on this Notice on June 18, 1997. This project was then held in abeyance pending the outcome of litigation that could materially affect the policies at issue in this rulemaking. However, several of the coordination issues were subsequently incorporated into the Presidential public funding NPRM issued on December 16, 1998 and were the subject of additional comments and testimony at the March 24, 1999 hearing. Subsequently, the Commission considered draft definitions of coordination, which were based on *FEC v. Christian Coalition*, 52 F.Supp. 2d 45 (D.D.C. 1999). The Commission approved a supplemental NPRM on December 2, 1999, which was published in the *Federal Register* on December 9. The comment deadline was January 24, 2000. Fifteen comments were received. Witnesses representing nine organizations testified at the public hearing on February 16, 2000. This Office has prepared a summary and analysis of the comments and testimony, which was circulated to the Regulations Committee on March 31. In accordance with the Regulations Committee's discussion of June 14, the Office prepared final rules, which were circulated to the Regulations Committee on June 28. The Regulations Committee discussed a revised version of the final rules on October 5. OGC is preparing a draft Explanation and Justification for Commission consideration together with the final rules in early November.

5. Soft Money (11 C.F.R. Parts 100, 102, 104, 106, 110 and 114) [Paul Sanford]

On May 20, 1997, the Commission received a petition for rulemaking from five Members of Congress urging the Commission "to modify its rules to help end or at least significantly lessen the influence of soft money." A second petition for rulemaking was submitted by President Clinton on June 5, 1997, asking the Commission to "ban soft money" and to tighten the rules on fundraising by federal candidates and national parties. The Commission published a Notice of Availability on these two petitions on June 18, 1997 and received 188 comments in response. A Notice of Proposed Rulemaking was published on July 13, 1998. Comments were due on October 2, and a hearing was held on November 18, 1998. This Office completed an analysis of the comments and testimony and forwarded recommendations to the Regulations Committee on February 4, 2000. OGC's draft final rules were circulated to the Commission on September 21. This rulemaking was discussed by the Commission on September 28 and by the Regulations Committee on October 5. OGC has prepared and will soon send to the Regulations Committee an alternative regarding nonfederal accounts of state party committees. The Regulations Committee is consulting with all Commissioners as to the scheduling of this rulemaking for a future Commission meeting after the November elections.

6. Political Organizations (11 C.F.R. § 100.5) [Rita Reimer]

On May 25, 2000, the Commission directed OGC to draft a rulemaking document seeking comments on whether the Commission should expand the definition of "political committee" found at 11 CFR 100.5 to cover additional entities. As directed by the Commission, we have had discussions with all Commissioners as to what each would like to see included in this document, which will likely seek comment on several alternative approaches. Depending on the amount of resources that must be devoted to higher priority rulemakings, this Office expects to send a draft Advance Notice of Proposed Rulemaking to the Regulations Committee this fall.

7. The Internet and Federal Election Campaigns [Paul Sanford]

On April 21, 1999, the Commission voted to direct the Office of General Counsel to draft a proposed Notice of Inquiry on the use of the Internet in federal election campaigns. A Notice of Inquiry was approved by the Commission on October 28. The Notice was published in the *Federal Register* on November 5. The Commission approved a request to extend the comment period until January 7, 2000. Over 1200 comments were received and placed on the public record. This Office is currently analyzing the public comments and working to prepare a list of issues and preliminary recommendations so that we may obtain input from the Regulations Committee as to the proposals to be included in the Notice of Proposed Rulemaking. We anticipate the issues list will be forwarded to the Regulations Committee next month.

Ongoing Rulemakings—Secondary Priority Projects

8. Disgorgement of Illegal Contributions (11 C.F.R. Part 103) [Mai Dinh]

A Commission discussion of *Fireman v. United States*, 44 Fed. Cl. (1999) touched on the possibility of beginning a new rulemaking to revise 11 C.F.R. § 103.3(b) to provide for disgorgement of certain illegal contributions to the United States Treasury in lieu their return to the contributor. This regulations project provides an opportunity to update other aspects of 11 C.F.R. Part 103, and to address the treatment of stale-dated checks by Title 2 committees. The Office of General Counsel expects to bring forward a Notice of Proposed Rulemaking this month.

