FEDERAL ELECTION COMMISSION

11 CFR Parts 100 and 104

[Notice 1991-24]

Loans From Lending Institutions to Candidates and Political Committees

AGENCY: Federal Election Commission.

ACTION: Final rule; transmittal of regulations to Congress.

SUMMARY: The Commission has revised its regulations at 11 CFR 100.7(b)(11), 100.8(b)(12), and 104.3(d), concerning loans from lending institutions of candidates and political committees. These regulations implement 2 U.S.C. 431(8)(B)(vii), a provision of the Federal Election Campaign Act of 1971, as amended ("the Act" or "FECA"), 2 U.S.C. 431 et seq. In particular, they provide guidance on when a loan is "made on a basis which assures repayment," as required at 2 U.S.C. 431(8)(B)(vii)(II). They also clarify that lines of credit are subject to the same requirements as other bank loans; emphasize restructuring, rather than settlement, of bank loans; and specify new information that is to be reported to the Commission concerning bank loans. 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).

FOR FURTHER INFORMATION CONTACT: Ms. Susan E. Propper, Assistant General Counsel, 999 E Street, NW., Washington, DC 20463, (202) 219-3690 or (800) 424-9530.

SUPPLEMENTARY INFORMATION: The Commission is publishing today the final text of revisions to its regulations at 11 CFR parts 100 and 104. These regulations concern loans from lending institutions to candidates and political committees.

Under 2 U.S.C. 431(8)(B)(vii), a bank loan "made in accordance with applicable law and in the ordinary course of business" is not considered a contribution under the Federal Election Campaign Act ("FECA" or "the Act"), if certain conditions are met. One of these conditions is that the loan be "made on a basis which assures repayment." 2 U.S.C. 431(8)(B)(vii)(II).

On August 5, 1986, the Commission published a notice of proposed rulemaking on Public Financing, in connection with the 1988 presidential election cycle. 51 FR 28154. In that notice, the Commission raised its concerns about loans from lending institutions and sought comment on several alternative applications of this statutory phrase in the context of publicly funded campaigns, as well as loans made to congressional candidates and other political committees. The Commission received fifteen comments that responded to the loan aspect of this notice. In addition, the Commission's public financing regulations hearing of December 3, 1986, addressed some aspects of the bank loan question.

On January 22, 1987, the Commission published an announcement of a hearing and the extension of the comment period, in a notice that focused solely on the bank loan issue. 52 FR 2416. This notice analyzed the comments received to date; announced a hearing date; and sought further comment on the alternatives presented in the August 1986 notice, as well as on other alternatives. Although the Commission received two additional comments in response to the second notice, it did not receive any requests to testify and therefore canceled the public hearing.

Both the 1986 and the 1987 notices contained narrative proposals dealing with various aspects of the bank loan question, but did not contain specific regulatory language. On July 27, 1989, the Commission published a notice of proposed rulemaking which contained the text of a proposed regulation, and also included draft forms designed to obtain more information about the circumstances under which loans were made. 54 FR 31286. This notice's primary focus was on clarifying when loans are "made on a basis which assures repayment," but related topics were also presented. The Commission received eleven comments in response to this notice.

Throughout the course of this rulemaking, the Commission has had numerous, ongoing contacts with the banking regulatory agencies, in addition to receiving comments from banking trade associations and lending institutions themselves, regarding the drafting of these regulations. Each of these sources provided valuable information which serves as the basis for the revised rules published today.

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 December 20, 1991.

Explanation and Justification

The notice of proposed rulemaking requested comments on a number of suggestions on how to best implement the statutory requirement that bank loans be "made on a basis which assures repayment." In addition to responses on the specific questions raised by the notice, commenters raised the following general concerns.

Several noted that there is no definitive standard in the banking industry for the term, "assurance of repayment," and argued that the Commission should not attempt to draft one. However, the Act expressly requires that loans, to avoid being construed as campaign contributions, be "made on a basis which assures repayment." Even though there is no clear definition for the phrase in the banking industry, the Commission is responsible for implementing the statutory requirement that includes this phrase. The Commission's regulatory approach should not be limited by banking rules that were developed for other purposes.

