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**11 CFR Part 110**

**[Notice 1989-18]**

**Contributions and Expenditures;  
Prohibited Contributions**

**AGENCY:** Federal Election Commission.

**ACTION:** Final rule; transmittal of  
regulations to Congress.

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**SUMMARY:** The Commission has revised  
its regulations at 11 CFR 110.4(a), which

prohibit foreign nationals from making contributions and other persons from accepting such contributions in connection with any election for local, State or Federal public office. The revisions to section 110.4(a) add corresponding references to expenditures, and clarify that foreign nationals may not participate in certain election-related activities. These regulations are based on the prohibitions set forth in section 441e of the Federal Election Campaign Act of 1971, as amended ("the Act" or "FECA"), 2 U.S.C. 431 *et seq.* Further information on these revisions is provided in the supplementary information which follows.

**DATES:** Further action, including the announcement of an effective date, will be taken after these regulations have been before Congress for 30 legislative days pursuant to 2 U.S.C. 438(d).

**FOR FURTHER INFORMATION CONTACT:** Ms. Susan E. Propper, Assistant General Counsel, 909 E Street NW., Washington, DC 20463, (202) 376-5680 or (800) 424-9530.

**SUPPLEMENTARY INFORMATION:** The Commission is publishing today the final text of revisions to its regulations at 11 CFR 110.4, which concern election-related activity undertaken by foreign nationals. On June 7, 1989 the Commission issued a Notice of Proposed Rulemaking (NPRM) in which it sought comments on proposed revisions to these regulations (54 FR 24351). No written comments were received in response to the Notice.

The NPRM also sought comment on possible revisions to other unrelated provisions of the Commission's regulations which exempt certain unreimbursed payments for transportation and subsistence costs from the definitions of "contribution" and "expenditure" (11 CFR 100.7(b)(8) and 100.8(b)(9)). After further consideration, the Commission has decided not to amend those provisions at this time.

Section 438(d) of title 2, United States Code requires that any rules or regulations prescribed by the Commission to carry out the provisions of title 2 of the United States Code be transmitted to the Speaker of the House of Representatives and the President of the Senate 30 legislative days before they are finally promulgated. These regulations were transmitted to Congress on November 17, 1989.

#### Explanation and Justification

The Commission is revising 11 CFR

110.4(a) concerning foreign nationals in two respects. First, an explicit prohibition on expenditures by foreign nationals is being added, which parallels the current prohibition on contributions by such persons. Second, new language is being added to clarify that foreign nationals may not participate in the election-related activities of others, including decisions regarding contributions or expenditures by political committees, corporations, labor organizations or other persons.

Section 414e of the FECA prohibits foreign nationals, directly or through another person, from making contributions in connection with any election for political office or in connection with any primary election, convention or caucus held to select candidates for any political office. 2 U.S.C. 441e. While the Act does not explicitly refer to expenditures by foreign nationals, FECA generally prohibits expenditures when it prohibits contributions by a specific category or persons, thereby ensuring that the persons cannot accomplish indirectly what they are prohibited from doing directly. See, e.g., 2 U.S.C. 441b. To foreclose the indirect violation of Section 441e and implement the general intent of the statute, the Commission is now revising 11 CFR 110.4(a)(1) to explicitly prohibit expenditures by as well as contributions from foreign nationals. The new language covers independent expenditures by foreign nationals as well as other kinds of expenditures.

The revisions also add new paragraph (a)(3) to prohibit foreign nationals from participating in election-related decisions by corporations, labor organizations, political committees or other persons, including decisions concerning contributions and expenditures. Accordingly, former paragraph (a)(3) has been renumbered as paragraph (a)(4).

The prohibition on contributions by foreign nationals has its origin in legislation that predates the FECA, the 1966 amendments to the Foreign Agents Registration Act (80 Stat. 248). In 1976 Congress incorporated into the FECA the foreign nationals provision, previously codified at 18 U.S.C. 613. The only change that Congress made was to replace the earlier statute's criminal penalties with new criminal and civil penalty and enforcement provisions.

Nothing in Section 441e's legislative history suggests that Congress intended to deviate from the FECA's general pattern of treating contributions and expenditures in parallel fashion. See S.

Rep. No. 94-677, 94th Cong., 2d Sess. 1, 11 (1976). Cf. H.R. Rep. No. 96-422, 96th Cong., 1st Sess. 11 (1979) ("Since all of these provisions are specific exemptions to the definition of contribution, exemptions from the expenditure definition are not necessary.") Further, under the 1976 amendments to the FECA "contribution" and "expenditure" are interrelated terms. For example, an expenditure made by a person in cooperation, consultation, or concert with a candidate or a candidate's committee is an in-kind contribution (2 U.S.C. 441a(a)(7)(B)). Also, a political committee receiving an in-kind contribution reports the amount as both a contribution and an expenditure pursuant to 11 CFR 104.13(a)(2). In general, a political committee reports the contributions that it makes to candidates as expenditures. See 11 CFR 100.8(a)(1) and 104.3(b).

The Commission faced an analogous situation in 1977 when it promulgated regulations to implement Section 441c(a) of the Act, which prohibits contributions by Government contractors. See Explanation and Justification of 11 CFR 115.2, found in "Communications from the Chairman," H.R. Doc. No. 95-44, 95th Cong., 1st Sess. 121 (January 12, 1977). An explicit prohibition on expenditures was included in those regulations.

Prior to this rulemaking, the Commission has not directly addressed the legality of expenditures by foreign nationals. For example, several advisory opinions concerning corporations owned by foreign principals have relied upon representations by the requesters that no foreign national would participate in the separate segregated funds' decisions regarding contributions or expenditures. Cf. Advisory Opinions 1980-100 and 1982-10. Thus, although the Commission has never directly ruled on the propriety of expenditures by foreign nationals or other election-related activity undertaken by foreign nationals directly or through a political committee, the Commission has consistently assumed that the statutory prohibition governing foreign nationals extends to these areas. The Commission has now decided to revise 11 CFR 110.4(a) to state expressly that foreign nationals are prohibited from making such expenditures and from undertaking these types of election-related activities.