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To: transfers@FEC

cc:

Subject: Request for Comments on Draft Statement--

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November 14, 2001

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- cover letter.frm



- MADDNCIV.wpd

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**FAX TRANSMITTAL**

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| <b>TO:</b><br>Rosemary C. Smith<br>Assistant General Counsel<br>Federal Election Commission | <b>FROM:</b><br>James Bopp, Jr.  |
| <b>DATE:</b><br>November 14, 2001   | <b>FAX NUMBER:</b><br>202/219-3923   |
| <b>ADDRESS:</b><br>999 E Street, NW<br>Washington, DC 20463                                 | <b>RE:</b><br>Comment on Draft Statement of Policy<br>Regarding Party Transfers of Non-Federal<br>Funds for Payment of Allocable<br>Expenses, Notice 2001-15 |

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COMMISSION  
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**COMMENTS:**

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November 14, 2001

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Re: Comment on Draft Statement of  
Policy Regarding Party  
Committee Transfers of  
Nonfederal Funds for Payment  
of Allocable Expenses, Notice  
2001-15

Dear Ms. Smith

We send with this (by fax, mail, and email) "*Comments on Proposed Policy Affecting 11 C.F.R. 106.5(g)(2)(ii)(B) Regarding Non-federal Funds Transferral Period*" by the James Madison Center for Free Speech (in response to a notice published at 66 Fed. Reg. 56247, November 7, 2001), incorporated herein by reference.

Notice is hereby given that Mr. James Bopp, Jr., General Counsel for the James Madison Center for Free Speech, wishes to testify orally concerning the proposed rulemaking in the event a hearing is scheduled on this matter.

Sincerely,

BOPP, COLESON & BOSTROM



James Bopp, Jr.

**Comments on Proposed Policy Affecting 11 C.F.R. 106.5(g)(2)(ii)(B)  
Regarding Non-federal Funds Transferral Period.**

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*By the*

**James Madison Center for Free Speech**

*To the*

**Federal Election Commission**

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*Prepared by*

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**November 14, 2001**

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The James Madison Center for Free Speech submits the following comments regarding the Federal Election Commission's Request for Comment on Draft Statement of Policy Regarding Party Committee Transfers of Nonfederal Funds for Payment of Allocable Expenses (Notice 2001-15).

**I. INTRODUCTION**

**A. Background**

In a letter dated September 28, 2001, the General Counsel for the Democratic National Committee ("DNC") requested an expedited advisory opinion

permitting the DNC to make transfers from their non-federal accounts to its federal accounts to cover the non-federal share of allocable expenses, pursuant to 11 C.F.R. § 106.5(g)(1)(i), more than 60 days after the payments for which such non-federal funds are designated are made,

notwithstanding the provisions of 11 C.F.R. §106.5(g)(2)(ii)(B).

Letter from Joseph E. Sandler, General Counsel, Democratic National Committee, to Bradley Litchfield, Office of General Counsel, Fed. Election Comm'n Bradley Litchfield (Sept. 28, 2001). In response, however, the Federal Election Commission ("FEC") issued a "Draft Statement of Policy" and requested comments. See *Request for Comment on Draft Statement of Policy Regarding Party Committee Transfers of Nonfederal Funds for Payment of Allocable Expenses*, 66 Fed. Reg. 56,247, 56,248 (2001) (to be codified at 11 C.F.R. pt. 106).

### B. The "Draft Statement of Policy" Has No Legal Basis

The DNC asked for an advisory opinion, and the FEC rightly declined to issue one,<sup>1</sup> but instead issued a "Draft Statement of Policy," a strange species that has no legal basis in the regulatory scheme. We will refer to it as a "draft statement" because it is neither a "statement of policy," a term of art with specific criteria that the courts have recognized, nor a properly proposed "rule," an equally specific legal term, but instead, apparently seeks to borrow some criteria from each.

Under any test provided by courts for distinguishing the two, the draft statement cannot be a statement of policy. But neither is it a properly promulgated rule, as the procedure employed here is defective. Under the Federal Elections Commission Act ("FECA") a proposed rule or regulation, along with "a detailed explanation and justification of it," must be transmitted to the Senate and the House, and cannot be prescribed unless both Houses of the Congress do not disapprove by resolution within 30 legislative days. 2 U.S.C. § 438(d)(1). Calling it a statement of policy, an FEC General Counsel's Memorandum claims that the draft statement "can be put into effect immediately upon publication, because the legislative review provision in 2 U.S.C. § 438(d) does not apply." *Gen. Couns. Mem.* at 10 (Fed. Election Comm'n Oct. 26, 2001). We disagree; the draft statement cannot be a statement of policy and is a rule and thus section 438 (the legislative submission and delay) does apply and the draft statement can not be a valid rule.