9. Voting Records and Voter Guides (11 C.F.R. § 114.4(c)(4) and (c)(5)) [Rita Reimer]

On July 20, 1999, the Commission received a Petition for Rulemaking from James Bopp, Jr., of the James Madison Center for Free Speech, on behalf of the Iowa Right to Life Committee, Inc. asking the Commission to repeal its voting records and voter guide rules at 11 C.F.R. § 114.4(c)(4) and (c)(5). A Notice of Availability was approved on August 19 and published in the *Federal Register* on August 25, 1999. Three timely comments were received by the expiration of the comment period on September 24, 1999. On July 13, 2000, the Commission approved this Office's recommendation that further consideration of the petition be considered after the coordination rulemaking is resolved, since both voting records and voter guides present coordination questions.

10. Party Committee Filing of 12 Day Pre-General Election Reports (11 C.F.R. § 104.5) [staff assignment pending]

On March 4, 1999, Commissioner Mason asked OGC to initiate a rulemaking on whether the Commission should require party committees at the national and State levels to file pre-general election reports in all cases, even when they make no candidate contributions or candidate specific expenditures in the period covered by such reports. The Office of General Counsel will begin this project as soon as resources are available and in conformance with the rulemaking priorities set out in Agenda Doc. No. 00-66, approved July 13, 2000.

11. Records of Payroll Deduction Authorization (11 C.F.R. Parts 102 and 104) [staff assignment pending]

On March 4, 1999, as a result of a Title 2 audit, Commissioner Sandstrom sought initiation of a rulemaking to clarify Commission policy that SSFs must keep employee authorization documents when employer administered payroll deduction plans are used to

collect SSF contributions; this rule would affirm that payroll deductions are a legal option and specify that authorization documents must be kept for a specified time period. The Office of General Counsel will begin this project as soon as resources are available and in conformance with the rulemaking priorities set out in Agenda Doc. No. 00-66, approved July 13, 2000.

12. Compliance Procedures (11 C.F.R. Part 111) [Cheryl Fowle]

Through this rulemaking, we are seeking to streamline the enforcement process, to update the regulations to better reflect that process, and to address the many procedural issues that have arisen over the years. A Notice of Proposed Rulemaking was published on July 8, 1993. Three witnesses testified at the public hearing held on October 20, 1993. In accordance with the Commission's rulemaking priorities set out in Agenda Document No. 00-66, as approved by the Commission on July 13, 2000, the Office of General Counsel will prepare a Notice of Disposition to close this rulemaking as soon as other higher priority projects permit.

13. PAC Reporting (11 C.F.R. § 100.6, § 100.12, § 102.2, § 104.3, § 104.8 and § 104.13) [Mai Dinh]

On September 20, 1999, the Commission received a Petition for Rulemaking from the Project on Government Oversight ("POGO") asking the Commission to amend various provisions of the regulations concerning information reported by political action committees. A Notice of Availability was approved on October 5 and published in the *Federal Register* on October 13. The comment period expired on November 12, 1999. The Office of General Counsel has analyzed the comments received in response to the petition. In accordance with the Commission's rulemaking priorities set out in Agenda Doc. No. 00-66, as approved by the Commission on July 13, 2000, the Office of General Counsel is preparing a Notice of Disposition, which we expect to circulate to the Commission for consideration on November 2.

Other Policy Projects

14. Case Management System [Paul Sanford + Regulations Team]

The Office of General Counsel's Case Management System went "live" on October 12, 1999. At present, all Regulations staff members are currently inputting information into the system and working on regular data verification. At the close of the initial six month review period, OGC developed recommendations for modifications to improve the operation of CMS, which were submitted to the Steering Committee on April 3, 2000. We are available to work with the Steering Committee regarding these modifications or others.

15. PC Docs [Rosie Smith + OGC Policy Staff]

In December, 1999, work began on the implementation of a document management system for OGC. Rosie Smith represents the Policy Division on the OGC PC Docs Consulting Group, and additional staff members are also involved. In March, in consultation with DSDD, the OGC PC Docs Consulting Group began work on determining the parameters for the new system, including a consideration as to which types of current and historical documents should be included. Interviews of Policy staff were completed on April 18. OGC's design input was submitted to PWC on May 9. Draft design documents were submitted by PWC on May 17 and July 7, which OGC reviewed and responded to. It is our understanding that the Policy Division will be the last area in OGC to undergo implementation.

