AGENDA DOCUMENT NO. 02-08

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

January 23, 2002

MEMORANDUM

AGENDA ITEM
For Meeting of: 1-31-02

TO: The Commission

FROM: James A. Pehrkon
Staff Director

SUBJECT: Draft Interpretation of Travel Allocation Regulations
At 11 CFR § 106.3(b)

Vice Chairman Karl Sandstrom has requested that the attached draft interpretative rule be discussed at the open Commission Meeting of January 31, 2002. The General Counsel reviewed and revised the document and provided detailed comments that are attached for your reference.

Several modifications were made to the revised draft. The most significant are:

- page 2, line 15 was edited to address concerns as to whether the "allocation and reporting requirements in 11 CFR 106.3(b) are applicable to travel expenses paid for with" funds authorized and appropriated by the Federal Government.
- page 3, line 7 was edited to delete the word "travel" before allocation and insert the words "and reporting" after the word allocation.
- page 3, line 17, the sentence beginning with "For example, ..." was deleted.
- several references to 11 CFR 106.3(b) were changed to 11 CFR 106.3; and
- a sentence was added to footnote 3 on page 4, to clarify that there are several differences between 11 CFR 106.3 and 11 CFR 9004.7 and 9034.7. "See, for example, 11 CFR 9004.7(b)(5) and 9034.7(b)(5), which address reimbursement requirements for use of a government airplane to travel to or from a campaign-related stop."

In sum, the General Counsel concludes that the attached draft interpretation could properly be issued as an interpretive rule.

Attachments

FEDERAL ELECTION COMMISSION

11 CFR Part 106

[NOTICE 2002 -]

INTERPRETATION OF ALLOCATION OF CANDIDATE TRAVEL EXPENSES

AGENCY: Federal Election Commission.

ACTION: Interpretation

SUMMARY: This notice expresses the view of the Commission that the travel allocation requirements of 11 CFR 106.3(b) are not applicable to the extent that a candidate pays for certain travel expenses using funds authorized and appropriated by the Federal Government.

DATE: [Insert date of publication in the Federal Register]

FOR FURTHER INFORMATION CONTACT: Christina H. VanBrakle, Director, Congressional Affairs 999 E Street, NW, Washington, D.C. 20463, (202) 694-1006 or (800) 424-9530.

SUPPLEMENTARY INFORMATION: Contributions and expenditures made for the purpose of influencing Federal elections are subject to various prohibitions and limitations under the Federal Election Campaign Act, 2 U.S.C. § 431 et seq., as amended ["FECA" or "the Act"]. These prohibitions and limitations apply to a contribution or expenditure by a "person," as defined

by 2 U.S.C. § 431(11) and 11 CFR 100.10.[1] The statutory definition of the term "person" expressly excludes the Federal Government and any authority thereof.[2]

Commission regulations at 11 CFR 106.3 require candidates for Federal office, other than Presidential and Vice-Presidential candidates who receive federal funds pursuant to 11 CFR part 9005 or 9036, to report expenditures for campaign-related travel. Specifically, section 106.3(b) states that "(1) Travel expenses paid for by a candidate from personal funds, or from a source other than a political committee, shall constitute reportable expenditures if the travel is campaign-related. (2) Where a candidate's trip involves both campaign-related and non-campaign related stops, the expenditures allocable for campaign purposes are reportable and are calculated on the actual cost-per-mile of the means of transportation actually used, starting at the point of origin of the trip, via every campaign related stop and ending at the point of origin. (3) Where a candidate conducts any campaign-related activity in a stop, the stop is a campaign related stop and travel expenditures made are reportable. Campaign-related activity shall not include any incidental contacts.

Questions have arisen as to whether the allocation and reporting requirements in 11 CFR 106.3(b) are applicable to travel expenses paid for with funds authorized and appropriated by the Federal Government. Thus, the Commission is announcing its interpretation of the scope of 11 CFR 106.3(b) in that circumstance.

[1] The terms "contribution" and "expenditure" are likewise defined at 2 U.S.C. § 431(8)(A) and 11 CFR 100.7, and 2 U.S.C. § 431(9)(A) and 11 CFR 100.8, respectively.
[2] 2 U.S.C. § 431(11) provides: "The term 'person' includes an individual, partnership, committee, association, corporation, labor organization, or any other organization or group of persons, but such term does not include the Federal Government or any authority of the Federal Government."

