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FEDERAL ELECTION COMMISSION
Washington, DC 20463

AGENDA ITEM
For Meeting of: 8-23-01

MEMORANDUM

TO: The Commission

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SUBJECT: Regulations Priorities

In consultation with the Regulations Committee, the Office of General Counsel has prepared the following list of priorities regarding the Commission's current and future rulemakings. We have divided these projects into several groups: 1) six rulemakings this Office believes to be the highest priority; 2) four that need to be completed when the top priority rulemakings permit; 3) eight third priority rulemakings that should be begun once the first and second priority rulemakings are completed; 4) four new regulations projects we believe should be initiated as second priority projects; 5) six projects being held in abeyance pending litigation or more pressing matters; and 6) one rulemaking that the Commission has already decided should be terminated.

The Commission last considered rulemaking priorities on December 14, 2000. See Agenda Doc. # 00-123. Since that time, the rulemaking on coordinated and independent expenditures (Part I) has been completed and removed from the list. Most of the other first and second priority rulemakings are substantially farther along. In addition to the projects listed below, the four attorneys assigned to the Regulations Team must devote time to other legal review assignments and issues arising under the Administrative Fines Program.

I. Top Priority Rulemaking Projects

1. Lines of Credit for Loans to Candidates (11 C.F.R. §§ 100.7, 100.8, 104.3, 104.8, and 104.9) [Mai Dinh]

This rulemaking implements Public Law 106-346, as enacted on October 23, 2000. Comments are due on the NPRM by August 24, and the hearing is scheduled for September 19. This Office recommends that this rulemaking continue to be a top priority.

2. Independent Expenditure Reporting (11 C.F.R. §§ 100.19, 104.4, 104.5, 104.18, 109.1, and 109.2) [Cheryl Fowle]

Public Law 106-346 also included two amendments to 2 U.S.C. § 434 regarding independent expenditure reporting. A NPRM was published in the *Federal Register* on May 9. One comment was received by the close of the public comment period on June 8. This rulemaking was discussed at the June 29 and August 8 Regulations Committee meetings. OGC recommends that this rulemaking continue to be a top priority.

3. Substantive and Procedural Changes to the Public Financing Rules (11 C.F.R. Parts 9001 - 9039) [Rita Reimer]

In accordance with the previously approved priorities, OGC-Policy has begun work on this rulemaking. In consultation with the Regulations Committee, PFESP and the Audit Division, we have identified topics that could be included, as set out in the attached list. However, we anticipate that additional topics will arise during the audits, repayments, and enforcement actions for the 2000 elections. This Office recommends that amendments to the public funding regulations be considered a top priority. We also recommend that issues affecting only independent, minor and new party candidates be considered at a later point.

4. Soft Money -- Petition for Rulemaking from Members of Congress and the President of the United States (11 C.F.R. Parts 100, 102, 104, 106, 110 and 114) [Paul Sanford]

Alternative versions of draft final rules were circulated to the Commission last year. This Office recommends that the soft money rulemaking remain a top priority.

5. The Internet and Federal Election Campaigns [Paul Sanford]

OGC has obtained input from the Regulations Committee on a draft Notice of Proposed Rulemaking, and expects to bring back a revised document shortly. We recommend this rulemaking remain a top priority.

6. Political Organizations/Political Committee Definition (11 C.F.R. § 100.5) [Rita Reimer]

The Office of General Counsel is preparing a memorandum analyzing the alternatives that may be considered now that the comment period is closed for the Advance NPRM. We recommend that this project remain a top priority.

II. Second Priority Projects

7. Disgorgement of Illegal Contributions (11 C.F.R. Part 103) [Mai Dinh]

This Office recommends that the NPRM on the disgorgement of illegal contributions and related issues remain a secondary priority project.

8. Party Committee Filing of 12 Day Pre-General Election Reports (11 C.F.R. § 104.5) [Cheryl Fowle]

This Office recommends that work on this rulemaking continue as a second priority project. A document will be ready to forward to the Regulations Committee as other higher priority projects permit.

9. Coordinated and Independent Expenditures- Part 2 (11 C.F.R. § 110.7)

The portion of the coordinated and independent expenditure rulemaking addressing coordination between party committees and their candidates was held in abeyance pending resolution by the Supreme Court of *Colorado Republicans II*. This Office recommends that it now become a second priority project.

10. Voting Records and Voter Guides – Petition for Rulemaking (11 C.F.R. § 114.4(c)(4) and (c)(5)) [Rita Reimer]

OGC recommends that this rulemaking remain a secondary priority project. We note that on Dec. 14, 2000, the Commission broadened this project to cover not only the Petition For Rulemaking on voting records and voter guides, but also other portions of 11 C.F.R. Part 114 that are affected by the final rules on expenditures for coordinated general public political communications and independent expenditures.