Some comments also argued that "assurance of repayment" depends on each lending institution's case-by-case analysis of the circumstances of each loan, and suggested that all loans made "in the ordinary course of business" be found to comply with the "assurance of repayment" requirement. However, the statutory requirement that these loans be made "in the ordinary course of business" was enacted in 1971, while the phrase "made on a basis which assures repayment" was added in 1979. Under ordinary rules of statutory construction, it is presumed that Congress, by amending its original enactment, intended to make a substantive change in the law. Thus, as of the effective date of the 1979 amendment, the fact that a loan is made "in the ordinary course of business" is no longer in and of itself sufficient to guarantee that the loan does not constitute an illegal campaign contribution. In addition, it must meet the further qualifications, including the "assurance of repayment" requirement, now included at 2 U.S.C. 431(8)(B)(vii).

Commenters responding to the earlier notices noted that, while lending institutions cannot always predict when debtors' circumstances may change so as to make repayment of loan problematic, their ultimate focus is on whether the loan is repaid. In contrast, the concern of the FECA focuses not only on repayment but also on the initial making of the loan—whether, at the time it was made, it was made on a basis which assured repayment.

Several banking associations expressed the view that only a lending institution, not the Commission, is qualified to determine what constitutes assurance of repayment. Some regulatory agencies similarly stated that lending institutions should not be made answerable to the Commission, but only to those entities specifically charged with overseeing banking activities. One questioned the appropriateness of the Commission's imposing affirmative compliance burdens on persons or entities other than candidates or political committees.

The Act, however, contemplates that lending institutions, when making loans to candidates and political committees, be subject to Commission oversight of the bank loan provisions, since failure to make a loan under conditions which assure repayment could result in a prohibited contribution. In fact, the Act imposes numerous obligations on persons and entities other than candidates and political committees in a number of other contexts. For these reasons, the Commission feels that the Act imposes on banks some portion of the requirement that bank loans be made on a basis which assures repayment.

The revised rules specify two sources of repayment that the Commission will consider to have met the "assurance of repayment" standard: Traditional collateral, with a perfected security interest in that collateral; and other sources of repayment, including anticipated future income (e.g., the anticipated receipt of public financing funds, fundraising, and interest income). Loans which do not meet these criteria will be considered on a case-by-case basis, based on the totality of their circumstances.

The notice solicited comments on how the rules should address lines of credit, given the concern that political candidates could draw on a line of credit after dissipating the collateral that originally supported it. The comments were unanimous in stating that lines of credit could be regulated in the same way as bank loans. The revised rules follow this approach: Lines of credit are considered bank loans, to be treated in the same manner as other loans from lending institutions.

The revised rules also follow Commission precedent by focusing on restructuring, rather than settlement, of bank loans. Each restructuring of a loan is considered a new loan for FECA purposes.

A number of other issues that were raised for comment in the notice of proposed rulemaking did not result in new regulations.

The notice sought comments on whether the Commission should analogize political loans to "insider loans," i.e., loans that a bank makes to its officers and board of directors. The intent of these insider loan provisions is to prevent favoritism in loans to "insiders," while the intent of an analogous Commission provision would be to guard against preferential treatment for political loans, and to subject political loans to a high level of scrutiny.

However, the fact that a lending institution complies with standard lending policies and procedures, including use of "insider" procedures, does not necessarily mean that the loan is "made on a basis which assures repayment." Moreover, this approach would not give lending institutions, candidates and political committees any guidelines on what is "assurance of repayment." The rules thus do not take this approach.

The notice also requested comments on whether the rules should include any limit on the amount of loans that a candidate or political committee could have outstanding at any given time. Four commenters opposed setting any such limits, since borrowing capacity may vary substantially between candidates. Several argued that the Commission does not have the statutory authority to impose such limits.

No commenters responded in favor of this proposal. The rules do not include any limitation on the amount of loans a candidate or committee can have outstanding.

The notice invited comments on whether the regulations should require the borrower to set aside a certain percentage of pledged future funds when the borrower receives the funds. This requirement is unnecessary because of the final rules' requirement that a separate depository account be established, under certain circumstances. Also, establishing a mandatory set aside percentage would unnecessarily infringe on the ability of the bank and the borrower to structure each loan to reflect the particular circumstances of that loan.

The notice asked whether the Commission should require reporting of bank loans that are made close to a federal election. The FECA currently requires reporting of contributions of $1000 or more if they occur less than 20 days but more than 48 hours before an election. 2 U.S.C. 434(a)(6)(A); 11 CFR 104.5(f).

