AGENDA DOCUMENT NO. 01-56

FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: The Commission

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SUBJECT: Proposed Statement of Enforcement Policy Regarding Party Committee Transfers of Nonfederal Funds For Payment of Allocable Expenses

I. Introduction

The Office of General Counsel has prepared a draft statement of policy regarding future enforcement of certain portions of the Commission's allocation rules in light of the events of September 11, 2001. This memorandum reviews the distinctions between policy statements and substantive rules, and analyzes the Commission's authority to issue general statements of policy without utilizing notice-and-comment rulemaking procedures. The memorandum then summarizes the scope and impact of the draft statement of policy, and makes recommendations regarding issuance of the policy.

II. Policy Statements under the Administrative Procedure Act

A. The APA Framework

Section 553 of the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, ["APA"] requires agencies that intend to promulgate rules[1] to provide the public with notice and an opportunity to comment. 5 U.S.C. § 553(b) and (c). Section 553(d) also requires agencies to publish a new rule "not less than 30 days before its effective date."

However, paragraphs (b) and (d) of section 553 exempt interpretative rules, general statements of policy, and rules of agency organization, procedure, or practice from the notice and comment and delayed effective date requirements.[2] These types of rules and statements may be issued without providing notice and comment, and may be made effective immediately upon publication.[3]

Thus, the APA recognizes that policy may be made using procedures other than formal and informal rulemaking. The D.C. Circuit has construed these exceptions as "an attempt to preserve agency flexibility in dealing with limited situations where substantive rights are not at stake." *American Hospital Association v. Bowen*, 834 F.2d 1037, 1045 (D.C. Cir. 1987). However, the court has also said that "[t]he exceptions to section 553 will be 'narrowly construed and only reluctantly countenanced.'" *Alcatraz v. Block*, 746 F.2d 593, 612 (D.C. Cir. 1984) (quoting *New Jersey Department of Environmental Protection v. EPA* 626 F.2d 1038, 1045 (D.C. Cir. 1980).

B. The Attorney General's Manual

The APA does not affirmatively define the term "general statement of policy," and provides limited guidance on the distinction between "substantive" or "legislative" rules and general statements of policy. However, the Attorney General's Manual on the Administrative Procedure Act, which was written shortly after the enactment of the APA, provides some guidance on this distinction:

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[1] Section 551(4) contains a broad definition of the term "rule" for purposes of section 553. Under that provision, "rule" refers to "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency." "Rulemaking" means an agency process for formulating, amending, or repealing a rule. Section 551(5).

[2] Paragraph (b) states that "[e]xcept when notice or hearing is required by statute, this subsection does not apply (A) to interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice." Paragraph (d) states that "[t]he required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except . . . (2) interpretive rules and statements of policy." 5 U.S.C. § 553(b) and (d).

[3] Although interpretive rules and policy statements may be issued without notice and comment, section 552(a)(1)(D) of the APA requires that these documents be published in the *Federal Register*. *See also Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 538-39 (D.C. Cir. 1986).

> Substantive rules - rules, other than organizational or procedural . . . issued by an agency pursuant to statutory authority and which implement the statute . . . Such rules have the force and effect of law.
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> * * *
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> General statements of policy - statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power.

Attorney General's Manual on the Administrative Procedure Act 15, at 30 n.3 (1947).[4]

C. Leading Cases From the D.C. Circuit

There is extensive case law discussing the distinctions between legislative rules and general statements of policy. Rules promulgated under specific statutory grants of rulemaking authority are often referred to as substantive rules or legislative rules.[5]

> [A] substantive rule *modifies* or *adds* to a legal norm based on the agency's *own authority*. That authority flows from a congressional delegation to promulgate substantive rules, to engage in supplementary lawmaking. And it is because the agency is engaged in lawmaking that the APA requires it to comply with notice and comment."

Syncor International Corp. v. Shalala, 127 F.3d 90, 95 (D.C. Cir. 1997) (emphasis in original). The additional procedural requirements give legislative rules "the force of law."

