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FEDERAL ELECTION COMMISSION
Washington, DC 20463

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JUL 6 2007

MEMORANDUM

AGENDA ITEM

For Meeting of: 07-12-07

SUBMITTED LATE

TO: The Commission

FROM: Thomasenia P. Duncan *TPD*
General Counsel

Rosemary C. Smith *RCR for RCS*
Associate General Counsel

Amy L. Rothstein *ALR*
Assistant General Counsel

Stacey J. Shin *SJS*
Attorney

SUBJECT: Draft Notice of Proposed Rulemaking on the Use of Campaign Funds for Donations to Non-Federal Candidates and Any Other Lawful Purpose

Attached is a draft Notice of Proposed Rulemaking ("NPRM") that proposes to add two additional uses of campaign funds to the list of permissible non-campaign uses at 11 CFR 113.2, pursuant to Section 301 of the Consolidated Appropriations Act, 2005. Congress amended 2 U.S.C 439a by adding (1) donations to non-Federal candidates, and reinstating (2) any other lawful purpose that does not convert campaign funds to personal use. This draft NPRM proposes to conform the Commission regulations accordingly.

We request that this draft be placed on the agenda for July 12, 2007.

Attachment

1 **FEDERAL ELECTION COMMISSION**

2 **11 CFR Part 113**

3 **[Notice 2007-]**

4 **Use of Campaign Funds for Donations to Non-Federal Candidates**
5 **and Any Other Lawful Purpose Other Than Personal Use**

6 **AGENCY:** Federal Election Commission.

7 **ACTION:** Notice of Proposed Rulemaking.

8 **SUMMARY:** The Federal Election Commission requests comments on a
9 proposed revision to its rules regarding the use of campaign funds.
10 The proposed revision would add to the current list of permissible
11 uses of campaign funds in Commission regulations: (1) donations
12 to non-Federal candidates; and (2) any other lawful purpose other
13 than personal use. This change would conform the provision with
14 those in the Federal Election Campaign Act, as amended (“the
15 Act”). The Commission has made no final decision on the issues
16 presented in this rulemaking. Further information is provided in
17 the supplementary information that follows.

18 **DATES:** Comments must be received on or before [INSERT DATE 30
19 DAYS AFTER THE DATE OF PUBLICATION IN THE
20 FEDERAL REGISTER].

21 **ADDRESSES:** All comments must be in writing, must be addressed to Ms. Amy
22 L. Rothstein, Assistant General Counsel, and must be submitted in
23 either e-mail, facsimile, or paper copy form. Commenters are

1 strongly encouraged to submit comments by e-mail to ensure
2 timely receipt and consideration. E-mail comments must be sent to
3 439aNPRM@fec.gov. If e-mail comments include an attachment,
4 the attachment must be in either Adobe Acrobat (.pdf) or Microsoft
5 Word (.doc) format. Faxed comments must be sent to (202) 219-
6 3923, with paper copy follow-up. Paper comments and paper copy
7 follow-up of faxed comments must be sent to the Federal Election
8 Commission, 999 E Street, NW, Washington, DC 20463. All
9 comments must include the full name and postal service address of
10 the commenter or they will not be considered. The Commission
11 will post comments on its website after the comment period ends.

12 **FOR FURTHER**
13 **INFORMATION**

14 **CONTACT:**

Ms. Amy L. Rothstein, Assistant General Counsel, or Ms. Stacey J.
15 Shin, Attorney, 999 E Street, NW, Washington, DC 20463, (202)
16 694-1650 or (800) 424-9530.

17 **SUPPLEMENTARY**

18 **INFORMATION:**

Section 313 of the Federal Election Campaign Act of 1971, as
19 amended (“the Act”), sets forth permissible uses of contributions accepted by candidates
20 and donations received by individuals to support their activities as Federal officeholders.
21 (This section is codified at 2 U.S.C. 439a and will be referred to hereafter as “Section
22 439a.”) Section 439a(a) provides that candidates may use contributions, and individuals
23 holding Federal office may use donations, for: (1) expenditures in connection with the
24 candidate’s or individual’s campaign for Federal office; (2) ordinary and necessary
25 expenses incurred in connection with duties of the individual as a Federal officeholder;

1 (3) contributions to an organization described in section 170(c) of the Internal Revenue
2 Code; (4) transfers, without limitation, to a national, State, or local committee of a
3 political party; (5) donations to State and local candidates subject to the provisions of
4 State law; and (6) any other lawful purpose, unless such purpose constitutes personal use
5 of contributions or donations. See 2 U.S.C. 439a(a).

6 Part 113 of the Commission’s regulations implements section 439a. Section
7 113.2 tracks the first four permissible uses of campaign funds and funds donated to a
8 Federal officeholder as set out in the Act (to defray Federal campaign expenses; to pay
9 ordinary and necessary expenses incurred in connection with the duties of a Federal
10 officeholder; to make donations to organizations described in section 170(c) of the
11 Internal Revenue Code; and to transfer such funds without limitation to any national,
12 State, or local political party committee). See 11 CFR 113.2. The Commission is
13 initiating this rulemaking to add to section 113.2 the last two permissible uses regarding
14 donations to non-Federal candidates, and donations for any other lawful purpose other
15 than personal use.