### C. The FEC Cannot Issue Rules Via Advisory Opinions

We agree with the FEC that the DNC's request cannot be effected by issuing an advisory opinion. Section 437f(b) of the FECA clearly prohibits issuing rules through the advisory opinion process; Congress amended the statute specifically to preclude this maneuver. But it is

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<sup>1</sup>According to one present at the meeting in which the request was discussed, in response, the FEC "suggested that this would not be appropriate for *what amounts to a change in FEC rules*" (emphasis added). Kenneth P. Doyle, *FEC to Consider Draft Policy Waiving 'Soft Money' Rule in Sept. 11 Aftermath*, MONEY & POLITICS REPORT (Oct. 30, 2001) [Hereinafter Doyle, *FEC to Consider Draft Policy*].

also clear that the FEC cannot issue a statement of policy, an even less substantive legal device, with the legal teeth of a rule. Ironically, if, as the FEC maintains, the draft statement is a statement of policy, then by definition it has no binding effect; it is pointless, especially in light of its supposed purpose. The special rulemaking procedure and the express prohibition of making substantive rules by advisory opinion clearly show that Congress intends that the FEC subject its regulation to the scrutiny of the body granting its authority.

#### D. The Draft Statement Would Not be Good Policy

The regulation to be waived is part of a larger regulatory scheme designed to ensure the proper use of funds, not provide for their accrual. If the deadline is too short, it should be amended by proper rulemaking and made to apply prospectively so that all parties can comment, critique, and then plan and adjust their conduct accordingly. All persons under the rule of law suffer periodic adverse effects, rightly so if they fail to order their affairs accordingly. The circumstances here suggest that it was a lack of planning and disregard for the effect of the law that led to the request for a waiver of the rule. If a deadline is dependent on subjective circumstances, it is not a deadline at all and if the rules can be waived because of circumstances arising from the disregard of the law, the rules will reward disregard for the law.

A non-binding "rule" is a ruse to avoid scrutiny. It is a problem for both the regulated and the regulators: the regulated proceed at their own risk, and the regulator must defend its position in each and every instance involving the issue; it cannot point to a "rule" because as a matter of law, one does not exist. Worse, to fashion a "rule" to relieve one organization one time insures inequities; worse yet, one made to fit one situation at the request of one of two competing parties by definition and in practice is partisan.

## II THE APPLICABLE RULEMAKING PROCEDURE

### A. Background: Rulemaking under the FECA and the APA

The rulemaking provisions of the APA, are applicable only if the statute authorizing an agency to act provides no procedure of its own; the APA procedure is the default. The FECA expressly provides a procedure for prescribing rules and thus this procedure "trumps" that of the APA. The FECA also clearly rules out rulemaking by way of advisory opinion, reserving the status and authority of law from any action that has not been reviewed for the prescribed period by Congress. The draft statement is subject to these provisions and is not valid if not submitted accordingly.

#### 1. The FECA Rulemaking Provisions

The Federal Election Campaign Act of 1971, as amended, specifically lays out the authority of the FEC to “make, amend and repeal such rules, pursuant to the provisions of chapter 5 of title 5, United States Code, as are necessary to carry out the provisions of this Act . . .” 2 U.S.C. § 437(a)(8). In § 437f(b), FECA further specifies that “[a]ny rule of law which is not stated in this Act . . . may be initially proposed by the Commission only as a rule or regulation pursuant to procedures established in section 438(d) of this title.”

Under the heading “Powers of the Commission,” subheading “*specific authorities*,” FECA grants the Commission specific authority “to develop such prescribed forms and to make, amend, *and repeal* such rules, pursuant to the provisions of chapter 5 of title 5, United States Code, as are necessary to carry out the provisions of this Act . . .” 2 U.S.C. § 437d(a)(8) (second and third emphasis added). The specific authority granted by the statute creating the Commission itself seems to require the making, *amending* or *repealing* of a rule subject to APA rulemaking procedure. But section 559 of the APA states that “[s]ubsequent statute [sic] may not held to supercede or modify this subchapter, . . . *except to the extent that it does so expressly*.” 5 U.S.C. § 559 (emphasis added).

Under the heading “Advisory Opinions,” subheaded “*Procedures applicable to initial proposal of rules or regulations, and advisory opinions*” FECA specifies that “any rule of law which is not stated in this Act . . . be initially proposed *only* according to procedure established in [2 U.S.C.] § 438(d).” 2 U.S.C. § 437f(b) (second emphasis added). Thus, in keeping with the axiomatic principle that the express language of the statute itself controls, the APA itself provides that the expressly mandated process of FECA determines the procedure for prescribing rules. If the draft statement is a rule, then the Commission must “transmit a statement with respect to such rule, regulation, or form to the Senate and the House of Representatives . . . set[ting] forth the proposed rule, regulation, or form and . . . contain[ing] a detailed explanation and justification of it.” 2 U.S.C. § 438(d)(1). The process by which these very comments were invited is insufficient under the statute and the proposal cannot be made effective.

