



FEDERAL ELECTION COMMISSION
Washington, DC 20463

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MEMORANDUM

AGENDA ITEM

For Meeting of: 08-28-03

TO: The Commission

THROUGH: James A. Pehrkon *JAP*
Staff Director

FROM: Lawrence H. Norton *LHN*
General Counsel
Rosemary C. Smith *RCS*
Acting Associate General Counsel
Mai T. Dinh *MTD*
Acting Assistant General Counsel
Jonny Levin *JL*
Senior Attorney

SUBJECT: Draft Notice of Proposed Rulemaking on Party Committee Phone Banks

Attached is the draft Notice of Proposed Rulemaking addressing issues related to the party committees' phone banks when they refer to a clearly identified presidential or vice-presidential nominee and refer generically to other Federal or non-Federal candidates.

Recommendation:

The Office of the General Counsel recommends that the Commission approve the attached NPRM for publication in the *Federal Register*.

Attachment

1 **FEDERAL ELECTION COMMISSION**

2 **11 CFR Part 106**

3 **[Notice 2003 - >]**

4 **Party Committee Telephone Banks**

5 **AGENCY:** Federal Election Commission.

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

7 **SUMMARY:** The Federal Election Commission requests comments on proposed
8 changes to its rules regarding the allocation of political party
9 committee expenditures for telephone bank communications made
10 on behalf of a presidential candidate. The proposed rules would
11 address the proper allocation of a party committee's expenditures
12 for such communications that refer to presidential and vice-
13 presidential nominees when the party's other candidates are
14 referred to generically, but not by name. The amount allocated as
15 an expenditure on behalf of, or a contribution to, the presidential
16 nominee would be subject to the limitations and prohibitions of the
17 Federal Election Campaign Act of 1971. The Commission has not
18 made any final decisions on the revisions proposed in this Notice.
19 Further information is provided in the supplementary information
20 that follows.

21 **DATES:** Comments must be received on or before September 25, 2003. If
22 the Commission receives sufficient requests to testify, it will hold a
23 hearing on these proposed rules on October 1, 2003, at 9:30 a.m.

1 Commenters wishing to testify at the hearing must so indicate in
2 their written or electronic comments.

3 **ADDRESSES:**

4 All comments should be addressed to Ms. Mai T. Dinh, Acting
5 Assistant General Counsel, and must be submitted in either
6 electronic or written form. Electronic mail comments should be
7 sent to phone2003@fec.gov and must include the full name,
8 electronic mail address and postal service address of the
9 commenter. Electronic mail comments that do not contain the full
10 name, electronic mail address and postal service address of the
11 commenter will not be considered. If the electronic mail
12 comments include an attachment, the attachment must be in the
13 Adobe Acrobat (.pdf) or Microsoft Word (.doc) format. Faxed
14 comments should be sent to (202) 219-3923, with printed copy
15 follow-up to ensure legibility. Written comments and printed
16 copies of faxed comments should be sent to the Federal Election
17 Commission, 999 E Street, N.W., Washington, D.C. 20463.
18 Commenters are strongly encouraged to submit comments
19 electronically to ensure timely receipt and consideration. The
20 Commission will make every effort to post public comments on its
21 Web site within ten business days of the close of the comment
22 period. The hearing will be held in the Commission's ninth floor
meeting room, 999 E Street N.W., Washington, D.C.

1 **FOR FURTHER**
2 **INFORMATION**
3 **CONTACT:**

Ms. Mai T. Dinh, Acting Assistant General Counsel, or Mr.
Jonathan M. Levin, Senior Attorney, 999 E Street N.W.,
Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

6 **SUPPLEMENTARY**
7 **INFORMATION:**

8 A. Background

9 In the months leading up to a presidential general election, party committees, or
10 party committees in conjunction with a principal campaign committee of a presidential
11 nominee, may conduct a phone bank to get out the vote or otherwise promote the party
12 and its candidates. Such phone banks may involve the reading of scripted messages that
13 include a statement asking the person called specifically to vote, or get their family and
14 friends out to vote, for the named presidential candidate and that then make a general
15 promotional reference or references to the party's other candidates. An example would
16 be: "Please tell your family and friends to come out and vote for President John Doe and
17 our great Party team." Given that no other Federal or non-Federal candidates are
18 specifically mentioned, the question is whether the entire cost of the communication or
19 only a portion of the cost should be attributed to the presidential candidate.

20 Current 11 CFR 106.1(a)(1) addresses the attribution of expenditures (including
21 in-kind contributions, independent expenditures, and coordinated expenditures) for
22 communications made on behalf of more than one clearly identified Federal candidate. It
23 also addresses expenditures and disbursements on behalf of a combination of clearly
24 identified Federal candidates and non-Federal candidates. In the case of communications

1 other than fundraising communications, the expenditure is generally attributed to a
2 candidate in accordance with the portion of the communication devoted to that candidate.
3 For example, in a publication or broadcast communication, the attribution is determined
4 by the space or time devoted to each candidate as compared to the space or time devoted
5 to all candidates. Similarly, for a phone bank, the attribution is based on the number of
6 questions or statements devoted to each candidate as compared to the total number of
7 questions or statements devoted to all candidates.

