
FEDERAL ELECTION COMMISSION

11 CFR Part 104

[Notice 1993-25]

**Recordkeeping and Reporting by
Political Committees: Best Efforts**

AGENCY: Federal Election Commission.

ACTION: Final rule; Transmittal of
regulations to Congress.

SUMMARY: The Federal Election Commission is revising its regulations implementing the requirement of Federal Election Campaign Act ("FECA") that treasurers of political committees exercise best efforts to obtain, maintain and report the complete identification of each contributor whose contributions aggregate more than \$200 per calendar year. The revisions are intended to ensure that solicitations clearly and

conspicuously request the necessary contributor information, and to provide guidance when the information is not received with the contribution. The changes also state the Commission's rule that committees must report contributor identifications received either before or after the end of the applicable reporting period.

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

SUPPLEMENTARY INFORMATION: The Commission is publishing today the text of revisions to its regulations at 11 CFR 104.7(b), which set forth steps needed to ensure that political committees obtain, maintain and report the names, addresses, occupations and employers of contributors whose donations exceed \$200 per year. These regulations implement section 432(i) of the Federal Election Campaign Act of 1971, as amended ("the Act" or "FECA"). 2 U.S.C. 432(i).

On September 24, 1992 the Commission issued a Notice of Proposed Rulemaking (NPRM) in which it sought comments on proposed revisions to these regulations. 57 FR 44137 (Sept. 24, 1992). Twenty three written comments were received from fourteen commenters in response to the Notice. A public hearing was held on March 31, 1993, at which six witnesses presented testimony on the issues raised in the rulemaking.

The Commission also sent anonymous questionnaires to 200 randomly selected committees to obtain additional information from a larger number of committees regarding the specific methods currently used to obtain, maintain and report the necessary contributor information, and the cost and effectiveness of the methods used. Only committees that received 40 or more contributions of \$200 or above during the '91-'92 election cycle were included. Approximately half of the authorized committees and party committees, and approximately one quarter of the nonconnected committees active during that election cycle had 40 or more contributions of over \$200. Committees included in the survey ranged from those who received under \$20,000 in contributions during 1992, to those whose contributions exceeded \$5

million. The committees chosen were divided into three groups based on whether their reports contained a high, medium or low percentage of contributions containing information on contributors' name of employer. The questionnaire was sent to both incumbents' committees and challengers' committees. (Separate segregated funds were not included in the pool of surveyed committees since most SSF contributors have an employment or other close relationship with the SSF's sponsoring organization.) Finally, the survey was publicized through an FEC Record article which invited other committees to participate in the survey.

The Commission received responses from 44 authorized committees, 11 party committees, 19 nonconnected committees and one unidentified committee. Six additional committees requested and completed questionnaires. Thus, there was a total of 81 responses. Although the questionnaires were completed anonymously, 74 included demographic information on the type of committee, its size, and whether it was in the upper third, middle, or lower third based on the amount of contributor information obtained. A compilation of these 74 responses to the survey questions is available from the Public Records Office.

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 October 22, 1993.

Explanation and Justification

The FECA specifies that reports filed by political committees disclose "the identification of each * * * person (other than a political committee) who makes a contribution to the reporting committee * * * whose contribution or contributions [aggregate over \$200 per calendar year] * * * together with the date and amount of any such contribution." 2 U.S.C. 434(b)(3)(A). For an individual, identification means his or her full name, mailing address, occupation and employer. 2 U.S.C. 431(13).

The Commission's regulations at 11 CFR 104.7(b) implement these statutory requirements. These rules are being revised to address several concerns that have arisen, including the low percentage of complete reporting by

some political committees. The regulatory changes focus on three areas in which problems have arisen: The phrasing and location of the request for the information in committee solicitations, the measures committees take if the necessary contributor information is not accompanying the contribution, and the reporting process. Please note that revised § 104.7(b) has been reorganized into four paragraphs to address the topics of solicitations, follow-up, reporting, and amendments separately.

