

## FEDERAL ELECTION COMMISSION

[Notice 1992-4]

## 11 CFR Part 106

## Allocation of Federal and Non-Federal Expenses

AGENCY: Federal Election Commission.

ACTION: Final rule; transmittal of regulations to Congress.

**SUMMARY:** The Federal Election Commission has revised its regulations at 11 CFR 106.5 and 106.6. These rules implement the contribution and expenditure limitations and prohibitions established by 2 U.S.C. 441a and 441b, provisions of the Federal Election Campaign Act of 1971, as amended ("the Act" or "FECA"), 2 U.S.C. 431 *et seq.*, by providing for allocation of expenses for activities that jointly benefit both federal and non-federal candidates and elections. Under the first revision, state and local party committees may add one additional non-federal point to the ballot composition ratio computed under 11 CFR 106.5(d). They may also include non-federal point(s) for local offices if partisan local candidates are expected on the ballot in any regularly scheduled election during the two-year congressional election cycle. Second, the former 40-day "window" for transfers from a non-federal to a federal account, to reimburse the federal account for the non-federal portion of joint expenditures, at 11 CFR 106.5(g)(2)(ii)(B), has been expanded to 70 days. Finally, covered entities may now, under 11 CFR 106.5(f), recalculate the federal/non-federal ratio for a particular fundraising program or event within 60 days after that program or event, and make corresponding transfers between their federal and non-federal accounts. These latter two changes apply to all party committees that make disbursements on behalf of both federal and non-federal candidates and elections. Parallel changes are included for nonconnected committees and separate segregated funds. 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, N.W., Washington,

DC 20463, (202) 219-3690 or (800) 424-9530.

**SUPPLEMENTARY INFORMATION:** The Commission is publishing today the final text of revised regulations at 11 CFR 106.5 and 106.6. These rules implement the contribution and expenditure limitations and prohibitions established by 2 U.S.C. 441a and 441b, provisions of the Federal Election Campaign Act of 1971, as amended ("the Act" or "FECA"), 2 U.S.C. 431 *et seq.*, by providing for allocation of expenses for activities that jointly benefit both federal and non-federal candidates and elections.

The final allocation rules were published on June 26, 1990 (55 FR 26058). They were the result of an extensive rulemaking process, the history of which is set forth in that document. The rules became effective, and the new forms implementing their reporting provisions took effect, on January 1, 1991 (55 FR 40377).

On March 26, 1991, the Commission received a Petition for Rulemaking from the Association of State Democratic Chairs ["ASDC"]. The petition requested reconsideration of three aspects of the allocation rules: (1) The ballot composition ratio, 11 CFR 106.5(d); (2) the payment, recordkeeping and reporting requirements, 11 CFR 104.10, 106.5(g); and (3) the requirement that state parties allocate their administrative expenses between federal and state elections before July of a federal election year.

The Commission published a Notice of Availability seeking comments on this ASDC petition on April 24, 1991. 56 FR 18780. It received 45 comments in response to this Notice.

The Commission believes that, with limited exceptions, it is premature to reopen this rulemaking before the end of the 1991-92 election cycle. These rules are the result of a lengthy and carefully considered rulemaking process. They serve the dual purposes of curbing the use of money raised outside of the FECA's requirements in federal elections, and of allowing the Commission and the public to monitor compliance with these requirements. See *Common Cause v. FEC*, 692 F.Supp. 1391 (D.D.C. 1987). Both the Commission and the regulated entities will be in a better position to evaluate what future adjustments might be needed to the allocation rules, after they have worked with these rules over the course of an entire election cycle.

However, after consideration of the petition and comments, the Commission decided to reopen the allocation rulemaking in the three areas discussed

below. A Notice of Proposed Rulemaking seeking comments on these proposals was published in the Federal Register on November 14, 1991. 56 FR 57864.

The Commission received 24 comments in response to the NPRM. Most were from state party committees, although national party committees, public interest groups, and private individuals also submitted comments. After reviewing all of the comments, the Commission has decided to adopt the first two proposals as set forth in the NPRM, but has modified the third to make it more workable.