8 Under one interpretation of section 106.1(a)(1), the disbursement for the political
9 party phone bank described above would be 100 percent attributable to the presidential
10 (and vice presidential) candidate because he or she would be the only candidate clearly
11 identified. On the other hand, this section could be read to mandate an attribution of
12 significantly less than fifty percent to the presidential candidate because the actual
13 wording of the message emphasizes support for all the party's Federal and non-Federal
14 candidates. To provide clear guidance as to the attribution of these types of phone banks,
15 the Commission is proposing new 11 CFR 106.8, which is described below.

16 A. Proposed 11 CFR 106.8 Allocation of political party committee phone banks that
17 refer to a clearly identified presidential or vice presidential nominee.

18 The Commission proposes adding new section 106.8 to address phone banks
19 conducted by national, State and local party committee on behalf of these presidential
20 nominees. In presidential election years, party committees conduct such phone banks to
21 encourage voters to support the entire ticket. Although, the specific mention of the
22 presidential candidate provides something of value to the presidential candidate being
23 promoted, it also provides the party with a benefit. In consideration of the fact that the

1 presidential candidate is the only candidate identified, and balancing that fact with the use
2 of the candidate's name for general party promotion purposes, the Commission proposes
3 establishing a bright line rule requiring fifty percent of the phone bank expenses to be
4 attributed to the presidential candidate.

5 Proposed 11 CFR 106.8(a) begins by stating the conditions under which the
6 special 50% attribution rule would apply. First, the proposed rule would apply only if the
7 provisions of 11 CFR 100.89 and 100.149 do not apply. They provide that, under specific
8 conditions, the payment by a State and local party committee for voter registration and
9 GOTV activities it conducts on behalf of a presidential or vice presidential nominee is
10 exempt from the definitions of "contribution" and "expenditure." These sections provide
11 an avenue for State and local party committees to spend on behalf of publicly financed
12 presidential candidates without making a coordinated expenditure or an impermissible
13 contribution. This exemption does not include payments for "any costs incurred in
14 connection with any broadcasting, newspaper, magazine, billboard, direct mail, or similar
15 type of general public communication or political advertising." 11 CFR 100.89(a) and
16 100.149(a). Phone banks are treated separately and qualify for the exemption when the
17 phone banks are operated by volunteer workers (although the use of paid professionals to
18 design the system, develop calling instructions, and train supervisors is permissible under
19 the exemption). 11 CFR 100.89(e) and 100.149(e). Thus, the proposed rules in new 11
20 CFR 106.8 would not apply, and no amount would have to be attributed to the
21 presidential candidate, if the phones are operated by volunteer workers and if the other
22 conditions pertaining to the source of the funds used in 11 CFR 100.89 and 100.149 are
23 satisfied.

1 Proposed paragraphs (a)(1) through (4) of section 106.8 would describe the
2 communication that would be subject to the proposed rule. The communication would
3 have to: refer to a clearly identified presidential or vice presidential nominee (proposed
4 paragraph (a)(1)); refer to no other clearly identified candidate (proposed paragraph
5 (a)(2)); and refer generically to the other candidates of the presidential nominee's party
6 without clearly identifying them (proposed paragraph (a)(3)). Generic references to "our
7 great Republican team" or "our great Democratic ticket" would satisfy the latter
8 requirement. Moreover, under proposed paragraph (a)(4), the communication must not
9 be used as a means to solicit contributions, donations, or any funds from any person for
10 any Federal or non-Federal candidate, or for any political committee or political
11 organization, or any entity disbursing funds in connection with a Federal or non-Federal
12 election. If such a solicitation were made, it would change the nature of the
13 communication and may require a different determination as to the attribution of the
14 party's spending for the communication among candidates or committees.

15 Proposed paragraph (b) of new section 106.8, would establish the attribution of
16 the party committee's payments for the phone bank. It would provide that fifty percent
17 of the disbursement must be attributed to the presidential and vice presidential nominees,
18 and the remaining fifty percent would not be attributable to any Federal or non-Federal
19 candidate but must be paid solely with Federal funds.

20 If the party committee pays for the entire cost of the phone bank mentioning a
21 publicly funded general election candidate (as opposed to the assumption of some of the
22 cost by the presidential candidate's principal campaign committee), the payment may be,
23 in some cases, either a coordinated expenditure under 2 U.S.C. 441(d) or an independent

1 expenditure under 2 U.S.C. 431(17) in the amount of fifty percent of the cost. In the case
2 of a non-publicly funded general election candidate, it may be either an in-kind
3 contribution to the candidate, or a coordinated or independent expenditure, in that
4 amount.