In reviewing the operation of the current regulations, the Commission has given serious consideration to concerns raised by several commenters, witnesses, and survey respondents regarding the privacy interests of contributors, and the perceived intrusiveness of asking for information about contributors' home addresses, occupations and employers. Despite the concerns of some, 52 of the 74 survey responses compiled indicated that contributors seldom expressly informed committees that they do not wish to provide this information. Moreover, these concerns must be evaluated in light of the high priority the FECA places on the public interest in the disclosure of accurate and complete contributor information. Some witnesses and commenters believed that wide differences in reporting rates were attributable to variations in the seriousness of different committees' efforts to comply with the statutory requirements. They were concerned that the Commission's long-standing best efforts rules were inadequate in ensuring sufficient disclosure.

The Commission has also weighed concerns regarding the cost, burdensomeness, and effectiveness of various modifications to the regulations. In revising these rules, the Commission has made every effort to ensure that costs are reasonable, and has attempted to give committees as much flexibility as possible in utilizing the methods they have found to be cost efficient and effective. The new rules establish procedures that many committees already follow voluntarily. As noted above, during the 1992 election cycle, about half of all authorized committees and party committees and three quarters of nonconnected committees had less than 40 individual contributions exceeding \$200. Consequently, many committees will need to make minimal additional efforts, or none, to meet these requirements. In addition, these measures do not apply to contributors who give a political committee \$200 or less per calendar year.

A. Solicitations

Under the previous regulations, to satisfy the best efforts requirement, the treasurer had to make at least one written or oral request per solicitation for contributor information. If the solicitation corresponding to a contribution requested the information and notified the solicitee that the committee is required by law to report such information, no further action had to be taken. Experience demonstrated, however, that the request for the information and the notice about reporting requirements often appeared in small type in a way that did not adequately convey their importance. For example, sometimes the request for occupation and employer was not included with the contributor's name and address on the front of the response card, but was placed on the back in lighter type or in a separate insert. Moreover, the regulations did not clarify what responsibilities a political committee has if the contribution does not correspond to a particular solicitation and it is not possible to know if the proper request and notice were provided. As a result, some committees have reported incomplete information for a significant percentage of their itemized contributions.

Accordingly, paragraph (b)(1) of § 104.7 is being revised to specify that if a political committee fails to provide all contributor information for any contribution, the best efforts defense is only available if the solicitation included a clear request for the information. The comments, testimony, and survey results indicate that most political committees already do so, and that they have found this to be a successful, financially feasible method of obtaining contributor information. In order for the best efforts explanation to be available, solicitations for contributions of \$200 or less must include the request, since contributors may make several contributions which are individually under \$200, but which aggregate over \$200 during the course of the calendar year. However, given that the best efforts requirements only apply when treasurers receive contributions aggregating over \$200 per calendar year, contributions aggregating under this amount would not trigger the best efforts requirements. Further, any contribution which is reported by a committee with all required contributor information will meet the reporting requirements for such information, whether or not the committee asked for the information in the solicitation or used the language specified in 11 CFR 104.7(b)(1).

The revised rules at 11 CFR 104.7(b)(1) also prescribe the precise language to be included in the solicitation. The statement must say, "Federal law requires political committees to report the name, mailing address, occupation and name of employer for each individual whose contributions aggregate in excess of \$200 in a calendar year." Statements such as "Federal law requires political committees to ask for this information," without more, do not meet the best efforts requirement. The results of the survey indicated that party committees tended to use the latter statement more frequently than authorized committees or nonconnected committees. Party committees tended to have lower success rates than other committees in obtaining contributor information.

Paragraph (b)(1) of § 104.7 also addresses the location, size and readability of the required language. This provision is intended to ensure that the request is more likely to be seen and read by the contributor. Several commenters and witnesses at the hearing favored a requirement that would standardize the wording, type size, and placement of the request for contributor information.