Because 2 U.S.C. § 431(11) specifically excludes the Federal Government from its definition of a "person," the Commission acknowledges that a candidate's travel expenses that are paid for using funds authorized and appropriated by the Federal Government are not paid for by a "person" for the purposes of the Act. Therefore, the Commission believes that the allocation and reporting requirements of 11 CFR 106.3(b) are not applicable to the extent that a candidate pays for travel expenses using funds authorized and appropriated by the Federal Government. The Commission notes that this interpretation of 11 CFR 106.3(b) is in harmony with 11 CFR 106.3(d), which states that a candidate need not report "travel between Washington, D.C. and the state or district in which he or she is a candidate ... unless the costs are paid by a candidate's authorized committee(s), or by any other political committee(s)."

Please note that this announcement represents the Commission's interpretation of an existing regulation and is not intended to create or remove any rights or duties, nor is it intended to affect any other aspect of 11 CFR 106.3, the Act, or the Commission's regulations. Furthermore, this interpretation does not apply to presidential or vice presidential campaigns that are covered by the Presidential Election Campaign Fund Act, 26 U.S.C. § 9001 et seq. (general elections) or the Presidential Primary Matching Payment

Account Act, 26 U.S.C. § 9031 et seq.[3] Finally, the Commission notes that the use of Federal funds is governed by general appropriations law and is subject to Congressional oversight.[4]

David M. Mason
Chairman
Federal Election Commission

DATED: _____

BILLING CODE: 6715-01-U

[3] The Commission's regulations governing travel by presidential and vice presidential candidates who receive federal funds are found at 11 CFR 9034.7 and 9004.7, respectively. These regulations differ from 11 CFR 106.3 in several ways. See, for example, 11 CFR 9004.7(b)(5) and 11 CFR 9034.7(b)(5), which address reimbursement requirements for use of a government airplane to travel to or from a campaign-related stop.

[4] Both the Senate and the House of Representatives have provided specific guidance to their members regarding mixed-purpose travel. See page 118 of the Senate Ethics Manual (September 2000) and page 95 of the Rules of the House of Representatives on Gifts and Travel (April 2000).

FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: The Commission

FROM: Lawrence H. Norton
General Counsel

N. Bradley Litchfield
Associate General Counsel

Rosemary C. Smith
Assistant General Counsel

Richard Ewell
Staff Attorney

SUBJECT: Comments on Draft Interpretation of Travel Allocation Regulations at 11 C.F.R. § 106.3(b)

I. Introduction

This memorandum discusses several procedural and substantive issues concerning possible promulgation of a new interpretive rule to clarify one aspect of the Commission's travel allocation regulations at 11 C.F.R. § 106.3(b).[1]

On December 7, 2001, Commissioner Sandstrom's office requested that the Office of General Counsel review a "Proposed Interpretive Rule" relating to travel allocation under 11 C.F.R. §106.3(b)(2) and (3). The Proposed Interpretive Rule explained that the Commission has the authority to enforce the Federal Election Campaign Act, 2 U.S.C. 431 *et seq.* ["FECA" or "the Act"] with respect to expenditures made by a "person." The Federal Government is not a "person" under the Act. Therefore, the Proposed Interpretive Rule

[1] Issues relating to the allocation of travel expenses incurred for trips with combined campaign and noncampaign purposes have generated many questions since 11 C.F.R. § 106.3 was first promulgated in 1977. The Commission has authorized a rulemaking to address these questions. On August 23, 2001, the Commission voted to address issues relating to the use of corporate aircraft in presidential campaigns in this rulemaking. The Commission also voted to make the rulemaking a third priority project.

concluded that "the Commission lacks the statutory authority to regulate travel expenses paid for with authorized, appropriated Federal funds."

In response, this Office suggests several revisions to the proposed interpretive rule. Accordingly, we have attached a revised version of the proposed interpretive rule. This memorandum explains the characteristics of an interpretive rule and describes the procedures required to properly implement an interpretive rule in accordance with the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* ["APA"], the FECA, and other statutes and applicable laws.