The Act clearly states at 2 U.S.C. 434(a)(6)(A) that any contribution received close to an election shall be reported within 48 hours. This requirement encompasses all loans except bank loans, since a bank loan which meets the statutory requirements is not a contribution. However, the proceeds of a bank loan obtained by a candidate, as well as any guarantees or endorsements of a bank loan, are subject to the 48 hour reporting requirement. The Commission sees no reason to add any additional requirements at this time.

Finally, the notice asked whether the rules should require loans made to political committees and candidates to include a due date for the loan that is at or near the election for which the loan is obtained. This approach would reflect a common banking practice, in which the timing of repayment is tied to the event for which the funds are used. For example, agricultural loans frequently fall due shortly after harvest.

All comments which addressed this issue responded negatively to this suggestion. These commenters said that due dates should be flexible, open to negotiation between lenders and borrowers. Also, while it may be difficult for a candidate to raise money after an unsuccessful campaign, it is also true that the kinds of collateral used by candidates and political committees are not necessarily received at the time of the election. The rules thus do not require loans to be subject to a due date at or near an election.

Part 100—Scope and Definitions

Section 100.7 Contribution

The rule specifies at paragraph (b)(11)(i) two general sources of repayment that the Commission will, by definition, find to have met the "assurance of repayment" standard: Traditional collateral, or a pledge of future receipts deposited in a separate account. A combination of these two methods is also acceptable.

The proposed rules would have required either traditional collateral or a pledge of future receipts deposited in a separate account to demonstrate that a loan is "made on a basis which assures repayment." This was presented as an either/or situation, so that a lending institution that wanted to make a loan backed in part by traditional collateral and in part by a pledge of future receipts might have felt obliged to make two separate loans to accomplish this purpose. Paragraph (b)(11)(i) has therefore been revised to specifically state that a loan may be obtained under either authorized method, or by using any combination of the two methods.

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The Commission believes that this approach will give candidates and committees the greatest possible flexibility in obtaining bank loans, while still assuring that they are made on a basis which assures repayment.

Paragraph (b)(11)(i)(A) sets forth the requirements for loans obtained on the basis of traditional types of collateral and possible secondary sources of repayment. It includes at paragraph (b)(11)(i)(A)(*1*) a non-exhaustive list of collateral sources. This list is similar to, although not as specific as, the list of acceptable collateral in the Federal Reserve Act's section on an insured institution's dealings with an affiliate, found at 12 U.S.C. 371c(c)(1). In the Commission's view, the description of traditional collateral set forth in this paragraph is sufficiently precise to provide adequate guidelines without running the risk of inadvertently excluding some acceptable sources due to over-specificity. However, the Commission notes that the cited section of the Federal Reserve Act may also be consulted for guidance regarding specific collateral that would satisfy this rule.

Paragraph (b)(11)(i)(A)(*1*) also includes a requirement that, if a financial institution relies on traditional collateral, the institution must perfect a security interest in that collateral. The banking regulatory agencies supported this requirement, because it protects lenders.

Moreover, the rule states that, if a security interest is not senior enough to cover the amount of the loan and any senior liens in existence on the date of the loan, the candidate or political committee must pledge additional collateral for this purpose. It also requires that sufficient collateral be maintained at all times to cover the full amount of the loan.

The Federal Deposit Insurance Corporation noted that secured loans are normally made on the fair market value of the security plus a margin of safety, so that there is some allowance for liquidation costs and interest. That agency said that it would regard a secured loan as not made on a basis which assures repayment if there was no safety allowance for costs associated with liquidation. The Comptroller of the Currency noted that the Commission could require lending institutions to have a security interest sufficiently senior to cover the loan amount, and require that the sufficiency be maintained when there is a decrease in value of the collateral securing the loan.

The Commission has not added specific language regarding a margin of safety, but believes this can be a relevant consideration in certain cases. For example, if a bank normally requires sufficient collateral to cover a margin of safety, but fails to do so in making a loan to a candidate or political committee, this may be seen as an indication that the loan was not made in the ordinary course of business.

Two commenters suggested that the Commission amend the proposed language to include a "good faith" standard which would cover those times when a security interest is not perfected because of a filing error. However, there is no codification of a "good faith" standard in the Federal Reserve Act or its regulations with regard to perfecting a security interest. Rather, if a security interest is not perfected because of a filing error, the Board takes that factor into consideration should any action subsequently be required. The Commission intends to take a similar approach in dealing with situations where a security interest is not perfected due to a filing error.