> Legislative rules thus implement congressional intent; they effectuate statutory purposes. In so doing, they grant rights, impose obligations, or produce other significant effects on private interests. They also narrowly constrict the discretion of agency officials by largely determining the issues addressed. Finally, legislative rules have substantive effect. They cannot be set aside by the courts unless found "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

Batterton v. Marshall, 648 F.2d 694, 701-02 (D.C. Cir. 1990) (quoting 5 U.S.C. § 706(2)(A) (footnotes omitted)). In more modern parlance, legislative rules are entitled to substantial deference from reviewing courts under *Chevron v. NRDC*, 467 U.S. 837 (1984).

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[4] The Attorney General's Manual describes interpretive rules as "rules or statements issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers."

[5] As will be discussed further below, section 437d(a)(8) is a specific statutory grant of authority to promulgate substantive rules. Section 437d(a)(8) authorizes the Commission to "develop such prescribed forms and to make, amend, and repeal such rules, pursuant to the provisions of chapter 5 of Title 5, as are necessary to carry out the provisions of this Act and chapter 95 and chapter 96 of Title 26." 2 U.S.C. § 437d(a)(8).

Although interpretive rules and policy statements are covered by the same exemption in section 553 of the APA, the *Syncor* court put policy statements in their own distinct category.

> An agency policy statement does not seek to impose or elaborate or interpret a legal norm. It merely represents an agency position with respect to how it will treat -- typically enforce -- the governing legal norm. By issuing a policy statement, an agency simply lets the public know its current enforcement or adjudicatory approach. The agency retains the discretion and the authority to change its position -- even abruptly -- in any specific case because a change in its policy does not affect the legal norm. We thus have said that policy statements are binding on neither the public . . . nor the agency. . . . The primary distinction between a substantive rule -- really any rule -- and a general statement of policy, then, turns on whether an agency intends to bind itself to a particular legal position.

Id. at 94. (Citations omitted).

The *Syncor* court relied heavily on *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579 (D.C. Cir. 1997). In *Paralyzed Veterans*, the D.C. Circuit acknowledged that agencies may, in some circumstances, interpret an ambiguous statute or rule without providing notice and comment. *Id.* at 588. However, the court also said that there are limits on an agency's ability to change its interpretation of its own regulation. Policy formulations that effectively amend or repeal existing rules cannot be issued without notice and comment.

> Under the APA, agencies are obliged to engage in notice and comment before formulating regulations, which applies as well to 'repeals' or 'amendments.' See 5 U.S.C. § 551(5). To allow an agency to make a fundamental change in its interpretation of a substantive regulation without notice and comment obviously would undermine those APA requirements. That is surely why the Supreme Court has noted (in dicta) that APA rulemaking is required where an interpretation "adopt[s] a new position inconsistent with . . . existing regulations."

Id. (quoting *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87 (1995)).

In *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533 (D.C. Cir. 1986), the D.C. Circuit considered whether an "enforcement policy" issued by the Department of Labor was a general statement of policy or a legislative rule. The court acknowledged that "there is no axiom to distinguish between regulations and general statements of policy," *Id.* at 536-37, and also said that "[a]n agency pronouncement is not deemed a binding regulation merely because it may have 'some substantive impact,' as long as it 'leave[s] the administrator free to exercise his informed discretion.'" *Id.* at 537 (quoting *Guardian Fed. Sav. & Loan Ass'n v. Federal Sav. & Loan Ins. Corp.* 589 F.2d 658, 666, 668 (D.C. Cir. 1978). The court went

on to describe the factors that are most relevant to determining whether something is a legislative rule or a policy statement.

> While the agency's characterization of an official statement as binding or nonbinding has been given some weight, . . . of far greater importance is the language used in the statement itself. We have, for example, given decisive weight to the agency's choice between the words "may" and "will." In holding that a declaration of the Interstate Commerce Commission was *not* a general statement of policy, we relied upon the fact that the pronouncement at issue declared that "the Commission *will*" make certain demands of applicants for particular certificates. . . . while in holding that a pronouncement of the Federal Savings and Loan Insurance Corporation was nothing more than a general statement of policy, we relied upon the use of the word "may" in its description of the agency's intended future course.

