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FEDERAL ELECTION COMMISSION
Washington, DC 20463

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AGENDA ITEM

OCT 28 2003 For Meeting of: 11-06-03

MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkon 
Staff Director

FROM: Lawrence H. Norton 
General Counsel

Rosemary C. Smith 
Acting Associate General Counsel

Mai T. Dinh
Acting Assistant General Counsel

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Senior Attorney

SUBJECT: Final Rules on Party Committee Telephone Banks (11 CFR 106.8)

On September 4, 2003, the Commission published a Notice of Proposed Rulemaking (NPRM) entitled "Party Committee Telephone Banks." That NPRM addressed the attribution of political party disbursements for certain telephone bank communications made on behalf of a clearly identified Federal candidate. See 68 Fed. Register 52,529 (Sept. 4, 2003). After reviewing the comment and considering the issues presented in the NPRM, the Office of General Counsel has prepared the attached Final Rules and Explanation and Justification for Commission consideration.

Recommendation

The Office of General Counsel recommends that the Commission approve the attached Final Rules and Explanation and Justification for publication in the *Federal Register* and transmittal to Congress.

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:** Final rule and transmittal of regulations to Congress.

7 **SUMMARY:** The Federal Election Commission is promulgating final rules
8 regarding the attribution of political party committee
9 disbursements for telephone bank communications made on behalf
10 of a clearly identified Federal candidate. The final rules address
11 the proper attribution of a party committee's or party
12 organization's disbursements for communications that refer to a
13 clearly identified Federal candidate when the party's other
14 candidates are referred to generically, but not by name. The entire
15 disbursement must be paid for with Federal funds. Further
16 information is provided in the Supplementary Information that
17 follows.

18 **EFFECTIVE**
19 **DATE:**

[Insert date that is 30 days after the date of publication in the
Federal Register.]

20

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:**

In the months leading up to a general election, political
party committees, or party committees in conjunction with the principal campaign
committees of Federal candidates, may conduct phone banks to get out the vote
("GOTV") or otherwise promote the party and its candidates. Such phone banks may
involve the reading of scripted messages that include a statement asking the person called
specifically to vote, or get their family and friends out to vote, for the named Federal
candidate and that then make one or more general promotional references to the party's
other candidates. An example would be: "Please tell your family and friends to come out
and vote for President John Doe and our great Party team." Given that no other Federal
or non-Federal candidates are specifically mentioned, the question is whether the entire
cost of the communication, or only a portion of the cost, should be attributed to the
Federal candidate. The Commission is issuing final rules to provide clear guidance on
how to attribute the cost of these communications.

20 Under the Administrative Procedures Act, 5 U.S.C. 553(d), and the Congressional
21 Review of Agency Rulemaking Act, 5 U.S.C. 801(a)(1), agencies must submit final rules
22 to the Speaker of the House of Representatives and the President of the Senate and
23 publish them in the Federal Register at least 30 calendar days before they take effect. The

1 final rules on party committee phone banks were transmitted to Congress on November
2 >>, 2003.

3 **Explanation and Justification**

4 The Commission published a Notice of Proposed Rulemaking (“NPRM”) on
5 September 4, 2003, in which it sought comment on proposed rules that would add a new
6 section to 11 CFR part 106 to address telephone bank expenditures by political party
7 committees and organizations. 68 FR 52529 (Sept. 4, 2003). The comment period was
8 originally set to close on September 19, 2003, but the Commission extended the comment
9 period until September 29, 2003. In addition to the comments concerning the proposed
10 rules, the NPRM sought comments on a number of other issues including: (1) whether the
11 scope of the rulemaking should be expanded to include other types of communications
12 such as broadcast or print media and to include candidates for the Senate or House of
13 Representatives; (2) whether the final rules should explicitly state that a State party
14 committee’s use of its coordinated party expenditure authority to pay for these phone
15 banks is subject to the restrictions of 11 CFR 109.33; and (3) whether the final rules
16 should explicitly state that party committees are prohibited from using contributions
17 designated for a particular candidate to pay for these phone bank expenditures.

18 The Commission received one comment in response to the NPRM. The
19 Commission did not receive any requests to testify on the subject of party committee’s
20 disbursements for telephone banks at its hearing on October 1, 2003.

