



FEDERAL ELECTION COMMISSION

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**MEMORANDUM**

TO: The Commission

THROUGH: James A. Pehrkon  
Staff Director

FROM: Lawrence M. Noble  
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**AGENDA ITEM**  
For Meeting of: 2-17-00

SUBJECT: Status of Regulations -- February Monthly Update

At the open meeting of November 5, 1998, the Commission directed the Office of General Counsel to prepare a monthly status report on the status of regulations and to circulate that report to the Commission on an informational basis. This memorandum provides an update regarding all current rulemakings and other projects involving the Regulations Team.

**Completed Projects**

1. **New Executive Order on Federalism [Rita Reimer]**

On August 4, 1999, President Clinton issued Executive Order 13132, which addresses the principles of federalism and establishes guidelines for federal departments and agencies in implementing their programs. On December 6, OGC circulated an informational memorandum summarizing the new executive order and explaining that the FEC is excluded from its coverage. This Office is available to discuss the executive order with any Commissioners who may have questions.

**Rulemakings Pending Before Congress**

**2. Public Financing of Presidential Primary and General Election Candidates (11 C.F.R. § 9007.1, § 9034.4(e), § 9035.3, and § 9038.1) [Rosie Smith]**

On December 16, 1998, a Notice of Proposed Rulemaking was published to address the principal issues that have arisen in the audits of the 1996 Presidential campaigns receiving public funds. The deadline for submitting comments was February 1, 1999, and a public hearing was held on March 24. Subsequently, the Office of General Counsel divided this rulemaking into several parts. On October 21, the Commission considered final rules on the "bright line" between primary and general election expenses, Vice Presidential campaign committees, and audit procedures. (11 C.F.R. § 9007.1, § 9034.4(e), § 9035.3 and § 9038.1). These rules and the accompanying Explanation and Justification were approved on November 4. They were transmitted to Congress on November 9 and published in the *Federal Register* on November 15. As of February 2, 2000, ten legislative days have expired.

**Ongoing Rulemakings—Top Priority Projects**

**3. Public Financing Regulations—Repayments for Exceeding Primary Spending Limits (11 C.F.R. § 9038.2) [Rosie Smith]**

A Notice of Proposed Rulemaking was published on December 16, 1998 to address, *inter alia*, questions regarding the Commission's statutory authority for seeking *pro rata* repayments from federally financed primary committees that exceed the state or overall spending limits. Two timely comments were submitted on this issue by the February 1, 1999 deadline, and three witnesses testified at the March 24 hearing. This Office forwarded its recommendations regarding final rules to the Regulations Committee on January 24, 2000.

**4. 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. Consequently, this is a top priority project. A task force drawn from OGC Policy, Enforcement, PFESP, Litigation, RAD, and the Staff Director's Office is preparing 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. One component of this project will be the promulgation of regulations with an opportunity for public comment. We are working to bring forward proposed rules, a draft fine schedule, and the alternative implementation plans for the Commission's consideration in February.

**5. 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. On September 30, October 21, and October 28, 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, which was published in the *Federal Register* on December 9. Thirteen comments were received by the January 24 comment deadline. Nine organizations have requested to testify at the public hearing scheduled for February 16.

**6. 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 has completed an analysis of the comments and testimony and is forwarding our recommendations to the Regulations Committee on February 4, 2000.

**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 Notice of Proposed Rulemaking.

**8. 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 preparing a NPRM, OGC has been working with the Data Systems Development Division, the Reports Analysis Division, the Information Division, the Press Office, and the Public Disclosure Division. We expect to have a draft Notice of Proposed Rulemaking to the Regulations Committee in late February or early March.

**9. Election Cycle Reporting (11 C.F.R. Part 104) [Cheryl Fowle]**

Public Law 106-58, as enacted on September 29, 1999, 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 preparing a NPRM, OGC has been working with the Data Systems Development Division, the Reports Analysis Division, the Information Division, the Press Office, and the Public Disclosure Division. This Office expects to have a draft Notice of Proposed Rulemaking to the Regulations Committee in late February or early March. We anticipate that there will need to be corresponding changes to several of the FEC's forms and we will work with the Forms Committee to prepare those.

