

FEDERAL ELECTION COMMISSION**(Notice 1991-12)****11 CFR Parts 102 and 113****Use of Excess Funds****AGENCY:** Federal Election Commission.**ACTION:** Final rules and transmittal of regulations to Congress.

SUMMARY: The Commission has revised its regulations at 11 CFR 102.3, 113.1 and 113.2(d), regarding disposition of excess campaign or donated funds by Members of Congress, to implement the Ethics Reform Act of 1989, Public Law 101-194. The Ethics Reform Act amended section 313 of the Federal Election Campaign Act ("FECA" or "the Act"), codified at 2 U.S.C. 439a, to prohibit any Member of Congress who serves in the 103d or a later Congress from converting excess campaign or donated funds to personal use as of the first day of such service. Those Members who held office on January 8, 1980, who formerly could convert unlimited amounts of excess funds to personal use, may now convert only the amount on hand as of November 30, 1989, the date of enactment of the Ethics Reform Act. Further information 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). A document announcing the effective date will be published in the *Federal Register*.

FOR FURTHER INFORMATION CONTACT: Ms. Susan E. Propper, Assistant General Counsel, 999 E Street NW., Washington, DC 20463 (202) 376-5690 or (800) 424-9530.

SUPPLEMENTARY INFORMATION: The Commission is publishing today the final text of revisions to its regulations at 11 CFR 102.3, 113.1, and 113.2, regarding the disposition of excess campaign or donated funds.

On April 24, 1991, the Commission issued a Notice of Proposed Rulemaking (NPRM) in which it sought comments on proposed revisions to these regulations. 55 FR 18777. One written comment was received in response to the notice.

Section 438(d) of title 2, United States Code, requires that any rule or regulation 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 July 19, 1991.

Explanation and Justification

The Federal Election Campaign Act Amendment of 1979, Public Law 96-187, amended 2 U.S.C. 439a, regarding the disposition of excess campaign or donated funds. The 1979 amendment prohibited any candidate or Member of Congress not in office on January 8, 1980, from converting any such funds to personal use, other than to defray ordinary and necessary expenses incurred in connection with his or her duties as a holder of Federal office. Funds not used for this purpose may be contributed to any tax-exempt charitable organization or used for any other lawful purpose, including unlimited transfers to any national, State, or local committee of any political party.

The Ethics Reform Act of 1989, Public Law 101-194, further amended this section to prohibit any Member of Congress who serves in the 103d or a later Congress from converting excess campaign or donated funds to personal use as of the first date of such service. (The 103d Congress will convene on January 3, 1993.) Also, a Member of Congress who held office on January 8, 1980, can now convert to personal use only the "unobligated balance" of campaign or donated funds as of the date of enactment of the Ethics Reform Act, November 30, 1989.

These rules amend 11 CFR 102.3, 113.1 and 113.2, to reflect the new statutory limits on conversion of excess funds to personal use. They provide two alternative methods for grandfathered Members to compute the "unobligated balance" which is eligible for such conversion. Under the first alternative, qualified Members who choose to convert no more than the value of their cash assets as of November 30, 1989, may do so by simply reporting this action. The second alternative authorizes Members to convert nonliquid committee assets held on that date (or a cash amount equal to the value of such assets) to personal use, provided that new reporting requirements are met. The new rules are consistent with Advisory Opinion 1990-26, in which the Commission permitted the November 1989 value of a computer owned by a grandfathered Member's authorized committee to be included in the balance eligible for conversion under certain conditions.

One comment was received on this rulemaking. The Internal Revenue Service found no conflict between this

proposal and the Internal Revenue Code or the regulations promulgated under it.

Part 102—Registration, Organization, and Recordkeeping by Political Committees**Section 102.3—Termination of Registration**

All terminating committees are required to report how residual funds will be used. 11 CFR 102.3(a). New paragraph (a)(2) adds a requirement that authorized committees of non-grandfathered Members include in their termination reports a statement signed by the committee's treasurer, stating that no noncash committee assets will be converted to personal use. This section also requires terminating committees of grandfathered Members to comply with the new provisions of § 113.2 before converting funds to personal use.

Part 113—Excess Campaign Funds and Funds Donated to Support Federal Officeholder Activities**Section 113.1—Definitions**

New paragraph 113.1(f) defines the term "qualified Member" for the purpose of converting excess funds to personal use under new 11 CFR 113.2(e). The definition includes all individuals who served as a Senator or Representative in, or Delegate or Resident Commissioner to, Congress, on January 8, 1980.