Paragraph (b)(11)(i)(B) permits loans to be made on the basis of a committee's anticipated future receipts, including but not limited to public financing payments, contributions, or interest income, if certain requirements are met. These requirements include that (1) the loan be evidenced by a written agreement; (2) the loan amount not exceed the amount of pledged funds; (3) the loan be made in an amount no higher than a reasonable expectation of the receipt of future funds, based on documentation provided by the candidate or political committee to the lending institution; (4) the borrower establish a separate account; (5) the borrower deposit the pledged funds in this separate account, to be used to retire the debt in accordance with the loan agreement; and (6) if the borrower pledges public financing payments, the borrower authorize the Secretary of the Treasury to directly deposit such payments into the separate account.

Various commenters stated throughout this rulemaking that the Commission's regulatory scheme should be flexible enough to better accommodate borrowers, while not imposing unnecessary constraints on the regular business of lending institutions. Paragraph (b)(11)(i)(B) allows this flexibility by providing that loans not based on traditional collateral may still be considered "made on a basis which assures repayment." The requirements set forth in this paragraph act as safeguards, since these loans are generally regarded by the banking agencies as "unsecured."

The FDIC indicated that, to the extent a loan is not backed by traditional security, banks rely primarily on the borrower's income, and that of any cosigners or guarantors to the loan, as security for the loan. Similarly, the Office of Thrift Supervision stated that, while it had no problem with the idea of using future receipts, it felt that the loan determinations should be based on the sound credit background of the borrower and adequate safeguards as evaluated by the lending institution. These approaches, however, could result in impermissible contributions and expenditures. For example, if the lender considers the income of a presidential candidate who receives public financing payments as the only source of repayment for a $100,000 loan, the candidate will have exceeded the $50,000 limitation on expenditures from personal funds. 26 U.S.C. 9004(d), 9035. Similarly, if the lender considers the guarantee of one other person for a $100,000 loan, that person will have made an excessive contribution. 2 U.S.C. 441a(a)(1)(A).

The recommendation to allow loans that are based on future receipts derives from prior Commission actions. In enforcement matters and advisory opinions involving future receipts, the Commission has looked to whether adequate safeguards exist, such as a separate depository account or an assignment of funds. If these safeguards exist, the Commission has determined that the loan was made on a basis which assures repayment. See, *e.g.*, Matter Under Review ("MUR") 1195 and Advisory Opinion 1980–108, for examples of safeguards the Commission has found sufficient to assure repayment of bank loans under particular circumstances.

Paragraph (b)(11)(i)(B) is consistent with these actions. Even though loans based on future receipts may be technically "unsecured," the Commission believes that the safeguards included in the rule are sufficient to ensure that such loans are made on a basis which assures repayment, in compliance with the statutory requirement.

Paragraph (b)(11)(i)(B)(*2*), as set forth in the notice, stated that loans were to be "based on a reasonable expectation of the receipt of pledged funds." This paragraph has been revised to clarify that it is the responsibility of the candidate or political committee to furnish the lending institution with documentation, such as cash flow charts or other financial plans, that reasonably establish that such future funds will be available.

The Commission notes that this factor alone is not enough to satisfy the

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"assurance of repayment" requirement. In addition, it does not absolve a lending institution from possible responsibility should a loan not otherwise be made on a basis which assures repayment. However, it provides another safeguard towards assuring that loans are made on that basis.

Paragraph (b)(11)(i)(B)(*3*) requires the candidate or political committee to set up a separate depository account for the receipt of any pledged future funds to be used to repay the debt. The Notice asked whether the regulations should allow a depository account that is not at the lending institution to be considered a valid source of repayment for loans obtained on the basis of future receipts. Commenters agreed that an assignment of contributions or other funds deposited with another financial institution would create as valid a security interest as a separate account at the lending institution. Also, courts have determined that, under the Uniform Commercial Code, assignments can be a valid security agreement. See *Mid-Eastern Electronics, Inc.* v. *First National Bank of Southern Maryland,* 455 F.2d 141, 146 (4th Cir. 1970) (assignment of proceeds which is signed by the maker and contains a description of collateral constitutes a security agreement); *Security Finance Group, Inc.* v. *United States,* 706 F.Supp. 83 (D.D.C. 1989) (debtor's assignment of proceeds of creditor gave creditor a security interest in the proceeds).