## 2. § 437(f): No Advisory Opinion Rules

The General Counsel’s memorandum sheds much light on the legislative impetus for Section 437f, the gist of it being to eliminate the promulgation of rules in the guise of advisory opinions. *See Gen. Couns. Mem.* at 8. (Oct. 26, 2001).<sup>2</sup> If Congress sought to eliminate substantive rulemaking via advisory opinions, how much less would it support rulemaking via the supposedly innocuous and admittedly nonbinding statement of general policy? The General Counsel’s memo goes to some lengths to establish that FECA authorizes the FEC to formulate policy and that general statements of policy fall under the exceptions to notice and comment requirements of the APA and by inference, of FECA itself. *Id.* But again, even if the FEC can

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<sup>24</sup>“Congress . . . sought to limit the Commission’s ability to use the advisory opinion process to establish rules of general applicability by inserting [the relevant part of § 437f(b)].”

issue statements of policy that are not subject to notice and comment requirements, it cannot issue advisory opinions or much less statements of policy or any other regulatory pronouncements *that are binding as a matter of law* that are exempt from rulemaking notice and comment requirements.

The critical question of whether this draft statement should be "put into effect" is whether it is in fact a statement of policy or a rule (disguised or otherwise), as those terms are defined by statute and the courts. *Gen. Couns. Mem.* at 13. (Fed. Election Comm'n Oct. 26, 2001). And again, it is our position that the draft statement represents a rule and not a general statement of policy and is thus subject to procedures that have thus far been ignored.

The procedure to be applied is clearly that of the FECA itself. More important, it is telling that FECA expressly mandates a more rigorous procedure for making valid, binding rules than did the APA. The draft statement and other rules, disguised or obvious, must be subjected to legislative review for no less than thirty days, ensuring sober and critical analysis by the body granting the agency its authority. Congress saw fit to expressly create a rulemaking procedure that is more substantial than that of the APA, and consciously eliminated the advisory opinion process as a means of rulemaking. Clearly, Congress wants agencies in general and especially the FEC to subject those policies that they intend to affect the rights and obligations of the regulated sector to outside scrutiny and explain and defend them as necessary.

### **III. THE FEC'S ACTION IS IMPROPER: THE DRAFT STATEMENT PROPOSES A SUBSTANTIVE RULE THAT MUST UNDERGO FORMAL RULEMAKING PROCEDURE.**

Rules and statements of policy are terms of art with specific characteristics and criteria; they are by no means interchangeable. Because a rule binds those to whom it applies with the force and effect of law, it is subject to procedures designed to produce critical analysis that informs the agency and to alert the regulated sector so that they may begin to plan and adjust their conduct to coincide with regulations with which they are familiar and on which they have had some influence. Under the express provisions of the FECA, rules proposed under its authority are reviewed by both Houses of Congress for not less than thirty days, ensuring debate and the influence of the source of the regulatory authority.

Statements of policy are prospective; they delineate how the agency intends to handle an issue in the future and they are marked by the absence of substantial impact on existing rights and obligations; by definition they cannot have a binding effect on the agency or the regulated sector. They are merely an agency's statements as to its tentative intentions for the future. Since statements of policy are not binding and do not have the effect of law, they are not subject to rulemaking procedures.



## A. Rules and Statements of Policy: The Importance of the Distinction

The difference between a statement of policy and a rule is important from two perspectives; first, rules undergo strictly structured procedures before they can become valid and statements of policy do not, and secondly, rules have the force of law while statements of policy are not binding on the agency or the regulated sector. A rule must be prescribed subject to the statutory procedure in order to be valid.

### 1. Notice, Comment, and Delayed Effects

The General Counsel's memorandum attempts to establish that the draft statement is a statement of policy and as such can be made effective immediately, and yet, at the same time, have the force and effect of law. It goes to great lengths to establish the legitimacy of statements of policy as a terms of art and the FEC's authority to issue them. But at bottom, the critical question to be answered is whether the proposed statement constitutes a substantive rule. If the "statement of policy" is in fact a rule,<sup>3</sup> the question of the FEC's authority to make a *general statement of policy* without utilizing statutorily prescribed notice-and-comment rulemaking procedures (a major thrust of the FEC General Counsel's memorandum) is irrelevant. Under either FECA itself or the APA, a *rule* must be made subject to one of two procedures, both of which require 30 days of review, and neither of which has been followed here.<sup>4</sup> The General Counsel's conclusions notwithstanding, perhaps the FEC is "voluntarily choos[ing] to provide a comment period" because it foresees credible challenge to the proposal's status as a policy statement. *Gen. Couns. Mem.* at 10 (Fed. Election Comm'n Oct. 26, 2001).

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<sup>3</sup>The FEC itself apparently recognized the rulemaking endemic to the Democratic National Committee's request. The DNC had requested an advisory opinion, but the FEC "suggested that this would not be appropriate for *what amounts to a change in FEC rules*" (emphasis added). Doyle, *FEC to Consider Draft Policy*, *supra* note 1.

<sup>4</sup>The APA procedure requires publication of a new rule "not less than 30 days before its effective date." 5 U.S.C. § 553(d). Under its rulemaking provisions, FECA requires that "before prescribing any rule, regulation, or form under this section or any other provision of this Act, the Commission shall transmit a statement with respect to such rule, regulation, or form to the Senate and the House of Representatives," and "if either House of the Congress does not disapprove by resolution any proposed rule or regulation submitted by the Commission under this section within 30 legislative days after the date of the receipt of such proposed rule or regulation . . . the Commission may prescribe such rule, regulation, or form." 2 U.S.C. § 438(d)(1).