The NPRM also solicited comments on allocation reporting requirements, with the understanding that no changes in these requirements would be made at this time. Some comments did address these requirements; and, as stated in the Notice, these comments will be considered at the end of the cycle, as part of a general review of the reporting provisions.

Section 438(d) of title 2, United States Code, requires that any rules 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 thirty legislative days before they are finally promulgated. These regulations were transmitted to Congress on March 9, 1992.

## Explanation and Justification

The new rules reflect the following revisions: First, state and local party committees, which are required to allocate their administrative expenses and generic voter drive costs using the "ballot composition method" set forth at 11 CFR 106.5(d), may add an additional non-federal point in computing this ratio. They may also include non-federal point(s) for local offices if partisan local candidates are expected on the ballot in any regularly scheduled election during the two-year congressional election cycle. Second, the 40-day "window" for transfers from a committee's non-federal to its federal account, to reimburse the federal account for the non-federal share of joint expenditures, has been expanded to 70 days. 11 CFR 106.5(g)(2)(ii)(B). Finally, committees are specifically allowed, under 11 CFR 106.5(f), to recalculate the federal/non-federal ratio for a particular fundraising program or event within 60 days after that fundraising program or event, and make corresponding transfers between their federal and non-federal accounts. The latter two changes apply to all party committees, including national party

committees. The Commission has made parallel amendments to 11 CFR 106.6, which parallels section 106.5 but applies to separate segregated funds ("SSF's") and nonconnected committees, to ensure continued consistency in these areas.

**Part 106—Allocations of Candidate and Committee Activities**

**Section 106.5 Allocation of Expenses Between Federal and Non-Federal Activities by Party Committees**

**Paragraph 106.5(d) State and Local Party Committees; Method for Allocating Administrative Expenses and Costs of Generic Voter Drive Activity**

This paragraph sets forth the ballot composition ratio by which party committees with separate federal and non-federal accounts must allocate their administrative and generic voter drive expenses. Paragraph (d)(1)(i) states that this method is "based on the ratio of federal offices expected on the ballot to total federal and non-federal offices expected on the ballot in the next general election to be held in the committee's state or geographic area." However, not all offices are included in this calculation. Rather, the Commission has specified various categories of offices which are assigned points to be used in computing the ratio.

The petition and most of the comments submitted in response to the Notice of Availability argued that the ratio underrepresented the percentage of funds spent on non-federal elections. After a comprehensive review, the Commission's NPRM proposed that state and local party committees be allowed to add one additional non-federal point in computing their ballot composition ratios, to compensate for underrepresentation of non-federal offices in the current formula. Because state situations differ widely, this point was not tied to a particular category of offices, such as partisan judicial elections or ballot questions. Rather, it was proposed as a generic point available to all state and local party committees.

Most of the comments to the NPRM supported the Commission's proposal to add an additional non-federal point to the ballot composition ratio. Some state party committees argued that still more non-federal points should be authorized, because of particular ballot situations in their states. One national committee supported adding the additional point, while another felt the original formula more accurately reflected federal/non-federal spending patterns.

The Commission notes that the ballot composition ratio was never anticipated to precisely reflect all state and local

party activity in all states in all election cycles. It believes that the formula's use of the "average ballot concept," which reflects variations in different states and localities in each election, as well as the special rules for states that hold statewide elections in non-federal election years, provide the necessary flexibility in this area. This approach represents a reasoned balance between the need for greater standardization, required by a federal district court in *Common Cause v. FEC*, *supra* (which struck down the "any reasonable [allocation] method" standard then in use), and the need to reflect differences between different states and types of political committees.

Also, while many comments to both the Notice of Availability and the NPRM requested that greater weight be given to the non-federal share of expenses, they offered no viable suggestions as to how this might be done. The original petition and some of the comments to both Notices expressed the view that all state and local offices, partisan judicial offices, and ballot questions should be included in the ballot composition ratio. However, this approach could lead to an inappropriately low federal percentage, and thereby permit impermissible money to enter federal campaigns, especially in areas where the ballot contains large numbers of local offices or numerous ballot questions, and only two or three federal offices.