**Ongoing Rulemakings—Secondary Priority Projects**

**10. Waiver of State Filing Requirements (11 C.F.R. Part 108) [Rita Reimer]**

The Recordkeeping and Reporting NPRM of September 26, 1997 addressed an issue raised by Public Law No. 104-97: removing the requirements to file reports with State Officers once the State has a system permitting electronic access and duplication of reports and statements filed with the Commission. The Commission discussed this project on September 30, 1999. An implementation plan put forward by the Public Records Office was approved on October 14, 1999 and a number of states have already qualified for waivers. This Office forwarded to the Regulations Committee draft final rules on electronic access and state filing on December 21. This document was discussed on January 21, 2000 and we are awaiting additional input. Also, the Forms Committee is preparing a revision to the instructions for the forms. We anticipate that a revised version of the final rules and the E & J, as well as the revised instructions, can be circulated to the Commission in February.

**11. 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. Two timely comments were received by the expiration of the comment period on September 24. The Office of the General Counsel is currently analyzing the comments and will forward its recommendation as soon as resources are available and in conformance with the rulemaking priorities set out in Agenda Doc. No. 99-114 circulated October 15, 1999.

**12. Minor Party GELACs and Contribution Limits (11 C.F.R. § 9003.3)**  
[Rita Reimer]

The Commission's rules currently limit the use of General Election Legal and Accounting Compliance funds ("GELAC") to major party candidates accepting public funding for the general election. On August 25, 1999, the Commission directed OGC to draft a Notice of Proposed Rulemaking seeking comments on a proposed revision that would allow new and minor party candidates who accept public funding to establish GELACs and to accept additional contributions for this purpose. We expect to provide a draft document to the Regulations Committee as soon as resources are available and in conformance with the rulemaking priorities set out in Agenda Doc. No. 99-114 circulated October 15, 1999.

**13. Electronic Freedom of Information Act Amendments (11 C.F.R. Part 4)**  
[Rita Reimer]

Public Law No. 104-231 (1996) expanded the FOIA to cover agency records that are in electronic form. It is also intended to streamline the process of responding to FOIA requests and to permit requesters to receive information via new computer technology. A Notice of Proposed Rulemaking was published on March 4, 1998 and one timely comment was received. This Office is completing draft final rules, which we expect to schedule for a Commission agenda in late February or early March.

**14. 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. 99-114 circulated October 15, 1999.

**15. 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. 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. 99-114 circulated October 15, 1999.

**16. 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. 99-114 circulated October 15, 1999.

**17. Disgorgement of Illegal Contributions (11 C.F.R. § 103.3(b)) [Mai Dinh]**

A recent Commission discussion of *Fireman v. United States*, No. 99-17C, slip op. (Fed. Cl. Sept. 2, 1999) touched on the possibility of beginning a new rulemaking to revise 11 C.F.R. § 103.3(b) to provide for disgorgement of illegal contributions to the United States Treasury in lieu their return to the contributor. The Office of General Counsel expects to bring forward a NPRM in March or April.

**18. 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. Wohlford 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, with a due date of July 12 for statements in support or opposition to the petition. The comment period was subsequently extended to July 26. The Office of General Counsel is currently analyzing the 92 written comments and approximately 1200 email comments received in response to the petition.

**19. 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. As a parallel project, the Forms Committee completed a proposed revision of Forms 3 and 3X. However, this Office has delayed bringing forward draft final rules for Commission consideration until the issue of whether and how to adapt the forms to incorporate "self-coding" has been resolved. A Forms Committee proposal to fund an independent study of these questions was not implemented due to a lack of resources in the '98 fiscal year, although funding to initiate this study was approved for FY 99. Given these circumstances, the Commission directed this Office to limit the final rule document to issues that do not change the reporting forms. We will resume work on these draft rules as other higher-priority projects permit.

**20. 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, the Commission considered a memorandum from Commissioner Sandstrom, but deferred taking any action at that time. The Office of General Counsel is available to advise on substantive and technical rulemaking questions regarding this project.

**21. Compliance Procedures (11 C.F.R. Part 111) [Rosie Smith]**

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. In the course of this comprehensive review, we have consulted extensively with the Enforcement staff and other divisions. At the Commission's direction, the Office of the General Counsel waited to complete its draft of the final rules until the PriceWaterhouseCoopers audit recommendations were received in January. This Office is in the process of addressing a number of areas discussed in the PriceWaterhouseCoopers report. Chairman Wold has suggested that the compliance rulemaking be terminated and a new regulations project be initiated to address those subjects that should be acted on. We are available to work with the Regulations Committee to determine the best course of action.

