



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

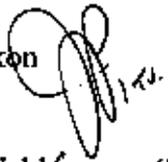
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**MEMORANDUM**

TO: The Commission

THROUGH: James A. Pehrson   
Staff Director

FROM: Lawrence M. Noble   
General Counsel

Bradley Litchfield   
Associate General Counsel

Rosemary C. Smith   
Assistant General Counsel

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Attorney

SUBJECT: Final Rules for Administrative Fines

**AGENDA ITEM**  
For Meeting of: 5-11-00

**SUBMITTED LATE**

The Office of General Counsel has drafted the attached Final Rule to implement the Administrative Fines program, 2 U.S.C. 437g(a)(4) (as amended).

The Administrative Fines program provides for the assessment of civil money penalties for violations of the reporting requirements of 2 U.S.C. 434(a). The final rules in new subpart B of 11 CFR part 111 will establish procedures for processing such violations and would include the schedules of penalties. The Office of General Counsel has worked with the Commission's Reports Analysis Division and Staff Director's Office in drafting these new regulations.

Section 111.36(c) of the Final Rules provides for the reviewing officer to have sole discretion to hold a hearing if:

1. The respondent requests a hearing;
2. There is a disputed issue of material fact;
3. The issue cannot be resolved on the basis of the paper submissions; AND
4. The hearing officer believes a hearing would resolve the issue.

While the OGC has determined that hearings are not required by the FECA, the Administrative Procedure Act, or the U.S. Constitution, the Commission should consider including the possibility for a hearing in certain limited circumstances because of the benefits of

Hearings may reduce the possibility for error in the decisionmaking process, and thus may reduce the number of court suits challenging civil monetary penalties. There are, however, some drawbacks in allowing the reviewing officer discretion to conduct hearings. Hearings create an additional work load for the reviewing officer and possibly for RAD. Another concern is that Congress intended this to be a quicker, more streamlined process than the one used for other types of enforcement actions, and an oral hearing inevitably adds to the time and effort needed to process the matter. On balance, while OGC does not believe an oral hearing is required by law, we recommend that the reviewing officer be given sole discretion to decide whether to hold a hearing and that these decisions should not be subject to Commission review.

### **Recommendation**

The Office of General Counsel recommends that the Commission approve the attached Final Rules for publication in the *Federal Register* and transmittal to Congress.

Attachment

1 **FEDERAL ELECTION COMMISSION**

2 **11 CFR Parts 104 and 111**

3 **[NOTICE 2000 - ]**

4 **ADMINISTRATIVE FINES**

5 **AGENCY:** Federal Election Commission.

6 **ACTION:** Final Rule; transmittal of regulations to Congress.

7 **SUMMARY:** The Treasury and General Government Appropriations Act,

8 2000, amended the Federal Election Campaign Act of 1971

9 (hereinafter "the Act" or "FECA") to permit the Federal

10 Election Commission to impose civil money penalties for

11 violations of the reporting requirements of the FECA that

12 occur between January 1, 2000, and December 31, 2001.

13 The amendments are intended to expedite and streamline

14 the Commission's enforcement procedures. The

15 Commission is promulgating amendments to its compliance

16 procedure regulations to implement the new program.

17 Further information is provided in the supplementary

18 information that follows.

19 **EFFECTIVE DATE:** July 14, 2000. The Commission transmitted the final rules

20 and the Explanation and Justification to Congress pursuant

21 to 2 U.S.C. 438(d) on May , 2000. The Commission

22 anticipates that 30 legislative days will elapse by the

23 effective date.

1 **FOR FURTHER**  
2 **INFORMATION**  
3 **CONTACT:**

Ms. Rosemary C. Smith, Assistant General Counsel, or Ms.  
Mai T. Dinh, Staff Attorney, 999 E Street, N.W.,  
Washington, D.C. 20463, (202) 694-1650 or (800) 424-  
9530.

7 **SUPPLEMENTARY INFORMATION:** The Commission is issuing final rules to  
8 establish the administrative fines program that Congress authorized in amendments to  
9 section 309(a)(4) of the FECA, 2 U.S.C. 437g(a)(4). These amendments were enacted as  
10 part of the Treasury and General Government Appropriations Act, 2000, Pub. L. No. 106-  
11 58, 106<sup>th</sup> Cong., § 640, 113 Stat. 430, 476-77 (1999). Under 2 U.S.C. 434, treasurers of  
12 political committees are required to file reports periodically to the Commission by a  
13 certain deadline. Prior to enactment of the amendment to the FECA, the Commission  
14 handled failures to file the reports in a timely manner under the enforcement procedures  
15 in 11 CFR part 111. The purpose of the administrative fines program is to institute  
16 streamlined procedures, while preserving the respondents' due process rights, to process  
17 violations of the reporting requirements of 2 U.S.C. 434(a) and assess a civil money  
18 penalty based on the schedules of penalties for such violations. The final rules include  
19 new subpart B of 11 CFR part 111, and technical amendments to 11 CFR 104.5, 111.8,  
20 111.20, and 111.24 to implement the administrative fines program.

21 Section 438(d) of Title 2, United States Code, requires that any rule or regulation  
22 prescribed by the Commission to carry out the provisions of Title 2 of the United States  
23 Code be transmitted to the Speaker of the House of Representatives and the President of

1 the Senate 30 legislative days before they are finally promulgated. These regulations  
2 were transmitted to Congress on May , 2000.

3

4 **Explanation and Justification**

5

6 The Commission initiated this rulemaking by issuing a Notice of Proposed  
7 Rulemaking (NPRM) on March 29, 2000, in which it sought comments to the proposed  
8 rule. 65 FR 16534 (March 29, 2000). The comment period ended on April 28, 2000.  
9 The Commission received one comment in response to the NPRM from Akin, Gump,  
10 Strauss, Hauer & Feld. The comment included a request for a public hearing. Because  
11 Congress intended for this new program to apply to violations that occur in 2000 and  
12 2001, the final rules need to be issued in a timely manner so that the program will be  
13 applicable to the reports that are due in 2000. Holding a public hearing would postpone  
14 publication of the final rules and delay the effective date, possibly until February or  
15 March, 2001. This late effective date would allow the Commission to apply the  
16 administrative fines procedure to only one major reporting period - the 2001 Mid-Year  
17 Report. This would not give the Commission a sufficient basis to determine whether to  
18 recommend that Congress make the program permanent. Also, the Commission received  
19 only one request for a public hearing and that requester did submit extensive comments.  
20 Therefore, the Commission will not hold a public hearing on this final rule.

1 General comments

2  
3 The commenter's overriding concern was that the proposed procedures do not  
4 afford adequate procedural due process and therefore, violate the Fifth Amendment's Due  
5 Process Clause of the U.S. Constitution. The commenter argued that the procedures do  
6 not meet the balancing test in Mathews v. Eldridge, 424 U.S. 319 (1976), by failing to  
7 recognize the respondents' private interests, by minimizing the potential risk of erroneous  
8 result, and by placing undue emphasis on administrative expediency. The commenter  
9 claimed that the potential risk of erroneous result is high because the civil money penalty  
10 calculation includes three factors that could be misapplied and because the coming advent  
11 of mandatory electronic filing could flood the Commission's computers and lead to a  
12 breakdown that would unfairly penalize the respondents.

13 The Commission disagrees with this assessment. The Commission does  
14 recognize that the respondents have a property interest at stake. Except for political  
15 committees with low levels of financial activity during the reporting period, the civil  
16 money penalty will not exceed fifteen percent of the level of activity in the report for  
17 respondents who have no previous violations. For committees whose financial activity is  
18 less than \$25,000 and who do not have a previous violation, the civil money penalty will  
19 not exceed \$1650 or the level of activity, whichever is less. Thus, the cost of additional  
20 procedures such as a hearing for the respondent as well as the Commission will exceed  
21 the benefit of having them. Also, the Mathews balancing test considers whether  
22 additional procedures will provide greater protection against deprivation of a property  
23 interest or error. Within the administrative fines program, additional procedures in most

1 cases will not afford the respondents greater protection against either. As stated in the  
2 NPRM, the factual and legal issues involved in violations of the reporting requirements of  
3 2 U.S.C. 434(a) are relatively straightforward. The Commission will carefully review the  
4 facts and its records before it will even proceed with a reason to believe finding. For the  
5 most part, the factual disputes surrounding this type of violation are whether the  
6 respondent filed the report and when the report was filed. If the respondent disagrees  
7 with the facts in the notification of the reason to believe finding, he or she can send proof  
8 of the filing and the date of the filing. In most cases, the Commission expects that the  
9 reviewing officer will be able to resolve these types of factual disputes based on the  
10 written submission. In only those cases where the reviewing officer cannot resolve  
11 disputed issues of material fact based on the written submission, he or she can conduct a  
12 hearing to explore the facts further. See infra.