Section 113.2 Use of Funds

Paragraph (d) has been amended to delete the phrase stating that grandfathered Members may convert unlimited amounts of excess funds to personal use. This paragraph now states that no excess funds may be converted to personal use except as set forth in paragraph (e), below.

Paragraph (e) allows qualified Members to convert to personal use no more than the unobligated balance in their campaign accounts as of November 30, 1989. The two alternatives they may use in computing this balance are set forth at paragraphs (e)(1) (i) and (ii).

The first alternative, found at paragraph (e)(1)(i), is available to qualified members who choose to convert no more than the value of their committee's cash assets on November 30, 1989, to personal use. (While the remainder of this discussion uses the singular "committee," it applies to all authorized committees, if a Member has more than one such committee.) To compute the value of its net cash assets, the committee first calculates its cash on hand on November 30, 1989, as defined

in 11 CFR 104.3(a)(1), and then subtracts its debts and obligations on that date. The § 104.3(a)(1) definition includes currency; the balance on deposit in banks, savings and loan institutions, and other depository institutions; travelers' checks owned by the committee; certificates of deposit, treasury bills and any other committee investments valued at cost.

A qualified Member who chooses this alternative also has the option of converting noncash campaign assets to personal use, by counting the fair market value of each item so converted against the total unobligated (cash) balance. For example, if the authorized committee's cash assets on November 30, 1989, totaled \$10,000, and the committee owns two vehicles, each with a fair market value of \$5,000, the Member may convert to personal use either the \$10,000; the two vehicles; or \$5,000 and one vehicle.

The second alternative, set forth at paragraph (e)(1)(ii), permits qualified Members to add the value of unliquidated committee assets and receivables as of November 30, 1989, to the unobligated balance, if certain requirements are met. Unliquidated committee assets in this context include noncash assets previously purchased by the committee, such as vehicles, computers, and office equipment. The term also includes other assets received as in-kind contributions on or before November 30, 1989, but not liquidated until a later reporting period, such as contributions of stocks, bonds, and art objects.

To take advantage of this higher limit, a Member must file a separate Memo Entry Schedule A as an amendment to the 1989 year end report (covering July 1 through December 31, 1989). This memo Schedule A must itemize each converted asset, giving the date of acquisition, its fair market value as of November 30, 1989, and a brief narrative description explaining how the asset's value was ascertained. In addition, the committee must disclose the disposition made of each such asset, including its fair market value at the date of sale or other disposition. This should be disclosed in the committee's termination report unless the asset was sold or distributed during an earlier period and included in the report covering that period.

Commission regulations use the term "usual and normal charge for such goods" when discussing the valuation of "in kind" contributions. 11 CFR 100.7(a)(1)(iii)(B). The Commission has incorporated this approach in its Advisory Opinions dealing with the sale of campaign assets. See Advisory Opinions 1985-1 and 1986-14. The

regulation follows this same approach in determining whether an asset has been sold for its fair market value.

Members who choose this second alternative may also treat committee receivables as other assets and include them in the unobligated balance which is eligible for conversion. Given the need to ascertain a definite amount, these receivables may only include those debts and loans reported as owed to the committee as of November 30, 1989, and itemized on the committee's year end report for 1989—provided that such receivables are actually collected by the committee prior to its termination. In addition, committee receivables in the form of vendor credits or deposit refunds may be included in calculating the unobligated balance. These types of receivables must be itemized on Schedule C or D of the committee's 1989 year end report or in an amendment thereto, in order to be included.

The Commission emphasizes that the more complicated procedures must be followed only by Members who wish to convert to personal use more than the value of their net cash assets on November 30, 1989. Those choosing to convert no more than the cash balance may simply report this action, no matter how great the value of their non-cash assets or how large the committee's other receivables on that date. However, the disposition of these other assets and receivables still must be reported.

To illustrate, assume that a Member's potential unobligated balance on November 30, 1989, consisted of \$80,000 in cash assets and \$20,000 in nonliquid assets, for a total of \$100,000. If the Member chooses to convert more than \$80,000 to personal use, he or she must follow the nonliquid asset procedures for the amount over \$80,000. However, if the Member chooses to convert to personal use no more than \$80,000, the simpler cash asset procedures can be followed. These procedures could be used, for example, if the Member chooses to convert \$50,000 to personal use and donate the remaining \$50,000 to charity or to a political party committee, or to use it in any other manner consistent with 2 U.S.C. 439a and 11 CFR 113.2 (a), (b), and (c).

