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No. 94-409

DISAPPROVING TWO REGULATIONS PROPOSED BY THE FEDERAL ELECTION COMMISSION

OCTOBER 6 (legislative day, SEPTEMBER 11), 1975.—Ordered to be printed

ATTACHMENT 3

JUSTIFICATION OF PART 113—OFFICE ACCOUNTS AND FRANKING ACCOUNT: EXCESS CAMPAIGN CONTRIBUTIONS

This statement will provide justification for the proposed office account regulation on a section-by-section basis.

§ 113.2 Contributions and Expenditure Limitations and Prohibitions

Contributions to and expenditures by an office account are treated as political contributions and expenditures subject to the limitations and prohibitions on such transactions. There are two exceptions: Matter sent under the frank and monies appropriated by Congress to fulfill the functions of a Member of Congress.

The Commission, pursuant to its duty to formulate general policy with respect to the administration of the Federeal Election Compaign Act, as amended (the Act) [See 2 U.S.C. § 437d(a)(9)], and to its authority under 2 U.S.C. § 437d(d)(8), has determined that expenditures and contributions over and above the two exceptions should be treated as political in nature. This determination is based on recent legislation concerning the frank and the tax treatment of newsletter accounts.

Congress has determined that the cost of preparing and printing frankable matter should not be considered a contribution or an expenditure for the purpose of determining any limitation on expenditures or contributions. 39 U.S.C. § 3210(f). The Commission has followed this precedent in its treatment of frankable matter. Congressman Frenzel, in supporting the Federal Election Campaign Act Amendments of 1974, stated:

> Questions have been raised as to whether or not congressional newsletters and other similar publications would be considered expenditures under the provisions of this bill. The congressional franking law passed last spring clearly states that such newsletters and other similar publications are legitimate expenses and can be sent under the frank. In general, I believe the Commission should follow the following guideline: If any item or publication can be sent under the frank, it should not be counted as an expenditure for the purpose of influencing an election. Hence, congressional newsletters and other similar publications need not be credited to the contribution or expenditures of congressional candidates. 120 Cong. Rec. H 10333 (Daily Ed., October 10, 1974)

It logically follows at the very least that a newsletter and other matter *not* sent under the frank should be considered political and there-

fore funds contributed and expended to support such newsletters and other matter should be subject to the limitations of 18 U.S.C. § 608(c).

Several other laws deal with franked matter which suggest its use should be non-political. See 39 U.S.C. § 3210(a)(5)(C). For example, no franked mass mailings are permitted less than 28 days before an election. Activities such as soliciting contributions and mass mailings within four weeks of an election are clearly political and funds used for these purposes should clearly be treated as expenditures and contributions subject to all limitations in the Federal Election Campaign Act.

Recent tax legislation reflects the intimate relationship between newsletter funds and campaign funds. The conference report to the Upholstery Regulator Act states: "Generally newsletter committees and separate funds are to be treated for tax purposes in the same manner as political campaign committees." H. Rept. 93-1642, 93d Cong., 2nd Sess. 22. During the debate on this legislation, several Members further noted the similarity between these two types of funds:

> Mr. SCHNEEBELI. Another change of importance would make individual contributions to candidates for public office which are used for newsletters to be eligible for the above-mentioned income tax credit for deductions.
>
> Mr. ULLMAN. Mr. Speaker these provisions place in the law the procedures outlining how we can use funds we have collected *for political purposes, for newsletter purposes.* We think this avoids the necessity for having a separate newsletter fund for Members who have a continuing campaign fund (emphasis added). (*Congressional Record*, daily edition December 20, 1974, page H12597.)

This exchange and the quoted report seem to the Commission to be a statement of Congressional awareness of the political and campaign nature of some newsletters.