B. Missing Information

Section 104.7(b)(2) is being revised to indicate that treasurers who receive itemizeable contributions lacking complete contributor identifications must take an additional step to obtain the information. The regulation gives committees flexibility to decide whether to send out written requests solely devoted to obtaining the needed information or to make telephone calls which are documented in writing. To ensure that a written request for the information is not overlooked, it cannot include material on other subjects or additional solicitations, but may thank the contributor for the previous contribution. The written or oral request must be made no later than thirty days after the receipt of the contribution. If a written request is sent out, it must be accompanied by a pre-addressed return envelope or postcard. The results of the anonymous survey indicated that committees in the lower third in success rate were much less likely to include return envelopes.

Please note that these follow-up measures are required whenever complete contributor identifications are lacking, even if the solicitation associates with the itemizeable contribution asked for the information. The comments, testimony and survey responses to this approach reflected a wide diversity of views, including

concerns regarding the cost and time needed to contact contributors to obtain missing information, and the perceived success or lack thereof for different follow-up measures. There was also a range of opinion regarding the importance of the public's right to know who is contributing to candidates, and possible reasons some contributors are reluctant to provide the information. Consequently, the Commission believes that it is preferable to allow committees to have the choice of making either verbal or written follow-up requests, so that they may use whichever method they believe is most effective and least costly.

Some of the commenters and one witness construed the legislative history to mean that Congress wished to preclude what they presumed had been the Commission's previous practice of requiring multiple requests. The Commission notes that when the original "best efforts" provision was enacted by Congress in 1976, those offering the amendment stated that "[d]isclosure of a contributor's occupation and place of business, including the name of the firm where the person is employed, is vitally important if the public is to know and understand the source of a candidate's campaign funds." 122 Cong. Rec. 6963 (March 17, 1976) (statement of Sen. Clark).

In 1979, the statutory best efforts requirements were revised in several respects. The amount triggering reporting of occupation and employer was raised from \$100 to \$200. In addition, the candidate's obligation to exercise best efforts was eliminated, although the treasurer's obligation remained. The House Report states that:

The application of the best efforts test is central to the enforcement of the recordkeeping and reporting provisions of the Act. It is the opinion of the Committee that the Commission has not adequately incorporated the best efforts test into its administration procedures, such as systematic review of reports.

One illustration of the application of this test is the current requirement for a committee to report the occupation and principal place of business of individual contributors who give in excess of \$100. If the committee does not report the occupation and principal place of business for each itemized individual contribution, the Commission's review and enforcement procedures must be geared to determining whether the committee exercised its best efforts to obtain the information. The best efforts test is crucial since contributor information is voluntarily supplied by persons who are not under the control of the committee.

In a situation such as this, the first question is what efforts did the committee

take to obtain the information. Did the solicitation contain a clear request for the occupation and principal place of business? If the committee made an effort to obtain the information in the initial solicitation and the contributor ignored the request, the Commission should not require the committee to make the same request two, three, or four times. On the other hand, if the best efforts test is not met, the committee must be required to take corrective action, such as contacting the contributor and requesting the information.

H.R. Rep. No. 96-422, 96th Cong., 1st Sess. 14 (1979).

The Commission does not read this legislative history to preclude requiring multiple requests. In fact, the legislative history set out above indicates concern with the ineffectiveness of the Commission's previous approach. Similarly, in *Federal Election Commission v. Citizens for the Republic, et al.*, Civil Action No. 78-1116, (D.D.C. March 1, 1979) the Court emphasized the Commission's "duty . . . to give considerably more detailed guidance by regulations, instructions, or otherwise, as to what was to be done to get this information . . ." Transcript of hearing on defendant's summary judgment motion, p. 41. The Commission's initial best efforts regulations were promulgated in 1980 after this case was decided and after the 1979 Amendments to the FECA were enacted.

After careful consideration of the full legislative history, and in light of the subsequent level of incomplete disclosure since the 1980 best efforts rules were promulgated, the Commission concludes that Congress did not intend to preclude it from requiring that committees take additional measures when the information sought in the solicitation is not forthcoming, such as a single request of a different type. Requiring committees to make a request which does not include any other subjects or solicitations, with an accompanying notice of the reporting requirement, will emphasize the importance and will be more in line with the true meaning of "best efforts." It will also clarify a committee's responsibilities regarding unsolicited contributions lacking the proper itemization information.