There are other reasons for allowing the assignment of funds at different depository institutions. Candidates may obtain loans from several institutions, and it may not be feasible to establish a separate account at each one. Also, the Department of the Treasury will only deposit matching fund payments into a single campaign depository. See, 11 CFR 9033.1(b)(7).

The final rule has thus been broadened to authorize the use of an account which is not at the lending institution where the loan is obtained as a depository for future receipts, if the candidate or political committee executes an assignment from that account to the lending institution, and notifies the depository institution of this assignment. A depository institution may seek to attach deposited funds if depositors do not meet their commitments to that institution; or it may fail to take action to freeze an account, if it does not know of the assignment. This notification requirement ensures that the depository institution is aware that some portion of the funds in a particular account has been pledged for other purposes.

The Commission notes that a separate depository account must be set up pursuant to paragraph (b)(11)(i)(B)(*3*) only if a committee has pledged future receipts as a source of repayment for all, or some portion, of a particular loan. If such an account is established, it can be structured in a variety of ways, as long as it complies with the requirement at paragraph (b)(11)(i)(B)(*4*) that the account be used for the purpose of retiring the debt according to the repayment requirements of the loan agreement. The borrower and the lending institution are thus free to structure the account, and the flow of funds in that account, in any manner consistent with the loan agreement.

For example, if the lender and borrower agree that $50,000 of a $100,000 loan is to be repaid using future receipts, at a rate of $10,000 a month for 5 months, the borrower must demonstrate that $10,000 will be available in the depository account at the time each such payment falls due. Additional amounts deposited in the account for any reason (e.g., public financing funds) may be withdrawn from the account, and used for other purposes. If all or part of the loan is repaid from other sources, any amount(s) so paid can also be withdrawn from the account, since they are no longer necessary "to assure repayment" of (that portion of) the loan.

Paragraphs (b)(11)(ii) of the proposed rules contained a presumption that a loan not obtained under either of the methods set forth in paragraph (b)(11)(i), or some combination of these methods, would not be considered made on a basis which assures repayment, unless the candidate or political committee could show otherwise. However, the Commission has now decided to consider the totality of circumstances on a case-by-case basis in determining whether loans that do not meet the criteria set forth at paragraph (b)(11)(i) were made on a basis which assures repayment.

Paragraphs (b)(11)(i)(A) and (B) provide avenues that, if followed, would clearly meet the "assurance of repayment" standard. Paragraph (b)(11)(ii) leaves open the possibility that other approaches, such as loans guaranteed in whole or in part by the borrower's signature, which are not specified in the rules, will also be found to have met this standard in specific cases.

Restructuring of Bank Loans

In issuing its final debt settlement rules last year, the Commission deferred until this rulemaking the question of how bank loans should be treated in the debt settlement process. The Explanation and Justification to those rules stated, "The Commission does not generally consider bank loans in the debt settlement process and does not intend to change its approach(,)" but noted that "(f)urther guidance on this may be provided in a separate rulemaking regarding the bank loan rules." 55 FR 26377, 26384 (June 27, 1990).

In response to the bank loan Notice, representatives from the Federal Reserve Board and the Office of Thrift Supervision stated that banks place primary emphasis on restructuring the terms of a loan if the borrower cannot repay it. Only if this proves impossible will a bank attempt to settle a particular loan or, as a last resort, write it off.

The final rules omit any reference to the settlement of loans from lending institutions. Rather, they provide at new § 104.3(d)(3), discussed below, that each time a loan is restructured to change its terms, the candidate or political committee must report it as a new loan. The terms of the restructured loan must again meet the "assurance of repayment" standard, as did the original loan.

This approach is consistent with Commission statements made over the course of the debt settlement rulemaking. While it is in the ordinary course of business for lending institutions to settle or write off certain loans, the Commission prefers not to encourage such actions, because this could result in prohibited contributions from lending institutions.

However, the Commission recognizes that, in certain cases, such as where a candidate declares bankruptcy or dies before anticipated funding can be raised, the settlement of a campaign loan may be the only realistic alternative. These extraordinary situations will be addressed by the Commission on a case-by-case basis.