5 The Commission also notes that, unlike the exempt payments in 11 CFR 100.89
6 and 100.149, a State party committee would be able to use coordinated expenditures
7 (under 2 U.S.C. 441a(d)) to cover allocable phone bank communications subject to
8 proposed 11 CFR 106.8 only if the national party committee has made a written
9 assignment of a specific amount of its spending authority to the State committee in an
10 amount sufficient to cover the expenditure. See 11 CFR 109.33(a). The district or local
11 party committee may spend some of the amount authorized by the national to the State
12 committee, subject to the control of the State committee, which ensures that the entire
13 party organization in the State stays within the assigned limit. See 11 CFR 109.33(b).
14 The Commission seeks comment on whether the proposed rule should refer to this
15 requirement or whether it is understood that this proposed rule would not exempt a State,
16 district, or local party committee from these requirements.

17 Barring the unlikely event that the phone bank will involve 500 or fewer calls, a
18 message such as, "Please vote for President John Doe and our great Party team," would
19 be a public communication that refers to a clearly identified Federal candidate and
20 promotes that candidate. It would thus be a form of Federal election activity that must be
21 paid for entirely with Federal funds, pursuant to 11 CFR 300.33(c)(1). See 11 CFR
22 100.24(b)(3), 100.26, and 100.28. Payments by a national party committee must be from
23 Federal funds because such committees are prohibited from maintaining accounts that do

1 not consist entirely of Federal funds. See 11 CFR 300.10(a)(1). Thus, the fifty percent
2 that would not be attributed to the presidential nominee would have to be paid for entirely
3 with Federal funds, and would not be allocable between Federal and non-Federal funds or
4 Federal and Levin funds.

5 B. Additional comments sought

6 In addition to the request for comment as to national party committee assignment
7 of its coordinated expenditure authority, the Commission seeks comments on several
8 aspects of the proposed rule. Specifically, comment is sought on whether this attribution
9 should apply only to phone banks or whether it should apply to other media such as
10 broadcast or print media. The Commission also seeks comment on whether a different
11 percentage, other than 50/50, should be applied, based on the actual space or time used to
12 refer to the presidential nominee, or the fact that the presidential candidate is the only
13 candidate clearly identified, or some other factor. For example, should the fact that the
14 presidential nominee is the only candidate named serve as a basis for attributing the entire
15 amount spent on the phone bank to that candidate? The Commission also seeks comment
16 on whether the specific condition in 11 CFR 100.89 and 100.149 - that the party
17 expenditures not be made from contributions designated for particular Federal candidates
18 - should be included in the proposed rule. See 2 U.S.C. 431(8)(B)(xi)(3) and
19 (9)(B)(ix)(3); 11 CFR 100.89 and 100.149.

1 **Certification of No Effect Pursuant to 5 U.S.C. § 605(b)**

2 **[Regulatory Flexibility Act]**

3 The attached proposed rules, if promulgated, would not have a significant
4 economic impact on a substantial number of small entities. The basis for this certification
5 is that few, if any, small entities would be affected by these proposals, which apply only
6 to committees of political parties. National, State and many local party committees of the
7 two major political parties and other political committees are not small entities under 5
8 U.S.C. 601 because they are not small businesses, small organizations, or small
9 governmental jurisdictions. The proposed rules are intended to simplify the
10 determination as to the amount of a party committee expenditure that must be attributed
11 to a presidential candidate in the case of certain telephone bank communications and to
12 clarify what funding is permissible. Any increase in the cost of compliance that might
13 result from these proposed rules would not be in an amount sufficient to cause a
14 significant economic impact.

15
16 **List of Subjects**

17 11 CFR Part 106

18 Campaign funds, political committees and parties, political candidates.

1 For the reasons set out in the preamble, the Federal Election Commission
2 proposes to amend subchapter A of chapter 1 of title 11 of the Code of Federal
3 Regulations as follows:

4 **PART 106 – ALLOCATIONS OF CANDIDATE AND COMMITTEE**
5 **ACTIVITIES**

6 1. The authority citation for part 106 would continue to read as follows:

7 Authority: 2 U.S.C. 438(a)(8), 441a(b), 441a(g).

8 2. New section 106.8 would be added to read as follows:

9 **§ 106.8 Allocation of expenses for political party committee phone banks that refer**
10 **to a clearly identified presidential or vice presidential nominee.**

11 (a) Scope. Except as provided in 11 CFR 100.89 and 100.149, this section applies to
12 a phone bank conducted by a national, State, district, or local committee or organization
13 of a political party where --

14 (1) The communication refers to a clearly identified presidential or vice
15 presidential nominee;

16 (2) The communication does not refer to any other clearly identified Federal
17 or non-Federal candidate;

18 (3) The communication generically refers to other candidates of the
19 presidential nominee's party without clearly identifying them; and

20 (4) The communication does not solicit a contribution, donation, or any other
21 funds from any person.

1 (b) Attribution. Each expenditure for the phone bank described in paragraph (a) of
2 this section (including an in-kind contribution, independent expenditure, and coordinated
3 expenditure) shall be attributed as follows:

4 (1) Fifty percent of the disbursement for the phone bank is attributed to the
5 presidential and vice presidential nominees; and

6 (2) The remaining fifty percent is not attributable to any other Federal or non-
7 Federal candidate, but must be paid for entirely with Federal funds.

8
9
10
11 Ellen L. Weintraub
12 Chair
13 Federal Election Commission
14

15 DATED _____
16 BILLING CODE: 6715-01-U
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