Rulemaking Projects Held in Abeyance

16. Candidate Debates (11 C.F.R. § 110.13) [Paul Sanford]

On May 25, 1999, the Commission received a Petition for Rulemaking from Mary Clare Wohlford, William T. Wohlford and Martin T. Mortimer asking the Commission to amend its rules governing Presidential and Vice Presidential debates. The Commission published a Notice of Availability in the Federal Register on June 10, 1999. The Commission received 92 written comments and approximately 1200 email comments in response to the petition. On February 17, 2000, the Commission voted to instruct the Office of General Counsel to hold the petition for rulemaking in abeyance until after the 2000 general election. This Office notified the petitioners of the Commission's action.

17. Loans to Political Committees by Brokerage Firms [staff reassignment pending]

In its Executive Session of December 15, 1993, the Commission directed the Office of General Counsel to initiate a rulemaking to determine whether loans by brokerage firms meet the Act's requirements for bank loans in the ordinary course of business. On July 13, 2000, the Commission voted to instruct the Office of General Counsel to hold this rulemaking in abeyance.

18. Contributions by U.S. Subsidiaries of Foreign Corporations (11 C.F.R. § 110.4(a)) [Brad Litchfield]

In light of the recent decision in *United States v. Kanchanalak*, 192 F.3d 1037 (D.C. Cir. 1999), Commissioner Sandstrom requested that a rulemaking be initiated to expressly prohibit domestic subsidiaries of foreign corporations from making contributions in state and local elections. On December 16, 1999, the Commission considered a memorandum from Commissioner Sandstrom, but deferred taking any

action at that time. On July 13, 2000, the Commission voted to hold this rulemaking in abeyance.

19. Allocation of Travel Expenses (11 C.F.R. § 106.3) [Rita Reimer]

This topic has generated many questions since 11 C.F.R. § 106.3 was first promulgated in 1977. A Notice of Proposed Rulemaking to update these rules, and to track the changes in the travel rules for Title 26 campaigns could be updated, reviewed and circulated at the Commission's direction.

20. Legibility of Filed Reports (11 C.F.R. Part 104) [staff assignment pending]

On March 4, 1999, Commissioner Sandstrom requested initiation of a rulemaking to require that all FEC reports submitted on paper documents be completed in typewritten form or with some other machine-produced type; such a rule would prohibit the filing of reports with handwritten entries. On July 13, 2000, the Commission voted to hold this rulemaking in abeyance until after mandatory electronic filing begins in January, 2001, to permit sufficient time to reevaluate the need for regulatory changes.

21. Recordkeeping and Reporting (11 C.F.R. Parts 102 and 104) [Rita Reimer]

This project is divided into two phases. With respect to the first phase, the Commission published a Notice of Proposed Rulemaking on September 26, 1997, which addressed the basic recordkeeping requirements in 11 C.F.R. § 102.9 and the basic reporting requirements in 11 C.F.R. § 104.3. Four comments were received in response to the NPRM and one commenter testified at the February 11, 1998 hearing. Subsequently, this Office delayed bringing forward draft final rules for Commission consideration until the completion of work on forms 3 and 3X by the Forms Committee. On July 13, 2000, the Commission voted to hold this rulemaking in abeyance to permit time to assess what further changes may be needed in light of several new programs, including election cycle reporting, mandatory electronic filing, the pilot program on amending reports, and the upcoming introduction of new forms.

22. Definition of Personal Funds for Contributors (11 C.F.R. § 110.10) [Paul Sanford]

This project addresses an issue that arose in the context of an audit of a publicly financed Presidential primary candidate in the 1996 election, but could also affect the definition of personal funds for all contributors. It presents questions as to whether other agencies' rules, such as those of the banking agencies, may provide guidance on questions involving the ownership of funds in jointly held bank accounts. On July 13, 2000, the Commission voted to hold this rulemaking in abeyance, thereby enabling us to wait to see if it becomes a problem in the future.