



FEDERAL ELECTION COMMISSION
Washington, DC 20463

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AGENDA ITEM

For Meeting of: 12-17-09

MEMORANDUM

December 17, 2009

TO: The Commission

FROM: Thomasenia P. Duncan *JPD*
General Counsel

Rosemary C. Smith *RCS/by Rmk*
Associate General Counsel

Robert M. Knop *Rmk*
Assistant General Counsel

Neven F. Stipanovic *NFS*
Attorney

SUBMITTED LATE

SUBJECT: Draft Interim Final Rule -- *EMILY's List v. FEC*

Attached is a draft Interim Final Rule to implement the D.C. Circuit Court's decision in *EMILY's List v. FEC*, 581 F.3d 1 (D.C. Cir. 2009). The draft would insert a note to the Commission's Regulations at 11 CFR 100.57 and 106.6(c) and (f).

We have been asked that this draft be placed on the agenda for December 17, 2009.

Attachment

1 **FEDERAL ELECTION COMMISSION**

2 **11 CFR Parts 100 and 106**

3 **[Notice 2009 - >]**

4 **Funds Received in Response to Solicitations; Allocation of Expenses by Separate**
5 **Segregated Funds and Nonconnected Committees**

6 **AGENCY:** Federal Election Commission.

7 **ACTION:** Interim Final Rule.

8 **SUMMARY:** The United States District Court for the District of Columbia
9 ordered that the Federal Election Commission's ("Commission")
10 rules regarding funds received in response to solicitations and the
11 allocation of certain expenses by separate segregated funds and
12 nonconnected committees are vacated. The Commission is
13 inserting a note to these regulations that reflects the court's
14 decision. The Commission will engage in a separate notice of
15 rulemaking to remove these rules from the Code of Federal
16 Regulations. Further information is provided in the supplementary
17 information that follows.

18 **DATES:** The interim final rule is effective on [INSERT DATE OF
19 PUBLICATION IN THE FEDERAL REGISTER]. Comments
20 must be received on or before [INSERT DATE 30 DAYS AFTER
21 DATE OF PUBLICATION IN THE FEDERAL REGISTER].

22 **ADDRESSES:** All comments must be in writing, must be addressed to Mr. Robert
23 M. Knop, Assistant General Counsel, and must be submitted in

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

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15 **FOR FURTHER**
16 **INFORMATION**
17 **CONTACT:**

Mr. Robert M. Knop, Assistant General Counsel, or Mr. Neven F.
Stipanovic, Attorney, 999 E Street, NW., Washington, DC 20463,
(202) 694-1650 or (800) 424-9530.

20 **SUPPLEMENTARY**
21 **INFORMATION:**

22 On September 18, 2009, the United States Court of Appeals for the D.C. Circuit
23 (“D.C. Circuit Court”) ruled that 11 CFR 100.57, 106.6(c), and 106.6(f) violated the First
24 Amendment of the United States Constitution. See EMILY’s List v. FEC, 581 F.3d 1
25 (D.C. Cir. 2009). The court also ruled that 11 CFR 100.57 and 106.6(f), as well as one

1 provision of 106.6(c), exceeded the Commission’s authority under the Federal Election
2 Campaign Act (“Act”). See id. At the direction of the D.C. Circuit Court, the United
3 States District Court for the District of Columbia ordered that these rules are vacated.
4 See Final Order, EMILY’s List v. FEC, No. 05-0049 (D.D.C. Nov. 30, 2009). The
5 Commission is now inserting a note to 11 CFR 100.57, 106.6(c), and 106.6(f) that
6 reflects this court order.

7 The Commission will issue a separate notice of rulemaking document to
8 implement the court’s order vacating 11 CFR 100.57, 106.6(c), and 106.6(f) from the
9 regulations pursuant to the EMILY’s List decision. The Commission is first inserting a
10 note to give the public immediate guidance that these provisions were vacated by court
11 order while the Commission completes the rulemaking process of implementing the
12 EMILY’s List decision.