While the FEC may have authority to issue policy statements and make them effective<sup>5</sup> immediately or with less than full notice and comment requirements, it cannot so prescribe rules. If a "provision[] stating a single, separable rule of law" is proposed, 2 U.S.C. § 438(d)(4), the FECA statutory notice and comment requirements including its 30-day implementation delay, is applicable. Agency action creating a rule of conduct in the regulated sector cannot be excepted from rulemaking; exemptions to rulemaking requirements are "limited situations where substantive rights are not at stake." *American Hospital Ass'n v. Bowen*, 834 F.2d 1037, 1045 (D.C. Cir. 1987).

## B. Distinguishing Rules from Policy Statements

The APA expressly exempts "interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice" from rulemaking, 5 U.S.C. § 553(b), and the FEC relies on this exemption as authority for the truncated comment procedure utilized in this instance.<sup>6</sup> A bona fide statement of policy is exempt from rulemaking procedures, but that leaves, as has been pointed out, the critical question as to whether this draft statement represents a statement of policy or a rule. While the General Counsel's memo concludes that the draft statement is a general statement of policy and thus exempt from rulemaking, that conclusion is not warranted by the applicable law. While the terrain controlled by substantive rules as opposed to statements of policy has often been a battleground, the definitions provided by the authorizing statutes and the APA provide guidance, and the Supreme Court, the D.C. Circuit Court and other courts have fashioned tests designed to distinguish the two.

### 1. Statutory definitions

Under section 551 of the APA, a "'rule' means the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." 5 U.S.C. § 551(4). These rules are "substantive" because they act upon or under the auspices of the law that Congress intends to be applied to the country's citizens, affecting substantive rights. Rules "describing the organization, procedure, or practice requirements of an agency," *id.*, are distinguishable from the substantive rules in that they are internal or affect the public at most by controlling to some degree "the manner in which the parties present themselves or their viewpoints to the agency." *Bowen*, 834 F.2d at 1047.

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<sup>5</sup>There is some question, given the nonbinding nature of a policy statement, as to what exactly it is that becomes effective.

<sup>6</sup>The General Counsel's memorandum proposes that because the FECA cross references the authority to *make* rules to the rulemaking requirements of the APA, the *exceptions* to the APA's requirements are applicable to rules made under the FECA process. See *Gen. Couns. Mem 8* (Fed. Election Comm'n Oct. 30, 2001).

Applying the bare-bones definitions supplied by the APA to this situation, waiving the rule establishing the 60 day window does not interpret law or policy; it changes it. The proposed action would not implement existing policy; by refraining from implementing established rules it is establishing a new rule. It surely is not a rule of agency organization, as it involves the very sector the organization is to regulate. Nor would the action affect only internal procedure or practice. Under the definition of the APA statute, the proposed action is a substantive rule.

As the General Counsel's Memorandum points out, the Attorney General's manual separates substantive rules from general statements of policy in terms of implementation and timing; substantive rules are issued pursuant to statutory authority, and policy statements advise prospectively.<sup>7</sup> See ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 15, at 30 n.3 (1947). Again, substantive rules implement the law Congress intends to be applied; statements of policy are prospective; they delineate how the agency intends to handle an issue in the future. Of course, merely delaying a substantive rule cannot make it a policy statement, future applicability is a critical characteristic of policy statements, but is not definitive of them. The dispositive distinction is the establishment of a norm; as the D.C. Circuit Court has put it,

[a] general statement of policy . . . does not establish a 'binding norm.' It is not finally determinative of the issues or rights to which it is addressed. The agency cannot apply or rely upon a general statement of policy as law because a general statement of policy only announces what the agency seeks to establish as policy.

*Bowen*, 834 F.2d at 1046 (quoting *Pacific Gas & Electric Co. v. FPC*, 506 F.2d 33, 38 (D.C. Cir. 1974) (footnote omitted)).

FECA provides less of a definition of a substantive rule, stating that for purposes of "issuance, procedures applicable" to "[r]ules, regulations, or forms," 2 U.S.C. § 438(d), the terms rule and regulation mean a "provision[] stating a single, separable rule of law." 2 U.S.C. § 438(d)(4). The FEC rightly thus concludes that a *policy statement* is not a rule under this definition, but again, the critical question is whether the draft statement is, as a matter of law, a statement of policy or a substantive "rule of law" as defined by FECA and thus subject to the procedure, including the thirty legislative day wait. See *Gen. Couns. Mem.* at 11 (Fed. Election Comm'n Oct. 26, 2001)

## 2. Case Law on Statements of Policy vs. Substantive Rules

Courts have developed various tests to determine whether an agency action is a substantive rule or is exempt from the rulemaking process. Early in the history of rulemaking,

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<sup>7</sup>The timing of rule is a factor in determining substantiveness and raises questions regarding the applicability of the proposed statement to past conduct, arguably what the Democratic National Committee's request would require.

courts detected *de facto* substantive rules by their effect on the regulated sector, an important distinction that remains part of the analysis. Courts have also looked for a substantial effect on the regulated sectors' decisions; if a professed statement of policy is calculated to have a substantial effect on conduct, it is in fact a substantive rule. The courts have also examined whether the action establishes a binding norm or has the effect of law; at times agencies simply declared their actions to be nonbinding and thus immune to review, and courts examined their effect rather than the nomenclature. The common thread among these approaches is the search for an effect on the regulated parties that is enforceable; such agency actions cannot be statements of policy. Under any of these criteria, the FEC draft statement is substantive rule and not a statement of policy.