21

1 11 CFR 106.8 Allocation of expenses for political party committee phone banks that
2 refer to a clearly identified Federal candidate.

3 The Commission is adding new section 106.8 to address the costs of phone banks
4 conducted by national, State and local party committees and party organizations on behalf
5 of clearly identified Federal candidates. In Federal election years, party committees and
6 organizations conduct such phone banks to encourage voters to support the entire ticket.
7 Although the specific mention of the clearly identified Federal candidate provides
8 something of value to the candidate being promoted, it also provides the party with a
9 benefit. The final rules, discussed below, reflect that such communications benefit both
10 the candidate and the party.

11 1. 11 CFR 106.8(a) Scope

12 New section 106.8(a) begins by stating the conditions under which the special
13 attribution rule in paragraph (b) would apply. Paragraphs (a)(1) through (a)(5) of new
14 section 106.8 describe the communications that are subject to the final rule. The
15 proposed rules would have limited the scope of the new section 106.8 to presidential and
16 vice presidential nominees, although the Commission asked whether they should be
17 expanded to include candidates for the Senate and the House of Representatives. The
18 commenter urged that the rules be extended to these candidates while noting that the
19 underlying coordinated party expenditure limits would differ for these candidates.
20 Because there is no apparent reason to distinguish presidential and vice presidential
21 candidates from other Federal candidates, and to maintain a consistent approach for all
22 Federal candidates, the Commission is extending the final rules to all Federal candidates.

1 Consequently, the conditions set forth in 11 CFR 106.8(a)(1) through (a)(5)
2 implement this approach. Under paragraph (a)(1) the communication must refer to a
3 clearly identified Federal candidate. The term “clearly identified” is defined in 2 U.S.C.
4 431(18) and 11 CFR 100.17. Second, the communication must also refer to no other
5 clearly identified Federal or non-Federal candidate under paragraph (a)(2). Third, under
6 paragraph (a)(3), the communication must refer generically to the other candidates of the
7 clearly identified Federal candidate’s party without clearly identifying them. Generic
8 references to “our great Republican team” or “our great Democratic ticket” would satisfy
9 the latter requirement. The commenter suggested that the final rules make clear that the
10 generic reference is to other candidates and not to the clearly identified Federal candidate.
11 For instance, according to the commenter, a reference to the “great Presidential Candidate
12 X team” with no other generic reference to other candidates should not fall within the
13 scope of the final rules because the word “team” should be treated as a reference to the
14 presidential ticket and not as a reference to other candidates of the same party. The
15 language in paragraph (a)(3) is slightly different from the proposed rule to make clear that
16 the communication must include another reference that generically refers to other
17 candidates and not the clearly identified Federal candidate.

18 Under paragraph (a)(4), the communication must not solicit contributions,
19 donations, or any funds from any person for any Federal or non-Federal candidate, or for
20 any political committee or political organization, or any entity disbursing funds in
21 connection with a Federal or non-Federal election. If such a solicitation were made, it
22 would change the nature of the communication and may require a different determination

1 as to the attribution of the party's spending for the communication among candidates or
2 committees.

3 Under paragraph (a)(5), the phone bank must not be exempt from the definitions
4 of "contribution" and "expenditure" under 11 CFR 100.89 and 100.149. These sections
5 implement the statutory exceptions for certain voter registration and GOTV activities
6 conducted by party committees under 2 U.S.C. 431(8)(B)(xi) and 431(9)(B)(ix).
7 Consequently, a State or local party committee's voter registration and GOTV activities,
8 including phone banks operated by volunteers under 11 CFR 100.89(e) or 100.149(e)
9 conducted on behalf of a presidential or vice presidential nominee, which are exempt
10 from the definitions of "contribution" and "expenditure," are not affected by new section
11 106.8, provided that the conditions set forth in 11 CFR 100.89(a) through (g) or
12 100.149(a) through (g) are satisfied. Thus, State and local party committees may
13 continue to spend on behalf of publicly financed presidential candidates for these
14 purposes without making an expenditure or a contribution.