The Upholstery Regulator Act permits individual taxpayers to take a tax deduction or a tax credit for money given to a newsletter account. 26 U.S.C. §§ 41 and 218. These sections of the Internal Revenue Code treat newsletter fund contributions and political contributions in the same manner; lumping the two together to allow an aggregate tax deduction or credit. Following this precedent, the Commission will treat funds contributed to support a non-frankable newsletter as a political contribution and expenditures made in connection with such newsletter as an expenditure subject to the limitations of the Act.

The Commission is of the opinion, however, that Congressional appropriations for staff salaries, newsletters, stationery and travel are for presumptively non-political, legislative activities and, therefore, not subject to the limitations and prohibitions of the Act. One may assume that Congress has provided or wil provide sufficient funds for the nonpolitical functions of the Membership. Accordingly, additional monies not appropriated by Congress but rather raised independently by the Members themselves or their supporters should be viewed as political and not legislative funds. Congress is, of course, always free to appropriate any additional funds deemed necessary to enable Mem-

bers to carry out their legislative functions. Indeed, the point was recently emphasized by the Honorable Wayne L. Hays, when he indicated that such additional money should come from the public treasury and not from contributions to Members or from the Members' own pocket.[1]

§ *113.3 Deposits of Funds into Office and Franking Accounts*

This section was drafted to implement 2 U.S.C. 439a. The provision of separate accounts facilitates reporting so that different accounts are not commingled. Members of Congress will have the option of using a principal campaign committee or an office account to make certain expenditures, such as for a non-frankable newsletter or questionnaire.

§ *113.4 Reports of Franking Accounts* and

§ *113.5 Reports of Office Accounts*

2 U.S.C. 439a provides that contributions to a federal officeholder for the purpose of supporting his or her activities as an officeholder and expenditures thereof "shall be fully disclosed in accordance with rules promulgated by the Commission." The Commission determined that office accounts, since they are treated for most purposes as political (See Section 113.2, *supra*), should file in the same manner and at the same time as political committees. Franking accounts are required to file less often, twice a year, so as not to be unduly burdensome to legislators. The times for filing were established so that the franking account reports would be available for public inspection prior to the general elections.

§ *113.6 Excess Campaign Funds*

This section has been proposed pursuant to the Commission's rulemaking authority under 2 U.S.C. 439a.

FEDERAL ELECTION COMMISSION,
Washington, D.C., September 30, 1975.

ATTACHMENT 3

JUSTIFICATION OF PART 113—OFFICE ACCOUNTS; EXCESS CAMPAIGN FUNDS

This statement will provide justification for the proposed office account regulation on a section-by-section basis.

§ *113.2 Expenditures—Limitations*

Expenditures by office accounts are presumed to be campaign-related when made during the calendar year of the usual general election for the House of Representatives and during the year before as well as during the calendar year of the affected candidate's election for the Senate. On the basis of the record of Commission's hearing held on September 16 and 17, 1975, and in light of comments received from the public pursuant to the Notice of Proposed Rulemaking published August 5, 1975 (40 FR 32951), the Commission concludes that the foregoing one and two-year presumptions for House and Senate candidates respectively are fair and reasonable. The presumption exists for a longer, continuing period for a Senator than for a Member of the House of Representatives because Senators generally represent larger districts than Representatives and their campaigns must normally commence at an earlier time. It may be noted, however, that over a six-year period the presumption operates for only two years with respect to a Senator but for three separated years with respect to a Representative.

The Commission, pursuant to its duty to formulate general policy with respect to the administration of the Federal Election Campaign Act, as amended (the Act) [see 2 U.S.C. § 437d(a)(9)], and to its authority under 2 U.S.C. 437(a)(8), has determined that expenditures made during these one and two-year periods respectively should be presumed to be campaign related. This determination is based on recent legislation concerning the franking privilege and, as noted, comments received from the public, as well as the testimony submitted at the hearings held on September 16th and 17th.