Two public interest groups argued that no transfers whatsoever should be allowed from the non-federal to the federal account—that is, that all joint expenditures should be paid entirely with funds meeting FECA requirements. However, the court in *Common Cause v. FEC* found that the Commission had not acted arbitrarily and capriciously in originally rejecting this approach, since some comments submitted in response to the 1984 petition "adamantly stated that there were no abuses of the type alleged" by the plaintiff (i.e., impermissible use of non-FECA money in federal campaigns). 692 F.Supp. at 1396.

While the court noted it was possible for the Commission to conclude that no method of allocation would effectuate the Congressional goal that all monies spent by state political committees on federal campaigns meet the FECA standards, *id.*, in which case it would be necessary that all joint expenditures be paid with funds raised consistent with FECA standards, this option proved unnecessary. Rather, the Commission was able to develop allocation rules which both prevent non-FECA money from entering federal campaigns, and allow for satisfactory monitoring of this

process, as required by the court. Comments submitted in connection with the ASDC petition support the Commission's continued use of its present approach.

In addition to the generic non-federal point, the NPRM proposed that paragraph (d)(1)(ii) be amended to allow state and local party committees to include non-federal point(s) for local offices in their ballot composition ratios, if partisan local candidates were expected on the ballot in any regularly scheduled election during the two-year congressional election cycle. Under the former rules, these committees computed their ratios based on the "next general election." The rules did not contemplate the situation in states where statewide officers are elected in even-numbered years, but local officers are elected in odd-numbered years.

Advisory Opinion 1991-25 authorized state party committees in such states to include a non-federal point for local offices in computing their ballot composition ratios. The NPRM proposed amending paragraph (d)(1)(ii), consistent with that ruling. It also proposed clarifying that local party committees may include up to two non-federal points for local offices, under these same circumstances.

Most comments that addressed this issue supported the proposed change. Two public interest groups opposed it, one characterizing this action as "allowing non-federal points for local offices to be taken in the year after the local election has occurred." However, with the exception of states that hold statewide elections in odd-numbered years, the ballot composition formula was intended to reflect the offices in each two-year congressional election cycle. The Explanation and Justification to the final rules, which added the non-federal point for partisan local offices, stated the Commission's intent to create a "non-federal slot [that would be] available to virtually every state party committee." 55 FR 26058, 26064. However, those rules did not contemplate the situation in states where statewide offices are elected in even-numbered years, but local offices are elected only in odd-numbered years. The Commission believes that party committees in those states should be able to consider local elections in their ballot composition ratios, just as do party committees in states that hold elections for both statewide and local offices in even-numbered years. Paragraph (d)(1)(ii) has thus been amended to clarify that all state and local party committees may include non-federal points for partisan local offices

in computing their ballot composition ratios, if elections for such offices are held at any regularly scheduled election during the two-year congressional election cycle.

**Paragraph 106.5(f) All Party Committees; Method for Allocating Direct Costs of Fundraising**

This paragraph sets forth the rules by which all party committees are to allocate the direct costs of each fundraising program or event, where both federal and non-federal funds are collected by one committee through such program or event. It applies to national, state and local party committees.

Party committees must allocate the direct costs of each such fundraising program or event according to the funds received method. The committee estimates the federal/non-federal ratio for each program or event prior to the first disbursement made in connection with that activity, and later adjusts this ratio to reflect the actual ratio of funds received. The former rules did not specify at what points these adjustments were to be made, and could be read to require a readjustment whenever additional funds were received.

The Notice proposed that committees be given 60 days following each fundraising program or event to recalculate the appropriate ratio based on funds received, to apply the recalculated ratio to program or event expenditures, and to transfer funds between the federal and non-federal accounts to reflect the adjusted ratio. However, it stated that this amendment would not supersede the 60-day post-expenditure limit, contained in 11 CFR 106.5(g)(2)(ii)(B), for non-federal accounts to reimburse federal accounts for the non-federal share of joint expenditures.