III. Third Priority Projects

Upon consulting with the Regulations Committee, the Office of General Counsel recommends that eight rulemakings be considered third priority projects. Each of these was approved by the Commission on December 14, 2000, with the expectation that this Office would begin work on them as resources permit.

11. Joint Fundraising (11 C.F.R. § 102.17(c))

A revision could be made to the joint fundraising rules to replace the reporting of the total amount of prohibited contributions with the itemization of these amounts.

12. Aiding and Abetting Other Violations (11 C.F.R. Part 110)

A new section could be added to 11 C.F.R. Part 110 to address the aiding and abetting of other violations.

13. Disclaimers (11 C.F.R. § 110.11)

The disclaimer rules could be amended to require a disclaimer for phone banks where more than one hundred people receive substantially similar solicitations or communications containing express advocacy.

14. Permissible Sources of Civil Penalties (11 C.F.R. § 111.24)

A provision could be added to the compliance procedure rules specifying permissible sources for payment of civil penalties and the reporting of these sources.

15. Use of Corporate and Labor Organization Facilities (11 C.F.R. § 114.9(d))

This regulation could be amended to replace the after-the-fact reimbursement with advance payment. It could also be clarified as to whether "person" includes the SSF.

16. Ethics Rules (11 C.F.R. Part 7)

A rulemaking could be initiated to update the FEC's ethics rules in light of the Office of Government Ethics' regulations on standards of conduct for Executive Branch employees, and to eliminate the overlap between the FEC's rules and OGE's rules.

17. Qualification as a State Party Committee

A new provision could establish a method for qualifying as a state committee of a political party, either through the AO process or through procedures administered by RAD, or by some other method.

18. Touhy Regulations

New rules could be issued to allow the Commission to quash subpoenas ordering Commission staff to appear as witnesses in civil cases.

IV. New Rulemaking Projects

The Office of General Counsel has identified four possible new rulemakings that we recommend be initiated as soon as feasible. They should all be added to the list of second priority projects.¹

19. Civil Penalty Inflation Adjustment (11 C.F.R. § 111.24) [Michael Marinelli]

The Debt Collection Improvement Act of 1996 (DCIA) requires agencies, by regulation, to adjust the minimum and maximum amount of their civil penalties every four years. The Commission last adjusted these amounts by regulation in the spring of 1997. Accordingly, the Office of General Counsel recommends that a new second priority project be initiated to determine what adjustments, if any, are required for the civil penalties set forth at 11 C.F.R. § 111.24. This Office expects that this project could be done fairly quickly, without consuming a large amount of resources.

20. FOIA/Privacy Act/Protection of Trade Secrets Act (11 C.F.R. Parts 4 and 5) [Rita Reimer]

Recently, a number of questions have arisen regarding the Commission's regulations, practices, and policies concerning the implementation of the Freedom of Information Act (5 U.S.C. § 552), the Privacy Act (5 U.S.C. § 552a), and the Protection of Trade Secrets Act (18 U.S.C. §§ 1831-1839). It has been quite a number of years since our regulations implementing these statutes were last evaluated in a comprehensive fashion, given changes in FEC practices and developments in case law in these areas. Accordingly, the Office of General Counsel forwarded to the Regulations Committee a memorandum outlining the topics that could be addressed in a rulemaking. In light of recent events, this Office recommends that a new rulemaking project be initiated to determine the extent to which these regulations need to be updated. We recommend this be considered a secondary priority project.

21. The Debt Collection Improvement Act (DCIA) (31 U.S.C. 3701 *et seq.*) [Mai Dinh]

In the Administrative Fines regulations, 11 C.F.R. part 111, subpart B, the Commission adopted the Department of Treasury's Federal Claims Collection Standards to implement the DCIA with respect to the Administrative Fines Program. In January, 2001, the Commission discussed the possibility of extending the DCIA to include other debts owed to the FEC including final court judgments. At the Commission's direction, OGC has begun to research the steps the Commission would need to take to expand the coverage of the DCIA, possibly including new regulations. We recommend that this be a second priority project. It involves a significant investment of effort.

¹ This Office is also monitoring the possible need for another change in the regulations that is dependent upon Congressional action. Specifically, if Congress extends the administrative fine pilot program beyond December 31, 2001, an amendment to 11 C.F.R. § 111.30 will be needed.