Id. at 537-38 (emphasis in original) (citations omitted). Thus, if the statement indicates that the agency retains discretion in the application of the rules to which it relates, it is more likely to be viewed as a policy statement by a reviewing court.

The *Brock* decision relied heavily on *Pacific Gas & Electric v. Federal Power Commission*, 506 F.2d 33 (D.C. Cir. 1974). *Pacific Gas* describes a general statement of policy as "merely an announcement to the public of the policy which the agency hopes to establish in future rulemakings or adjudications. A general statement of policy, like a press release, presages an upcoming rulemaking or announces the course which the agency intends to follow in future adjudications." *Id.* at 38.[6] The court went on to say that

> [t]he critical distinction between a substantive rule and a general statement of policy is the different practical effect that these two types of pronouncements have in subsequent administrative proceedings. . . . A properly adopted substantive rule establishes a standard of conduct which has the force of law. In subsequent administrative proceedings involving a substantive rule, the issues are whether the adjudicated facts conform to the rule and whether the rule should be waived or applied in that particular instance. The underlying policy embodied in the rule is not generally subject to challenge before the agency.

Id. (citations omitted). In contrast,

[6] The court explained the purposes of general statements of policy in this way: "By providing a formal method by which an agency can express its views, the general statement of policy encourages public dissemination of the agency's policies prior to their actual application in particular situations. Thus, the agency's initial views do not remain secret but are disclosed well in advance of their actual application. Additionally, the publication of a general statement of policy facilitates long range planning within the regulated industry and promotes uniformity in areas of national concern." *Id.*

> [a] general statement of policy . . . does not establish a 'binding norm.' It is not finally determinative of the issues or rights to which it is addressed. The agency cannot apply or rely upon a general statement of policy as law because a general statement of policy only announces what the agency seeks to establish as policy. A policy statement announces the agency's tentative intentions for the future. When the agency applies the policy in a particular situation, it must be prepared to support the policy just as if the policy statement had never been issued.

Id. (citations omitted).

D. FEC Cases

Two cases in which the Commission was directly involved provide some guidance on the distinction between substantive rules and general statements of policy.

In *Virginia Society for Human Life v. FEC*, 263 F.3d 379 (4th Cir. 2001), the Fourth Circuit discussed the effect of a Commission policy, established by vote in an executive session, that it would not seek to enforce portions of 11 CFR 100.22 in Fourth Circuit states. The court said

> the FEC's policy is not contained in a final rule that underwent the rigors of notice and comment rulemaking . . . Instead, the policy is recorded in FEC minutes that do not carry the binding force of law. The Commissioners who adopted it might be replaced with ones who disagree with it, or some of the Commissioners who voted might change their minds. A simple vote of the Commission, in other words, could scuttle the policy.

263 F.3d at 388. Thus, the court clearly regarded the Commission's nonenforcement decision as a general statement of policy that provided no real protection to those who feared enforcement of the regulation, and to which no deference should be afforded. However, the court did not question the Commission's authority to issue such a policy.

In contrast, the D.C. Circuit recently concluded that the Commission's advisory opinions are entitled to judicial deference.[7] *Federal Election Commission v. National Rifle Ass'n*, 254 F.3d 173 (D.C. Cir. 2001). The court cited several characteristics of advisory opinions that justified judicial deference. First, the Commission issues AOs pursuant to a detailed statutory framework that includes an opportunity for public comment. Second, in issuing AOs, "the Commission fulfills its statutorily granted responsibility to interpret the Act." *Id.* at 185. Finally, the AOs have a binding legal effect on the Commission. *Id.*

[7] The D.C. Circuit recently reached the same conclusion regarding a Commission probable cause determination and its underlying statutory interpretation. *In re Sealed Case*, 223 F.3d 775 (D.C. Cir. 2000).

E. Conclusion - General Principles

The foregoing cases provide the following general guidelines for distinguishing legislative rules and policy statements.

1. Policy Statements

A policy statement describes how an agency may enforce an existing legal norm, but does not itself establish or interpret a legal norm. It is not finally determinative of the rights or issues to which it is addressed.

A policy statement does not constitute a policy regarding the norm that the agency may rely on, nor does it limit the agency's authority or discretion to enforce the norm differently in a particular case, since enforcing the norm differently does not change the norm itself.