Congress has determined that funds used to pay the costs of preparing and printing frankable matter should not be considered an expenditure for the purpose of determining any limitation on expenditures. 39 U.S.C. § 3210(f). The Commission has followed this precedent in its treatment of frankable matter. Congressman Frenzel, in supporting the Federal Election Campaign Act Amendments of 1974, stated:

> Questions have been raised as to whether or not congressional newsletters and other similar publications would be considered expenditures under the provisions of this bill. The congressional franking law passed last spring clearly states that such newsletters and other similar publications are legitimate expenses and can be sent under the frank. In general, I believe the Commission should follow the following guideline: If any item or publication can be sent under the frank, it should not be counted as an expenditure for the purpose of influencing an election. Hence, congressional newsletters and other similar publications need not be credited to the contribution or expenditures limits of congressional candidates. 120 *Cong. Rec.* H. 10333 (Daily Ed., Oct. 10, 1974)

It logically follows that a newsletter or other matter, *not* under the frank, and sent in relatively close proximity to an election should be considered campaign-related; and therefore funds expended (within the last full year of a Representative's term and within the last two full years of a Senator's term) to support such newsletters and other matter should be subject to the limitations of 18 U.S.C. § 608(c).

With respect to office accounts, the proposed regulation creates a rebuttable presumption that, in the case of a Senator, for example, expenditures made out of such an account are non-campaign-related for the first four years of the Senator's term, but are to be presumed to be campaign related thereafter until the close of the Senator's term. Testimony presented at the Commission's hearings held on September 16 and 17, 1975, fully support this presumption approach. Senator Ted Stevens testified that the recording studio precedent should be followed (2 U.S.C. 434(d)). (Transcript at p. 39.) Senator Stevens later concluded, "We merely want a presumption * * * that expenses from the account are presumed not to be political but if they are political you've got to charge them." (Transcript at p. 41.)

Mr. Roy Greenaway, Administrative Assistant to Senator Cranston, also supported the presumption approach in his testimony. (Transcript at p. 156.) Mr. Greenaway stated "Let me make clear, though, that during the last two years, once he [Senator Cranston] is a candidate, we don't charge any travel to the Senate. We just assume that once he's a candidate, he's a candidate."

Commissioner Staebler asked: "Did I gather that in the last two years prior to an election the Senator regards all of his travels as political?"

Mr. Greenaway: "Almost all of it—unless it is clearly not. We would bend over backwards to have his campaign committee, which has been formed, to pay for his travel." (Transcript at p. 158.)

Mr. Robert Thomson, Counsel to the Senate Democratic Campaign Committee, later made additional comment on the practical wisdom of regarding activities closer to an election in a different manner:

> To me it makes a lot of sense to apply a time period rule similar to that expressed in my fourth example, the one that is contained in the FECA [2 U.S.C. 434(d)] as it now exists, applying the regulation similar to as you have written it so far, during the year prior to the year in which the term expires.
>
> I think on the Senate side there may be a feeling in some quarters that perhaps it is too liberal a rule; it should perhaps extend to the two calendar years which precede the year in which the term expires.
>
> I think either of those approaches would be acceptable, the former being preferable from the standpoint of some, and the latter being preferable from the standpoint of others.

The testimony at these hearings provided near unanimous agreement that the time period/presumption approach is reasonable. Differences of opinion as to the length of the time period were expressed. Senators Stevens and Johnston supported a one-year presumption. (Transcript at pp. 13, 36.) Roy Greenaway stated that a Senator's campaign starts two or three years before the expiration of his or her term. (Transcript at p. 151.) Fred Wertheimer testified on behalf of Common Cause that

the presumption should apply for all six years of a Senator's term and for all of a Representative's term. (Transcript at pp. 75, 76.) Louise Wides, testifying on behalf of the Center for Public Financing of Elections said that a two-year presumption for the Senate would be appropriate. (Transcript at pp. 96, 97.) The Commission recognized that this problem may be resolved in different ways, but has concluded that the two-year/one-year presumption approach is eminently fair and most reasonable.