#### a. The Effect-of-the-Agency-Action test

Early in the life of the APA the Supreme Court recognized the temptation to merely label a rule as a statement of policy in order to escape review. In *Columbia Broadcasting System, Inc., v. United States*, 316 U.S. 407 (1942), a Federal Communications Commission issued an "expression of general policy" that certain contractual relationships between radio stations were disfavored. *Id.* at 411. When challenged in court, the FCC maintained that as a policy statement, its action was without the effect of law and thus not subject to challenge.

Using words eerily similar to some cited in the General Counsel's memorandum<sup>1</sup>, the Court framed the FCC's argument as thus: "since its Report *characterized* the regulations as announcements of policy, the order promulgating them is no more subject to review than a press release similarly announcing its policy." *Id.* at 422 (emphasis added). The Court disagreed with this proposition, holding that "the particular label placed upon [the agency action] by the Commission is not necessarily conclusive, for it is the *substance* of what the Commission has purported to do and has done which is decisive." *Id.* at 416 (emphasis added).

Regardless of the nomenclature employed, therefore, it is substance of the FEC's plans that determine whether it is a statement of policy or a rule and thus whether it is now being properly subjected to comment; an agency can not shield actions affecting those it regulates by

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<sup>1</sup>The memorandum, in distinguishing a statement of policy from a rule cites language in *Pacific Gas & Electric v. Federal Power Commission*, 506 F.2d 33 (D.C. Cir. 1974): "A general statement of policy, like a press release, presages an upcoming rulemaking or announces the course which the agency intends to follow in future adjudications." (emphasis added). But merely assigning a later date to an action does not make it a statement of policy. Aside from the obvious question of whether the FEC would in fact be acting in the future when the conduct to which the policy will apply occurred or was at least commenced before any such "policy" announcement, the dispositive question is the effect of the action on the regulated sector's conduct.

merely choosing a label that carries a desired status.

This draft statement, if implemented, would eliminate the effect of a clear and properly promulgated regulation and make heretofore illegal activity legal; the substance of the FEC's actions would be to amend a rule of conduct. According to 11C.F.R. § 106.5(g)(2)(iii), any transfer made more than 60 days after payment of the allocable expense "shall be presumed to be a loan or contribution from the non-federal account to a federal account, *in violation of the Act.*" (emphasis added). Surely the DNC seeks an adjustment to the rule of conduct now in place, and ostensibly will adjust its conduct according to the action, or else this entire affair is an academic exercise. If the FEC does not intend its action to have the effect of law, it is puzzling why the Office of General Counsel recommends that "the Commission dispense with the comment period . . . so that the policy can be put into effect immediately." *Gen. Couns. Mem.* at 12. What exactly is to be effected? The plain result of the draft statement would be to allow fund transfers that were previously explicitly illegal—a more substantive effect could hardly be imagined.

#### b. The Substantial Effects Test

In *Pickus v. U.S. Board of Parole*, 507 F.2d 1107 (D.C. Cir. 1974), the D.C. Circuit examined whether the actions of the Board of Parole were exempt from rule-making procedures because they were a general statement of policy. Citing a string of cases, the court noted that limiting the boundaries of the general policy statement category stems from the congressional purpose in enacting rulemaking; that the interested public have an opportunity to participate, and that the agency be fully informed.<sup>9</sup> The court held that "agency action cannot be a general statement of policy if it substantially affects the rights of persons subject to agency regulations." *Id.* at 1112.

Here, the FEC will not act<sup>10</sup> on what has been a violation of the regulation--substantially affecting the rights of persons subject to the "new regulation"; for some, it means a heretofore illegal use of funds will now be legal--they will have new rights-- i.e. certain monies will be acceptable as contributions to campaigns, explicitly on the basis of this action. For others, opportunities will have been foregone, very likely affecting the outcome of elections and policies--certainly interests of those regulated. The proposed action will substantially affect the rights of those subject to its regulations; under this test, the proposal cannot be a general statement of policy.

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<sup>9</sup>The General Counsel's memorandum "doubted that comments would illuminate the appropriateness of granting relief"; but the purpose of comments is the participation of the regulated parties, as it is they who will be subject to the effect of the Commission's actions.

<sup>10</sup>Under 5 U.S.C. § 551(13), a failure to act is an agency action.