Finally, a policy statement is not binding on the public or the agency, and is entitled to no judicial deference.

2. Substantive or Legislative Rules

A substantive or legislative rule modifies or adds to a legal norm based on agency authority flowing from a congressional delegation to promulgate substantive rules. A substantive or legislative rule establishes a binding norm that has the force of law, and is entitled to full *Chevron* deference.

III. The Commission's Authority to Issue General Statements of Policy

A review of the Commission's authority under the APA, the Federal Election Campaign Act, 2 U.S.C. § 431 *et seq.*, ["FECA" or "the Act"] and the legislative history of the Act, supports the Commission's authority to issue statements of policy, but also reveals some inconsistent authority. These authorities are described below.

A. The FECA Framework

The Act states that "[t]he Commission shall administer, seek to obtain compliance with, and formulate policy with respect to, this Act and chapter 95 and chapter 96 of the Internal Revenue Code of 1954. The Commission shall have exclusive primary jurisdiction with respect to the civil enforcement of such provisions." 2 U.S.C. § 437c(b)(1) (emphasis added). The Act also gives the Commission the power to "develop such prescribed forms and to make, amend, and repeal such rules, pursuant to the provisions of chapter 5 of Title 5, as are necessary to carry out the provisions of this Act and chapter 95 and chapter 96 of Title 26." 2 U.S.C. § 437d(a)(8). Thus, the Commission has administrative and policymaking authority in areas governed by the FECA.

The FECA does not expressly grant the Commission the authority to issue general statements of policy within the meaning of section 553 of the APA. However, as quoted above, in granting the Commission the authority to "make, amend and repeal" rules with respect to the Act, section 437d(a)(8) cross references "the provisions of chapter 5 of Title 5." Thus, the notice and comment and delayed effective date requirements apply to Commission rulemakings. It could be presumed that the procedural requirements of section 553 carry with them authority to utilize the exceptions to those requirements.

Furthermore, there is case law indicating that an agency with general administrative and enforcement power has the implied authority to issue general statements of policy. In two cases involving interpretive rules, which are part of the same APA exception as general statements of policy, the courts have said that the authority to issue interpretive rules emanates from an agency's general responsibility to administer a statute, rather than from explicit statutory language. "It is well established that an agency charged with a duty to enforce or administer a statute has inherent authority to issue interpretive rules informing the public of the procedures and standards it intends to apply in exercising its discretion." *Production Tool v. Employment and Training Administration*, 688 F.2d 1161, 1167 (7th Cir. 1982). *See also Metropolitan School District v. Davila*, 969 F.2d 485 (7th Cir. 1992). The Act gives the Commission "exclusive jurisdiction with respect to the civil enforcement" of the Act. 2 U.S.C. § 437c(b)(1). *See also* sections 437d(a)(6) and 437g. This suggests inherent authority exists for issuing general statements of policy.

B. FECA Legislative History

While the current provisions of the FECA indicate that the Commission has extensive policymaking authority, two aspects of the FECA's legislative history could be read as limiting the Commission's authority to formulate generally applicable rules without using notice and comment procedures.

1. The Amendment of Section 437f

When Congress amended the Act in 1976, it sought to limit the Commission's ability to use the advisory opinion process to establish rules of general applicability by inserting the following sentence in section 437f: "Any such general rule of law not stated in the Act or in Chapter 95 or 96 of the Internal Revenue Code of 1954 may be initially proposed by the Commission only as a rule or regulation pursuant to the procedures established by section 438d." A slightly modified version of this sentence is currently part of section 437f(b).