13       The Commission also disagrees with the commenter's assertion that the procedure  
14 set forth in the NPRM pose a large potential risk of erroneous result. The civil money  
15 penalty calculation is a simple arithmetic formula whereby an error can be readily  
16 corrected by the Commission or the reviewing officer when it is brought to their attention.  
17 It is premature to predict the impact of mandatory electronic filing on administrative  
18 fines. It will have no real effect on the administrative fines program during the year 2000  
19 because mandatory electronic filing is not scheduled to begin until January, 2001. Given  
20 that most committees will file only two reports due during 2001 (2000 Year End and  
21 1002 Mid-Year reports) before the administrative fines program sunsets on December 31,  
22 2001, the impact is likely to be minimal, if any. The Commission's electronic filing  
23 system has been designed to accommodate filings by all committees who will be

1 mandated to file electronically in 2001. As a result, there is no expectation that the  
2 system will have an adverse impact on the ability of committees to file their reports in a  
3 timely manner. In fact, committees may find that electronic filing is easier, faster, and  
4 more convenient than paper filing. Nevertheless, any failure of the system that prevents  
5 committees from filing their reports when due would be recognized by the Commission  
6 as a circumstance beyond the control of the filer and would be taken into account when  
7 considering reason to believe findings or the final determination.

8 The Commission recognizes that the need to avoid administrative burdens is one  
9 of the stated purposes for the amendment to the FECA. Congressman William Thomas,  
10 Chairman of the Committee of House Administration, stated the following on the floor  
11 of the House of Representatives on September 15, 1999:

12 Allowing the FEC to impose administrative fines for reporting violations without  
13 the lengthy procedural steps required in a normal enforcement case will free  
14 critical FEC resources for more important disclosure and enforcement efforts.

15 The rights of those under these regulations are protected by preserving the option  
16 of appeal to a U.S. District Court for those who believe the FEC erred.

17 The Commission, however, disagrees with the commenter that the proposed rule  
18 sacrificed the respondents' rights and procedural due process in the interest of  
19 administrative efficiency. The Commission applied the Mathews balancing test in  
20 developing the administrative fines procedures, taking into consideration the private  
21 interests involved and the nature of the violation. The Commission believes that the  
22 procedures in the final rules more than adequately meet the Mathews test in providing the  
23 respondents with their procedural due process.

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Section 104.5 Filing dates.

Paragraph (i) is being added to section 104.5 to encourage political committees to keep proof that they filed their reports and the dates on which the reports were filed. Retaining this evidence will allow a respondent to demonstrate timely filing if the respondent disagrees with the Commission on whether the report was filed and if so, the date of the filing. No substantive comments were made concerning this proposed section.

Section 111.8 Internally generated matters; referrals.

Paragraph (d) is being added to section 111.8 to permit the Commission to process complaint generated matters that allege violations of the reporting requirements of 2 U.S.C. 434(a) under the administrative fines program. The Commission received no substantive comment on this section.

Section 111.20 Public disclosure of Commission action.

New paragraph (c) in section 111.20 is being added to provide for the public disclosure of the enforcement file once the matter is completely resolved. The Commission did not receive any substantive comments to this section.

1 Section 111.24 Civil Penalties.

2

3 Revised paragraph (a) of section 111.24 allows for the imposition of civil money  
4 penalties so as to make section 111.24 consistent with 11 CFR part 111, subpart B. The  
5 Commission did not receive any substantive comments on this section.

6

7 Section 111.30 When will subpart B apply?

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9 The amendment to FECA authorizes the administrative fines procedures for  
10 violations of the reporting requirements of 2 U.S.C. 434(a) that occur between January 1,  
11 2000 and December 31, 2001. Therefore, this section provides that subpart B only  
12 applies to violations that occur during that time frame and subpart B sunsets as of January  
13 1, 2002. The Commission did not receive any substantive comments on this section.

14

15 Section 111.31 Does this subpart replace subpart A of this part for violations of the  
16 reporting requirements of 2 U.S.C. 434(a)?

17

18 Under the amendment to FECA, the Commission has discretion to apply either the  
19 administrative fines procedures or the current enforcement procedures set forth in  
20 §§111.9 through 111.19 to violations of the reporting requirements of 2 U.S.C. 434(a).  
21 The amendment, however, still requires the Commission to find reason to believe that a  
22 violation has occurred prior to making a final determination. Thus, §§111.1 through  
23 111.8, which include the Commission's reason to believe procedures, will apply to

1 violations processed through the administrative fines procedures. Please note that under  
2 2 U.S.C. 437g(b), the Commission will continue to publish the names of political  
3 committees that fail to file their reports when due in the calendar quarter preceding an  
4 election including pre-election reports if the committees do not respond within four  
5 business days of being notified by the Commission of their failure to file. Sections  
6 111.20 through 111.24, which pertains to public disclosure, confidentiality, ex parte  
7 communications, representation by counsel, and civil penalties, will also apply to  
8 violations processed under subpart B. In addition, while the Commission anticipates that  
9 it will process most of these violations under the administrative fines procedures, §111.31  
10 makes clear that the Commission has the discretion to use the enforcement procedures in  
11 §§111.9 through 111.19 to handle these violations in circumstances the Commission  
12 deems appropriate.

13 Proposed §111.31(b) is being modified to include complaint generated matters  
14 that allege violations of the reporting requirements of 2 U.S.C. 434(a) along with  
15 violations of other provisions of the FECA in the administrative fines program. The  
16 alleged violations of the reporting requirements will be processed through subpart B  
17 while the other alleged violations will be handled through the enforcement process of  
18 subpart A. The Commission made this modification to maintain consistency in its  
19 prosecution of alleged violations of the reporting requirement of 2 U.S.C. 434(a). The  
20 Commission did not receive any substantive comments on this section.

21

1 Section 111.32 How will the Commission notify respondents of a reason to believe  
2 finding and a proposed civil money penalty?

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4 The Commission will follow its current procedures in finding reason to believe  
5 and in notifying the respondents of its finding. If the Commission, by an affirmative vote  
6 of at least four of its members, finds reason to believe that a violation has occurred, the  
7 Chairman or the Vice-Chairman will notify the respondent of the finding. The  
8 notification will include the legal and factual basis for the finding as well as the proposed  
9 civil money penalty in accordance with the schedules of penalties and an explanation of  
10 the respondent's right to challenge the finding and/or the proposed civil money penalty.

11 As stated in the NPRM, the Commission will also continue to follow its current  
12 procedure of notifying the political committees of their duty to file their reports and the  
13 dates on which the reports are due prior to the filing deadline. Thus, political committees  
14 will continue to be on notice of their legal obligation to file their reports in a timely  
15 manner.

16 The commenter urged that the Commission to include a regulation stating when a  
17 report filed electronically is considered "filed." The Commission agrees that the  
18 regulations should include such a provision but has decided that this topic is better  
19 addressed in the Commission's rulemaking regarding mandatory electronic filing.

20  
21 Section 111.33 What are the respondent's choices upon receiving the reason to  
22 believe finding and the proposed civil money penalty?

1           Upon receipt of the notification of the reason to believe finding and the proposed  
2 civil money penalty, the respondents will have two options. They may pay the civil  
3 money penalties pursuant to §111.34. The Commission will process the payment and  
4 then close the matter. Respondents may also challenge the reason to believe finding  
5 and/or the proposed civil money penalty by following the procedures set forth in §111.35.  
6 The Commission did not receive any substantive comments on this section.

7  
8 Section 111.34           If the respondent decides to pay the civil money penalty and not to  
9 challenge the reason to believe finding, what should the respondent do?

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11           Respondents who do not wish to challenge the reason to believe finding and the  
12 proposed civil money penalty must submit a check or money order equal to the amount of  
13 the proposed civil money penalty to the Commission within 40 days of the reason to  
14 believe determination. Once the Commission receives payment, it will send the  
15 respondent a final determination that the respondent has violated 2 U.S.C. 434(a) and  
16 acknowledgment of the respondent's payment of the civil money penalty. The matter  
17 would then be closed and the file would be placed on the public record pursuant to 11  
18 CFR 111.20 and new 11 CFR 111.42. The Commission did not receive any substantive  
19 comments on this section.

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21 Section 111.35           If the respondent decides to challenge the alleged violation or  
22 proposed civil money penalty, what should the respondent do?

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Proposed §111.35 in the NPRM set forth the requirements that respondents must meet to challenge a reason to believe finding and/or proposed civil money penalty. The requirements include filing a notice of intent to challenge within twenty days of the date of the Commission finding reason to believe and filing a written response with supporting documentation within forty days of that date. This proposed section also provided for circumstances the Commission will consider in determining whether to levy a civil money penalty and defenses that the Commission will not accept.

The commenter had several criticisms of this aspect of the administrative fines procedures. First, the commenter objected to the requirement of the notice of intent to challenge the reason to believe finding and/or proposed civil money penalty, stating that the requirement is “contrary to the plain language of the statute, which forbids the Commission from making an adverse determination ‘until the person has been given notice and an opportunity to be heard before the Commission.’” (citation omitted). While the Commission disagrees with the commenter’s legal analysis on this issue, the Commission agrees that a notice of intent to challenge is not necessary. Consequently, that step has been eliminated from the final rules.

The commenter also objected to the use of the date of the Commission’s reason to believe determination to trigger the time that the respondent has to file a notice of intent and the written response. The commenter suggested that the time to file the notice of intent and the written response should not begin until receipt of the notification of the Commission’s reason to believe finding.

