



July 12, 2002

VIA E-MAIL

Rosemary C. Smith
Acting Associate General Counsel
Federal Election Commission
999 E Street NW
Washington, DC 20463

Re: Notice 2002-9: Reorganization of Regulations on "Contribution" and "Expenditure"

Dear Ms. Smith:

FEC Watch, a project of the Center for Responsive Politics (CRP), is pleased to submit these comments on the Notice of Proposed Rulemaking (NPRM) to reorganize the definitions of "contribution" and "expenditure," published at 67 FR 40881 (June 14, 2002).

In general, we believe the proposed reorganization of the contribution and expenditure definitions will make these provisions much easier to read and understand, and we encourage the Commission to implement this proposal.

However, for reasons explained more fully below, we urge the Commission to revise the rules to address some of the issues raised in the NPRM, and publish the revised rules in a second NPRM to give interested persons another opportunity to comment on them.

FEC Watch has specific comments on three aspects of the NPRM. These comments are set forth below.

Conforming Amendments For the Soft Money Rules

The NPRM discusses the potential impact of the ongoing soft money rulemaking, saying that the soft money final rules "may affect the substance in the definitions of 'contribution' and 'expenditure.'" 67 FR 40882. The NPRM explains that if the soft

money rules "require substantively amending the current definitions of 'contribution' or 'expenditure,' the amendment to the text of the regulations will be incorporated in the final rules arising from this reorganization rulemaking." *Id.*

It appears from this discussion that the Commission intends to incorporate conforming amendments into the contribution and expenditure definitions at the final rule stage, without first making those amendments available for public comment. Presumably, the Commission believes this procedure is acceptable because the amendments would merely "conform" the reorganized contribution and expenditure definitions to substantive rules that were approved in the soft money rulemaking.

This approach underestimates the potential substantive impact of the conforming amendments. The soft money rulemaking involves complicated issues that have generated significant controversy. Conforming the contribution and expenditure definitions to these rules is likely to involve the resolution of interpretive issues that will have a substantive impact on the way the definitions are applied. The public should have an opportunity to comment on these issues before the conforming amendments are put into effect.

Therefore, we urge the Commission to prepare the conforming amendments required by the soft money rules, and publish a second NPRM in this rulemaking that sets out these amendments and invites comments on them. We note that, unlike the rulemakings to implement the Bipartisan Campaign Reform Act of 2002, the Commission is under no time limit to complete the reorganization rulemaking. Thus, the Commission has ample opportunity to publish a second NPRM to ensure that both the form and substance of these amendments is fully examined and considered.

II. Proposal To Replace "Allocation" To "Attribution"

The NPRM indicates that the Commission is considering a clarifying amendment that would replace the word "allocation" and its derivatives with "attribution" or its derivatives in several provisions in the contribution and expenditure definitions. The NPRM states that "[c]hanging the words in the proposed sections may eliminate any confusion that these contributions and expenditures would need to be allocated in a manner similar to the allocations that are required under current 11 CFR part 106." 67 FR 40882.

While the Commission's goal is laudable, the proposed change will not, in our view, resolve the confusion in the exempt activities provisions. These provisions correctly acknowledge that payments for exempt activities must be allocated in some circumstances. See section 106.5(a)(iii). However, they do not specifically identify the source of the allocation requirement, and thus provide no guidance on how these payments must be allocated.

This problem will be exacerbated when the Commission's soft money rules go into effect. In some instances, exempt activities will be Federal election activities that must be paid for with hard money or a combination of hard money and Levin money under

11 CFR part 300. In other instances, exempt activities will not be Federal election activities, but will be allocable under new section 106.7.

Therefore, rather than merely substituting "attribution" for "allocation," we recommend that the Commission add language to the contribution and expenditure definitions that more explicitly references the allocation rules in part 106 and part 300. This approach, perhaps in combination with the use of the word "attribution" in some circumstances, is more likely to eliminate the confusion that exists under the current regulations.

We also urge the Commission to publish these revisions in a new NPRM, and provide the public with an additional opportunity to comment on these changes before issuing them as final rules. This will ensure that the revisions have received careful consideration, and will also serve as a useful test of whether the revised rules are more understandable.

III. Recounts and Election Contests

Sections 100.91 and 100.151 would continue the exemptions for receipts or disbursements relating to recounts and election contests that are currently in 100.7(b)(20) and 100.8(b)(20). According to the Explanation and Justification for these exemptions, recount receipts and disbursements are excluded from the definitions of contribution and expenditure because recounts and election contests, "though they are related to elections, are not Federal elections as defined by the Act." *Federal Election Regulations*, House Document 95-44 at 40 (1977) (*FEC E & J Compilation* at 38, 42).

Although recounts and election contests are not specifically listed as separate elections under section 431(1) of the Federal Election Campaign Act, they are an integral part of an election. They have the potential to determine the outcome of the election, and no election is final until any recount or contest has been completed. Thus, treating them as separate and apart from the election process is an artificial distinction.

Under the current rules, recounts and election contests serve as an avenue for the use of soft money to influence federal elections. The rules prohibit corporations, labor organizations and foreign nationals from donating funds for recounts and election contests, but allow individuals and PACs to make unlimited contributions.

The Presidential campaigns that were involved in the 2000 Florida recount took advantage of this loophole. According to disclosure reports filed with the Internal Revenue Service, one of the campaigns received millions of dollars in contributions, many of which were hundreds of times larger than the contribution limits in the FECA.¹ News reports also indicated that the other campaign accepted individual contributions

¹ See *The Never-ending Story II: A Look at Donors to Gore's Recount Fund*, Money in Politics Alert, Center for Responsive Politics (Dec. 8, 2000) <http://www.opensecrets.org/alerts/v5/alertv5_65.asp>.

up to \$5000, five times the FECA limit.² These funds were used to pay for the recount effort that ultimately determined the outcome of the election.

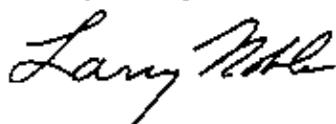
We urge the Commission to end the use of excessive contributions for recounts and election contests by deleting these exemptions from the contribution and expenditure definitions. Recounts and election contests should be treated as part of the election they seek to resolve, and donations made for the recount or contest should be treated as contributions for that election. The contribution limits and aggregation requirements should apply, and receipts and disbursements for recounts and election contests should be reportable as contributions and expenditures.

Should the Commission decide that it is unable to delete the exemptions entirely, we urge in the alternative that the Commission apply the individual and PAC contribution limits to amounts given for recounts and election contests, in the same manner that it currently applies the prohibitions on contributions from corporations, labor organizations and foreign nationals. This would ensure that recounts and election contests do not serve as an avenue for the use of excessive contributions to influence the outcome of federal elections.

Conclusion

FEC Watch hopes that these comments are useful to the Commission as it considers the reorganization of the contribution and expenditure definitions.

Respectfully submitted,



Lawrence Noble
Executive Director
Center for Responsive Politics



Paul Sanford
Director
FEC Watch

² See *The Never-ending Story: A Look at Donors to Bush's Recount Fund*, Money in Politics Alert, Center for Responsive Politics (Dec. 5, 2000) <http://www.opensecrets.org/alerts/v5/alertv5_64.asp>.