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Part IX

Federal Election Commission

11 CFR Part 110

Transfers of Funds From State to Federal Campaigns; Final Rule

FEDERAL ELECTION COMMISSION

11 CFR Part 110

[Notice 1992-13]

Transfers of Funds From State to Federal Campaigns

AGENCY: Federal Election Commission.

ACTION: Final rules and transmittal of regulations to Congress.

SUMMARY: The Commission has revised its regulations at 11 CFR 110.3(c) regarding the transfer of funds from state to federal campaigns. This revision comes in response to a Petition for Rulemaking filed by Congressman William Thomas. 56 FR 66866 (Dec. 26, 1991). Congressman Thomas' Petition alleges that the current regulations are ineffective, because they fail to prevent the indirect use of impermissible funds in federal elections. The new rule amends 11 CFR 110.3(c) to prohibit the transfer of funds from state to federal campaign committees. Further information is provided in the supplementary information which follows.

DATES: Further action, including announcement of an effective date, will be taken after these regulations have been before Congress for 30 legislative days pursuant to 2 U.S.C. 438(d). A document announcing the effective date will be published in the Federal Register.

FOR FURTHER INFORMATION CONTACT: Ms. Susan E. Propper, Assistant General Counsel, 999 E Street, NW., Washington, DC 20463, (202) 219-3690 or (800) 424-9530.

SUPPLEMENTARY INFORMATION: The Commission is publishing today the final text of revisions to its regulations at 11 CFR 110.3 regarding the transfer of funds from state to federal campaigns.

The Commission published a Notice of Proposed Rulemaking ["NPRM"] on April 15, 1992, in which it sought comments on proposed revisions to these regulations. 57 FR 13054 (Apr. 15, 1992). The Commission received thirteen comments in response to the NPRM.

Section 438(d) of title 2, United States Code, requires that any rule or regulation prescribed by the Commission to carry out the provisions of title 2 of the United States Code be transmitted to the Speaker of the House of Representatives and the President of the Senate 30 legislative days before they are finally promulgated. These regulations were transmitted to Congress on August 7, 1992.

After the thirty legislative days have expired, the Commission will publish an effective date for this new regulation in the Federal Register. The Commission does not intend to make this rule effective until after the 1992 election cycle.

Explanation and Justification

The Federal Election Campaign Act, as amended, 2 U.S.C. 431 et seq. ["FECA" or "the Act"], places certain limitations and prohibitions on the sources and amounts of contributions to federal election campaigns. Section 441a limits the dollar amount of contributions by individuals and multicandidate political committees. Section 441b, in general, prohibits contributions by corporations and labor organizations. The FEC has promulgated regulations to implement these statutory provisions. See 11 CFR parts 110 and 114.

In contrast, many states impose fewer restrictions on contributions to campaigns for state elective offices. Many states allow individuals to make contributions to state candidates that would exceed FECA limits if they were directed to a federal candidate. Many states also allow corporations and labor organizations to make contributions to state candidates, in some cases without any dollar limit. Contributions to state candidates that would be impermissible if given to a federal candidate are often referred to as "soft money" contributions.

In many instances, candidates for federal office who were once candidates for state office have state campaign committees with funds leftover from a state campaign. These candidates often wish to transfer these funds to their federal campaign committees for use in the federal campaign. Until now, the Commission has allowed nonfederal campaign committees to transfer funds to an authorized federal committee of the same candidate, so long as the funds transferred do not contain impermissible or "soft money" contributions. 11 CFR 110.3(c)(6). This policy can be traced to a series of advisory opinions that date back to the Commission's inception. Advisory Opinions 1975-66, 1980-117, 1982-52, 1983-34, 1984-3, 1984-46, 1985-1, 1987-12, 1990-16. See Explanation and Justification of Final Rule, 54 FR 34098, 34104 (Aug. 17, 1989).

On December 5, 1991, Congressman William Thomas filed a Petition for Rulemaking urging the Commission to revise its regulations regarding the transfer of funds from nonfederal campaign committees to federal campaign committees. The Petition alleges that the current regulations are ineffective, because they allow nonfederal committees to use soft money to finance the solicitation of "hard money" contributions that would be permissible under the Act. These permissible contributions can then be transferred to a federal committee for use in the federal campaign. The petition argues that this amounts to an indirect use of impermissible contributions in federal elections.

The Commission published a Notice of Availability on December 26, 1991, which sought public comments on the petition. See 56 FR 66866 (Dec. 26, 1991). The Commission received three comments supporting the petition. An additional comment sought clarification.

On April 15, 1992, the Commission published a Notice of Proposed Rulemaking. 57 FR 13054 (Apr. 15, 1992). The Notice proposed amendments to 11 CFR 110.3(c)(6) that would prohibit the transfer of funds raised using contributions that would be impermissible under the Act. The Notice also contained an alternative proposal, which would reverse the Commission's existing policy and ban all transfers from state campaigns to federal campaigns. The Notice sought comments on whether such a prohibition would be preferable to the proposed rule.

The Commission anticipates that certain practical problems could occur should the proposed rule, rather than the alternative, be implemented. Under the proposed rule, committees must be able to demonstrate that the funds they wish to transfer were raised with funds that are permissible under the Act. Linking specific funds to be transferred to particular fundraising disbursements will be difficult for committees in the best of circumstances. This process would also be difficult for the Commission to monitor and enforce.