1           In determining when the time to appeal begins to toll, some federal agencies chose  
2 the date on which the decision was made, not the date of receipt, often providing thirty  
3 days from the date of the initial decision. See e.g., Coast Guards Regulations on  
4 Suspension, Revocation, and Appeals, 33 CFR 158.190 (2000); Department of the  
5 Interior Regulations on Public Lands, 43 CFR 4.356 (2000). The Commission also notes  
6 that several agencies that begin to toll the time for appeal upon service of an initial  
7 adverse decision provide thirty days for a party to file the appeal. See Federal Retirement  
8 Thrift Investment Board Privacy Act Regulations, 5 CFR §1630.13 (2000); National  
9 Indian Gaming Commission Regulations on Appeals, 25 CFR parts 524 and 539 (2000);  
10 Postal Service Regulations on Suspension and Revocation of Appeal, 39 CFR §501.12  
11 (2000). Seen in this context, the Commission believes that forty days is an ample and fair  
12 amount of time for respondents to file a written response. The Commission has extended  
13 the traditional thirty day appeal period an additional ten days to take into account the time  
14 it takes for Commission staff to prepare the mailing as well as for the Postal Service to  
15 deliver the notification, with a few additional days as a margin for error.

16           The commenter strongly disagrees with the list of defenses in proposed §111.35  
17 that the Commission will and will not consider, suggesting that the Commission has  
18 failed to balance the respondent's rights with "administrative expediency" for the  
19 Commission. The commenter recommends that the Commission eliminate proposed  
20 §111.35(c)(1)(iii) and (c)(4) because the Commission has no rationale for limiting  
21 defenses to "48-hour extraordinary circumstance" and errors on the part of the  
22 Commission. In addition, the commenter believes that the Commission should allow  
23 "good faith" defenses.

1           The Commission has sound policy reasons for limiting the respondents' defenses  
2 beyond streamlining the administrative process. A key cornerstone of campaign finance  
3 law is the full and timely disclosure of the political committee's financial activity. Such  
4 disclosure is essential to providing the public with accurate and complete information  
5 regarding the financing of federal candidates and political campaigns. Thus, violations of  
6 the reporting requirements of the 2 U.S.C. 434(a) are strict liability offenses. Political  
7 committees are aware or should be aware of their legal duty to file the required reports in  
8 a timely manner, and the Commission makes ongoing efforts to remind committees of  
9 their duty. Committees are given ample time from the end of the reporting period to the  
10 filing deadline to prepare and file their reports. Absent extraordinary circumstances  
11 beyond the committees' control, the Commission sees no reason why committees cannot  
12 file their reports by the deadline. The rationale behind the "48-hour extraordinary  
13 circumstances" exception is that the Commission recognizes there may be instances such  
14 as natural disasters like severe hurricanes where a committee's office is located in the  
15 disaster area and the committee cannot timely file a report because of lack of electricity or  
16 flooding or destruction of committee records. The Commission, however, expects the  
17 committee to file its report as soon as it can reasonably do so.

18           The commenter argues that under proposed §111.35(c)(4)(iv) respondents may be  
19 held liable for the failure of the Commission's computers. Any failure of the  
20 Commission's system that prevents committees from filing their reports when due would  
21 be recognized as an extraordinary circumstance beyond the respondents' control.  
22 Therefore, §111.35(c)(4)(iv) has been revised to exclude Commission computer failures

1 from the list of circumstances that the Commission will not consider as extraordinary  
2 circumstances.

3 The commenter states that, under the Due Process Clause of the U.S. Constitution,  
4 the Commission bears the burden of proving the factual allegations, not the respondent.  
5 In its notification to the respondent of its reason to believe finding, the Commission does  
6 include the factual and legal basis for its finding based on the information available to it.  
7 Only the respondents can answer the Commission's allegations, devise their defenses, and  
8 provide the documents that would support their defenses. Supporting documentation will  
9 permit the reviewing officer to evaluate the respondents' factual allegations and defenses.  
10 Administrative procedures under other federal agencies also require respondents to  
11 provide the factual and legal basis for seeking relief or appealing a decision of the agency.  
12 See e.g., 18 CFR §1312.12(d) (2000) (Tennessee Valley Authority's regulations requiring  
13 the petition for relief from an assessment of a civil penalty to "set forth in full the legal  
14 and factual basis for the requested relief."); 25 CFR §577.3 (2000) (The National Indian  
15 Gaming Commission's hearing regulations state that "...the respondent shall file with the  
16 Commission a supplemental statement that states with particularity the relief desired and  
17 the grounds therefor and that includes, when available, supporting evidence in the form of  
18 affidavits."). Therefore, requiring a respondent to include reasons for challenging the  
19 reason to believe finding and/or proposed civil money penalty and the factual basis for  
20 those reasons does not violate a respondent's rights under the Due Process Clause.

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22 Section 111.36 Who will review the respondent's written response?

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Proposed §111.36 in the NPRM provided for an impartial reviewing officer to review the reason to believe finding, the proposed civil money penalty, the Commission’s documentation, and the respondent’s written response and to make a recommendation to the Commission. The reviewing officer may request that the respondent and/or the Commission staff submit supplemental information. Paragraph (b) is being revised to clarify the consequence of failure by the respondent to file the supplemental information. Such failure will entitle the reviewing officer to draw an adverse inference.

The commenter expressed concern that the procedures described in proposed §111.36 fail to meet the statutory requirements of Administrative Procedure Act (APA), 5 U.S.C. 551, *et. seq.*, and the Due Process Clause of the U.S. Constitution. The commenter states that the proposed rule does not include provisions that incorporate 5 U.S.C. 555(b) and (c), which entitle a party to appear in person, to be represented by counsel, and to have access to documents that are the basis of the reviewing officer’s recommendation to the Commission. The commenter argues that oral hearings will fulfill the requirements of 5 U.S.C. 555(b) and the Mathews balancing test to determine whether an agency’s procedures afford respondents adequate procedural due process. The commenter contends that oral hearings would give greater meaning to the respondents’ right to an “opportunity to be heard”; would settle disputes without need for litigation, thereby conserving resources; and would develop a full administrative record for the purposes of judicial review. The Commission disagrees with some of these contentions and believes that these objectives can be achieved in almost all cases without need for an oral hearing.

1           With regard to the respondents' right to be represented by counsel, new §111.31  
2 explicitly incorporates §111.23, which allows for respondents to be represented by  
3 counsel in any matter before the Commission. The commenter cited to 5 U.S.C. 555(c)  
4 as the basis for requiring the Commission to give respondents access to documents used  
5 by the reviewing officer in formulating his or her recommendation. The Commission  
6 disagrees with this reading of this section of the APA. Section 555(c) states that a  
7 "person compelled to submit data or evidence is entitled to retain or . . . procure a copy or  
8 transcript thereof." Thus, respondents are entitled to keep a copy of their written  
9 submissions or ask the Commission to send them a copy of their written submissions. It  
10 does not grant the respondents the right to obtain or review other documents that the  
11 reviewing officer relied upon to make his or her recommendation. The Commission,  
12 however, recognizes that a respondent should be given copies of any additional  
13 documents that the reviewing officer examines after the respondent has filed a challenge  
14 to the reason to believe finding and/or proposed civil money penalty. For example,  
15 Commission staff might possibly provide additional materials regarding receipt of an  
16 electronically filed report. Therefore, paragraph (e) is being added to revised §111.36 to  
17 provide for that procedure. Revised §111.36 also adds new paragraph (g) to require the  
18 reviewing officer to send the respondent a copy of the recommendation to the  
19 Commission and allows the respondent to file with the Commission Secretary a written  
20 response to the recommendation within ten days of the transmittal of the  
21 recommendation.

22           The commenter interprets the second sentence of 5 U.S.C. 555(b) as creating an  
23 independent right to appear in person with counsel whenever there is an agency

1 proceeding. The Commission disagrees with this interpretation. In reading 5 U.S.C.  
2 555(b) as a whole, it is apparent that the entitlement described in the second sentence is  
3 triggered only if the person is compelled to appear in person in an agency proceeding.  
4 Thus, if a person is compelled to appear in person, the person may chose to appear by  
5 himself or herself, to appear with counsel, or send counsel or a duly qualified  
6 representative in his or her stead. The right to appear under 5 U.S.C. 555(b) "is not  
7 blindly absolute, without regard to the status or nature of the proceedings and concern for  
8 the orderly conduct of public business." DeVyver v. Warden, 388 F.Supp. 1213, 1222  
9 (M.D. Pa. 1974) (citing Easton Utilities Commission v. Atomic Energy Commission, 424  
10 F.2d 847, 852 (D.C. Cir. 1970)).

