



FEDERAL ELECTION COMMISSION
Washington, DC 20463

FEDERAL ELECTION
COMMISSION
SECRETARIAT

2007 SEP 21 P 2:10

September 21, 2007

MEMORANDUM

TO: The Commission

FROM: Thomasenia P. Duncan *TPD*
General Counsel
Rosemary C. Smith *RS*
Associate General Counsel
Amy L. Rothstein *AR*
Assistant General Counsel
Stacey J. Shin *SJS*
Attorney

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

Attached is a draft Final Rule that adds two additional uses of campaign funds to the list of permissible non-campaign uses at 11 CFR 113.2. The Consolidated Appropriations Act of 2005 amended 2 U.S.C 439a by adding (1) donations to non-Federal candidates, and reinstating (2) any other lawful purpose that does not convert campaign funds to personal use. This draft Final Rule conforms the Commission regulations to 2 U.S.C 439a, as revised.

We request that this draft be placed on the agenda for September 24, 2007.

Attachment

AGENDA ITEM
For Meeting of: 9-24-07
SUBMITTED LATE

1 **FEDERAL ELECTION COMMISSION**

2 **11 CFR Part 113**

3 **[Notice 2007-]**

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

6 **AGENCY:** Federal Election Commission.

7 **ACTION:** Final Rules and Transmittal of Rules to Congress.

8 **SUMMARY:** The Federal Election Commission is revising its rules regarding
9 the use of campaign funds by candidates and other individuals.

10 The revision adds to the current list of permissible uses of
11 campaign funds in Commission regulations: (1) donations to non-
12 Federal candidates; and (2) any other lawful purpose other than
13 personal use. This change conforms the provision with those in the
14 Federal Election Campaign Act, as amended (“the Act”). Further
15 information is provided in the supplementary information that
16 follows.

17 **EFFECTIVE**
18 **DATE:** [INSERT DATE 30 DAYS AFTER THE DATE OF
19 PUBLICATION IN THE FEDERAL REGISTER].

20
21 **FOR FURTHER**
22 **INFORMATION**
23 **CONTACT:**

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

1 **SUPPLEMENTARY**

2 **INFORMATION:** Section 313 of the Federal Election Campaign Act of 1971, as
3 amended (“the Act”), sets forth permissible uses of contributions¹ accepted by candidates
4 and donations² received by individuals to support their activities as Federal officeholders.
5 Section 313 is codified at 2 U.S.C. 439a and is referred to hereafter as “Section 439a.”
6 Section 439a(a) provides that candidates may use contributions, and individuals holding
7 Federal office may use donations, for: (1) expenditures in connection with the candidate’s
8 or individual’s campaign for Federal office; (2) ordinary and necessary expenses incurred
9 in connection with duties of the individual as a Federal officeholder; (3) contributions to
10 an organization described in section 170(c) of the Internal Revenue Code; (4) transfers,
11 without limitation, to a national, State, or local committee of a political party; (5)
12 donations to State and local candidates subject to the provisions of State law; and (6) any
13 other lawful purpose, unless such purpose constitutes personal use of contributions or
14 donations. See 2 U.S.C. 439a(a).

15 Section 113.2 of the Commission’s regulations implements Section 439a by
16 tracking the permissible uses of campaign funds and funds donated to a Federal
17 officeholder. The Commission initiated this rulemaking to add to section 113.2 the two
18 recently enacted permissible uses regarding donations to non-Federal candidates, and
19 donations for any other lawful purpose other than personal use. See the Consolidated
20 Appropriations Act of 2005.³ The Commission notes that before 2002, the Act and

¹ A “contribution” is a payment, service or anything of value given to a person for the purpose of influencing a Federal election. See 11 CFR 100.52(a). “Contributions” are subject to the limits and prohibitions of the Act.

² A “donation” is a payment, service or anything of value given to a person other than a “contribution.” See 11 CFR 300.2(e).

³ Pub. L. 108-447, 118 Stat. 2809 (2004). The Consolidated Appropriations Act of 2005 directed that section 312a(a) of the Act be amended, but was executed by amending section 313(a) of the Act “as the probable intent of Congress.” 2 U.S.C.A. 439a (West 2004).

1 Commission regulations had permitted the use of campaign funds for “any other lawful
2 purpose” other than personal use. The Bipartisan Campaign Reform Act of 2002
3 (“BCRA”),⁴ deleted “any other lawful purpose” from Section 439a and set forth four
4 permissible uses of campaign funds.