The Conference Report for the 1976 amendments states that under this provision, "general rules of law may be initially proposed by the Commission only as rules and regulations subject to congressional review and disapproval and not through the advisory opinion procedure." H. Rep. 94-1057 at 44-45 (1976) (Conference Report).[8] Several

[8] The Conference report also says the Conference bill was largely the same as the House bill. H. Rep. 94-1057 at 45 (1976) (Conference Report). The Committee Report accompanying the House bill states that "[i]t is the

statements during the floor debate on the Conference bill emphasized this limitation. "[The AO] provision announces the congressional determination that the Commission is to rely exclusively on its rulemaking authority to elaborate the meaning of the basic provisions of the law, and is to utilize its authority to render advisory opinions only to answer the residual questions created by unique circumstances . . . ." 122 Cong. Rec. H 3777 (May 3, 1976) (statement of Congressman Hays). "The conference report makes clear, however, that the Commission is not permitted to use the advisory opinion procedure to circumvent the requirement that proposed rules and regulations be submitted for congressional review." 122 Cong. Rec. H 3777 (May 3, 1976) (statement of Congressman Brademas).

2. The Repeal of Section 437d(a)(9)

Prior to 1979, section 437d(a)(9) of the Act said "[t]he Commission has the power to formulate general policy with respect to the administration of this Act and Chapter 95 and 96 of the Internal Revenue Code of 1954." This provision was repealed as part of the 1979 amendments. The House Report that serves as the legislative history for the 1979 amendments states that "[t]his section, which allowed the Commission to formulate general policy with respect to the administration of the Act and Title 26, was deleted to insure that the formulation of general policy is done through the regulatory process which is open to public comment." H. Rep. 96-422, at 19 (1979). As noted above, however, the 1979 amendments left intact section 437c(b)(1), in which Congress grants the Commission the authority to formulate policy.

C. Section 559 of the APA

Section 559 of the APA states, in part, that "[s]ubsequent statute [sic] may not be held to supercede or modify this subchapter, . . . except to the extent that it does so expressly." Thus, section 559 limits the effect of subsequent statutory enactments to those that expressly supersede or modify the provisions of the APA. In *Church of Scientology v. IRS*, 792 F.2d 146 (D.C. Cir. 1986), the D.C. Circuit concluded that the *de novo* judicial review procedure in the FOIA provisions of section 552 was not superceded by later provisions in the Internal Revenue Code.

> FOIA is a structural statute, designed to apply across-the-board to many substantive programs; . . . it is subject to the provision, governing all of the Administrative Procedure Act of which it is part, that a "[s]ubsequent statute may not be held to supercede or modify this subchapter . . . except to the extent that it does so expressly," 5 U.S.C. § 559. We find it impossible to conclude that such a statute was *sub silentio* repealed by [subsequent provisions of the IRC].

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intent of the Committee that the advisory opinions and regulations shall be the only means through which the Commission may establish guidelines and procedures for carrying out the Act." H. Rep. No. 94-917 at 3 (1976).

792 F.2d at 149. *See also Dickinson v. Zurko*, 527 U.S. 150 (1999), ("[C]learly erroneous" standard of review in Fed. R. Civ. P. 52(a) does not supercede APA standard of review for patent cases, even though a "clearly erroneous" standard was in use for patent cases at the time of enactment of APA.)[9]

D. Conclusion

The legal authorities cited above appear to lead to conflicting conclusions.

On the one hand, current section 437c(b)(1) authorizes the Commission to "formulate policy" with respect to the Act and the public financing statutes, and section 438d(a)(8) gives the Commission the power to make, amend, and repeal rules, pursuant to the APA. Thus, the Commission clearly retains significant policymaking authority. Furthermore, section 559 of the APA limits the effect of subsequent statutory enactments on the procedural aspects of section 553.

On the other hand, the repeal of section 437d(a)(9), and the legislative history of the 1976 and 1979 amendments, indicate that Congress intended to require the Commission to follow certain procedures when issuing general rules of law.

The Office of General Counsel believes these authorities can be reconciled by interpreting the repeal of section 437d(a)(9), and the 1976 and 1979 legislative histories, as ensuring that the Commission adheres to the APA's notice and comment requirement for substantive or legislative rules of general applicability. The Commission retains the authority under sections 553 and 559 of the APA to issue specific statements of enforcement policy in the form of policy statements. These policy statements must have the characteristics described in section II above, *i.e.*, they must be nonbinding statements of how the Commission intends to exercise its enforcement discretion in the future. If so limited, these statements can be issued without notice and comment. However, the Commission could voluntarily choose to provide a comment period.