11 Moreover, 5 U.S.C. 555(b) does not afford the respondents a right to a hearing.  
12 The Supreme Court has held that even where a statute requires an "opportunity for  
13 hearing," it "cannot impute to Congress the design requiring, nor does due process  
14 demand, a hearing when it appears conclusively from the applicant's 'pleadings' that the  
15 applicant cannot succeed." Weinberger v. Hynson, Westcott & Dunning, Inc., 412 U.S.  
16 609, 621 (1973) (involving the Federal Drug Administration's procedure for withdrawing  
17 approval of a new drug application). Similarly, lower courts have held that agencies may  
18 make a decision solely on the written submission, much like summary judgment, where  
19 there are no disputed issues of material fact that cannot be resolved by the written  
20 submissions. State of Pennsylvania v. Riley, 84 F.3d 125, 130 (3<sup>rd</sup> Cir. 1996) (citing  
21 Moreau v. F.E.R.C., 982 F.2d 556, 568 (D.C.Cir.1993); Altenheim German Home v.  
22 Turnock, 902 F.2d 582, 584 (7th Cir.1990); California v. Bennett, 843 F.2d, 333 340 (9<sup>th</sup>  
23 Cir. 1988); Bell Telephone Co. of Pennsylvania v. FCC, 503 F.2d 1250, 1267-68 (3<sup>rd</sup> Cir.

1 1974); Puerto Rico Aqueduct & Sewer Auth. v. E.P.A., 35 F.3d 600, 606 (1st Cir.1994);  
2 Louisiana Ass'n of Indep. Producers and Royalty Owners v. FERC, 958 F.2d 1101, 1113-  
3 15 (D.C.Cir.1992); City of St. Louis v. Department of Transp., 936 F.2d 1528, 1534 n. 1  
4 (8th Cir.1991)).

5 The court in Puerto Rico Aqueduct & Sewer recognized the need for  
6 administrative summary judgment. It stated that:

7 The choice between summary judgment and full adjudication--in virtually any  
8 context--reflects a balancing of the value of efficiency against the values of  
9 accuracy and fairness. Seen in that light, summary judgment often makes  
10 especially good sense in an administrative forum, for, given the volume of matters  
11 coursing through an agency's hallways, efficiency is perhaps more central to an  
12 agency than to a court. . . . Administrative summary judgment is not only widely  
13 accepted, but also intrinsically valid. An agency's choice of such a procedural  
14 device is deserving of deference under "the very basic tenet of administrative law  
15 that agencies should be free to fashion their own rules of procedure." Vermont  
16 Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 544, 98 S.Ct. 1197, 1212,  
17 55 L.Ed.2d 460 (1978).

18 35 F. 3d at 606.

19 The balancing of accuracy and fairness with the need for efficiency in an agency  
20 contains two of the three prongs of the Mathews test. Unlike other types of violations  
21 that may involve complex factual and legal issues requiring extensive fact finding and  
22 analysis and witness testimony, the legal and factual issues pertaining to violations of the  
23 reporting requirements of 2 U.S.C. 434(a), in most cases, are elementary and readily

1 ascertainable by review of written submissions. Because of this, a hearing will not  
2 significantly increase accuracy and fairness in most instances but will drain the  
3 Commission's resources and hinder its efficiency. While the Commission does not  
4 believe that a hearing is legally required, it recognizes a hearing may be beneficial under  
5 certain limited circumstances. Therefore, §111.36 is being revised by adding paragraph  
6 (c) to give the reviewing officer discretion to hold a hearing if the respondent requests  
7 one and the reviewing officer determines there are disputed issues of material fact that  
8 cannot be resolved by the written submissions and a hearing will resolve the issues.  
9 Proposed §111.36(c) is being re-designated as paragraph (f).

10 Paragraph (d) is being added to revised §111.36 to require that all documents that  
11 are submitted to the reviewing officer under §§111.35 and 111.36 must be sworn to in the  
12 form of affidavits or declarations. Such affidavits and declarations are necessary to  
13 develop the administrative record of the proceedings.

14 The commenter had several additional comments with regard to the reviewing  
15 officer. First, the commenter stated that the reviewing officer could not be viewed as  
16 impartial if he or she is within the Reports Analysis Division (RAD) or the Office of  
17 General Counsel (OGC) and suggested an independent position be created to ensure  
18 objectivity and to shield the reviewing officer from the supervision of the General  
19 Counsel or the Assistant Staff Director of RAD. The Commission agrees that  
20 "[i]mpartiality does not require total independence from the government agency or the  
21 presence of an administrative law judge . . . [but] only decisionmaker independence . . .  
22 from the individual action to be decided." P. Verkuil, A Study of Informal Adjudication,  
23 43 U. Chi. L. Rev. 739, 750 n.45 (1976) (citing Goldberg v. Kelly, 397 U.S. 254, 271

1 (1970)). The Commission recognizes the need to separate its prosecutorial functions  
2 from its role as the decider of facts. Consequently, at this time, the Commission  
3 anticipates that the reviewing officer most likely will not be an employee within OGC or  
4 RAD.

5 The commenter also suggested that the civil money penalties in the schedules of  
6 penalties in §111.43 should be considered the maximum civil money penalty and that the  
7 reviewing officer should have the authority to reduce the civil money penalty after  
8 considering mitigating factors and the totality of the circumstances to create "more  
9 flexibility in applying the new rules." The Commission disagrees. Allowing the  
10 reviewing officer to reduce the civil money penalty would vest in the reviewing officer  
11 the authority to make final decisions, contrary to the FECA and long standing practice.  
12 See 2 U.S.C. 437c(c). Final agency decisions must be made by an affirmative vote of  
13 four members of the Commission. Also, if the reviewing officer is granted the discretion  
14 to reduce the civil money penalties, different civil money penalty amounts may be levied  
15 against political committees that commit identical violations, resulting in lack of  
16 uniformity and certainty and giving rise to the perception of unfairness.

17 Finally with respect to the reviewing officer, the commenter advocated that this  
18 person should be subject to the Commission's ethics regulation. Further, the person  
19 "should not be a member of the enforcement staff who previously served as counsel in a  
20 matter where the current respondent was either a witness or a respondent" because it will  
21 create a conflict of interest and an appearance of impropriety. As an employee of the  
22 Commission and the federal government, the reviewing officer will be subject to the  
23 Commission's Standards of Conduct set forth at 11 CFR part 7, and the Standards of

1 Ethical Conduct for Employees of the Executive Branch. The conflict of interest standard  
2 in 11 CFR 7.2(c) is designed to address instances where the employee's private interests  
3 are inconsistent with the efficient and impartial conduct of his or her official duties and  
4 responsibilities. Nothing in the rules bars an employee from serving in different  
5 capacities at different times such as employees in the Office of General Counsel  
6 subsequently filling positions in Commissioners' offices.

7  
8 Section 111.37 What will the Commission do once it receives the respondent's  
9 written response and the reviewing officer's recommendation?

10

11 The Commission will make a final determination, by an affirmative vote of at  
12 least four of its members, as to whether the respondent has violated the reporting  
13 requirements of 2 U.S.C. 434(a) and the amount of the civil money penalty, if any. The  
14 Commission will then authorize the reviewing officer to notify the respondent of its  
15 decision. The Commission did not receive any substantive comments on this section.

16

17 Section 111.38 Can the respondent appeal the Commission's final determination?

18

19 This section follows the amendment to the FECA by specifying that respondents  
20 may appeal a final adverse determination by the Commission to a federal district court  
21 where the respondents reside or conduct business by filing a written petition within thirty  
22 days of receipt of the Commission's final determination. Respondents, however, may not

1 raise any issue that they did not timely raise in the administrative proceeding. The  
2 Commission received no substantive comments on this section.

3

4 Section 111.39 When must the respondent transmit payment of the civil money  
5 penalty?

6

7 Unless the respondent appeals the Commission's final determination, the  
8 respondent must send a check or money order to the Commission within thirty days of  
9 receipt of the final determination. Once there is a final determination of the civil money  
10 penalty amount, the civil money penalty will be considered as a debt owed to the federal  
11 government. If the respondent does not submit full payment, the Commission may  
12 forward the debt to the U.S. Department of Treasury for collection under the Debt  
13 Collection Improvement Act of 1996 within 180 days of the date of the final  
14 determination. In the alternative, the Commission may initiate a civil suit pursuant to 2  
15 U.S.C. 437g(a)(6)(A). The Commission did not receive any substantive comments on  
16 this section.

17

18 Section 111.40 What happens if the respondent does not pay the civil money  
19 penalty pursuant to 11 CFR 111.34 and does not submit a written response to the reason  
20 to believe finding pursuant to 11 CFR 111.35?

21

22 The Commission will make a final determination and assess a civil money  
23 penalty, if any. The Commission will authorize the reviewing officer to inform the

1 respondents of the final determination. The respondent must pay any assessed civil  
2 money penalty within thirty days of receipt of the final determination. Unpaid civil  
3 money penalties are considered as debts owed to the federal government and may be  
4 transferred to the Department of Treasury for collection. In the alternative, the  
5 Commission may initiate a civil suit pursuant to 2 U.S.C. 437g(a)(6)(A). There were no  
6 substantive comments on this section.

7  
8 Section 111.41 To whom should the civil money penalty payment be made  
9 payable?

10  
11 Respondents must pay the civil money penalties by check or money order and  
12 make the check or money order payable to the Federal Election Commission. The  
13 Commission did not receive any substantive comments on this section.