22. Technical Corrections to Reporting Regulations (11 C.F.R. § 104.3) [Cheryl Fowle]

This Office recently discovered that in codifying the changes made to 11 C.F.R. § 104.3 in the 2001 edition of the Code of Federal Regulations, the provisions setting out permissible and impermissible purposes for disbursements by authorized committees were omitted. A technical correction is needed to ensure that these provisions are restored to 11 C.F.R. § 104.3. This Office recommends that the technical amendments be a second priority project. We expect that this project could be done fairly quickly, without consuming a large amount of resources.

IV. Rulemaking Projects To Continue To Be Held in Abeyance

23. Candidate Debates -- Petition for Rulemaking (11 C.F.R. § 110.13) [Paul Sanford]

OGC recommends that this rulemaking continue to be held in abeyance pending resolution of ongoing litigation in *Committee For A Unified Independent Party, Inc. v. FEC*.

24. Allocation of Travel Expenses (11 C.F.R. §§ 100.7(b) and 106.3) [Rita Reimer]

This project includes both the rules in § 106.3 on allocating travel expenses and a possible new exception to the definition of "contribution" in 11 C.F.R. § 100.7(b) for candidate travel on aircraft owned by individuals or other entities, which would be similar to the 11 C.F.R. § 114.9(e) exemption for corporations and labor organizations. This Office recommends that the rulemaking on travel expenses continue to be held in abeyance.

25. Recordkeeping and Reporting (11 C.F.R. Parts 102 and 104) [Rita Reimer]

OGC recommends that this rulemaking continue to be held in abeyance to permit time to assess what further changes may be needed in light of several new programs, including election cycle reporting, mandatory electronic filing, and the introduction of new forms.

26. "MCFL Corporations" Rules (11 C.F.R. § 114.10)

The rules governing qualified nonprofit corporations could be amended to permit a small amount of corporate contributions. OGC recommends postponing a decision on beginning a new rulemaking until the resolution of the current litigation.

27. Express Advocacy Definition (11 C.F.R. § 100.22(b))

It has been suggested that the Commission repeal part of the definition of "express advocacy" located at 11 C.F.R. 100.22(b). This Office recommends that a decision be deferred pending the outcome of ongoing litigation.

28. Alternative Dispute Resolution (11 C.F.R. Part 111)

OGC recommends that the Commission wait until the new Alternative Dispute Resolution program has been in place for at least a year before assessing the need to add a new subpart C to 11 C.F.R. Part 111 to set forth procedures on Alternative Dispute Resolution.

V. Rulemaking Projects To Be Terminated

29. Compliance Procedures (11 C.F.R. Part 111, Subpart A) [Paul Sanford]

On July 13, 2000, the Commission voted to direct this Office to prepare a Notice of Disposition to close the rulemaking on compliance procedures. This project was recently reassigned. The Commission may wish to consider initiating a separate project to draft internal guidelines or FEC Directives covering some or all of the following topics:

- admonishment letters
- pre-probable cause conciliation
- prohibition against deponents taping their depositions
- extensions of time, including the tolling of the statute of limitations when an extension is granted
- motions for reconsideration submitted by respondents

Recommendation

The Office of General Counsel recommends that the Commission approve the above listing of rulemaking priorities.

Public Funding Issues

Primary Elections Only

1. The Commission could codify AO 2000-12, to allow losing primary election candidates to use public money to attend and pay certain expenses incurred at their parties' national nominating conventions. 11 CFR 9032.9.
2. The Commission could clarify, and perhaps simplify, the relationship between 11 CFR 9034.4(a)(1), (a)(3), and (b)(3), dealing with winding down costs and qualified campaign expenses.
3. The Commission could revise the last sentence of 11 CFR 9034.4(a)(3)(iii), to clarify that the primary committee can pay wind down after the end of the Expenditure Report Period only for the primary campaign (i.e., they cannot pay wind down for the whole primary-general election campaign).
4. In the matching fund submission rules, the Commission could revise 11 CFR 9036.1(b)(1)(ii) and 9036.2(b)(1)(v) to reflect election cycle rather than calendar year reporting for individuals whose contributions exceed \$200.