15 The Commission did not receive any comments in response to its question as to
16 whether the final rules should specifically prohibit State and local party committees from
17 using contributions that were designated for a particular Federal candidate to make
18 expenditures for these phone banks. See 11 CFR 100.89(c) and 100.149(c). This
19 situation is already governed by the "coattails" exception in 2 U.S.C. 431(8)(B)(xi) and
20 (9)(B)(ix) and is not relevant to situations addressed in new section 106.8. The
21 Commission therefore is not including this prohibition in the final rules. In answer to the
22 Commission's question of whether 11 CFR 106.8 should include other forms of
23 communications such as broadcast or print media, the commenter urged the Commission

1 to defer consideration of extending the final rules to include other forms of
2 communications. The Commission has decided to limit the scope of new section 106.8 to
3 phone banks at this time because each type of communication presents different issues
4 that need to be considered in further detail before establishing new rules.

5 2. 11 CFR 106.8(b) Attribution

6 The NPRM included two alternatives for new section 106.8(b) to establish the
7 attribution of the party committee's payments for the phone bank. Under Alternative A,
8 party committees and organizations would have attributed fifty percent of the
9 disbursement to clearly identified presidential and vice presidential nominees, and the
10 remaining fifty percent would not have been attributable to any Federal or non-Federal
11 candidate but would have to be paid solely with Federal funds. Alternative B would have
12 provided that 100 percent of the disbursement must be attributed to the clearly identified
13 presidential and vice presidential nominees.

14 The Commission sought comment on which of these two alternatives would be
15 preferable, or on whether the percentage should be based on the actual space or time used
16 to refer to the presidential nominee, or some other factor. The commenter argued that a
17 fifty percent attribution to the presidential or vice presidential nominee is permissible
18 provided that the entire phone bank expenditure is paid for with Federal funds.

19 The Commission is incorporating Alternative A in the final rules. Because these
20 phone bank communications contain two references - one to a clearly identified Federal
21 candidate and one that generically refers to other candidates - it is appropriate that the
22 disbursement for the communications be attributed evenly between the two references.
23 Thus, new section 106.8(b)(1) states that fifty percent of the disbursement for the phone

1 bank is not attributed to any candidate because the generic reference does not refer to any
2 clearly identified candidate and therefore cannot be attributed to any specific candidate.

3 The Commission has determined that Federal funds must be used to pay for all
4 disbursements for telephone banks that fall within the scope of new section 106.8, even
5 the portion that is not attributed to any particular candidate. Barring the unlikely event
6 that the phone bank will involve 500 or fewer calls, a message such as, "Please vote for
7 President John Doe and our great Party team," would be a public communication that
8 refers to a clearly identified Federal candidate and promotes that candidate. It would thus
9 be a form of Federal election activity that must be paid for entirely with Federal funds,
10 pursuant to 11 CFR 300.33(c)(1), if conducted by a State, district, or local party
11 committee. See 11 CFR 100.24(b)(3), 100.26 and 100.28. It must also be paid for
12 entirely with Federal funds if conducted by a national party committee, which only has
13 Federal funds under 2 U.S.C. 441i(a) and 11 CFR 300.10. The amount that is not
14 attributed to a Federal candidate, however, is not considered an in-kind contribution to
15 any candidate, a coordinated party expenditure, or an independent expenditure by the
16 party committee or organization.

17 Section 106.8(b)(2) requires that the remaining fifty percent of the disbursement
18 be attributed to the clearly identified Federal candidate and that this portion of the
19 disbursement must be paid for with Federal funds. Generally, party committees have
20 several options in how to treat the attributed portion of a disbursement – as an in-kind
21 contribution, a coordinated party expenditure, or an independent expenditure. They may
22 also obtain reimbursement from the clearly identified Federal candidate of some or the
23 entire attributed portion of the disbursement. Consequently, paragraph (b)(2) allows

1 party committees and organizations to treat the portions of disbursements attributed to
2 clearly identified Federal candidates as in-kind contributions, or as coordinated or
3 independent expenditures, or as expenses to be reimbursed by the clearly identified
4 Federal candidates, or a combination of any of these. Under paragraph (b)(2)(i), if the
5 disbursement is treated as an in-kind contribution, it is subject to the contribution
6 limitations of 11 CFR 110.1 or 110.2.