II. Distinguishing Between Substantive Rules and Interpretive Rules

An interpretive rule differs from a substantive rule in the process by which it is implemented, its effect on an agency and members of the regulated community, and the amount of deference it receives from the judiciary. Courts have struggled to explain the precise distinctions between interpretive and substantive rules, and the boundaries of those rules continue to evolve in case law.[2] As explained below, however, several characteristics are commonly used to identify an interpretive rule.

A. The Attorney General's Manual

The APA does not specifically define the term "interpretive rule" nor does it provide guidance on the distinction between that formulation and "substantive" or "legislative" rules. However, the Attorney General's Manual on the Administrative Procedure Act, which was written shortly after the enactment of the APA and is given "considerable weight" by the Court of Appeals for the D.C. Circuit,[3] provides some guidance on these distinctions:

> 1. Substantive rules (sometimes called "legislative rules") - rules, other than organizational or procedural . . . issued by an agency pursuant to statutory authority and which implement the statute . . . Such rules have the force and effect of law.
> 2. Interpretive rules - rules or statements issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers.

Attorney General's Manual on the Administrative Procedure Act 15, at 30 n.3 (1947).

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[2] *See* Arizona v. Shalala, 121 F.Supp.2d 40, 50 (D.D.C.2000), quoting *American Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1045 (D.C.Cir.1987) (describing the distinction between the two types of rules as a "hazy continuum").

[3] *Pacific Gas & Electric v. Federal Power Commission*, 506 F.2d 33, 38 n.17 (D.C. Cir. 1974). The Supreme Court has also acknowledged the importance of the Attorney General's Manual in this area. *See Chrysler Corp. v. Brown*, 441 U.S. 281, 302 n. 31 (1979).

B. Leading Cases From the D.C. Circuit

There is extensive case law discussing the distinctions between legislative rules and interpretive rules. Rules promulgated under specific statutory grants of rulemaking authority are often referred to as substantive rules or legislative rules.[4]

> [A] substantive rule *modifies* or *adds* to a legal norm based on the agency's *own authority*. That authority flows from a congressional delegation to promulgate substantive rules, to engage in supplementary lawmaking. And it is because the agency is engaged in lawmaking that the APA requires it to comply with notice and comment."

Syncor International Corp. v. Shalala, 127 F.3d 90, 95 (D.C. Cir. 1997) (emphasis in original). The additional procedural requirements give legislative rules "the force of law."

> Legislative rules thus implement congressional intent; they effectuate statutory purposes. In so doing, they grant rights, impose obligations, or produce other significant effects on private interests. They also narrowly constrict the discretion of agency officials by largely determining the issues addressed. Finally, legislative rules have substantive effect. They cannot be set aside by the courts unless found "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

Batterton v. Marshall, 648 F.2d 694, 701-02 (D.C. Cir. 1990) (quoting 5 U.S.C. § 706(2)(A) (footnotes omitted)). Under *Chevron v. NRDC*, 467 U.S. 837 (1984), legislative rules are entitled to substantial deference from reviewing courts.

Interpretive rules are described differently by the *Syncor* court, which distinguished interpretive rules from both general statements of policy[5] and substantive rules:

> An interpretative[6] rule, on the other hand, typically reflects an agency's construction of a statute that has been entrusted to the agency to administer. The legal norm is one that Congress has devised; the agency does not purport to modify that norm, in other words, to engage in lawmaking. To be sure, since an agency's interpretation of an ambiguous statute is entitled to deference under *Chevron*, it might be thought that the interpretative rule -- particularly if it changes a prior statutory interpretation as an agency may do without notice and comment -- is, in reality, a change in the legal norm. Still,

[4] As will be discussed further below, 2 U.S.C. 437d(a)(8) is a specific statutory grant of authority to promulgate substantive rules. Section 437d(a)(8) authorizes the Commission to "develop such prescribed forms and to make, amend, and repeal such rules, pursuant to the provisions of chapter 5 of Title 5, as are necessary to carry out the provisions of this Act and chapter 95 and chapter 96 of Title 26." 2 U.S.C. § 437d(a)(8).

[5] "An agency policy statement does not seek to impose or elaborate or interpret a legal norm. It merely represents an agency position with respect to how it will treat – typically enforce – the governing legal norm." *Id.* at 94 (Citations omitted).