14  
15 Section 111.42 Will the enforcement file be made available to the public?

16  
17 Once the enforcement matter is closed, the file will be made available to the  
18 public subject to the provisions of 11 CFR 4.4(a)(3). A matter is considered closed when  
19 neither the Commission nor the respondent files a civil action in federal court or when  
20 there is a final disposition of the civil action pursuant to 11 CFR 111.20(c). The  
21 Commission received no substantive comments on this section.

22

1 Section 111.43 What are the schedules of penalties?

2  
3 Proposed §111.43 contained two schedules of penalties - one for election sensitive  
4 reports and one for all other reports. The Commission took into account the level of  
5 activity in the report, the number of days late, the election sensitivity of the reports, and  
6 the existence of previous violations in developing the schedules. Two of these factors -  
7 the level of activity and the existence of previous violations - are mandated by the FECA.  
8 The Commission included the number of days as a factor because fairness demands that a  
9 report that is only a few days late should not be treated in the same manner as one that is  
10 many days late or not filed. Similarly, several state agencies responsible for overseeing  
11 state campaign finance laws levy fines on a per day basis for violations of their reporting  
12 requirements. See e.g., Fla. Stat. Ann. §106.04(8) (West 2000); Haw. Rev. Stat. §11-  
13 193(a)(5) (1999); N.M. Stat. Ann. §1-19-35A (Michie 1999). Because of the need to  
14 disseminate campaign finance information prior to an election for it to have a meaningful  
15 impact, the Commission concluded that it is especially important for reports due prior to  
16 an election to be filed in a timely manner and before the election. Thus, the Commission  
17 developed a different schedule of penalties for election sensitive reports that imposes a  
18 higher civil money penalty for these reports than other types of reports. In addition, the  
19 schedule of penalties for election sensitive reports uses an earlier cut-off date in  
20 considering a report not to be filed than the date used for reports that are not election  
21 sensitive.

22 The commenter made several comments and suggestions regarding the schedules  
23 of penalties. First the commenter urged the Commission to calculate the level of activity

1 based on contributions and expenditures less overhead and administrative costs, rather  
2 than receipts and disbursements, arguing that a calculation based on receipts and  
3 disbursements does not further the goals of FECA and discriminates against political  
4 action committees. This argument implicitly assumes that disclosure of some types of  
5 receipts and disbursements is of lesser importance than disclosure of other types. The  
6 Commission disagrees with this assumption. The amendment to the FECA clearly states  
7 that the Commission must take into account the "amount of the violation involved,"  
8 which is not limited to contributions and expenditures. Under section 434 of the Act,  
9 political committees are required to disclose all receipts and disbursements in their  
10 reports, not just contributions and expenditures. Moreover, Congress could have drafted  
11 the amendment to include just contributions and expenditures, as it did for mandatory  
12 electronic filing in Section 639 within the same amendment, but it did not. This  
13 difference in terms used in these two sections is strong evidence that Congress intended  
14 these two provisions to reach different types of financial activity. Thus, the Commission  
15 concludes that the "amount of the violation involved" is equal to receipts and  
16 disbursements.

17 The commenter suggested that the final rules should state that committees with no  
18 receipts or disbursements will not be subject to the administrative fines, and urged the  
19 Commission to allow committees to send an affidavit attesting to the fact that they did not  
20 have any receipts or disbursements in lieu of filing a report. The Commission cannot do  
21 so because it does not have the authority to waive reporting requirements in this  
22 situation. While the Commission theoretically could make a final determination that a  
23 committee with no receipts and disbursements is in violation of 2 U.S.C. 434(a), the

1 Commission could not assess a civil money penalty against the committee because the  
2 schedules of penalties only provides for civil money penalties if the level of activity is  
3 \$1.00 or more. However, committees with no financial activity should file their reports;  
4 otherwise, the Commission will calculate an estimated level of activity based on the  
5 average level of activity over the current or previous two-year election cycle. Unless the  
6 committees file their reports disclosing no financial activity, the Commission will assess  
7 a civil money penalty based on that estimated level of activity or \$5500 if the  
8 Commission cannot calculate the estimated level of activity.

9 The commenter advocates the creation of a "safe harbor" for committees that do  
10 not have any contributions or expenditures in the given reporting period because these  
11 committees have not engaged in any political activity in that period. As discussed above,  
12 one of the mandated factors in determining the civil money penalty is the amount of the  
13 violation, which is not limited to just contributions and expenditures. Committees are  
14 required to file reports even if the committees did not have any contributions or  
15 expenditures. To create such a "safe harbor" would be to implicitly allow committees to  
16 ignore their affirmative and legal duty to file the required reports.

17 The commenter characterized the schedules of penalties in the NPRM as lacking a  
18 rational basis and as discriminating against small committees. The commenter suggested  
19 that the Commission break down the level of activity by \$5,000 increments. The basis for  
20 the schedules of penalties is discussed above. The Commission believes the breakdowns  
21 in the schedules of penalties using the levels of activity fairly and equitably assess civil  
22 money penalties that reflect the nature and scope of the violation. The Commission  
23 notes, however, that the commenter was correct in stating that small committees that fall

1 within the first range, \$1 - 24,999.99, could potentially pay a civil money penalty that  
2 exceeds their total financial activity for a given reporting period. Therefore, the two  
3 schedules in §111.43 are being amended to include a provision stating that respondents  
4 with no previous violations will not be assessed a civil money penalty that exceeds the  
5 levels of activity in the report.

6 The preamble to the NPRM included an alternative method to calculating the  
7 schedule of penalties for the election sensitive reports. Instead of a fifty percent increase  
8 in the base amounts, the NPRM sought comment on adding a flat amount of \$1000 to the  
9 base amounts for all levels of activity. No comments directly addressing this issue were  
10 received. However, the commenter expressed concern that the schedules of penalties  
11 discriminated against committees with low levels of financial activity. The Commission  
12 has determined that a flat \$1000 addition to the base amounts would impose on  
13 committees with low levels of financial activity a significantly higher civil money penalty  
14 relative to their level of activity than committees with higher levels of financial activity.  
15 Consequently, the Commission has decided to adopt a schedule of penalties that increases  
16 the base amounts by fifty percent for election sensitive reports instead of adding a flat  
17 \$1000 to the base amounts.

18 Finally, paragraphs (d) and (e) are being revised to clarify that election sensitive  
19 reports include reports due before special elections.

#### 20 Examples of Civil Money Penalties

21 Example 1: The respondent files an October quarterly report 20 days late. The level of  
22 activity on the report is \$105,000. The civil money penalty would be calculated as  
23 follows. The base amount would be \$900. The per day amount would be \$125

1 multiplied by 20 days, which equals \$2500. The civil money penalty would be the sum of  
2 these two amounts, which would be \$3400.

3 Example 2: The respondent in the above example has one prior violation in the current  
4 two-year election cycle. The premium for the one prior violation would be 25% of the  
5 civil money penalty calculated in example 1, which would equal \$850. The civil money  
6 penalty would be the sum of this premium and the civil money penalty from example 1,  
7 which would be \$4250.

8 Example 3: The respondent files a July quarterly report on September 1. The report  
9 contains \$1500 in receipts and disbursements. The respondent would be considered as a  
10 non-filer because the report was more than thirty days late. The civil money penalty  
11 would be \$1500 because it is the lesser of the level of activity in the report and \$1600,  
12 which is the civil money penalty for a non-filer whose level of activity is less than  
13 \$25,000.

14 Example 4: The respondent in the example 3 had one prior violation in the current two-  
15 year election cycle. Because this would not be the respondent's first violation, the civil  
16 money penalty would not be capped by the respondent's level of activity. The civil  
17 money penalty would be the \$1600 assessed against non-filers whose level of activity is  
18 less than \$25,000 plus a 25 % premium equaling \$400 for the one prior violation.  
19 Therefore, the civil money penalty for this respondent would be \$2000.

20  
21 Section 111.44 What is the schedule of penalties for 48-hour notices?  
22

1 Committees are required to report within 48 hours of receipt of those  
2 contributions of \$1000 or more that are received after the 20<sup>th</sup> day but more than 48 hours  
3 before an election. 2 U.S.C. 434(a)(6). The Commission developed a different schedule  
4 of penalties for failure to file these notices on time because of the nature and timing of  
5 these notices and the need to have them filed on time. The schedule does not distinguish  
6 between notices that are filed late and those that are not filed at all and imposes a civil  
7 money penalty equal to fifteen percent of the amount of the contribution(s) not reported  
8 on time plus \$100. The Commission did not receive any substantive comments on this  
9 section.

10

11 Section 111.45 Will the Debt Collection Improvement Act of 1996 be used to  
12 collect unpaid civil money penalties?

13

14 The Debt Collection Improvement Act of 1996, 31 U.S.C. 3711(g), requires all  
15 agencies to transfer uncollected debts, including civil money penalties, to the U.S.  
16 Department of Treasury for collection. This section incorporates the Department of  
17 Treasury's debt collection regulations and the Federal Claims Collection Standards issued  
18 jointly by the Department of Justice and the Government Accounting Office, to provide  
19 for procedures for the transfer and collection of the debt. No substantive comments were  
20 made on this section.