7 The Commission notes that a State party committee would be able to make
8 coordinated party expenditures (under 2 U.S.C. 441a(d)) to pay for phone bank
9 communications on behalf of its presidential candidate subject to new 11 CFR 106.8 only
10 if the national party committee has made a written assignment of a specific amount of its
11 coordinated party expenditure authority to the State party committee. See 11 CFR
12 109.33(a). Similarly, a district or local party committee may spend some of the amount
13 authorized by the national or the State party committee upon receiving a written
14 authorization to do so. See 11 CFR 109.33(b). The Commission did not receive any
15 comments in response to its question on whether the final rule should refer to this
16 requirement or whether it is understood that this final rule would not exempt a State,
17 district, or local party committee from these requirements. The Commission is including
18 a reference to 11 CFR 109.33 as well as to section 109.32 in new section 106.8(b)(2)(ii)
19 to ensure that party committees understand that these sections apply to disbursements for
20 phone banks that are treated as coordinated expenditures.

21 New section 106.8(b)(2)(ii) also provides for the disbursements attributed to the
22 clearly identified Federal candidate to be treated as independent expenditures. As
23 independent expenditures, they are also subject to the requirements of 11 CFR 109.10,

1 and a reference to that section is included in paragraph (b)(2)(ii). This paragraph also
2 includes a reference to 11 CFR 109.35 requiring party committees to choose between
3 making either coordinated party expenditures or independent expenditures, but not both,
4 on behalf of a Federal candidate after the party has nominated that candidate. Once, a
5 party committee makes a coordinated party expenditure on behalf of a Federal candidate,
6 it may not make an independent expenditure on behalf of that Federal candidate, and vice
7 versa.

8 3. Examples

9 The following examples illustrate the scope and operation of new section 106.8.

10 Example 1: A week before the general election, a local party committee operates a phone
11 bank through the use of volunteers and the message is: "You can show your support for
12 the Green Party presidential nominee by going to the polls next Tuesday and contributing
13 to the local party committee so that it can help others to get to the polls too."

14 The costs of the phone bank would not fall within the scope of 11 CFR 106.8 for
15 three reasons. First, by using volunteers to run a phone bank that seeks to get out the vote
16 for the presidential and vice presidential nominee, and by complying with other
17 requirements in 11 CFR 100.89(e) and 100.149(e), the local party committee does not
18 make a contribution or expenditure under 11 CFR 100.89 and 100.149, and, therefore,
19 these costs are excluded from the provisions of section 106.8. Second, the
20 communication only contains a reference to the clearly identified Federal candidate
21 ("Green Party presidential nominee") and does not refer generically to other candidates.
22 Thus, it does not meet the condition set forth in 11 CFR 106.8(a)(3). Finally, the message

1 includes a solicitation for the local party committee, and, therefore, does not meet the
2 condition set forth in section 106.8(a)(4).

3 Example 2: The Republican National Committee (“RNC”) operates a phone bank and the
4 message is: “When you vote for Representative Jane Smith on Tuesday, remember to vote
5 for the other Republican candidates.” The cost of operating this phone bank is \$20,000.
6 The RNC has already made an independent expenditure on behalf of Representative
7 Smith but has not made any contributions to her authorized committee.

8 The costs of the phone bank would come within the scope of 11 CFR 106.8
9 because the communication: (1) contains a reference to a clearly identified Federal
10 candidate (“Representative Jane Smith”); (2) contains a generic reference to other
11 Republican candidates; (3) does not include a reference to any other clearly identified
12 candidate; (4) does not solicit a contribution or donation from any person; and (5) is
13 conveyed by paid workers, not volunteers, and is thus not exempt from the definitions of
14 “contribution” and “expenditure.” The RNC must attribute \$10,000 to Representative
15 Smith. Because the RNC has already made an independent expenditure on behalf of
16 Representative Smith, it cannot treat this \$10,000 as a coordinated party expenditure. See
17 2 U.S.C. 441a(d)(4)(A)(i); 11 CFR 109.35(b)(1). Rather it may treat the entire amount as
18 an independent expenditure provided that it has not coordinated with Representative
19 Smith or her authorized committee or agents. If the RNC or its agents coordinated this
20 phone bank with Representative Smith or her agents, then it may treat \$5,000 as an in-
21 kind contribution to her authorized committee under the limits of 2 U.S.C. 441a(a)(2)(A),
22 and it must seek reimbursement from her authorized committee for the other \$5,000. The

1 remaining fifty percent of the expenditure (\$10,000) is not attributed to any candidate and
2 the entire \$20,000 must be paid for with Federal funds.