5 As noted above, however, the “any other lawful purpose” provision was restored
6 to Section 439a through the Consolidated Appropriations Act of 2005. At that time,
7 Congress also added donations to State and local candidates as permissible uses of
8 campaign funds. These changes to the Act prompted this rulemaking.

9 The Commission published a Notice of Proposed Rulemaking (“NPRM”) on
10 July 19, 2007, in which it sought comment on proposed revisions to 11 CFR 113.2. See
11 Notice of Proposed Rulemaking for Use of Campaign Funds for Donations to Non-
12 Federal Candidates and Any Other Lawful Purpose Other Than Personal Use, 72 FR
13 39583 (July 19, 2007).⁵ The comment period closed on August 20, 2007. The
14 Commission received one written comment from the Internal Revenue Service, which
15 stated that “the proposed rules do not pose a conflict with the Internal Revenue Code or
16 the regulations thereunder.”

17 Accordingly, the Commission has decided to revise its rules governing the use of
18 campaign funds to add to the current list of permissible uses of campaign funds in
19 Commission regulations: (1) donations to non-Federal candidates; and (2) any other
20 lawful purpose other than personal use. These changes are identical to those proposed in
21 the NPRM.

⁴ Pub. L. 107-155, 116 Stat. 81 (2002).

⁵ Available at www.fec.gov/pdf/nprm/useoffunds/notice_2007-15.pdf.

1 **TRANSMISSION OF FINAL RULES TO CONGRESS**

2 Under the Administrative Procedure Act, 5 U.S.C. 553(d), and the Congressional
3 Review of Agency Rulemaking Act, 5 U.S.C. 801(a)(1), agencies must submit final rules
4 to the Speaker of the House of Representatives and the President of the Senate and
5 publish them in the Federal Register at least 30 calendar days before they take effect.

6 The final rules that follow were transmitted to Congress on _____, 2007.

7 **EXPLANATION AND JUSTIFICATION**

8 **1. 11 CFR 113.2(d) – Donations to State and local candidates**

9 Section 439a(a)(5) of the Act expressly permits Federal candidates and
10 officeholders to donate their campaign funds to State and local candidates. The
11 Commission is amending 11 CFR 113.2 accordingly, by adding a new paragraph (d),
12 which permits Federal candidates and officeholders to donate campaign funds from their
13 authorized committees to “State and local candidates subject to the provisions of State
14 law.”

15 **2. 11 CFR 113.2(e) – Any other lawful purpose**

16 The Commission is amending 11 CFR 113.2 by inserting a new paragraph (e),
17 which states that campaign funds “may be used for any other lawful purpose, unless such
18 use is personal use under 11 CFR 113.1(g).” New paragraph (e) follows section
19 439a(a)(6) of the Act, which permits the use of campaign funds “for any other lawful
20 purpose,” unless the funds are converted by any person to personal use. The Commission
21 notes that this change to the Act had the effect of superseding the analysis in Advisory
22 Opinion 2003-26 (Voinovich), in which the Commission concluded that after BCRA
23 deleted the “any other lawful purpose” provision from Section 439a, campaign funds

1 could be used only for those non-campaign purposes that were specifically enumerated in
2 Section 439a. The change also had the effect of superseding, in part, Advisory Opinion
3 2004-03 (Dooley), to the extent that Advisory Opinion 2004-03 placed certain limits on
4 an authorized committee that had converted into a multicandidate committee and its use,
5 for any lawful purpose, of funds that had been received when the committee was an
6 authorized committee.

7

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

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

21 The final rule also does not impose any additional restrictions or increase the
22 costs of compliance for authorized committees. Instead, the final rule provides
23 authorized committees with additional options for using campaign funds, which track the

1 recent changes to 2 U.S.C. 439a(a). The final rule does not impose an undue burden
2 upon authorized committees because they are already required to report the use of
3 campaign funds to the Commission. Therefore, the attached final rule does not have a
4 significant economic impact on a substantial number of small entities.

5 **List of Subjects**

6 11 CFR Part 113

7 Campaign funds.

8

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

2 **PURPOSES**

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

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

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

8 2. Section 113.2 is amended by:

9 a. Adding paragraph (d); and

10 b. Redesignating paragraphs (e) and (f) as paragraphs (f) and (g) and adding new
11 paragraph (e) to read as follows:

12 **§ 113.2 Permissible non-campaign use of funds (2 U.S.C. 439a).**

13 * * * * *

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

16 (e) May be used for any other lawful purpose, unless such use is personal use under
17 11 CFR 113.1(g).

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Robert D. Lenhard
Chairman
Federal Election Commission

DATED: _____
BILLING CODE: 6715-01-U