AGENDA DOCUMENT NO. 02-15-A

FEDERAL ELECTION COMMISSION

Washington, DC 20463

MEMORANDUM

TO: Commissioners
General Counsel Lawrence H. Norton

FROM: Commissioner Darryl R. Wold DRW

DATE: February 22, 2002

RE: Final Rules re Independent Expenditure Reporting

On Thursday, February 28, 2002, the Commission will consider promulgating a final rule to implement Congressional amendments to the Federal Election Campaign Act in 2000 concerning filing notices of independent expenditures. (See Public Law 106-346 (Department of Transportation and Related Agencies Appropriations Act, 2001, 114 Stat. 1356 (2000), Sec. 502(c), amending 2 U.S.C. 434(c)(2) and 2 U.S.C. 434(a)(5).) That statutory amendment requires notices of independent expenditures of $1,000 or more, made less than 20 days but more than 24 hours before an election, to be received by the Commission or the Secretary of the Senate within 24 hours of when they are made. Under previous law, such a notice could be given, other than by electronic filers, by mailing the notice by registered or certified mail within 24 hours, which meant that it might not be received until somewhat later.

It appears, however, that H.R. 2356 (the "Bipartisan Campaign Reform Act of 2002", also known as "Shays-Meehan"), adopted by the House on February 14, 2002, amends the independent expenditure provisions in the Act in at least two ways that have implications for our regulations. First, H.R. 2356 repeals the "received" requirement, which has significant implications for this pending rulemaking concerning that requirement. Second, H.R. 2356 eliminates the provision in current law that requires notices of independent expenditures concerning Senate candidates to be filed with the Secretary of the Senate, and requires all such notices to be filed with the Commission. This has implications for our future rulemaking, and we should consider asking for clarification now, while H.R. 2356 is still pending final passage.

(1) Repeal of requirement notices be "received" in 24 hours.

The Congressional amendment in 2000 that initiated this particular rulemaking required notices of independent expenditures to be received by the Commission or the Secretary of the Senate within 24 hours of when made. That provision is now found in 2 U.S.C. 434(c)(2). H.R. 2356 repeals this requirement by striking the language in section 434, subsection (c)(2), that contains the requirement, and by making a conforming amendment to delete the cross-reference to this provision presently found in subsection (a)(5). (See H.R. 2356, Sec. 212, subsection (a)(1) and subsection (b).) H.R. 2356 restates the basic requirement requiring reports of independent expenditures in a new subsection (g)(1), but requires only that such reports be "filed" within 24 hours. That appears to revert to the statutory language prior to the 2000 amendment, and would permit the notice to be filed by certified or registered mail. (See 2 U.S.C. 434(a)(5).) That means, of course, that it is likely that some reports will be received later than 24 hours after the independent expenditure is made.

The repeal of the "received" requirement would be effective November 6, 2002, the effective date of H.R. 2356 if it is finally enacted into law. This repeal therefore has two significant implications for our present rulemaking.

First, it at least suggests that we consider adding a sunset provision to our proposed new regulation that would automatically repeal those provisions in the regulations requiring that reports of independent expenditures be received in 24 hours, if the underlying provision in the Act is repealed. That wording of a sunset provision would accommodate any present uncertainty whether H.R. 2356 will be finally enacted, by tying repeal of the regulatory provision to the effective date of repeal of the statutory provision.

I would welcome any comments from the Office of General Counsel on the effect of H.R. 2356 as I have outlined above, and on the possible wording of a sunset provision.

Second, and probably more significantly, the repeal of the "received" requirement raises the question whether we should even promulgate a regulation to implement the 2000 amendment, at least until we see if H.R. 2356 becomes law with this repeal in it. I raise this because there is no saving clause in H.R. 2356 in connection with the repeal of the "received" requirement. Without a saving clause, it is my understanding that violations of that provision that occur prior to the effective date of repeal, November 6, 2002, could not be the subject of any enforcement action after that date. Because of the time requirements for enforcement actions under 2 U.S.C. 437g, that means, as a practical matter, that the Commission would be unable to take any action for any violations of the "received" requirement occurring during this current election cycle.

In that light, our pending rulemaking would simply add language to the Commission's regulations which will be moot as a legal matter after November 6 and unenforceable as a practical matter in the meantime.

Because H.R. 2356 is still pending action in the Senate, it may be that we should postpone a decision on our proposed final rule until we see whether H.R. 2356 is adopted or amended in the Senate, and signed into law. I also suggest that we consider bringing this matter to the attention of Congress in the meantime, to see if the repeal of the "received" requirement was intended, and if not, if there will be any amendments to undo that repeal.

(2) Elimination of filing with Secretary of Senate.

It also appears that H.R. 2356, in section 212, would amend 2 U.S.C. 434 to require that all immediate reports of independent expenditures, including both the 24-hour reports of such expenditures of $1,000 or more, and the new requirement for 48-hour reports of earlier independent expenditures of $10,000 or more, be filed only with the Commission. At the present time, 2 U.S.C. 434(c) provides that 24-hour reports of independent expenditures be filed with the Commission or with the Secretary of the Senate, depending on which is appropriate for the particular filer. (The Secretary of the Senate is the appropriate recipient of reports of independent expenditures that either support or oppose candidates for the Senate. 11 CFR 104.4(c)(2).)

Since the provision in H.R. 2356 that would require all reports of independent expenditures to be filed with the Commission would not be effective until November 6, 2002, it is not directly pertinent to the immediately pending rulemaking. For our future consideration in connection with the promulgation of rules to implement H.R. 2356 if it is finally enacted into law, however, Commissioners might want to bring this matter to the attention of Congress at this point in time to see if that omission was intended, or if there will be amendments to restore filing with the Senate for certain filers. We could do that by an appropriate letter to the Congressional leadership.

I note also that the absence of a saving clause in connection with the elimination of the present requirement for filing with the Secretary of the Senate, where appropriate, may likewise have implications for our ability to enforce any failure in the current election cycle to file reports of independent expenditures concerning Senate candidates. Under present law, such reports are required to be filed with the Secretary of the Senate, but that requirement would be repealed effective November 6, 2002, precluding us from pursuing any enforcement action after that date, concerning violations during this election cycle. Any further analysis or advice by our General Counsel on this aspect of H.R. 2356 would be welcome. If my concern is justified, however, it makes bringing this issue to the attention of Congress that much more appropriate and urgent.