We believe this interpretation gives appropriate meaning to the statutory provisions and legislative history set out above. We also note that nonbinding statements regarding future enforcement are not subject to judicial review. In *Heckler v. Chaney*, 470 U.S. 821 (1985), the Supreme Court concluded that an FDA decision not to undertake certain enforcement actions was not judicially reviewable. "This Court has recognized on several occasions over many years that an agency's decision not to prosecute or enforce, whether

[9] *Compare NAB v. Library of Congress*, 146 F.3d 907 (D.C. Cir. 1998) (Subsequent statute that (1) revised standard of review, (2) repealed provision stating that review would be "in accordance with chapter 7 of title 5," and (3) repealed provision subjecting agency panel "to the provisions of the Administrative Procedure Act . . ." superseded APA standards for review. "[T]o the extent the petitioners argue that the strong presumption in favor of applying the APA requires us to adhere to the review standards set forth in 5 U.S.C. § 706(2), we think this is one of those unusual circumstances in which the Congress's intent is sufficiently clear to overcome the presumption." *Id.* at 919 n.9.); *Asiana Airlines v. FAA*, 134 F.3d 393 (D.C. Cir. 1998) (Congressional instruction to publish interim final rule with request for comment, followed by final rule, superceded APA notice and comment requirement.)

through civil or criminal processes, is a decision generally committed to an agency's absolute discretion." *Id.* at 831 (citations omitted).

As noted above, statements of policy must be published in the *Federal Register*. 5 U.S.C § 552(a)(1)(D). In addition, because the definition of "rule" in the APA is broad enough to encompass policy statements,[10] these statements must be submitted to Congress under the Congressional Review Act. *See* 5 U.S.C. § 801(a).[11] However, because a policy statement is not a "rule" under section 438(d)(4) of the FECA,[12] the Commission need not wait thirty legislative days after Congressional submission to put the policy statement into effect. *See* 2 U.S.C. § 438(d)(1). Therefore, a policy statement may be made effective on the date it is published in the *Federal Register*.

IV. The Draft Statement of Policy

The events of September 11, 2001 have affected American life in ways that could not have been anticipated. One impact is that some party committees -- and other types of organizations, for that matter, -- decided that fundraising in the aftermath of these events would be inappropriate (and probably ineffective), and therefore voluntarily suspended their fundraising activities. This suspension may be having an adverse impact on the parties' ability to comply with the sixty day time limit for party committee transfers of nonfederal funds to pay for the nonfederal share of allocable expenses. We anticipate that the Commission may want to take this impact into account for a limited period in its enforcement of the sixty day limit.

We note that a number of federal agencies have taken steps to temporarily waive rules or regulations in response to the events of September 11, 2001. For example, the Commodity Futures Trading Commission published a "Statement of Policy" that referred to the "disruptions to the financial markets caused by the terrorist attacks" and explained that, "as a matter of regulatory policy," the CFTC had "determined not to require compliance with certain Commission regulations."[13] The Treasury Department's Office of Thrift Supervision reiterated its policy for responding to disasters and offered to "temporarily waive the Qualified Thrift Lender requirement" so that thrift institutions could respond to the needs of borrowers affected by the events of September 11.[14] Similarly, the U.S. Merit Systems Protection Board announced that it would allow "variations from normal case processing procedures," such as delaying filing deadlines and permitting its judges to "waive any Board

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[10] See section II.A., above.

[11] Section 801(a)(1)(A) states that "[b]efore a rule can take effect, the Federal agency promulgating such rule shall submit to each House of the Congress and to the Comptroller General a report containing (i) a copy of the rule; (ii) a concise general statement relating to the rule, including whether it is a major rule; and (iii) the proposed effective date of the rule." GAO has created a form for agencies to use in complying with this requirement.

[12] Section 438(d)(4) states that "[f]or purposes of this subsection, the terms 'rule' and 'regulation' mean a provision or series of interrelated provisions stating a single, separable rule of law."

[13] 66 FR 49556 (Sept. 27, 2001).