### a. The Binding Norm/ Force of Law Test

The Eighth Circuit Court of Appeals, like many other courts, finds it easier to tell what a policy statement is *not*. "Such a statement does not establish a 'binding norm' but instead announces the agency's tentative intentions for the future and is marked by the absence of substantial impact on existing rights and obligations." *Iowa Power and Light Co. v. Burlington Northern, Inc.*, 647 F.2d 796, 811 (8<sup>th</sup> Cir.1981) (citations omitted) (quoting *Pacific Gas and Electric Co. v. Federal Power Commission*, 506 F.2d 33, 38 (D.C. Cir. 1974)).

Once again, the test is whether an action had a substantial impact on existing rights and obligations and here, as before, the proposed action would substantially affect the existing rights and obligations of those it seeks to regulate. The DNC would no longer be obligated to fund its allocable expenditures completely from federal funds, as is the present situation.<sup>11</sup> They would have a right to fund campaigns and candidates (the very conduct the agency wishes to regulate) in a new way and that right would be exactly contemporaneous with the proposal "being put into effect." *Gen. Couns. Mem.* at 12 (Fed. Election Comm'n Oct. 26, 2001).

In the leading case for the "force of law" approach, *Pacific*, the D.C. Circuit Court of Appeals decided a case in which regulated parties challenged an agency action as a rule that had been promulgated outside the procedure of the APA. The Federal Power Commission had issued a "Statement of Policy" setting forth the Commission's view that the national interest would be best served by determining who would get short supplies of natural gas based on its end use rather than on the basis of contractual commitments. In its decision, the court discussed at length the difference between a statement of policy and a substantive rule. It noted that a statement of policy cannot be a "binding norm"; but instead "announces the agency's tentative intentions for the future" and "is not finally determinative of the issues or rights to which it is addressed;" "[t]he agency cannot apply or rely upon a general statement of policy as law because a general statement of policy only announces what the agency seeks to establish as policy." *Pacific Gas and Electric Co. v. Federal Power Commission*, 506 F.2d 33, 38 (D.C. Cir. 1974).

This definition tracks with the approach of the FEC in this instance. By nominally withholding "binding norm" status from its statement, it can be relegated to the status of a policy statement, avoid the cumbersome and delaying rulemaking procedure and more immediately grant "relief."<sup>12</sup> But with the ease of creation comes an alacrity for demise; "when the agency

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<sup>11</sup>The DNC admits that its nonfederal funds are depleted and thus, applying the present regulation, allocable costs will be met with federal funds alone.

<sup>12</sup>The D.C. Circuit seems to have abandoned the "force of law" approach to determining whether an action is a statement of policy or a substantive rule. See *Community Nutrition Institute v. Young*, 818 F.2d 943 (D.C. Cir.1987) (stating that an "action level" is the same as a rule and subject to rulemaking when it commits itself to action based on them); *Guardian*, 589

applies the policy in a particular situation, it must be prepared to defend it, and cannot claim that the matter is foreclosed by the prior policy statement." *Guardian Fed. Savings and Loan Ass'n v. Federal Savings and Loan Ins. Corp.*, 589 F.2d 658,666 (D.C. Cir. 1978); see also *Pacific Gas*, 506 F.2d at 39. This raises some obvious questions; surely the DNC expects to act on the draft statement, and ostensibly so does the FEC. Attaching nomenclature and commensurate characteristics to an action does not change its legal status; the draft statement is to have the effect of law if it is to have any effect or purpose at all.

### C. The Draft Statement Represents a Substantive Rule that is Subject to Rulemaking Procedure

The common thread among the statutes and the cases is that a rule that substantially affects the rights and obligations of the regulated sector is substantive, and is therefore, by design of Congress, subject to formal notice (to alert interested parties) and comment (to allow critical analysis that will inform the agency). Congress is especially interested in the rulemaking of the FEC, mandating that it review all of its proposed substantive rules. It is understandable that the FEC would attempt to effect rules as quickly and expeditiously as possible, and given the events of September 11, a heightened sense of compassion may be warranted. But the action would have substantive effects on the regulated sector, effects that are favorable to some and unfavorable to others. Their concerns and comments, expressed through the legislative branch, are a legislatively-mandated part of the record, as they should be. This proposal is clearly a substantive rule, and given the situation's inherent opportunity for a partisan effect, this rule should be subject to no less strenuous a process.