§ *113.3 Contributions—Prohibitions and Limitations*

(a) The Commission's hearings on office accounts were marked by unanimous agreement on the point that contributions to office accounts from union and corporate treasuries should be prohibited. (Transcript at pp. 52, 67, 90, 157, 181, 182, 192, 193.) Since the regulation creates a mere presumption that expenditures from an office account during the first four years of a Senator's term and the first year of a Representative's term are not campaign related, it is wholly possible that funds so contributed may be used to influence an election; and the presumption can accordingly be rebutted. To clearly segregate corporate and union funds from these potentially campaign-related uses, contributions from corporate and union treasuries are prohibited. Similarly, government contractors and foreign nationals are not permitted to contribute funds to office accounts.

(b) The limitations on contributions contained in the Federal Election Campaign Act of 1971, as amended, are applied to all contributions to an office account. Since it is possible that office accounts will be used for campaign purposes at any time during the term of a Member of Congress, contributions to such an account should be subject to the appropriate campaign limitations throughout the entire term. Moreover, under recent Internal Revenue Code amendments in the Upholstery Regulator Act, contributions to office accounts are treated as political contributions. The legislative history of this Act reflects the intimate relationship between office funds and campaign funds. The conference report to the Act states: "Generally newsletter committees (and separate funds) are to be treated for tax purposes in the same manner as political campaign committees." H. Rept. 93-1642, 93rd Cong., 2nd Sess. 22. During the debate on this legislation, several Members further noted the similarity between these two types of funds:

> Mr. SCHNEEBELI. Another change of importance would make individual contributions to candidates for public office which are used for newsletters to be eligible for the above-mentioned income tax credit for deductions.
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> Mr. ULLMAN. Mr. Speaker these provisions place in the law the procedures outlining how we can use funds we have collected *for political purposes, for newsletter purposes.* We think this avoids the necessity for having a separate newsletter fund for Members who have a continuing campaign fund (emphasis added). (*Congressional Record*, daily edition December 20, 1974, page H12597.)

The Upholstery Regulator Act permits individual taxpayers to take a tax deduction or a tax credit for money given to a newsletter account. 26 U.S.C. §§ 441 and 218. These sections of the Internal Revenue Code

treat newsletter fund contributions and political contributions in the same manner; lumping the two together to allow an aggregate tax deduction or credit. It is consistent, therefore, for the Commission to treat funds contributed to support a nonfrankable newsletter as political contributions subject to the limitations of the Act. It should again be noted that the limitations do not apply to contributions earmarked for an account which is used exclusively to pay for the preparation of frankable materials.

§ *113.4 Deposits of Funds Contributed to a Holder of Federal Office*

This section was drafted to implement 2 U.S.C. 439a. The provision for separate accounts forestalls any confusing commingling of funds dedicated to different functions, and facilities accurate disclosure of the relevant transactions. Members of Congress will have the option of using a principal campaign committee or an office account to make certain expenditures, such as for a non-frankable newsletter or questionnaire.

§ *113.5 Excess Campaign Funds*

This section has been proposed pursuant to the Commission's rulemaking authority under 2 U.S.C. 439a.

§ *113.6 Reports of* § *113.4(b) Accounts* and

§ *113.7 Reports of* § *113.4(c) Accounts-Office Accounts*

2 U.S.C. 439a provides that contributions to a Federal officeholder for the purpose of supporting his or her activities as an officeholder and expenditures thereof "shall be fully disclosed in accordance with rules promulgated by the Commission." The Commission determined that office accounts may be used for campaign-related purposes (See Section 113.2 and 113.3, *supra*), and therefore, should file in the same manner and at the same time as political committees. § 113.4(b) accounts are required to file less often, twice a year, which should not be unduly burdensome to legislators. The times for filing were established so that the § 113.4(b) account reports would be available for public inspection prior to the general election.