[14] Memorandum for Chief Executive Officers, "Serving Customers Affected by Terrorist Attacks" (Sept. 12, 2001), <http://www.ots.treas.gov/docs/25146.pdf>.

regulation the application of which is not required by law."[15] All three agencies took this action without reference to specific statutory authority,[16] and without soliciting public comment, and all three waivers were put into effect immediately.[17]

In an effort to provide a vehicle for taking these unusual circumstances into account, the Office of General Counsel has prepared a draft Statement of Policy regarding future enforcement of the sixty day time limit for transfers to pay for allocable expenses. The draft Statement of Policy notes the suspension of some party committee fundraising activities after September 11, and recognizes that this suspension may be complicating party committees' efforts to transfer nonfederal funds to their federal accounts or allocation accounts in a timely manner. The draft Statement explains that, in light of these circumstances, the Commission intends to exercise its discretion by not pursuing apparent violations of the sixty day time limit in situations where: (1) The untimely transfer pays the nonfederal share of an allocable expense paid between August 27 and November 1, 2001; (2) The transfer is executed on or before December 31, 2001; and (3) The transfer is fully disclosed on the party committee's year end report. This Statement would apply to any party committee that operates both federal and nonfederal accounts. The Statement also notes that the Commission is taking this action only in response to these particular circumstances, and that this action should not be viewed as a precedent for similar action in the future.

The Office of General Counsel recommends that the Commission issue this Statement of Policy. In addition, we recommend that the Commission put this policy into effect immediately, rather than postpone it to provide the public with an opportunity to comment. As currently drafted, the Statement of Policy would apply to all party committees in the enforcement process, without regard to the special circumstances of particular committees. This eliminates the need for the Commission to evaluate a host of different situations on an *ad hoc* basis, and also makes it unnecessary for the Commission to build a record in support of the policy. Furthermore, we doubt that comments would illuminate the appropriateness of granting relief based on the September 11 events. Therefore, we recommend that the Commission dispense with the comment period, which is not required under the APA, so that the policy can be put into effect immediately.[18]

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[15] 66 FR 49213-49214 (Sept. 26, 2001).

[16] In addition, at least three agencies took action pursuant to explicit statutory or regulatory authority to respond to emergency situations. SEC Interpretation: *Bookkeeping Services Provided by Auditors to Audit Clients in Emergency or Other Unusual Situations* (Sept. 14, 2001), <http://www.sec.gov/rules/interp/33-8004.htm>; SEC Emergency Orders at 66 FR 48493 and 48494 (Sept. 20, 2001); FAA Final Rules at 66 FR 48942 (Sept. 24, 2001) and 56 FR 51548 (Oct. 9, 2001); IRS Release No. IR-2001-81 (Sept. 13, 2001) and Notices 2001-61 and 2001-63 at <http://www.irs.gov/relief/index.html>.

[17] Two agencies invited public comment on specific responses to the events of September 11, but only in relation to the promulgation of new rules. *See* SEC "Notice of Filing and Order Granting Accelerated Approval of a Proposed Rule Change ... Regarding the Temporary Use by the American Stock Exchange LLC of the Facilities of the New York Stock Exchange, Inc.," 66 FR 48495 (Sept. 20, 2001); Immigration and Naturalization Service "Interim Rule with Request for Comment." 66 FR 48334 (Sept. 20, 2001).

[18] We note that the public has already been given an opportunity to comment on this issue, in connection with AOR 2001-16.

This Office further recommends that, in accordance with section 552(a)(1)(D) of the APA and section 801(a) of the Congressional Review Act, the draft Statement of Policy be transmitted for publication in the *Federal Register* and submitted to Congress. As noted above, the Statement can be put into effect immediately upon publication, because the legislative review provision in 2 U.S.C. § 438(d) does not apply.

V. Recommendation

The Office of General Counsel recommends that the Commission take the following actions:

1. Approve the attached draft Statement of Policy for publication in the *Federal Register*.

2. Direct the Office of General Counsel to submit the Statement of Policy to Congress in accordance with the Congressional Review Act, 5 U.S.C. § 801 *et seq.*

Attachment

FEDERAL ELECTION COMMISSION

11 CFR Part 106

[NOTICE 2001 -]

STATEMENT OF POLICY REGARDING PARTY COMMITTEE TRANSFERS OF NONFEDERAL FUNDS FOR PAYMENT OF ALLOCABLE EXPENSES

AGENCY: Federal Election Commission.

