

FEDERAL ELECTION COMMISSION

11 CFR Part 201

[Notice 1992-23]

Ex Parte Communications

AGENCY: Federal Election Commission.

ACTION: Interim rules, with request for comments.

SUMMARY: The Federal Election Commission is establishing procedures for handling communications made to Commissioner offices in connection with Commission audits, litigation, rulemaking proceedings and advisory opinions, by persons not employed by the Commission. These communications are prohibited, in the case of audits and litigation; and are to be made part of the public record, in the case of rulemaking proceedings and advisory opinions.

EFFECTIVE DATE: These interim rules are effective on December 9, 1992. The Commission will accept comments on these rules received on or before January 8, 1993, and may re-evaluate them in light of these comments.

ADDRESSES: Comments must be in writing and addressed to: Ms. Susan E. Propper, Assistant General Counsel, 999 E Street, NW., Washington, DC 20463.

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

SUPPLEMENTARY INFORMATION: The Federal Election Commission is establishing procedures for handling ex parte communications made in connection with Commission audits,

litigation, rulemaking proceedings and the advisory opinion process. These new rules complement those found at 11 CFR 7.15 and 111.22, which prohibit these communications in connection with Commission enforcement actions.

The Commission anticipates that there will be future revisions to the Standard of Conduct rules that could change the 11 CFR 7.15 citation. Any such change will be reflected in the final publication of these rules.

The interim rules prohibit ex parte communications made in connection with ongoing Commission audits and litigation. These communications are permitted in the case of rulemaking proceedings and advisory opinions, but are to be made part of the public record.

The new rules apply to Commissioners, Special Deputies of ex officio Commissioners, and all individuals serving under their personal supervision. The Commission also plans to consider recommendations for internal guidelines in this area for other Commission employees.

Audits and Litigation

The ban on ex parte communications in connection with Commission audits and litigation is necessary to avoid the possibility of prejudice, real or apparent, to the public interest in these activities. The new and former rules interrelate so that, if an audit or enforcement matter leads to litigation, the ban on ex parte communications extends from the start of the audit or enforcement action through the conclusion of any related litigation. The ban applies to both written and oral communications.

The Commission is required to audit the records of any presidential campaign that receives payments from the Presidential Election Campaign Fund. 26 U.S.C. 9007(a), 9009(b), 9038(a), 9039(b). If a party receives funding for its presidential nominating convention, the Commission is required to audit the records of the party's convention committee. The Commission is also required to audit the records of all convention host committees. 26 U.S.C. 9008 (g) and (h), 11 CFR 9008.9.

In addition, the Commission is authorized at 2 U.S.C. 438(b), under its general administrative authority, to conduct audits for cause of any political committee that is required to file campaign finance reports under the Federal Election Campaign Act's general reporting requirement, 2 U.S.C. 434.

The prohibition on ex parte contacts in connection with a Commission audit covers different time periods, depending on which type of audit is involved, to

reflect the different procedures followed in each instance.

In the case of an audit of a presidential campaign committee, a convention committee or host committee, the prohibition on ex parte communications begins when the Commission sends a letter to the committee asking that it make a pre-inventory check of its records prior to the commencement of audit fieldwork by the Commission. Commissioners' offices will be provided with contemporaneous copies of these letters.

The prohibition on audits of all publicly funded committees extends until the end of the audit process. This occurs when the Commission issues a final audit report ("FAR"), if the report does not contain a repayment determination. If the FAR contains a repayment determination, the process ends when the United States Treasury receives the final repayment check from the committee, or when the Commission authorizes suit to pursue the repayment.

In addition, the Commission invites comments on whether broader ex parte rules should be adopted that would apply from the time a candidate or committee seeks eligibility to receive matching federal funds. The Commission is seeking comments on three possible approaches: (1) A ban on ex parte communications, but only while a candidate or committee's eligibility was being determined, or during other Commission determinations pursuant to 11 CFR 9033.10; (2) a ban throughout the public funding process, i.e., from the date the candidate or committee seeks eligibility through the end of the audit process; or (3) permitting ex parte communications from the time the candidate or committee seeks eligibility through the end of the audit process, but requiring public disclosure of such contacts: (a) While eligibility was being determined, or during other Commission determinations pursuant to 11 CFR 9033.10, or (b) throughout the public funding process. The Commission also welcomes comments on any other way to deal with this situation.