16 This difference between the Commission’s regulations and the Act resulted from
17 amendments to the Act by the Bipartisan Campaign Reform Act of 2002 (“BCRA”)¹ and
18 the Consolidated Appropriations Act of 2005.² Prior to the passage of BCRA, the Act
19 and Commission regulations permitted the use of campaign funds for “any other lawful
20 purpose” other than personal use. In BCRA, Congress deleted “any other lawful

¹ Pub. L. 107-155, 116 Stat. 81 (2002).

² Pub. L. 108-447, 118 Stat. 2809 (2004). The Consolidated Appropriations Act of 2005 directed that section 312a(a) of the Act be amended, but was executed by amending section 313(a) of the Act "as the probable intent of Congress." 2 U.S.C.A. 439a (West 2004).

1 purpose” from section 439a and retained only four permissible uses of campaign funds.
2 The Commission amended its regulation accordingly.³

3 Congress later amended section 439a again, in the Consolidated Appropriations
4 Act of 2005, by reinstating “any other lawful purpose” and adding donations to State and
5 local candidates as permissible uses of campaign funds. These changes to the Act have
6 prompted this rulemaking.

7 **I. Donations to State and local candidates**

8 Section 439a(a)(5) of the Act expressly permits Federal candidates and
9 officeholders to donate contributions accepted and other monies received to State and
10 local candidates. The Commission proposes to amend 11 CFR 113.2 accordingly, by
11 adding a new paragraph (d), which would permit Federal candidates and officeholders to
12 donate campaign funds from their authorized committees to “State and local candidates
13 subject to the provisions of State law.” The Commission seeks comment on this
14 proposed revision.

15 **II. Any other lawful purpose**

16 The Commission also proposes to amend 11 CFR 113.2 by inserting a new
17 paragraph (e), which would state that campaign funds “may be used for any other lawful
18 purpose, unless such use is personal use under 11 CFR 113.1(g).” New paragraph (e)
19 would follow current section 439a(a)(6) of the Act, which permits the use of campaign
20 funds “for any other lawful purpose,” unless the funds are converted by any person to
21 personal use. The Commission seeks comment on this proposed revision to the
22 regulation. The Commission notes that this change to the statute has the effect of

³ Disclaimers, Fraudulent Solicitation, Civil Penalties, and Personal Use of Campaign Funds; Final Rule, 67 FR 76962, 76970-75 and 76978-79 (Dec. 13, 2002).

1 superseding the analysis in Advisory Opinions 2003-26 (Voinovich) and 2004-03
2 (Dooley).

3 **Certification of No Effect Pursuant to 5 U.S.C. 605(b) (Regulatory Flexibility Act)**

4 The Commission certifies that the attached proposed rule would not, if
5 promulgated, have a significant economic impact on a substantial number of small
6 entities. The basis for this certification is that any individuals and not-for-profit entities
7 that would be affected by this proposed rule are not “small entities” under 5 U.S.C. 601.
8 The definition of “small entity” does not include individuals, but classifies a not-for-
9 profit enterprise as a “small organization” if it is independently owned and operated and
10 not dominant in its field. 5 U.S.C. 601(4). The proposed rule would affect authorized
11 committees, which are not independently owned and operated because they are not
12 financed and controlled by a small identifiable group of individuals. Authorized
13 committees are financed by contributions from a large number of persons and controlled
14 by the candidate and the candidate’s campaign employees and volunteers. To the extent
15 that any authorized committees might be considered “small organizations,” the number
16 that would be affected by this proposed rule is not substantial.

17 The proposed rule also would not impose any additional restrictions or increase
18 the costs of compliance for authorized committees. Instead, the proposed rule would
19 provide authorized committees with additional options for using campaign funds. The
20 proposed rule would not impose an undue burden upon authorized committees because
21 they are already required to report the use of campaign funds to the Commission.
22 Therefore, the attached proposed rule, if promulgated, would not have a significant
23 economic impact on a substantial number of small entities.

1 **List of Subjects**

2 11 CFR Part 113

3 Campaign funds.

4

1 **PART 113 – USE OF CAMPAIGN ACCOUNTS FOR NON-CAMPAIGN**

2 **PURPOSES**

3 For the reasons set out in the preamble, the Federal Election Commission
4 proposes to amend Subchapter A of Chapter I of Title 11 of the Code of Federal
5 Regulations as follows:

6 1. The authority citation for Part 113 would continue to read as follows:

7 **Authority:** 2 U.S.C. 432(h), 438(a)(8), 439a, 441a.

8 2. Section 113.2 would be amended by:

9 a. Redesignating paragraphs (e) and (f) as paragraphs (f) and (g); and

10 b. Revising paragraph (d) and adding new paragraph (e) to read as follows:

11 **§ 113.2 Permissible non-campaign use of funds (2 U.S.C. 439a).**

12 * * * * *

13 (d) May be donated to State and local candidates subject to the provisions of State
14 law; or

15 (e) May be used for any other lawful purpose, unless such use is personal use under
16 11 CFR 113.1(g).

17 * * * * *

18
19 _____
20 Robert D. Lenhard
21 Chairman
22 Federal Election Commission
23

24 DATED: _____
25 BILLING CODE: 6715-01-U
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