[6] So in original, *passim*.

> in such a situation the agency does not claim to be exercising authority to itself make positive law. Instead, it is construing the product of congressional lawmaking "based on specific statutory provisions." . . . That is why we have said that "[t]he distinction between an interpretive rule and substantive rule . . . likely turns on how tightly the agency's interpretation is drawn linguistically from the actual language of the statute."

Id. at 94 (quoting *United Technologies Corp. v. U.S. EPA*, 821 F.2d 714, 719 (D.C. Cir. 1987), *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 588 (D.C. Cir. 1997). The court also said that if a rule purporting to be an interpretive rule construes an agency's substantive regulation rather than the statute itself,

> the interpretative rule is, in a sense, even more binding on the agency because its modification, unlike a modification of an intrepretative rule construing a statute, will likely require a notice and comment procedure. Otherwise, the agency could evade its notice and comment obligation by 'modifying' a substantive rule that was promulgated by notice and comment rulemaking.

Id. at 94-95. Thus, an interpretation issued without notice and comment must not only be confined by the bounds of existing law, but it is also not entitled to full *Chevron* deference. *See also* Christensen v. Harris County, 529 U.S. 576, 587 (2000) (interpretations which lack the force of law do not warrant Chevron-style deference).

The *Syncor* court relied heavily on *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579 (D.C. Cir. 1997). In *Paralyzed Veterans*, the D.C. Circuit acknowledged that agencies may, in some circumstances, interpret an ambiguous statute or rule without providing notice and comment. *Id.* at 588. However, the court also said that there are limits on an agency's ability to change its interpretation of its own regulations. Policy formulations that effectively amend or repeal existing rules cannot be issued without notice and comment.

> Under the APA, agencies are obliged to engage in notice and comment before formulating regulations, which applies as well to 'repeals' or 'amendments.' See 5 U.S.C. § 551(5). To allow an agency to make a fundamental change in its interpretation of a substantive regulation without notice and comment obviously would undermine those APA requirements. That is surely why the Supreme Court has noted (in dicta) that APA rulemaking is required where an interpretation "adopt[s] a new position inconsistent with . . . existing regulations."

Id. at 586 (quoting *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87 (1995)). The court made it clear that the same standard applies to interpretive rules: "Once an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify the regulation itself: through the process of notice and comment rulemaking." *Id.*

Later, the *Paralyzed Veterans* court talked about the substantive - interpretive distinction in more detail. "The distinction between an interpretive rule and substantive rule more likely turns on how tightly the agency's interpretation is drawn linguistically from the actual language of the statute or rule. . . . If the statute or rule to be interpreted is itself very general, using terms like 'equitable' or 'fair' and the 'interpretation' really provides all the guidance, then the latter will likely be a substantive regulation. . . . [However, if,] even 'in the absence of the [interpretation,] there would . . . be an adequate [regulatory] basis for [an] enforcement action to . . . ensure the performance of duties,'" then the rule will be interpretive. *Id.* at 588 (quoting *American Mining Congress v. MSHA*, 995 F.2d 1106, 1112 (D.C. Cir. 1993).

While an agency's characterization of its own action is given some weight by reviewing courts, the courts are free to determine that an agency's proffered "interpretation" is in fact something different. *See Truckers United for Safety v. Federal Highway Admin.*, 139 F.3d 934 (D.C. Cir. 1998). *American Mining Congress* sets out a test to determine whether a rule is a legislative or interpretive rule.

> Accordingly, insofar as our cases can be reconciled at all, we think it almost exclusively on the basis of whether the purported interpretive rule has 'legal effect,' which in turn is best ascertained by asking (1) whether in the absence of the rule there would not be an adequate basis for enforcement action or other agency action to confer benefits or ensure performance of duties, (2) whether the agency has published the rule in the Code of Federal Regulations, (3) whether the agency has explicitly invoked its general legislative authority, or (4) whether the rule effectively amends a prior legislative rule. If the answer to any of these questions is affirmative, we have a legislative, not an interpretive rule.