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

22 The attached final rule will not have a significant economic impact on a  
23 substantial number of small entities. The basis for this certification is that the final rule

1 will impose penalties which are scaled to take into account the size of the financial  
2 activity of the political committees. Thus, committees with less financial activity will be  
3 subject to lower fines than committees with more financial activity. Also, the  
4 Commission anticipates that there will not be a large number of small committees that  
5 would be subject to the process in the proposed rules. Therefore, the final rules will not  
6 have a significant economic impact on a substantial number of small entities.

7

8 List of Subjects

9 11 CFR Part 104

10 Campaign funds, Political committees and parties, Reporting and recordkeeping  
11 requirements.

12 11 CFR Part 111

13 Administrative practice and procedures, Elections, Law enforcement

1 For reasons set out in the preamble, subchapter A, Chapter I of Title 11 of the  
2 Code of Federal Regulations is amended as follows:

3  
4 **PART 104—REPORTS BY POLITICAL COMMITTEES (2 U.S.C. 434)**

5 1. The authority for part 104 continues to read as follows:

6 Authority: 2 U.S.C. 431(1), 431(8), 431(9), 432(i), 434,  
7 438(a)(8), 438(b), 439a.

8 2. 11 CFR 104.5 is amended by adding new paragraph (i) to read as follows:

9 **§ 104.5 Filing dates (2 U.S.C. 434(a)(2)).**

10 \* \* \* \* \*

11 (i) Committees should retain proof of mailing or other means of transmittal of the  
12 reports to the Commission.

13  
14 **PART 111—COMPLIANCE PROCEDURES (2 U.S.C. 437g, 437d(a))**

15 3. The authority for part 111 continues to read as follows:

16 Authority: 2 U.S.C. 437g, 437d(a), 438(a)(8).

17 4. 11 CFR 111.8 is amended by adding new paragraph (d) to read as follows:

18 **§ 111.8. Internally generated matters; referrals (2 U.S.C. 437g(a)(2)).**

19 \* \* \* \* \*

20 (d) Notwithstanding §§111.9 through 111.19, for violations of 2 U.S.C. 434(a), the  
21 Commission, when appropriate, may review internally generated matters under subpart B  
22 of this part.

1 5. 11 CFR 111.20 is amended by adding new paragraph (c) to

2 read as follows:

3 **§ 111.20 Public disclosure of Commission action (2 U.S.C. 437g(a)(4)).**

4 \* \* \* \* \*

5 (c) For any compliance matter in which a civil action is commenced, the Commission  
6 will make public the non-exempt 2 U.S.C. 437g investigatory materials in the  
7 enforcement and litigation files no later than thirty (30) days from the date on which the  
8 Commission sends the complainant and the respondent(s) the required notification of the  
9 final disposition of the civil action. The final disposition may consist of a judicial  
10 decision which is not reviewed by a higher court.

11 6. 11 CFR 111.24(a) is revised to read as follows:

12 **§ 111.24 Civil Penalties (2 U.S.C. 437g(a) (5), (6), (12), 28 U.S.C. 2461 nt.).**

13 (a) Except as provided in 11 CFR part 111,-44 subpart B and in paragraph (b) of this  
14 section, a civil penalty negotiated by the Commission or imposed by a court for a  
15 violation of the Act or chapters 95 or 96 of title 26 (26 U.S.C.) shall not exceed the  
16 greater of \$5,500 or an amount equal to any contribution or expenditure involved in the  
17 violation. In the case of a knowing and willful violation, the civil penalty shall not exceed  
18 the greater of \$11,000 or an amount equal to 200% of any contribution or expenditure  
19 involved in the violation.

20 \* \* \* \* \*

21 7. 11 CFR 111.25 through 111.29 are added and reserved.

22 8. Part 111 is amended by designating 11 CFR 111.1 through 111.24 as subpart A--  
23 Enforcement--and by adding new subpart B to read as follows:

1 **Subpart B—Administrative Fines**

2 Sec.

3 111.30 When will subpart B apply?

4 111.31 Does this subpart replace subpart A of this part for violations of the reporting  
5 requirements of 2 U.S.C. 434(a)?

6 111.32 How will the Commission notify respondents of a reason to believe finding and a  
7 proposed civil money penalty?

8 111.33 What are the respondent's choices upon receiving the reason to believe finding  
9 and the proposed civil money penalty?

10 111.34 If the respondent decides to pay the civil money penalty and not to challenge the  
11 reason to believe finding, what should the respondent do?

12 111.35 If the respondent decides to challenge the alleged violation or proposed civil  
13 money penalty, what should the respondent do?

14 111.36 Who will review the respondent's written response?

15 111.37 What will the Commission do once it receives the respondent's written response  
16 and the reviewing officer's recommendation?

17 111.38 Can the respondent appeal the Commission's final determination?

18 111.39 When must the respondent transmit payment of the civil money penalty?

19 111.40 What happens if the respondent does not pay the civil money penalty pursuant to  
20 11 CFR 111.34 and does not submit a written response to the reason to believe  
21 finding pursuant to 11 CFR 111.35?

22 111.41 To whom should the civil money penalty payment be made payable?

- 1 111.42 Will the enforcement file be made available to the public?
- 2 111.43 What are the schedules of penalties?
- 3 111.44 What is the schedule of penalties for 48-hour notices?
- 4 111.45 Will the Debt Collection Improvement Act of 1996 be used to collect unpaid civil
- 5 money penalties?

6

7 **§ 111.30. When will subpart B apply?**

8 Subpart B applies to violations of the reporting requirements of 2 U.S.C. 434(a)

9 committed by political committees and their treasurers on or after July 14, 2000, and on

10 or before December 31, 2001.

11

12 **§ 111.31. Does this subpart replace subpart A of this part for violations of the**

13 **reporting requirements of 2 U.S.C. 434(a)?**

14 (a) No; §§111.1 through 111.8 and 111.20 through 111.24 shall apply to all

15 compliance matters. This subpart will apply, rather than §§111.9 through 111.19, when

16 the Commission, on the basis of information ascertained by the Commission in the

17 normal course of carrying out its supervisory responsibilities, and when appropriate,

18 determines that the compliance matter should be subject to this subpart. If the

19 Commission determines that the violation should not be subject to this subpart, then the

20 violation will be subject to all sections of subpart A of this part.

21 (b) Subpart B will apply to compliance matters resulting from a complaint filed

22 pursuant to 11 CFR 111.4 through 111.7 if the complaint alleges a violation of 2 U.S.C.

23 434(a). ~~and does not~~ if the complaint alleges violations of any other provision of any

1 statute or regulation over which the Commission has jurisdiction, subpart A will apply to  
2 the alleged violations of these other provisions.

3

4 **§\_111.32 How will the Commission notify respondents of a reason to believe finding**  
5 **and a proposed civil money penalty?**

6 If the Commission determines, by an affirmative vote of at least four (4) of its  
7 members, that it has reason to believe that a respondent has violated 2 U.S.C. 434(a), it  
8 shall authorize the Chairman or Vice-Chairman to notify such respondent of the  
9 Commission's finding. The written notification shall set forth the following:

- 10 (a) The alleged factual and legal basis supporting the finding including the type of  
11 report that was due, the filing deadline, the actual date filed (if filed), and the number of  
12 days the report was late (if filed);
- 13 (b) The applicable schedule of penalties;
- 14 (c) The number of times the respondent has been assessed a civil money penalty  
15 under this subpart during the current two-year election cycle and the prior two-year  
16 election cycle;
- 17 (d) The amount of the proposed civil money penalty based on the schedules of  
18 penalties set forth in 11 CFR 111.43 or 111.44; and
- 19 (e) An explanation of the respondent's right to challenge both the reason to believe  
20 finding and the proposed civil money penalty.

21

22 **§\_111.33 What are the respondent's choices upon receiving the reason to believe**  
23 **finding and the proposed civil money penalty?**

1           The respondent must either send payment in the amount of the proposed civil  
2 money penalty pursuant to 11 CFR 111.34 or submit a written response pursuant to 11  
3 CFR 111.35.

4  
5 **§\_111.34 If the respondent decides to pay the civil money penalty and not to**  
6 **challenge the reason to believe finding, what should the respondent do?**

7 (a)     The respondent shall transmit payment in the amount of the civil money penalty to  
8 the Commission within forty (40) days of the Commission's reason to believe finding.

9 (b)     Upon receipt of the respondent's payment, the Commission shall send the  
10 respondent a final determination that the respondent has violated the statute or regulations  
11 and the amount of the civil money penalty and an acknowledgment of the respondent's  
12 payment.

13  
14 **§\_111.35. If the respondent decides to challenge the alleged violation or proposed**  
15 **civil money penalty, what should the respondent do?**

16 ~~(a)     Within twenty (20) days of the Commission's reason to believe finding, the~~  
17 ~~respondent shall submit to the Commission a written notice of intent to challenge the~~  
18 ~~reason to believe finding and/or the proposed civil money penalty.~~

19 (ab)    Within forty (40) days of the Commission's reason to believe finding, the  
20 respondent shall submit to the Commission a written response.