C. Reporting

The Commission is also adding new language at 11 CFR 104.7(b)(3) to ensure that contributor identifications are reported as accurately and as completely as possible. The revised rules in paragraph (b)(3) state the Commission's current policy that political committees are expected to review their own records, including

contributor records, fundraising records and previously-filed FEC reports, so that they can report information known to them but not listed on contributor response cards. To prevent reporting of outdated information, political committees need only check their records and reports for the current two-year election cycle. In general, those who responded to the survey indicated that this approach enhances reporting either a great deal or somewhat with little increase in cost.

The Commission has decided not to add new language requiring a committee treasurer to report all contributor information which is not provided by the contributor, but which is in fact known by the committee treasurer or the treasurer's agents. Some commenters and survey participants expressed concern regarding the accuracy of the information they would be expected to provide when contributors are prominent individuals, and regarding outdated or incorrect information inadvertently supplied by the treasurer or committee staff. Revised § 104.7(b)(3) does not include such a requirement because treasurers should not be encouraged to guess at contributor information.

Finally, new paragraph (b)(4) of § 104.7 sets forth the Commission's current policy that when political committees do not have complete contributor identifications at the time they file reports, they must include whatever information is available. In this situation, political committees have an obligation under the FECA to file amended reports if additional contributor information is obtained after the applicable reporting period. See *Matters Under Review* 3528, 3114 and 2874. Accordingly, new language is being added to § 104.7(b)(3) to explain more fully that political committees have two options for filing amendments. Under both options, it is important that committees clearly indicate the previous report, schedule, page number and line number which is being amended. Under the first option, on or before the next regularly scheduled reporting date, committees may amend each of their previous reports on which the contributions were originally reported. Under the second option, they may file a single memo Schedule A listing all the contributions for which they have received additional information, including the full name of each contributor, his or her mailing address, occupation, and employer, together with the amount and date of the contribution. Under this option, the information should be submitted at the same time committees file their next regularly

scheduled reports. While both options are intended to promote more timely and complete reporting of contributor information, the second option avoids an increase in the number of times committees must file reports during the election year. Several commenters, survey participants and witnesses suggested timing the amendments to correspond to existing reporting dates. Although this means that months may elapse in non-election years before such information is placed on the public record, it will ensure more timely disclosure during election years.

Several comments and survey participants raised concerns regarding the burdensomeness of filing amendments over a lengthy period of time. Accordingly, the revised rules include language indicating that the requirement to file amendments regarding contributor information only applies to reports covering the two year election cycle in which contributions were received from a contributor, and does not require amendments to reports from previous election cycles. For example, if an itemizable contribution lacking occupation and name of employer is received in February, 1994, and a follow-up letter is sent in thirty days, and a response is received in April, 1994, amendments would be needed for previously filed reports covering the '93-'94 election cycle, but not for the '91-'92 election cycle. In situations where a contribution is received in late October, 1992, a follow-up request must be made by late November, 1992, and amendments to '91-'92 election cycle reports must be filed even if the information is not received until March, 1993.

D. Other Issues

Two commenters suggested revising 11 CFR 9036.2 so that Presidential primary candidates would only receive matching funds for contributions containing complete contributor information. While full contributor identifications are required for threshold submissions, they are not currently required for additional submissions for matching funds. The commenters' suggestion is beyond the scope of this rulemaking, but may be addressed in a subsequent rulemaking.

The Commission also considered comments and testimony that itemizable contributions which do not contain complete contributor identifications be returned or held without depositing them, until the necessary information is requested and a response is forthcoming. These proposals would eliminate the need for amended reports, since they do not anticipate that

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anything would be reported until the contribution is deposited. Both of these approaches are beyond the statutory authority granted to the Commission at this time. They were incorporated into the Commission's legislative recommendations submitted to Congress on January 26, 1993.