Section 100.8 Expenditure

Revised paragraph 100.8(b)(12) is identical to revised § 100.7(b)(11), discussed above.

Section 104.3 Contents of Reports

The Notice requested comments on a proposal to require more detailed reporting of bank loans, and included draft supplements to Schedules C and C–P for candidates and political committees to report the required information. Revised section 104.3(d) implements these requirements through new reporting regulations.

A Schedule C–1 or C–P–1 must be filed with the next due report, for each bank loan obtained during the reporting period. Except as provided in paragraph

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(d)(3), a Schedule C-1 or C-P-1 need only be filed once for each loan, at the time the loan is first reported.

New paragraph (d)(1) specifies the information required by the supplemental forms, while paragraph (d)(2) requires the candidate or political committee to submit a copy of the loan agreement to the Commission at the time the loan is first reported. Paragraph (d)(3) requires committees to file with their next due report a Schedule C-1 or C-P-1, if any draw was made on a line of credit or any loan was restructured to change the terms of repayment during the reporting period.

In drafting these requirements, the Commission sought to strike a balance, by requiring the minimum amount of information necessary to provide adequate disclosure for monitoring purposes, while avoiding requirements that would have unduly burdened borrowers and lenders. It also sought to respect privacy concerns of candidates and committees, by requiring that only a copy of the loan agreement be submitted to the Commission with the committee's reports. The Commission notes, however, that if questions later arise regarding the loan, in the course of a compliance or other action, it may request additional documentation.

The rules require information from the borrower and certification from the lender. Under paragraph (d)(1), the borrower must provide information about the loan at the time it is obtained, including the types and value of collateral pledged, whether a security interest was perfected in any traditional collateral, and when and where depository accounts for pledged funds were established. If no traditional collateral or other source of repayment was pledged, the borrower must show that the loan was made on another basis which assures repayment.

Paragraph (d)(1)(v) requires the lender to certify that, to the best of its knowledge, the information provided by the borrower is accurate; the interest rate is usual and customary; the loan was made in accordance with the financial institution's usual policies and practices; and the lending institution is aware of the requirement that the loan must be made on a basis which assures repayment, and has complied with the revised Commission regulations at §§ 100.7(b)(11) and 100.8(b)(12).

While most commenters supported the proposed requirement that the borrower provide information about the loan, some raised the concern that lenders will be held responsible if they sign the supplemental forms. These commenters urged that the rules require the borrower, but not the lender, to sign the forms.

However, the requirement that the lender certify that the information provided by the borrower is correct is justified on several grounds. Only the bank has access to some of the information that either served as the basis for making the loan, or relates to the satisfaction of certain requirements in the rules—such as whether the interest rate is usual and customary, or whether a security interest has been perfected. Also, lending institutions clearly have obligations and responsibilities under the FECA. Should a violation occur, they may be held liable regardless of which party is required to sign the supplemental forms. Finally, requiring a bank to certify that the borrower's information is accurate ensures that the bank is aware of the requirements of §§ 100.7(b)(11) and 100.8(b)(12).

A banking association suggested that instead of this requirement, the Commission require the loan note to be attached to the disclosure form to assist the Commission in determining the basis on which the loan was made. The new rules already require political committees that obtain loans from lending institutions to submit the loan agreement, which contains the terms and conditions of the loan. However, knowing the terms of the loan is not sufficient for Commission purposes. It is also necessary to know, *inter alia*, if the terms are consistent with the bank's usual practices.

The FDIC suggested that, instead of requiring the lender to sign the conclusory statements as the Commission proposed, the rules should require the lender to state that "the loan was made on terms and conditions including interest no more favorable at the time than those imposed for similar extensions of credit to other borrowers of comparable credit worthiness." This is basically a definition of the ordinary course of business test. However, as already discussed, the "assurance of repayment" requirement may at times exceed the "ordinary course of business" standard. Thus, a statement that a loan meets the latter standard does not necessarily mean that it meets the former.

Paragraph (d)(2) requires the borrower to supply a copy of the loan agreement to the Commission at the time the loan is initially reported. The Commission expects the loan agreement to include such information as the interest rate at which the loan was made, the total of each payment (principal and interest), and any applicable later charges.