After further consideration, however, the Commission has decided that the 60-day reimbursement window should be waived, for purposes of this limited exception. Under these new rules, committees are still required to allocate their pre-program or event expenditures based on their past experience. However, they are given an additional opportunity to transfer funds from their non-federal to their federal accounts: They have 60 days after the program or event to recalculate this ratio and transfer funds from the non-federal to the federal account, if receipts at that time indicate that the committee originally underestimated the non-federal percentage of these receipts. The Commission notes, however, that the new requirement does not rule out the possibility of further adjustments after

that date, should additional Federal receipts come in.

In order to monitor these transfers, the Commission is also requiring, under this new rule, that committees report the date of the fundraising program or event, at the time they report any transfer made to reflect a readjusted ratio. (The former rules had no requirement that the date of a fundraising program or event be reported.) In the case of a telemarketing or direct mail campaign, the "date" for purposes of this rule is the last day of the telemarketing campaign, or the day on which the final direct mail solicitations are mailed.

**Paragraph 106.5(g) Payment of Allocable Expenses by Committees With Separate Federal and Non-Federal Accounts**

This paragraph sets forth the procedures by which party committees with separate federal and non-federal accounts are to pay the bills for their administrative expenses and shared federal and non-federal activities. These procedures apply to all covered expenditures, with the exception of the shared fundraising expenditures discussed under subsection 106.5(f), *supra*.

As originally promulgated, the "window" in paragraph (g)(2)(ii)(B), during which funds must be transferred from a non-federal to a federal account to reimburse the federal account for the non-federal share of joint activities, was 40 days, extending from 10 days before until 30 days after payment is made from the federal account for a particular allocable expense. This 40-day limit was adopted in place of the 10-day limitation contained in the 1988 NPRM, 53 FR 38012, 38017, and exceeds the 30-day limit advocated by comments to that NPRM. The deadline was extended to allow committees to consolidate monthly payments, rather than requiring every expense to be paid with two separate checks.

The ASDC petition and some of the comments to the Notice of Availability asked that further expansion of the reimbursement period be considered. They noted, for example, that a committee that pays its bills once a month could face cash flow problems under the 30-day post-payment deadline. After reviewing this material, the Commission proposed that the reimbursement "window" be extended to 70 days, from 10 days before until 60 days after the payment from the federal account.

This approach allows greater consolidation of payments than is possible under the current system, and should thus ease possible compliance

and cash flow problems in this area. All of the party committees which submitted comments supported this proposed change, and no comments were received which opposed it.

Finally, the word "payment" in paragraph (g)(2)(ii)(B) has been amended to read, "payments." This clarifies that one check from the non-federal to the federal account may be used to reimburse the federal account for the non-federal share of more than one allocable expenditure.

**Section 106.6 Allocation of Expenses Between Federal and Non-Federal Activities by Separate Segregated Funds and Nonconnected Committees**

The amendments to paragraphs (d) and (e) of this section parallel those made in 11 CFR 106.5(f) and 106.5(g), respectively. These revisions have been made to maintain the consistency in treatment of party committees, nonconnected committees and separate segregated funds in these areas.

**Effective Dates**

One comment specifically inquired about possible retroactive application of the new rules, although most party committees asked that they be effectuated as soon as possible. The Commission believes it is appropriate, and consistent with past Commission action, to make the amendments to the ballot composition ratio contained in revised 11 CFR 106.5(d) retroactive to the start of the current allocation cycle, January 1, 1991. See Advisory Opinions 1991-15 and 1991-25.

While these rules will not be promulgated until after the expiration of the 30 legislative days review period pursuant to 2 U.S.C. 438(d), the Commission plans to include in its announcement of effective date a statement that the revisions to section 106.5(d) apply retroactively to January 1, 1991. State and local party committees that choose to apply the new rule retroactively will have 30 days after the publication of the effective date announcement in the Federal Register to calculate the ballot composition ratios pursuant to the revised formula, and make any necessary transfers from their non-federal to their federal accounts.

The other amendments will be effective when prescribed, following the expiration of the 30 legislative day review period required by 2 U.S.C. 438(d).