Conventions

5. The Commission could review the current list of permissible purposes for donations to host committees found at 11 CFR 9008.52(c). Paragraph 9008.52(c)(1)(xi) could also be revised to include a non-exhaustive list of impermissible expenditures, to clarify the meaning of "other similar convention-related facilities and services" as used in the paragraph. The Commission could also encourage convention committees to submit contracts with hotels, vendors, and other providers under the Advisory Opinion process to determine the permissibility of specific expenditures in advance.
6. The Commission could consider adding a new section 11 CFR 9008.55 to the rules, to explain consequences for failure to comply with the host committee and municipal fund regulations. The Commission could also examine which entities are properly classified as host committees.
7. The Commission could re-examine the rules at 11 CFR 9008.51(b), under which host committees file reports with the Commission only after the convention is well over. The Commission could also revise 11 CFR 9008.51(b) to state when books close for host committees' post-convention reports.
8. The Commission could revise 11 CFR 9008.52(c)(1) and 9008.53(b)(1) to clarify the meaning of a "local" individual in certain situations.

GELAC

9. The *Federal Register* mistakenly removed 11 CFR 9004.4(a)(4)(iii), dealing with certain uses of GELAC funds, from the 2000 edition.

Both Primary and General Elections

10. The Commission could codify at 11 CFR 9005.1 procedures for handling complaints or requests urging the denial of public funding to primary and/or general election candidates.

11. The Commission could revise 11 CFR 104.5(b)(2) and 9006.2 to require presidential committees to notify the Commission if they opt to change from monthly to quarterly filing, or vice versa, in a non-election year.

12. The Commission could address at 11 CFR 9004.6(a)(1) and 9034.6(a)(1) the billing of the press and Secret Service for the cost of reconfiguring an aircraft.

13. The Commission could revisit the use of corporate aircraft in presidential campaigns. See 11 CFR 9004.7(b), 9034.7(b). The use of subsidiaries, operating aircraft on a time-share basis, and the use of an aircraft for charter purposes when the owners are not using it, for example, have made the difficulty of verifying that a particular flight was eligible for first class treatment increasingly complex.

14. Also in connection with corporate aircraft, the Commission could require additional records and information from the companies providing the travel as to ownership, management, or leasing arrangements involved with a particular flight. 11 CFR 9004.7(b)(3), 9034.7(b)(3).

15. The Commission could address the rules governing mailing lists. While this is not addressed in the public funding rules, but rather at 11 CFR 100.7(a)(1)(iii), the auditors have encountered situations involving the acquisition from a related PAC or the previous campaign at little or no cost, the rules on list exchanges, the rules on the sale or lease of the list both during the active campaign and after the campaign is over. This topic affects House and Senate candidates in addition to Presidential candidates.

16. The Commission could address whether winding down costs should be limited to a percentage of the candidate's total expenditures subject to the overall expenditure limitation, an amount based on average winding down costs for the previous election cycle, or a figure obtained by some other method. 11 CFR 9004.4(a)(4), 9034.4(a)(3). Another approach would be to limit wind-down costs to a specific time period following an election.

Primary and General Elections, and Conventions

17. The Commission could revise 11 CFR 104.3 to specifically require reporting of repayments to the United States Treasury made pursuant to 11 CFR parts 9007, 9008 and/or 9038.

18. The Commission could include the credit card disbursement requirements in 11 CFR 102.9(b)(2)(ii) in the Title 26 recordkeeping requirements at 11 CFR 9034.2.

19. The Commission could also incorporate the guidance in the pertinent Advisory Opinions on the subject of credit cards, e.g., AO 1999-09, into the text of the rules at 11 CFR 9034.2.

20. The Commission could address the Debt Collection Improvement Act ("DCIA") implications for publicly-funded candidates and entities.

21. The rules currently authorize the use of statistical sampling techniques in Title 26 audit reviews and in calculating the amounts of violations and disgorgement payments. See 11 CFR 9007.1(f)(1), 9038.1(f)(1). The Commission might wish to include comparable language in 11 CFR 9007.2 and 9038.2, dealing with repayments. The Commission used sampling techniques to determine the Buchanan for President, Inc., repayment obligation following the 1996 presidential election.

Issues That Affect Independent, Minor and New Party Candidates Only

22. The Commission could address how the 10% "ineligibility" rule, 11 CFR 9033.5(b), and the rule for reestablishing eligibility, 11 CFR 9033.8(b), apply in the case of parties that hold a single, national primary election.

23. The Commission could establish procedures to reexamine initial and final determinations for minor party pre-election funding made pursuant to 11 CFR 9005.1(b), when there is a dispute as to which candidate qualifies for funding.

24. The Commission could address at 11 CFR 9004.2(a) and 9004.3(a) treatment of candidates appearing on the ballot under multiple parties or as independents for purposes of calculating general election funding eligibility.

25. During the last Title 26 rulemaking, the Commission voted to direct OGC to address the possible formation of GELACs by new and minor party candidates. This would implicate various portions of 11 CFR 9003.3.