The draft Schedules C-1 and C-P-1 contained in the Notice would have required filers to include not only a signed copy of the loan agreement, but also any related security agreement(s), promissory note(s), and other related documents. The Commission has not determined that no other documentation is required when the report is filed. It again notes, however, that further documentation may be needed if questions arise with regard to a particular loan, or the original agreement does not contain all the required information.

Several commenters raised concerns about potential confidentiality problems of both the lending institution and the borrower if information in addition to that contained in the loan agreement was required. They argued that banks should be required to submit only those documents used in the ordinary course of making loans, and that to require anything further could conflict with certain state laws, in particular state privacy laws.

The FEC has authority to require the reporting of loan documentation. Under the Right to Financial Privacy Act, 12 U.S.C. 3401-3422, information involving financial transactions that is required by federal statute or regulation is exempt from the prohibitions and limitations of that Act. 12 U.S.C. 3413(d). This exemption encompasses information required to be reported under the FECA. The Right to Financial Privacy Act further exempts "the disclosure of financial records in accordance with procedures authorized by title 26." 12 U.S.C. 3413(c). Also, it has been held to supersede conflicting state laws. See, *e.g.*: *In re Letter of Request for Judicial Assistance from the Tribunal Civil de Port-au-Prince, Republic of Haiti*, 669 F Supp. 403 (S.D.Fla. 1987); *In re Grand Jury Subpoena (Connecticut Savings Bank)*, 481 F.Supp. 833 (D.Conn. 1979).

However, the Commission recognizes that practical problems may develop if it requires candidates and political committees to submit the documentation provided to lending institutions to the Commission at the time the loan is first reported. This documentation may include fundraising plans, cash flow charts, and other information which the borrower for tactical reasons my not want on the public record during a campaign. The rules thus require the candidate or political committee to submit documentation other than the loan agreement only to the lender. Should a loan later be questioned, the documentation could then be provided to the Commission.

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As discussed above with regard to § 100.7(b)(11), the Commission has traditionally treated lines of credit the same as any other loan from a lending institution. However, there are currently no explicit rules on how political committees should report lines of credit.

The Commission's experience has been that some committees—typically presidential candidate committees that obtain large lines of credit—voluntarily report such information as when draws can be made and the maximum amount of each draw. However, they usually report lines of credit when the first draw is made, not when the line is first established.

Political committees are required to report the total amount of all "receipts" including loans, under 2 U.S.C. 434(b)(2) and 11 CFR 104.3(a)(2). Paragraphs (d)(1) and (d)(3) require candidates and political committees to include a Schedule C-1 or C-P-1 with their next report to the Commission whenever a line of credit is established, as well as each time a draw is made. In addition, the regulations specifically state at §§ 100.7(b)(11)(i), 100.8(b)(12)(i), and 104.3(d)(1) that the bank loan rules apply to draws on lines of credit. Thus lines of credit are treated the same as other bank loans for purposes of these rules, except for the additional reporting requirement each time a draw is made.

The Commission notes that, if a loan is reported on schedule C, ordinarily there will be corresponding entries in Schedule A, both in the summary and in the itemized reports. This will not be so if the establishment of a line of credit is reported—since there is in fact no loan until such time as a draw is made, there is nothing to report on Schedule A until that time.

Nevertheless, the Commission believes it is important that lines of credit be reported at the time they are established. This approach minimizes the possibility that the same collateral was used for more than one loan or line of credit. It also provides a more accurate picture of a candidate's financial status for the public record.

As discussed above, the revised rules omit any reference to the settlement of loans from lending institutions. Rather, they provide at paragraph (d)(3) that each time a loan is restructured to change its terms, the candidate or political committee must report it as a new loan.

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Corrections

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This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

FEDERAL ELECTION COMMISSION

11 CFR Parts 100 and 104

[Notice 1991-24]

Loans From Lending Institutions to Candidates and Political Committees

Correction

In rule document 91-30766 beginning on page 67118 in the issue of Friday, December 27, 1991, make the following corrections:

1. On page 67118, in the first column, in the SUMMARY, in the fourth line, "of" should read "to".
2. On the same page, in the third column, in the last paragraph, in the fifth line, "loan" should read "loans".
3. On page 67122, in the third column, in the first paragraph, in the seventh line, "not" should read "now".
4. On the same page, in the same column, in the last paragraph, in the tenth line, "my" should read "may".
5. On page 67123, in the first column, in the fourth paragraph, in the fifth line, "reports" should read "receipts".

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