13 **Administrative Procedure Act**

14 The Commission is issuing this rule as an interim final rule. This interim final
15 rule will take effect immediately upon publication in the Federal Register. The public
16 nonetheless may comment on this interim final rule and the Commission may address any
17 comments received in a later rulemaking document.

18 The Administrative Procedure Act (“APA”) requires an agency promulgating
19 regulations to publish a notice of a proposed rulemaking in the Federal Register.
20 5 U.S.C. 553(b). The notice and comment requirement does not apply, however, “when
21 the agency for good cause finds (and incorporates the finding and a brief statement of
22 reasons therefore in the rules issued) that notice and public procedure thereon are
23 impracticable, unnecessary, or contrary to the public interest.” 5 U.S.C. 553(b)(B). The

1 notice and comment requirement in this case is unnecessary because the Commission
2 action is merely to insert language reciting the fact that the D.C. District Court has
3 ordered that the aforementioned regulations are vacated. The result of the court's order is
4 that neither public notice nor a comment period are likely to benefit the Commission in
5 this rulemaking. This interim final rule is merely an informational amendment indicating
6 that a court has issued an order concerning these rules.

7 Moreover, the notice and comment period may be contrary to the public interest.
8 The Commission notes that the 2010 elections for Federal office are scheduled to begin
9 as early as February 2010, when some States begin holding their primary elections. The
10 State of Illinois, for example, will hold its 2010 primary election on February 2, 2010.
11 See <http://www.elections.il.gov/Votinginformation/2010GPGE.aspx>. It is urgent,
12 therefore, to give immediate notice to the public that these rules have been vacated by
13 court order. The additional delay that would be incurred by providing notice and an
14 opportunity to comment could be contrary to the public interest.

15 For the same reasons, this interim final rule is not subject to the APA's thirty day
16 delayed effective date requirement under the "good cause" exemption to the delayed
17 effective date requirement. 5 U.S.C. 553(d)(3).

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Regulatory Flexibility Act

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Because this interim final rule is exempt from the notice and comment procedure

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under 5 U.S.C. 553(b), the Commission is not required to conduct a regulatory flexibility

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analysis under 5 U.S.C. 603 and 604 (Regulatory Flexibility Act). See 5 U.S.C. 601(2)

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and 604(a).

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1 **List of Subjects**

2 11 CFR Part 100

3 Elections.

4 11 CFR Part 106

5 Campaign Funds, Political committees and parties, Reporting and recordkeeping
6 requirements.

7 For the reasons set out in the preamble, the Commission is amending Subchapter
8 A of Chapter I of Title 11 of the Code of Federal Regulations as follows:

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10 **PART 100 – SCOPE AND DEFINITIONS (2 U.S.C. 431)**

11 1. The authority citation for part 100 continues to read as follows:

12 Authority: 2 U.S.C. 431, 434, 438(a)(8), and 439a(c).

13 2. Section 100.57 is amended by adding a note to read as follows:

14 **§ 100.57 Funds received in response to solicitations.**

15 * * * * *

16 Note to § 100.57:

17 On November 30, 2009, the United States District Court for the District of Columbia
18 ordered that § 100.57 is vacated. See Final Order, EMILY’s List v. FEC, No. 05-0049
19 (D.D.C. Nov. 30, 2009).

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21 **PART 106 - ALLOCATIONS OF CANDIDATE AND COMMITTEE ACTIVITIES**

22 3. The authority citation for part 106 continues to read as follows:

23 Authority: 2 U.S.C. 438(a)(8), 441a(b), 441a(g).

1 4. Section 106.6 is amended by adding a note to read as follows:

2 **§ 106.6 Allocation of expenses between federal and non-federal activities by separate**
3 **segregated funds and nonconnected committees.**

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5 Note to 11 CFR 106.6:

6 On November 30, 2009, the United States District Court for the District of Columbia
7 ordered that paragraphs (c) and (f) of § 106.6 are vacated. See Final Order, EMILY's
8 List v. FEC, No. 05-0049 (D.D.C. Nov. 30, 2009).

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10 On behalf of the Commission,

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Steven T. Walther
Chairman
Federal Election Commission

DATED: _____
BILLING CODE: 6715-01-U