21 (be)    The written response shall contain the following:

- 22           (1) Reason(s) why the respondent is challenging the reason to believe finding  
23           and/or civil money penalty which may consist of:

- 1 (i) The existence of factual errors; and/or
- 2 (ii) The improper calculation of the civil money penalty; and/or
- 3 (iii) The existence of extraordinary circumstances that were beyond the
- 4 control of the respondent and that were for a duration of at least 48
- 5 hours and that prevented the respondent from filing the report in a
- 6 timely manner;

7 (2) The factual basis supporting the reason(s); and

8 (3) Supporting documentation.

9 (4) Examples of circumstances that will not be considered extraordinary include,

10 but are not limited to, the following:

- 11 (i) Negligence;
- 12 (ii) Problems with vendors or contractors;
- 13 (iii) Illness of staff;
- 14 (iv) Computer failures (except failures of the Commission's computers);
- 15 and
- 16 (v) Other similar circumstances.

17

18 **§\_111.36 Who will review the respondent's written response?**

19 (a) ~~The~~A reviewing officer shall review the respondent's written response. The

20 reviewing officer shall be a person who has not been involved in the reason to believe

21 finding.

22 (b) The reviewing officer shall review the reason to believe finding with supporting

23 documentation and the respondent's written response with supporting documentation. The

1 reviewing officer may request supplemental information from the respondent and/or the  
2 Commission staff. The respondent shall submit the supplemental information to the  
3 reviewing officer within a time specified by the reviewing officer. The reviewing officer  
4 will be entitled to draw an adverse inference from the failure by the respondent to submit  
5 the supplemental information.

6 (c) The reviewing officer may conduct a hearing if:

7 (1) The respondent requests a hearing;

8 (2) The reviewing officer determines that there are disputed issue(s) of material  
9 facts that cannot be resolved by the written submissions; and

10 (3) The reviewing officer determines that a hearing will resolve the disputed  
11 issue(s).

12 (d) All documents required pursuant to this section and §111.35 shall be submitted in  
13 the form of affidavits or declarations.

14 (e) If the Commission staff, after the respondent files a written response pursuant to  
15 §111.35, forwards any additional documents pertaining to the matter to the reviewing  
16 officer for his or her examination, the reviewing officer shall also furnish a copy of the  
17 document(s) to the respondents.

18 (f) Upon completion of the review, the reviewing officer shall forward a written  
19 recommendation to the Commission along with all documents required under this section  
20 and 11 CFR 111.32 and 111.35.

21 (g) The reviewing office shall also forward a copy of the recommendation to the  
22 respondent. The respondent may file with the Commission Secretary a written response  
23 to the recommendation within ten (10) days of transmittal of the recommendation.

1 **§\_111.37 What will the Commission do once it receives the respondent's written**  
2 **response and the reviewing officer's recommendation?**

3 (a) If the Commission, after having found reason to believe and after reviewing the  
4 respondent's written response and the reviewing officer's recommendation, determines by  
5 an affirmative vote of at least four (4) of its members, that the respondent has violated 2  
6 U.S.C. 434(a) and the amount of the civil money penalty, the Commission shall authorize  
7 the reviewing officer to notify the respondent by letter of its final determination.

8 (b) If the Commission, after reviewing the reason to believe finding, the respondent's  
9 written response, and the reviewing officer's written recommendation, determines by an  
10 affirmative vote of at least four (4) of its members, that no violation has occurred, or  
11 otherwise terminates its proceedings, the Commission shall authorize the reviewing  
12 officer to notify the respondent by letter of its final determination.

13 (c) The Commission will modify the proposed civil money penalty only if the  
14 respondent is able to demonstrate that the amount of the proposed civil money penalty  
15 was calculated on an incorrect basis.

16 (d) The Commission may determine, by an affirmative vote of at least four of its  
17 members, that a violation of 2 U.S.C. 434(a) has occurred but waive the penalty because  
18 the respondent has convincingly demonstrated the existence of extraordinary  
19 circumstances that were beyond the respondent's control and that were for a duration of at  
20 least 48 hours. The Commission shall authorize the reviewing officer to notify the  
21 respondent by letter of its final determination.  
22

1 | **§ 111.38. Can the respondent appeal the Commission's final determination?**

2 | Yes; within thirty (30) days of receipt of the Commission's final determination  
3 | under 11 CFR 111.37, the respondent may submit a written petition to the district court of  
4 | the United States for the district in which the respondent resides, or transacts business,  
5 | requesting that the final determination be modified or set aside. The respondent's failure  
6 | to raise an argument in a timely fashion during the administrative process shall be  
7 | deemed a waiver of the respondent's right to present such argument in a petition to the  
8 | district court under 2 U.S.C. 437g.

9 |  
10 | **§ 111.39. When must the respondent ~~transmit payment~~ pay the civil money penalty?**

11 | (a) If the respondent does not submit a written petition to the district court of the  
12 | United States, the respondent must remit payment of the civil money penalty within thirty  
13 | (30) days of receipt of the Commission's final determination under 11 CFR 111.37.

14 | (b) If the respondent submits a written petition to the district court of the United  
15 | States and, upon the final disposition of the civil action, is required to pay a civil money  
16 | penalty, the respondent shall remit payment of the civil money penalty to the Commission  
17 | within thirty (30) days of the final disposition of the civil action. The final disposition  
18 | may consist of a judicial decision which is not reviewed by a higher court.

19 | (c) Failure to pay the civil money penalty may result in the commencement of a  
20 | collection action under 31 U.S.C. 3701 et seq. (1996), or a civil suit pursuant to 2 U.S.C.  
21 | 437g(6)(A), or any other legal action deemed necessary by the Commission.

1 **§ 111.40. What happens if the respondent does not pay the civil money penalty**  
2 **pursuant to 11 CFR 111.34 and does not submit a written response to the reason to**  
3 **believe finding pursuant to 11 CFR 111.35?**

4 (a) If the Commission, after the respondent has failed to pay the civil money penalty  
5 and has failed to submit a written response, determines by an affirmative vote of at least  
6 four (4) of its members that the respondent has violated 2 U.S.C. 434(a) and determines  
7 the amount of the civil money penalty, the Commission shall authorize the reviewing  
8 officer to notify the respondent by letter of its final determination.

9 (b) The respondent shall transmit payment of the civil money penalty to the  
10 Commission within thirty (30) days of receipt of the Commission's final determination.

11 (c) Failure to pay the civil money penalty may result in the commencement of a  
12 collection action under 31 U.S.C. 3701 et seq. (1996), or a civil suit pursuant to 2 U.S.C.  
13 437g(6)(A), or any other legal action deemed necessary by the Commission.

14

15 **§ 111.41. To whom should the civil money penalty payment be made payable?**

16 Payment of civil money penalties shall be made in the form of a check or money  
17 order made payable to the Federal Election Commission.

18

19 **§ 111.42. Will the enforcement file be made available to the public?**

20 (a) Yes; the Commission shall make the enforcement file available to the public.

21 (b) If neither the Commission nor the respondent commences a civil action, the  
22 Commission shall make the enforcement file available to the public pursuant to 11 CFR  
23 4.4(a)(3).

1 (c) If a civil action is commenced, the Commission shall make the enforcement file  
 2 available pursuant to 11 CFR 111.20(c).

3

4 **§ 111.43. What are the schedules of penalties?**

5 (a) The civil money penalty for all reports that are filed late or not filed, except  
 6 election sensitive reports and pre-election reports under 11 CFR 104.5, shall be calculated  
 7 in accordance with the following schedule of penalties:

8

If the level of activity in the report was:	And the report was filed late, the civil money penalty is:	Or the report was not filed, the civil money penalty is:
\$1 - 24,999.99 <sup>a</sup>	[\$100 + (\$25 x Number of days late)] x [1 + (.25 x Number of previous violations)]	\$1600 x [1 + (.25 x Number of previous violations)]
\$25,000 - 49,999.99	[\$200 + (\$50 x Number of days late)] x [1 + (.25 x Number of previous violations)]	\$3200 x [1 + (.25 x Number of previous violations)]
\$50,000 - 74,999.99	[\$300 + (\$75 x Number of days late)] x [1 + (.25 x Number of previous violations)]	\$4800 x [1 + (.25 x Number of previous violations)]
\$75,000 - 99,999.99	[\$400 + (\$100 x Number of days late)] x [1 + (.25 x Number of previous violations)]	\$6400 x [1 + (.25 x Number of previous violations)]