ACTION: Statement of Policy.

SUMMARY: In light of the suspension of fundraising activities by some party committees after the terrorist attacks of September 11, 2001, the Commission intends, in certain limited circumstances, to exercise its discretion by not pursuing prima facie violations of the 60 day time limit for party committee transfers of nonfederal funds to pay for the nonfederal share of allocable expenses. The limitations on the scope and duration of this enforcement policy will be discussed in detail below.

DATE: November >, 2001.

FOR FURTHER INFORMATION CONTACT: Rosemary C. Smith, Assistant General Counsel, or Richard Ewell, Staff Attorney, 999 E Street, NW, Washington, D.C. 20463, (202) 694-1650 or (800) 424-9530.

SUPPLEMENTARY INFORMATION: Sections 106.1 and 106.5 of the Commission's regulations (11 CFR 106.1 and 106.5) allow party committees to defray the costs of activities that relate

to both federal and nonfederal elections by allocating the costs between their federal and nonfederal accounts, so long as they pay an amount equal to or greater than the federal portion of these expenses with funds that are permissible under the Federal Election Campaign Act, 2 U.S.C. § 431 et seq. ["FECA" or "the Act"].

Party committees allocate these expenses by paying the entire amount of the expense from a federal account or allocation account, and transferring funds from a nonfederal account to cover the nonfederal portion of the allocable expense. 11 CFR 106.5(g)(1)(i) and (ii). The regulations establish a time period, or "window," during which these nonfederal transfers may be made. "[S]uch funds may not be transferred more than 10 days before or more than 60 days after the payments for which they are designated are made." 11 CFR 106.5(g)(2)(ii)(B). Any transfer made more than 60 days after payment of the related allocable expense "shall be presumed to be a loan or contribution from the non-federal account to a federal account, in violation of the Act." 11 CFR 106.5(g)(2)(iii).

In many instances, party committees plan and execute allocable activities based, in part, on the expectation that they will subsequently receive nonfederal funds that can be transferred to their federal or allocation accounts before the expiration of the 60 day time limit in section 106.5(g)(2)(ii)(B). In most instances, committees' expectations are realized.

Some party committees suspended their fundraising activities in the immediate aftermath of the September 11, 2001 terrorist attacks. See e.g., FEC Advisory Opinion Request 2001-16; Rachel Van Dongen, Shoptalk, Roll Call, October 11, 2001 <http://www.rollcall.com/pages/politics/shoptalk/>. As a result, some party committees may not have sufficient funds in their nonfederal accounts to make transfers to their federal

accounts or allocation accounts in a timely manner, i.e., within 60 days of when the committee pays the allocable expense for which those funds would be transferred.[1]

Rather than attempt to evaluate, on an ad hoc basis, the impact of the September 11 attacks on committees' ability to make nonfederal transfers, the Commission intends to exercise its discretion by not pursuing prima facie violations of the 60 day time limit in certain limited situations. Specifically, the Commission does not intend to pursue untimely party committee transfers made to cover the nonfederal share of an allocable expense paid between August 27, 2001 and November 1, 2001, so long as the transfer is made no later than December 31, 2001, and is fully disclosed on the party committee's year end report.

The Commission is taking this action only in response to these unique circumstances. Consequently, this should not be viewed as a precedent for other dispensation from the FECA or the Commission's regulations.

Danny L. McDonald
Chairman
Federal Election Commission

DATED: _____
BILLING CODE: 6715-01-U

[1] The Commission notes that the rules permit but do not require party committees to transfer nonfederal funds to cover the nonfederal portion of an allocable expense, since the effect of not making such a transfer would be that federal funds are used to defray the full amount of the allocable expense, a result that is permissible under the Act and regulations. See Methods of Allocation Between Federal and Non-Federal Accounts; Payments; Reporting, 55 FR 26058, 26063 (June 26, 1990) (explaining that "allocating a portion of certain costs to a committee's non-federal account is a permissive rather than a mandated procedure").