Id. at 112

The *Bowen* case, cited above, summarizes earlier cases by saying that they "generally sought to distinguish cases in which an agency is merely explicating Congress' desires from those cases in which the agency is adding substantive content of its own." 834 F.2d at 1046. The court also said that substantive or legislative rules "'are those which create law, usually implementary to an existing law; whereas interpretive rules are statements as to what [the] administrative officer thinks the statute or regulation means.'" *Id.* (quoting *Gibson Wine Co. v. Snyder, 194 F.2d 329, 331 (D.C. Cir. 1952).* In addition, *Bowen* and other cases make it clear that when an agency issues an interpretive rule, it "merely reminds parties of existing duties." *Id. See also Orengo Caraballo v. Reich*, 11 F.3d 186, 195 (D.C. Cir. 1993) (agency "does not intend to create new rights or duties" through an interpretive rule).

III. The Commission's Authority to Issue Interpretive Rules

A. Policymaking Provisions in the FECA and Public Financing Statutes

The Act states that "[t]he Commission shall administer, seek to obtain compliance with, and formulate policy with respect to, this Act and chapter 95 and chapter 96 of the Internal Revenue Code of 1954." 2 U.S.C. § 437c(b)(1). The Act also gives the Commission the power to "make, amend, and repeal such rules, pursuant to the provisions of chapter 5 of Title 5, as are necessary to carry out the provisions of this Act and chapter 95 and chapter 96 of Title 26." 2 U.S.C. § 437d(a)(8). Sections 9009(b) and 9039(b) authorize the Commission to "prescribe such rules and regulations . . . as it deems necessary to carry out the functions and duties imposed on it" by chapters 95 and 96 of title 26, respectively. Thus, the Commission has administrative and policymaking authority in areas governed by the FECA and the public financing statutes. The reference to "chapter 5 of Title 5" in section 437d(a)(8) has the effect of explicitly incorporating the procedural requirements of the APA into the Commission's rulemaking process.[7]

Neither the FECA nor the public financing statutes expressly grant the Commission the authority to issue interpretive rules within the meaning of section 553 of the APA. However, as quoted above, in granting the Commission the authority to "make, amend and repeal" rules with respect to the Act, section 437d(a)(8) cross-references "the provisions of chapter 5 of Title 5." Thus, the notice and comment and delayed effective date requirements of the APA apply to Commission rulemakings. It could be presumed that the procedural requirements of section 553 carry with them authority to utilize the exceptions to those requirements.

Furthermore, case law suggests that an agency with general administrative and enforcement power has the implied authority to issue interpretive rules. In two cases the courts have said that the authority to issue interpretive rules emanates from an agency's general responsibility to administer a statute, rather than from explicit statutory language. "It is well established that an agency charged with a duty to enforce or administer a statute has inherent authority to issue interpretive rules informing the public of the procedures and standards it intends to apply in exercising its discretion." *Production Tool v. Employment and Training Administration*, 688 F.2d 1161, 1167 (7th Cir. 1982). *See also Metropolitan School District v. Davila*, 969 F.2d 485 (7th Cir. 1992). The Act gives the Commission "exclusive jurisdiction with respect to the civil enforcement" of the Act. 2 U.S.C. § 437c(b)(1). *See also* sections 437d(a)(6) and 437g. This suggests inherent authority exists for issuing interpretive rules.

[7] The procedural requirements of section 553 of the APA are explained more fully in the following section.

IV. Procedural Requirements

A. The APA

1. Coverage of Interpretive Rules

The APA contains procedural requirements for issuing any policymaking document that is a rule under the broad definition in 5 U.S.C. § 551(4), which defines "rule" as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency." Although the APA defines "rule" broadly, and interpretive rules are therefore subject to most procedural requirements, the APA does treat interpretive rules differently from substantive rules in several aspects. Generally, the APA requires agencies to provide notice and an opportunity for comment before promulgating rules, and also requires publication of rules at least thirty days before their effective date. *See* 5 U.S.C. § 553. However, the APA also contains exceptions from the notice and comment and delayed effective date requirements. Thus, the APA recognizes that agencies may make policy using procedures other than notice and comment rulemaking.