The Commission sought comments in the NPRM on whether this rule should limit conversion to liquid assets, a limitation seemingly implied by the statutory use of the term "unobligated balance" (emphasis added). The Ethics Reform Act's legislative history is silent on this point, in that the Senate debate (the only substantive discussion of this provision in the Act's legislative history) focused on the ability to use excess

funds, rather than on what constitutes excess funds. See 135 Cong. Rec. S 15966-71 (daily ed., Nov. 17, 1989).

However, the Commission has previously construed "excess funds" to include nonliquid committee assets. In Advisory Opinion 1981-11, the Commission held that the term "excess campaign funds" can include noncash items—in that case a mailing list—determined by the candidate to be no longer needed to defray committee expenses. See also Advisory Opinion 1984-50 (same reasoning applied to political art). Each of these Advisory Opinions allowed a candidate to transfer the item(s) in question from the candidate's principal campaign committee to a national party committee under the "excess funds" provision of 2 U.S.C. 439a. In addition, in Advisory Opinion 1982-33, the Commission permitted a retired Senator to convert a car owned by his principal campaign committee to his personal use, in addition to the committee's cash assets. This regulation follows this approach.

This section also provides that if the unobligated balance subsequently drops below its November 30, 1989, level, it may be restored back to that level, and the full amount converted to personal use. This approach is consistent with the statutory language, which in pertinent part provides: "The amendment [prohibiting personal use] shall apply . . . to the use of . . . amounts totaling *more than the amount* [of] . . . the unobligated balance on hand on [November 30, 1989]" (Pub. L. 101-194, § 504(b), 103 Stat. 1755) (emphasis added).

The section permits proceeds from the sale of noncash assets (those obtained both before and after November 30, 1989) to be used to restore an account whose balance has fallen below its November 30, 1989, level, back up to that level. For such sales to be valid, the Member must show that the seller received no more than the fair market value for the asset as of the date of the sale. Committee receivables other than debts and loans, e.g., interest income, and refunded rent and utility deposits, may also be used for this purpose.

Thus, for example, if a Member's unobligated balance on November 30, 1989, was \$50,000, but it later dropped to \$25,000, subsequent lawfully received contributions and other committee income could be used to restore it to the \$50,000 level. The full unobligated balance of \$50,000 could still be converted to personal use, despite its post-November 1989 shrinkage.

Under either alternative, if noncash assets are sold or other moneys received

in amounts which would bring the unobligated balance above its November 30, 1989, level, these additional sums may not be converted to personal use. Rather, they must be used for the other purposes set forth in 2 U.S.C. 439a and 11 CFR 113.2 (a), (b), and (c).

Thus, the Commission stresses that, using this same example, no more than \$50,000 could ever be converted to personal use. If the Member converted \$10,000 of the original \$50,000 to personal use and the balance later dropped to \$25,000, the balance that could later be restored for personal use conversion would be reduced to \$40,000 (\$50,000 less the \$10,000 which had already been converted). Any additional amounts would have to be used for the other purposes set forth in 2 U.S.C. 439a and 11 CFR 113.2 (a), (b), and (c).

The Commission recognizes that some Members may already have converted some portion of their November 30, 1989, unobligated balance to personal use. Any such amounts count as drawdowns on the ceiling eligible for conversion. For example, a Member whose November 30, 1989, unobligated balance was \$50,000, who has already converted \$10,000 to personal use, is now limited to \$40,000 in future conversions.

Finally, the Commission notes that there is no time limit for qualified Members who do not serve in the 103rd or a later Congress who want to convert their unobligated balance to personal use. The only limitation is of that amount, i.e., the converted amount may not exceed the November 30, 1989, unobligated balance.

New paragraph 113.2(f) clarifies that nothing in 11 CFR part 113 is intended to supersede other Federal laws, outside the Commission's jurisdiction, which also regulate the use of campaign or donated funds. See, e.g., newly enacted 2 U.S.C. 59e(d), Public Law 101-520, § 310(d)(Nov. 5, 1990), which prohibits the use of any funds which are not specifically appropriated for Members' official expenses from being used to defray such expenses. In addition, relevant state laws may affect whether a particular type of personal use qualifies as a "lawful purpose" under section 439a, and are therefore not superseded.

concerning the disposition of excess campaign and donated funds. This does not impose a significant economic burden because any small entities affected are already required to comply with the Act's requirements in this area.