\$100,000 - 149,999.99	$[\$600 + (\$125 \times \text{Number of days late})] \times [1 + (.25 \times \text{Number of previous violations})]$	$\$8100 \times [1 + (.25 \times \text{Number of previous violations})]$
\$150,000 - 199,999.99	$[\$800 + (\$150 \times \text{Number of days late})] \times [1 + (.25 \times \text{Number of previous violations})]$	$\$9800 \times [1 + (.25 \times \text{Number of previous violations})]$
\$200,000 - 249,999.99	$[\$1,000 + (\$175 \times \text{Number of days late})] \times [1 + (.25 \times \text{Number of previous violations})]$	$\$11,500 \times [1 + (.25 \times \text{Number of previous violations})]$
\$250,000 - 349,999.99	$[\$1500 + (\$200 \times \text{Number of days late})] \times [1 + (.25 \times \text{Number of previous violations})]$	$\$13,500 \times [1 + (.25 \times \text{Number of previous violations})]$
\$350,000 - 449,999.99	$[\$2000 + (\$200 \times \text{Number of days late})] \times [1 + (.25 \times \text{Number of previous violations})]$	$\$14,000 \times [1 + (.25 \times \text{Number of previous violations})]$
\$450,000 - 549,999.99	$[\$2500 + (\$200 \times \text{Number of days late})] \times [1 + (.25 \times \text{Number of previous violations})]$	$\$14,500 \times [1 + (.25 \times \text{Number of previous violations})]$
\$550,000 - 649,999.99	$[\$3000 + (\$200 \times \text{Number of days late})] \times [1 + (.25 \times \text{Number of previous violations})]$	$\$15,000 \times [1 + (.25 \times \text{Number of previous violations})]$

1

\$650,000 - 749,999.99	[\$3500 + (\$200 x Number of days late)] x [1 + (.25 x Number of previous violations)]	\$15,500 x [1 + (.25 x Number of previous violations)]
\$750,000 - 849,999.99	[\$4000 + (\$200 x Number of days late)] x [1 + (.25 x Number of previous violations)]	\$16,000 x [1 + (.25 x Number of previous violations)]
\$850,000 - 949,999.99	[\$4500 + (\$200 x Number of days late)] x [1 + (.25 x Number of previous violations)]	\$16,500 x [1 + (.25 x Number of previous violations)]
\$950,000 or over	[\$5000 + (\$200 x Number of days late)] x [1 + (.25 x Number of previous violations)]	\$17,000 x [1 + (.25 x Number of previous violations)]

2 <sup>a/</sup>The civil money penalty for a respondent who does not have any previous violations will  
3 not exceed the level of activity in the report.

4

5 (b) The civil money penalty for election sensitive reports that are filed late or not filed  
6 shall be calculated in accordance with the following schedule of penalties:

If the level of activity in the report was:	And the report was filed late, the civil money penalty is:	Or the report was not filed, the civil money penalty is:
\$1 - 24,999.99 <sup>a</sup>	[\$150 + (\$25 x Number of days late)] x [1 + (.25 x Number of previous violations)]	\$1650 x [1 + (.25 x Number of previous violations)]
\$25,000 - 49,999.99	[\$300 + (\$50 x Number of days late)] x [1 + (.25 x Number of previous violations)]	\$3300 x [1 + (.25 x Number of previous violations)]
\$50,000 - 74,999.99	[\$450 + (\$75 x Number of days late)] x [1 + (.25 x Number of previous violations)]	\$4950 x [1 + (.25 x Number of previous violations)]
\$75,000 - 99,999.99	[\$600 + (\$100 x Number of days late)] x [1 + (.25 x Number of previous violations)]	\$6600 x [1 + (.25 x Number of previous violations)]
\$100,000 - 149,999.99	[\$900 + (\$125 x Number of days late)] x [1 + (.25 x Number of previous violations)]	\$8400 x [1 + (.25 x Number of previous violations)]
\$150,000 - 199,999.99	[\$1200 + (\$150 x Number of days late)] x [1 + (.25 x Number of previous violations)]	\$10,200 x [1 + (.25 x Number of previous violations)]

1

\$200,000 - 249,999.99	$[\$1500 + (\$175 \times \text{Number of days late}) \times [1 + (.25 \times \text{Number of previous violations})]]$	$\$12,000 \times [1 + (.25 \times \text{Number of previous violations})]$
\$250,000 - 349,999.99	$[\$2250 + (\$200 \times \text{Number of days late}) \times [1 + (.25 \times \text{Number of previous violations})]]$	$\$14,250 \times [1 + (.25 \times \text{Number of previous violations})]$
\$350,000 - 449,999.99	$[\$3000 + (\$200 \times \text{Number of days late}) \times [1 + (.25 \times \text{Number of previous violations})]]$	$\$15,000 \times [1 + (.25 \times \text{Number of previous violations})]$
\$450,000 - 549,999.99	$[\$3750 + (\$200 \times \text{Number of days late}) \times [1 + (.25 \times \text{Number of previous violations})]]$	$\$15,750 \times [1 + (.25 \times \text{Number of previous violations})]$
\$550,000 - 649,999.99	$[\$4500 + (\$200 \times \text{Number of days late}) \times [1 + (.25 \times \text{Number of previous violations})]]$	$\$16,500 \times [1 + (.25 \times \text{Number of previous violations})]$
\$650,000 - 749,999.99	$[\$5250 + (\$200 \times \text{Number of days late}) \times [1 + (.25 \times \text{Number of previous violations})]]$	$\$17,250 \times [1 + (.25 \times \text{Number of previous violations})]$
\$750,000 - 849,999.99	$[\$6000 + (\$200 \times \text{Number of days late}) \times [1 + (.25 \times \text{Number of previous violations})]]$	$\$18,000 \times [1 + (.25 \times \text{Number of previous violations})]$

1

\$850,000 - 949,999.99	[\$6250 + (\$200 x Number of days late)] x [1 + (.25 x Number of previous violations)]	\$18,750 x [1 + (.25 x Number of previous violations)]
\$950,000 or over	[\$7500 + (\$200 x Number of days late)] x [1 + (.25 x Number of previous violations)]	\$19,500 x [1 + (.25 x Number of previous violations)]

2 <sup>2/</sup>The civil money penalty for a respondent who does not have any previous violations will  
3 not exceed the level of activity in the report.

4

5 (c) If the respondent fails to file a required report and the Commission cannot  
6 calculate the level of activity under paragraph (d) of this section, then the civil money  
7 penalty shall be \$5,500.

8 (d) Definitions. For this section only, the following definitions will apply:

9 Election Sensitive Reports means third quarter reports due on October 15th before  
10 the general election (for all committees required to file this report except  
11 committees of unless the candidates who does not participate in that general  
12 election); monthly reports due October 20th before the general election (for all  
13 committees required to file this report except committees of unless the candidates  
14 who does not participate in that general election); and pre-election reports for  
15 primary, general, and special elections under 11 CFR 104.5.

16 Estimated level of activity means total receipts and disbursements reported in the  
17 current two-year election cycle divided by the number of reports filed to date

1 covering the activity in the current two-year election cycle. If the respondent has  
2 not filed a report covering activity in the current two-year election cycle,  
3 estimated level of activity means total receipts and disbursements reported in the  
4 prior two-year election cycle divided by the number of reports filed covering the  
5 activity in the prior two-year election cycle.

6 Level of activity means the total amount of receipts and disbursements for the  
7 period covered by the late report. If the report is not filed, the level of activity is  
8 the estimated level of activity.

9 Number of previous violations mean all prior final civil money penalties assessed  
10 under this subpart during the current two-year election cycle and the prior two-  
11 year election cycle.

12 (e) For purposes of the schedules of penalties in paragraphs (a) and (b) of this section,

13 (1) Reports that are not election sensitive reports are considered to be filed late if  
14 they are filed after their due dates but within thirty (30) days of their due dates.

15 These reports are considered to be not filed if they are filed after thirty (30)  
16 days of their due dates or not filed at all.

17 (2) Election sensitive reports are considered to be filed late if they are filed after  
18 their due dates but prior to four (4) days before the primary election for pre-  
19 primary reports, prior to four (4) days before the special election for pre-  
20 special election reports, or prior to four (4) days before the general election for  
21 all other election sensitive reports. These reports are considered to be not filed  
22 if they are not filed prior to four (4) days before the primary election for pre-  
23 primary reports, prior to four (4) days before the special election for pre-

1            special election reports or prior to four (4) days before the general election for  
2            all other election sensitive reports.

3  
4    **§ 111.44. What is the schedule of penalties for 48-hour notices that are not filed or**  
5    **filed late?**

6    (a)    If the respondent fails to file timely a notice regarding contribution(s) received  
7    after the 20th day but more than 48 hours before the election as required under 2 U.S.C.  
8    434(a)(6), the civil money penalty will be calculated as follows:

9            (1) Civil money penalty = \$100 + (.15 x amount of the contribution(s) not timely  
10           reported).

11           (2) The civil money penalty calculated in paragraph (a)(1) of this section shall be  
12           increased by twenty-five percent (25%) for each prior violation.

13    (b)    For purposes of this section, prior violation means a civil money penalty that has  
14    been assessed against the respondent under this subpart in the current two-year election  
15    cycle or the prior two-year election cycle.

1 § 111.45. Will the Debt Collection Improvement Act of 1996 be used to collect  
2 unpaid civil money penalties?

3 Yes; The debt collection regulations issued by the Department of Treasury at 31  
4 CFR part 285 and the Federal Claims Collection Standards issued jointly by the  
5 Department of Justice and the Government Accounting Office at 4 CFR parts 101  
6 through 104 also apply.

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Darryl R. Wold  
Chairman  
Federal Election Committee

**Dated:** \_\_\_\_\_  
**Billing Code 6715-01-P**