The D.C. Circuit has characterized the exceptions for interpretive rules and policy statements as "an attempt to preserve agency flexibility in dealing with limited situations where substantive rights are not at stake." *Bowen*, 834 F.2d at 1045. However, the court has also said that "[t]he exceptions to section 553 will be 'narrowly construed and only reluctantly countenanced.'" *Alcatraz v. Block*, 746 F.2d 593, 612 (D.C. Cir. 1984) (quoting *New Jersey Department of Environmental Protection v. EPA* 626 F.2d 1038, 1045 (D.C. Cir. 1980).

2. Notice and Comment

There are two significant publication requirements of the APA. One is a requirement that an agency publish its proposed rule during the process of rulemaking so that the public has notice and an opportunity to comment on the proposed rule. *See* 5 U.S.C. § 553. Secondly, the Freedom of Information Act ["FOIA"] requires publication of a final rule so that the public has notice of the law. *See* 5 U.S.C. § 552. The FOIA requirements are discussed in the "Publication" subsection below.

Section 553(b) of the APA states that "[g]eneral notice of proposed rule making shall be published in the Federal Register." This notice must include "(1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved." *Id.* However, interpretive rules are expressly exempted from this notice requirement because section 553(b) also provides that "[e]xcept when notice or hearing is required by statute, this subsection does not apply (A) to

interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice."

Section 553(c) states that "*[a]fter notice required by this section*, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation." (Emphasis added).[8] Thus, an agency is only required to allow for public participation and comment on a proposed rule when it is required by section 553(b) to provide notice. Therefore, because interpretive rules are exempted from the notice requirement of section 553(b), they are likewise exempted from the comment requirement of section 553(c).

3. Publication in the *Federal Register* and the *Code of Federal Regulations*

The general FOIA publication requirements of section 552 parallel the notice publication requirements of section 553(b). Section 552(a)(1) states that "[e]ach agency shall separately state and currently publish in the Federal Register for the guidance of the public . . . (D) substantive rules of general applicability adopted as authorized by law, and statements of general policy *or interpretations of general applicability* formulated and adopted by the agency; and (E) each amendment, revision, or repeal of the foregoing." (Emphasis added)[9] Furthermore, the APA says that a person may not "be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published," unless the person has "actual and timely notice of the terms thereof." Section 552(a)(1).

Because the APA defines a rule broadly in 5 U.S.C. § 551(4), interpretive rules are presumed to be subject to the provisions of the APA unless expressly exempted. Interpretive rules are not expressly exempted from the publication requirements of section 552(a). Thus, interpretive rules must be published in the *Federal Register* in accordance with 5 U.S.C. § 552(a)(1)(D). *See Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 538-39 (D.C. Cir. 1986). Specifically, "[G]eneral policy statements concerning regulations [and] interpretations of agency regulations" must be published in the section of the *Federal Register* designated as "Rules and Regulations." *See* 1 U.S.C. § 5.9(b).

Publication in the *Code of Federal Regulations* ["CFR"] is a different matter. Generally, a regulation "of general applicability and legal effect" is codified in the CFR. 1 U.S.C. § 8.1(a). An interpretive rule, however, does not have the force or effect of law,[10] so publication of an interpretive rule in the CFR is not appropriate. Furthermore, in *American Mining Congress* and other decisions the Court of Appeals for the D.C. Circuit has considered publication in the CFR to be an indication that the agency action is a substantive rule. *See* 995 F.2d at 1112; *see also Truckers United for Safety*, 139 F.3d at 939 (applying

[8] Section 553(c) also requires agencies to "incorporate in the rules adopted a concise general statement of their basis and purpose."

[9] In contrast, the Commission is not required to publish its advisory opinions in the *Federal Register*. *National Conservative Political Action Committee v. FEC*, 626 F.2d 953, 958 n.12 (D.C. Cir. 1980).

[10] *See Shalala v. Guernsey Memorial Hosp.*, 514 U.S. 87, 88 (1995).

American Mining test). At least one post-*American Mining* decision has suggested that publication in the CFR may only amount to a "snippet of evidence of agency intent," but the court nevertheless indicated that the publication in the CFR was a factor in determining whether an agency action is a substantive or interpretive rule. *See Health Insurance Ass'n of America, Inc. v. Shalala*, 23 F.3d 412, 423 (D.C. Cir. 1994); *see also National Association of Manufacturers v. Department of Labor*, 1996 WL 420868 (D.D.C. July 1996)(memo opinion) (relying on that "snippet" to determine that agency's action was a legislative rule, not an interpretation). Thus, if an agency publishes a purported interpretive rule in the CFR it may well be re-characterized by a court and struck down as a legislative rule invalidly promulgated without notice and comment.