## IV POLICY CONSIDERATIONS

### A. The Regulation to be Waived is Part of a Larger Regulatory Scheme

The fundamental purposes of the allocation regulations are not, as the DNC maintains in their request for an advisory opinion, "solely" for *tracking* funds. Letter from Joseph E. Sandler, General Counsel, Democratic National Committee, to Bradley Litchfield, Office of General Counsel, Fed. Election Comm'n Bradley Litchfield 2 (Sept. 28, 2001). In ensuring the strict statutory use of the funds, the Commission saw fit to enact explicit percentages or methods for all categories of allocable expenses, extended the scope of allocation and reporting requirements,

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F.2d 658 ("The form of a regulation is obviously not controlling; substance and effect will determine whether a rule is a 'general statement of policy.'" *Id.* at 667. ).

and required more detailed disclosures, as well as creating the 60 day "window"<sup>13</sup> The Commission's explanation and more importantly, the regulations themselves, emphasize statutorily proper use of funds, not providing a flexible pipeline for the funds they seek to regulate. By defining an explicit period in which funds can be transferred, the regulation limits the amount as well as the timing of those funds. Campaign events, advertising, and elections themselves happen at defined times; forcing the committees to spend their money according to a schedule limits their opportunities and inevitably controls where the money goes. That means that any given need is constrained in its demand for funding; it is in competition that is created by the deadline. The waiver creates an open door instead of a window and the competition is eliminated; inevitably, more money will be spent in areas that would have lost in the war of opportunity costs and elections will be affected as a result.

### B. The DNC's Request is Unprecedented

In attempting to find precedence for its request, the DNC compares its current circumstances to those in which a technical banking glitch interrupted an already initiated transfer of funds. *See Id.* In those situations, *existing* funds were not received or deposited in a timely manner i.e. they were interrupted in their transfer, because of errors outside the control of the committee or its agents. Here, the funds are not being held in another location by an outside party whose duty it is to transfer them as the DNC has ordered.. The existence of funds is not analogous to the deposit or transfer of them, nor is this circumstance definitively outside the control of the committee or its agents. The committee made at least three decisions that led directly to the present circumstance:

1. They decided to pay all the relevant expenses out federal funds.
2. They decided to suspend all fund-raising after the events of September 11.
3. They spent their non-federal funds elsewhere, while explicitly aware fundraising had been suspended.<sup>14</sup>

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<sup>13</sup>See Explanation and Justification of Regulations on Methods of Allocation Between Federal and Non-Federal Accounts: Payments: Reporting, 55 Fed. Reg. 26058, 26066 (Fed. Election Comm'n 1990) (listing these and other changes to the relevant regulations)

<sup>14</sup>In the 17 days immediately following the event, the DNC spent \$998, 217 in non-federal funds, by the time of the FEC General Counsel Memorandum regarding the proposed statement of policy, the DNC had spent \$1.73M . Supplement to Letter from Joseph E. Sandler, General Counsel, Democratic National Committee, to Bradley Litchfield, Office of General Counsel, Fed. Election Comm'n Bradley Litchfield (Oct. 25, 2001).



The present circumstance, i.e., insufficient non-federal funds to cover allocable expenses, could be directly attributable to any one or combination of these decisions. The current situation is not because of circumstances outside the control of the committee or its agents; it occurred exactly because of conscious decisions of the committee or its agents.

The DNC's request is akin to a taxpayer, having taken a vacation and purchased a new car with money earmarked for a quarterly tax payment, asking the IRS for an extension, justifying it with the plea "I had only so much money, you'll have to wait for yours." Surely one of the largest, best-funded organizations in the world can be held to at least the same standard as that applied to an ordinary citizen.

### C. Law Inevitably has Adverse Effects

Any rule like this periodically results in adverse effects on particular parties at a particular time; a donor promises a check, his business suffers a reversal, and the check is not written. A secretary, rushing to deposit a check before the statutory window closes has an accident and the check is cleared too late. Checks bounce. Fundraisers are cancelled. The non-federal fund of all regulated parties surely suffers from such scenarios regularly. Rules are defined by their effect on the conduct of people, and purposefully require people to organize their affairs to comply with them. If a rule is made subject to the circumstances of the regulated, it is no longer a rule; there is a "if you're not adversely affected rule," or a 60-day-unless-you-fail-to-comply rule.

The effect of the draft statement is to grant, *ex post facto*, a dispensation for a party that failed to adjust their conduct to the requirements of a law. Worse, the very same law was surely adversely affecting other regulated parties, who did adjust their conduct, who did not anticipate an *ex post facto* reprieve from the hardship the law created, and now, it seems, will be penalized. This action "may apply to all party committees in the enforcement process," but it surely is not "without regard to the special circumstances of particular committees." *Gen. Couns. Mem.* at 12 (Fed. Election Comm'n Oct. 26, 2001). The proposal is *in response* to a formal request by a particular committee; the Republican National Committee has not requested a similar waiver of the regulations and ostensibly would not use one if granted. And since the RNC did not conduct its affairs with an eye to a rule being passed to retroactively relieve it of the consequences of its decisions, but made choices depending on the laws in place, they cannot benefit from the new rule. The strange thing about retroactive rules is that you must conduct yourself in accordance with them before you know of them if you are to avoid prosecution or reap any benefit.