When an audit is conducted pursuant to 2 U.S.C. 438(b), the prohibition takes effect when the Commission's staff circulates a document for Commission approval containing a proposed referral to undertake an audit, and extends until the Commission publicly issues the final audit report. If the matter is referred to the Office of General Counsel and there is reason to believe that a violation has occurred, the prohibition on ex parte communications made in connection with an enforcement matter,

found at 11 CFR 111.22, becomes applicable.

The prohibition involving litigation takes effect with the Commission's authorization to file suit, in the case of offensive litigation; or at the time a suit is filed against the Commission, in the case of defensive litigation. It extends through the conclusion of the litigation, that is, the date on which a judgment is entered which cannot be appealed, or on which the deadline for appealing a judgment expires.

The rules state that a Commissioner or member of a Commissioner's staff who receives a prohibited communication shall attempt to prevent the communication. If the Commissioner or staff member is unsuccessful in preventing the communication, he or she shall advise the person making the communication that it will not be considered. In addition, if unable to prevent the communication, he or she shall prepare a statement setting forth the substance and circumstances of the communication no later than 48 hours after its receipt, or prior to the next Commission discussion of the matter, whichever is earlier, and deliver this statement to the Designated Agency Ethics Official for placement in the file of the litigation case or audit. A copy of written comments must be filed with the Designated Agency Ethics Official within the same timeframe. (This is similar to the Commission's existing rules regarding enforcement matters.)

Rulemaking Proceedings and Advisory Opinion Requests

The Commission encourages members of the public to state their views on rulemakings and advisory opinion requests in writing, during the public comment period on each such matter. Communications prior to the start of a rulemaking proceeding or the receipt of an advisory opinion request are also welcome. Communications made after the rulemaking or advisory opinion process has started are permitted, but these must be made public so that all persons will have equal notice of the information before the Commission.

A Commissioner or member of a Commissioner's staff who receives written comments on a rulemaking or advisory opinion once the rulemaking or advisory opinion process has started shall transmit the communication to the Commission Secretary no later than 48 hours after receipt, or prior to the next Commission discussion of the matter, whichever is earlier, to be made part of the public record. If a Commissioner or member of a Commissioner's staff has a discussion that would qualify as an ex parte communication regarding a

rulemaking proceeding or advisory opinion during the pertinent time period established by these rules, the Commissioner or staff member shall, no later than 48 hours after the conversation or prior to the next Commission discussion of the matter, whichever is earlier, summarize the conversation in writing and transmit this summary to the Commission Secretary, who shall make it part of the public record.

For advisory opinions, the pertinent period begins when a request for an advisory opinion is circulated to Commissioners' offices and extends through the date the opinion is issued. The restrictions also apply during any reconsideration of an advisory opinion, and any discussion of reconsideration.

For rulemaking proceedings, the period begins on the date a proposal for rulemaking is circulated to Commissioners' offices, or the date on which a rulemaking petition is received. It extends through the conclusion of the rulemaking. This can occur at different times, depending on the course of a particular rulemaking: E.g., when a rulemaking petition is denied; when the reconsideration process regarding a petition is concluded; when final rules are approved and transmitted to Congress; or when the Commission concludes its consideration of any action relating to proposed or actual congressional disapproval of a pending rule.

Exceptions

The rules contain an exception for communications limited to the procedural status of a pending matter, where the communication is not made for the purpose of influencing a decision, does not address the substance or merits of a matter before the Commission, and does not tend to have an effect on Commission consideration of the matter. Commissioners or their staff who receive status inquiries regarding audit or litigation matters shall direct the inquiries to the appropriate Commission staff.

Also, Commissioners and other covered personnel making public appearances may express their views either spontaneously or in response to inquiries from members of the audience at such appearances on a subject involved in a pending rulemaking or advisory opinion request, without triggering these requirements.