**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 as it affects the definition of personal funds for all contributors, we are proposing to handle it in a separate rulemaking. We intend to research how other agencies' rules, such as those of the banking agencies, could provide guidance on some of the questions presented by the project. For example, we will look at questions regarding ownership of funds in jointly held bank accounts. This Office expects to forward a draft Notice of Proposed Rulemaking for Commission consideration as other higher-priority projects permit.

**23. PAC Reporting (11 C.F.R. § 100.6, § 100.12, § 102.2, § 104.3, § 104.8 and § 104.13) [Rita Reimer]**

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. The Office of the General Counsel is currently analyzing the comments received in response to the petition and will forward its recommendations to the Commission as other higher-priority projects permit.

**Other Policy Projects**

**24. AO Web Site Citation Project [Bradley Litchfield + OGC Policy staff]**

Shortly after the AO web site went "on line" Commissioner Mason requested that OGC begin a project to identify past advisory opinions that have been superseded by more recent opinions or regulations in order to help users of the web site avoid mistaken reliance on older opinions that no longer reflect the current views of the Commission. OGC has prepared a partial listing of such opinions using the advisory opinion citations in footnote 2 of the Concurring Opinion in Advisory Opinion 1999-11, by Commissioners Thomas and McDonald, issued June 14, 1999. Additional verification and research still needs to be completed, particularly with reference to regulations that have superseded prior advisory opinions. OGC staff will have to identify past opinions that may have been superseded by regulations issued over the past 20+ years. This research effort entails close review of Explanation and Justification documents for each regulation revision. A reliable estimate of the OGC staff hours needed for this review is difficult to make, but a good faith estimate would be in the range of 150-250 hours. This estimate only pertains to OGC research to identify the relevant opinions. It does not include time by the Data Division to enter notations (or hyperlinks) on each individual opinion that has been superseded.

**25. Rulemakings on the FEC Web Site [Rosie Smith + Mai-Dinh]**

OGC is working with the Data Systems Development and Information Divisions to place additional rulemaking information on the Commission's website and to make that information more easily useable. To date, a link to the full text of 11 C.F.R. has been added. In addition, recent Petitions for Rulemaking, Notices of Availability, Notices of Inquiry, and Notices of Proposed Rulemaking appear on a separate web page entitled, "Campaign Finance Law Resources." Also, a variety of other rulemaking documents published in the *Federal Register* are listed chronologically under "What's new." On November 1, OGC forwarded to the DSDD a memorandum discussing a variety of considerations regarding posting rulemaking agenda documents on the FEC website. Beginning with the Internet Notice of Inquiry in January, 2000, DSDD has assisted us by scanning the public comments received and making them more readily available and easily accessible through the FEC's website.

**26. Case Management System [Paul Sanford + Regulations Team]**

OGC's Case Management System went "live" on October 12, 1999 and the six-month initial implementation phase is underway. During this period, the focus is on training and data entry. In addition, a significant amount of effort has been devoted to designing the time entry component of the system and training staff on its use. Paul Sanford represents the Policy Division on the case management system implementation team for OGC. Most of the Regulations staff and additional Policy staff are currently inputting information into the system, although two new staff members await training.

**Rulemaking Projects Held in Abeyance**

**27. Definition of Major Purpose (11 C.F.R. § 100.5) [Paul Sanford]**

This project, which is an offshoot of the *MCFL* rulemaking, concerns a central issue affecting qualified nonprofit corporations: when does their activity convert their status to that of a political committee? In addition, the concept of "major purpose" has broader application outside the QNC context. This issue was addressed in *James E. Akins, et al. v. Federal Election Commission*, 101 F.3d 731 (D.C. Cir. 1997) (*en banc*). The court of appeals concluded that an organization may be a political committee even though its major purpose is not campaign-related activity. While the Supreme Court granted *certiorari* in the *Akins* case, its opinion did not reach this issue; rather, the Court remanded the case back to the Commission to consider the question of whether the organization had "members" under the FEC's rules. We had held a Notice of Proposed Rulemaking in abeyance pending the Supreme Court's decision, but given the outcome, this document could be updated, reviewed and circulated at the Commission's direction.

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

In its executive session of December 15, 1993, the Commission directed the Office of the 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. A draft Advance Notice of Proposed Rulemaking could be updated, reviewed and circulated at the Commission's direction.

**29. 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.