### D. The Problem of a Nonbinding Statement

It would be a problem to both the FEC and the DNC if the proffered waiving of the 60 day window were not binding and could not be applied as law. If the draft statement is not law and therefore not binding on the FEC, the DNC will make the transfers outside the statutory

window at its own risk, a scenario that they likely sought to avoid when they requested an Advisory Opinion. If the FEC means to allow extra-statutory fund transfers, it is hardly conducive to that purpose to invite them with a maneuver that leaves the invitees completely exposed to adverse determinations. Again, if the FEC is *benevolently* inviting conduct that blatantly violates regulations promulgated under the authority given it by Congress, it is puzzling that they should choose the vehicle that is least reliable for the invitees

The tenuous nature of a nonbinding policy statement can affect the legal rights of parties in other ways as well, and may well backfire on agencies hoping to avoid challenge by informally affecting conduct. In a recent case in the Fourth Circuit, the question of an issue advocacy organization's standing to challenge a statute raised the question as to whether the FEC was legally bound by a "policy of nonenforcement, adopted by the FEC in a closed meeting." *Virginia Society for Human Life v. FEC*, 263 F.3d 379, 388 (4<sup>th</sup> Cir. 2001).<sup>15</sup> The court pointed out that the policy, without "the rigors of notice and comment rulemaking," did not "carry the binding force of law." *Id.* As the General Counsel's memo points out, the court in *VSHL* noted that a change in policy (as opposed to a rule) is only a simple vote away. *Id.* at 388 ("a simple vote of the Commission . . . could scuttle the policy") See also *Gen. Couns. Mem.* at 6 (Fed. Election Comm'n Oct. 26, 2001).

#### E. The Policy Rewards Disregard for Law and is Inevitably Partisan

The proposal cannot but have a partisan effect. To relieve one organization one time of an ongoing obligation insures inequities; a rule made one time to fit one situation at the request of one of two competing parties by definition and in practice benefits one over the other. The widening of the regulatory window, after the DNC has spent its monies in other contests and the RNC refrained, in reliance on the law, can only benefit the DNC and it is only a benefit because the DNC did not order its conduct in reliance on the law.

The FEC clearly intends that the regulation be narrow and temporary; it "is taking this action in response to the unique circumstances"; those "unique circumstances" include those directly resulting from the DNC's choosing to act in the way most beneficial to them, without prudent regard for the applicable laws. *Request for Comment*, 66 Fed. Reg. at 56,248. By removing the effect of that disregarded law, the FEC action will inexorably produce a result that benefits one party over the other.

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<sup>15</sup>The standing issue was decided without determining whether the FEC's policy was so easy to change that it represented a credible threat sufficient to grant standing for a preenforcement action. The court found that the offered "protection," even if reliable, was limited to the Fourth Circuit, and thus was too narrow to protect the *VSHL* from a constitutionally prohibited chilling of its free speech.

## V. CONCLUSION

The proposed Statement of Policy is a substantive rule; waiving the regulatory deadline is not interpretive, procedural or a statement of policy. Labels aside, the substance of what the Commission purports to do is to amend a rule of conduct, substantially affecting the rights of committees to which it will apply. Because it is a rule, the proposed statement must be submitted to Congress for thirty legislative days of review if it is to be valid.

Characterizing the policy as non-binding is a ruse to escape review; the FEC and the DNC no doubt intend for the statement to be binding, at least for the immediate future. The DNC and all other relevant parties will, no doubt, amend their conduct to the degree that the rule is binding—that is, *the rule will have an effect only in so far and to the extent that it is a binding rule*. If, then, the draft statement is a statement of policy, of no substantial effect and the FEC would conduct investigations according to the statute with no regard to the draft statement (the legal effectiveness of a policy statement), this entire affair is an academic exercise. The draft statement can accomplish what the FEC ostensibly intends *only if it is a substantive rule*; the statement must have an effect if it is to have any meaning at all.

The applicable rulemaking procedure is that of the FECA itself; the APA defers to express statutory pronouncements that conflict. Congress expressly created a rulemaking procedure for the FEC that subjected their proposed substantive rules to the scrutiny of the body that grants their authority. Congress also consciously closed the advisory opinion loophole, demonstrating their resolve that agency actions that substantially affect the rights and obligations of the public be subject to this heightened procedure. It is therefore especially troubling that the FEC would attempt to prescribe a binding norm without the clearly mandated protection of legislative review.

Temporarily opening the 60 day window has policy ramifications for FEC-regulated parties and for the wider public as well. The narrow window was implemented as one of several changes designed to buttress a larger regulatory scheme, and adjusting one component will skew that scheme's effect on the regulated sector, resulting in changes in spending that will affect elections. The proposal will result in heretofore illegal fund transfers and will do so *at the request* of one of the regulated parties who will clearly benefit from the change, and whose only rationale is the shoring up of their own finances. Ostensibly, the FEC exists to regulate the use of funds according to the mandate of the FECA, not to provide and adjust a channel for the funds they are to regulate.

Rules are defined by their effect on the conduct of people, and purposefully require people to organize their affairs to comply with them. The proposed waiver is unprecedented and sends the message that rules are malleable to circumstances resulting from a disregard for the law. It would grant a dispensation for a party that failed to adjust their conduct to the requirements of a law while the very same law was surely adversely affecting other regulated parties. To remove the effect of that disregarded law after competing parties had properly

adjusted their conduct to coincide with its requirements will inexorably produce a result that benefits one party over the other; to do so one time cannot be but partisan.