4. Delay in Effective Date

Section 553(d) requires agencies to publish a substantive rule "not less than 30 days before its effective date." Paragraph (2) of that section, however, exempts "interpretive rules and statements of policy" from the delayed effective date requirement. 5 U.S.C. § 553(d)(2). As a result, agencies may put an interpretive rule into effect immediately.

5. Summary

If an agency seeks to implement a rule that has the force of law and is entitled to judicial deference, it must use notice and comment procedures. Rules that fill gaps left by the statute or amend existing substantive rules must be implemented using these procedures. Notice and comment procedures have the advantage of ensuring that the final rule has been carefully considered, and that the public has had an opportunity to participate in the formulation of the rule by submitting comments. It also ensures compliance with the Regulatory Flexibility Act, 5 U.S.C. § 601, *et seq.*

In contrast, the Commission may issue an interpretive rule without notice and comment, so long as the rule is properly limited. A rule that clarifies or restates a provision in the statute could be issued as an interpretive rule. However, a rule that fills a gap between statutory provisions cannot be issued as an interpretive rule, since this would be creation of positive law that requires notice and comment. Similarly, a rule that amends or is inconsistent with an existing substantive or interpretive rule cannot be issued without notice and comment rulemaking. The Commission may also voluntarily choose to provide a comment period on a properly limited interpretive rule.

B. The Congressional Review Act

The Congressional Review Act, 5 U.S.C. § 801 *et seq.* ["CRA"], states that "[b]efore a rule can take effect, the Federal agency promulgating such rule shall submit to each House of the Congress and to the Comptroller General a report containing (i) a copy of the rule; (ii) a concise general statement relating to the rule, including whether it is a major rule; and (iii) the proposed effective date of the rule." 5 U.S.C. § 801(a)(1)(A). For purposes of the Congressional Review Act, the definition of "rule" is the same as in section 551, except for

certain specific exclusions. 5 U.S.C. § 804(3).[11] Thus, the Congressional Review Act requires agencies to submit a broad range of policymaking documents to Congress for review, including some interpretive rules and policy statements. The Comptroller General has created a form for agencies to use in complying with this requirement.

Under the CRA, agency submission of a rule starts a time period during which the submitting agency must wait before it can put the rule into effect. The length of the time period depends on whether or not the rule is a "major" rule under the CRA. A "major" rule is any rule that has resulted in or is likely to result in: (A) a $100 million annual effect on the economy; (B) a major increase in costs for consumers, industries, government agencies or geographic regions; or (C) significant adverse effects on competition, employment, investment, productivity, innovation or ability to compete in foreign or domestic markets. 5 U.S.C. § 804(2). An agency is required to submit information about its rule to the Administrator of the Office of Information and Regulatory Affairs ["OIRA"], who determines whether a rule is a major rule for purposes of the CRA. Generally, major rules take effect 60 calendar days after Congress receives the agency's report on the rule or the date the rule is published in the *Federal Register*, whichever is later.[12]

In contrast, rules that are not major rules take effect on the date they would have otherwise become effective if not for the Congressional Review Act.[13] In this situation, the congressional review provisions of the FECA, the Presidential Election Campaign Fund Act, 26 U.S.C. § 9001 *et seq.*, and the Presidential Primary Matching Payment Account Act, 26 U.S.C. § 9031 *et seq.*, would apply.[14]

C. FECA and the Public Financing Statutes

Section 438(d)(1) of the FECA requires the Commission to transmit to Congress an explanation and justification for any pending rule before that rule is promulgated in final form. Section 438(d)(4) also states that "[f]or purposes of this subsection, the terms 'rule' and 'regulation' mean a provision or series of interrelated provisions stating a single, *separable rule of law*." (Emphasis added). As noted above, an interpretive rule does not have the force or effect of a "rule of law." Furthermore, an interpretive rule, by its very nature, may not exist separately from the rule or statutory provision that it interprets. Thus, an interpretive rule is not a "rule" as contemplated by section 438(d).