The difficulty of this process is often compounded in several ways. For example, most state campaigns are subject to less stringent recordkeeping and reporting requirements than those imposed by federal law. In addition, state campaigns often make fundraising disbursements from accounts containing a constantly varying mixture of permissible and impermissible funds. Finally, fundraising activities are often paid for with multiple disbursements over the course of several days.

If fundraising is paid for with multiple disbursements that come from accounts containing a mixture of funds, linking the contributions received to funds disbursed, and then limiting the transfer to those contributions that can be linked to permissible disbursements, presents significant practical difficulties. In addition, the NPRM noted that some campaign committees might choose to set up separate accounts for permissible

and impermissible funds in order to simplify the recordkeeping process for future transfers. This practice could raise questions about federal regulation of state campaign activity and about the possible onset of federal candidate status during a state campaign.

It was because of these anticipated difficulties that the Commission included the alternative proposal in the Notice of Proposed Rulemaking. The alternative proposal would prohibit all transfers from state to federal campaign committees. The Notice sought comments on whether this would be preferable to the proposed rule.

The Commission received 13 comments in response to the Notice of Proposed Rulemaking. Most of the commenters endorsed the alternative proposal in some form, and rejected the more limited ban on transfers of contributions raised with soft money. Seven commenters urged the Commission to prohibit all transfers from "commingled" state campaign accounts. Three commenters spoke more generally in support of a prohibition on all transfers from state to federal campaigns. All of the commenters who expressed support for the promulgation of new rules in this area preferred the total ban.

Although the Commission is reluctant to reverse long-standing policy, it is also concerned about the indirect use of impermissible funds in federal elections. This is an area in which the Commission has engaged in closer regulation in recent years. See, e.g., Methods of Allocation Between Federal and Non-Federal Accounts, 55 FR 26058 (June 26, 1990). Consequently, the Commission has decided to promulgate new rules that would more effectively prevent the indirect use of impermissible funds in federal elections.

However, in light of the comments received and the difficulties presented by the proposed rule, the Commission believes that the alternative proposal, a prohibition on all transfers from state to federal campaigns, is the best way to address the concerns raised in the Petition for Rulemaking. Choosing the alternative proposal will avoid the issues raised by a rule that leads to the segregation of funds in separate state campaign accounts, and will also obviate the need for additional complicated recordkeeping.

The final rule prohibits transfers of cash or other assets from state campaign committees to federal campaign committees. The rule also, prohibits transfers from the bank account of a state campaign in order to address those situations where there is no recognized state campaign committee. However, the rule should not be read to proscribe the sale of assets by the state campaign committee to the federal campaign committee, so long as those assets are sold at fair market value. Committees may look to the valuation mechanism contained in 11 CFR 9034.5(c)(1) for guidance in determining fair market value.

Nor should this rule be read to limit the federal campaign committee's right to solicit contributions from those who made contributions to the state campaign. The federal campaign is permitted to solicit contributions from the same contributors. However, if the federal campaign committee intends to use a mailing list compiled by the state campaign, the federal campaign must purchase the list at fair market value. The mailing list is an asset of the state campaign, and any transfer for less than fair market value would violate the rule announced in this Notice.

The Commission will publish an effective date for this new regulation in the **Federal Register** after it has been before Congress for thirty legislative days. As indicated in the Notice of Proposed Rulemaking, the Commission does not intend to make this rule effective until after the 1992 election cycle.

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

I certify that the attached final rule will not have a significant economic impact on a substantial number of small entities. The basis of this certification is that the rule would bar transfers of funds from a state campaign to a federal campaign for use in federal election activity. This does not impose a significant economic burden, because any small entities affected are already required to comply with the Act's requirements, including those on permissible sources of funds, if they engage in activity designed to influence a federal election.

List of Subjects in 11 CFR Part 110

Campaign funds, Political candidates.

For the reasons set out in the preamble, subchapter A, chapter I of title 11 of the Code of Federal Regulations is amended as follows:

PART 110—CONTRIBUTION AND EXPENDITURE LIMITATIONS AND PROHIBITIONS

1. The authority citation for part 110 continues to read as follows:

Authority: 2 U.S.C. 431(8), 431(9), 432(c)(2), 437d(a)(8), 438(a)(8), 441a, 441b, 441d, 441e, 441f, 441g and 441h.

2. Section 110.3 is amended by revising the heading of paragraph (c), by removing and reserving paragraph (c)(6), and by adding paragraph (d), to read as follows:

§ 110.3 Contribution limitations for affiliated committees and political party committees; Transfers (2 U.S.C. 441a(a)(5), 441a(a)(4)).

* * * * *

(c) *Permissible transfers.* * * *

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(d) *Transfers from nonfederal to federal campaigns.* Transfers of funds or assets from a candidate's campaign committee or account for a nonfederal election to his or her principal campaign committee or other authorized committee for a federal election are prohibited. However, at the option of the nonfederal committee, the nonfederal committee may refund contributions, and may coordinate arrangements with the candidate's principal campaign committee or other authorized committee for a solicitation by such committee(s) to the same contributors. The full cost of this solicitation shall be paid by the Federal committee.

Dated: August 7, 1992.

Joan D. Aikens,

Chairman, Federal Election Commission.

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