3 Example 3: A State party committee operates a phone bank and the message is: "Show
4 your support for Senator John Doe and the great Democratic team by voting for them."
5 The cost of operating the phone bank is \$34,000. The State party committee's
6 coordinated party expenditure limit under 2 U.S.C. 441a(d) is \$20,000 and it already
7 spent \$5,000 in coordinated party expenditures on behalf of Senator Doe. The State party
8 committee is a multicandidate committee and has made a \$1,000 contribution to his
9 campaign.

10 The costs of this phone bank are within the scope of 11 CFR 106.8 because the
11 communication: (1) contains a reference to a clearly identified Federal candidate
12 ("Senator John Doe"); (2) contains a generic reference to other Democratic candidates;
13 (3) does not include a reference to any other clearly identified candidate; (4) does not
14 solicit a contribution or donation from any person; and (5) does not qualify for the 11
15 CFR 100.89 and 100.149 exceptions. Because the State party committee has already
16 made a coordinated party expenditure on behalf of Senator Doe after the nomination, the
17 State party committee cannot make a subsequent independent expenditure on his behalf.
18 The State party committee does not have to attribute \$17,000 to any candidate but must
19 still use all Federal funds to pay for that \$17,000. The remaining \$17,000 must be
20 attributed to Senator Doe and must also be paid for with Federal funds. The State party
21 committee may treat \$15,000, which is equal to its remaining coordinated party spending
22 authority, of the attributed amount as a coordinated party expenditure. The remaining
23 \$2,000 may be treated as an in-kind contribution because when aggregated with the

1 earlier \$1,000 contribution, it does not exceed the State party committee's \$5,000
2 contribution limit under 11 CFR 110.2.

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

4 **[Regulatory Flexibility Act]**

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

17

18 **List of Subjects**

19 11 CFR Part 106

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

21

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

3 **PART 106 – ALLOCATIONS OF CANDIDATE AND COMMITTEE**

4 **ACTIVITIES**

5 1. The authority citation for part 106 continues to read as follows:

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

7 2. New section 106.8 is added to read as follows:

8 **§ 106.8 Allocation of expenses for political party committee phone banks that refer**
9 **to a clearly identified Federal candidate.**

10 (a) Scope. This section applies to the costs of a phone bank conducted by a national,
11 State, district, or local committee or organization of a political party where --

12 (1) The communication refers to a clearly identified Federal candidate;

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

15 (3) The communication includes another reference that generically refers to
16 other candidates of the Federal candidate's party without clearly
17 identifying them;

18 (4) The communication does not solicit a contribution, donation, or any other
19 funds from any person; and

20 (5) The phone bank is not exempt from the definition of "contribution" under
21 11 CFR 100.89 and is not exempt from the definition of "expenditure"
22 under 11 CFR 100.149.

1 (b) Attribution. Each disbursement for the costs of a phone bank described in
2 paragraph (a) of this section shall be attributed as follows:

3 (1) Fifty percent of the disbursement is not attributable to any other Federal or
4 non-Federal candidate, but must be paid for entirely with Federal funds;
5 and

6 (2) Fifty percent of the disbursement is attributed to the clearly identified
7 Federal candidate and must be paid for entirely with Federal funds. This
8 disbursement may be one or a combination of the following:

9 (i) An in-kind contribution, subject to the limitations set forth in 11
10 CFR 110.1 or 110.2; or

11 (ii) A coordinated expenditure or an independent expenditure, subject
12 to the limitations, restrictions, and requirements of 11 CFR 109.10,
13 109.32, 109.33 and 109.35; or

14 (iii) Reimbursed by the clearly identified Federal candidate or his or her
15 authorized committee.

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Ellen L. Weintraub
Chair
Federal Election Commission

DATED _____
BILLING CODE: 6715-01-U