[11] Section 804(3) excludes from the definition of rule "(A) any rule of particular applicability, including a rule that approves or prescribes for the future rates, wages, prices, services, or allowances therefore, corporate or financial structures, reorganizations, mergers, or acquisitions thereof, or accounting practices or disclosures bearing on any of the foregoing; (B) any rule relating to agency management or personnel; or (C) any rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties." 5 U.S.C. § 804(3).

[12] A major rule may go into effect before the 60 day waiting period has expired if, during that time, Congress attempts to disapprove the rule but is unsuccessful.

[13] Of course, neither type of rule will go into effect if a disapproval resolution is enacted before the applicable effective date.

[14] Since few, if any, of the Commission's rules will be major rules, most of them will go into effect in accordance with the provisions of the FECA and the public financing statutes.

Sections 9009(c) and 9039(c) of Title 26 contain similar requirements and definitions for rules relating to the public financing programs. All three sections allow the Commission to put a rule into effect if Congress does not disapprove the rule within thirty legislative days. 2 U.S.C. § 438(d)(2), 26 U.S.C. §§ 9009(c)(2), 9039(c)(2).[15] However, because interpretive rules and policy statements are not rules under section 438(d)(4) of the FECA, the Commission need not wait thirty legislative days after Congressional submission to put them into effect. *See* 2 U.S.C. § 438(d)(1). Therefore, they may be made effective on the date they are published in the *Federal Register*.

In addition, subsection 438(f) of the FECA requires the Commission to "consult and work together" with the Internal Revenue Service [IRS] to ensure consistency in "prescribing ... rules, regulations, and forms under this section." 2 U.S.C. § 438(f). This subsection could be read not to apply to interpretive rules. The third part of the test for an interpretive rule set forth in *American Mining Corp* suggests that when an agency invokes its "general legislative authority" to issue a rule, courts will view the result as a substantive rule rather than a true interpretative rule. *See* 995 F.2d at 1112. Agencies therefore issue true interpretive rules pursuant to their inherent authority to interpret the statutory guidance from Congress, rather than from any explicit legislative authority. Because section 438(f) specifies that it applies to the prescription of rules, regulations, and forms "under this section," by negative inference it excludes rules not prescribed pursuant to the legislative authority conferred by section 438. Thus, an interpretive rule issued pursuant the Commission's general authority to interpret its own regulations, and not under the specific authority of section 438, would probably not be subject to the IRS cooperation requirements of subsection 438(f).

Nevertheless, this Office believes that it is both appropriate and advisable for the Commission to coordinate with the IRS in accordance with the spirit of the statute. The Commission has traditionally provided a copy of its proposed regulations and some other actions to the IRS, and similar treatment of an interpretive rule might help to ensure consistent interpretation.

D. The Reports Elimination and Sunset Act

The Federal Reports Elimination and Sunset Act of 1995, Pub. L. 104-66 (1995), eliminated the congressional submission requirements in sections 438(d) and 9039(c). Section 3003(a)(1), 109 Stat. 734, states that any reporting requirement listed in House Document No. 103-7 will cease to be effective on December 21, 1999. House Document 103-7 lists reports of "[p]roposed rules, regulations and forms implementing the Federal Election Campaign Act" under 2 U.S.C. § 438(d) and "Proposed rules and regulations governing the Presidential Primary Matching Payment Account" under 26 U.S.C. § 9039(c).

[15] Sections 438(d)(3), 9009(c)(3), and 9039(c)(3) contain slightly different definitions of "legislative day."

Thus, the FECA and the Matching Payment Act no longer require submission of rules to Congress. However, this will have little practical effect, because the Commission is still required to submit a wide range of policymaking documents to Congress under section 801 of the CRA, discussed above. Continuing to submit rules has the further benefit of simplifying the process of determining when final rules may be put into effect.[16] In addition, the congressional submission requirement in section 9009(c) remains in effect.

E. Regulatory Flexibility Act

The Regulatory Flexibility Act, codified at 5 U.S.C. § 601 *et. seq.* ["RFA"], directs agencies to assess the potential impact of its rules on small businesses and other small entities. A rule, for the purposes of the RFA, is defined as "any rule for which the agency publishes a general notice of proposed rulemaking pursuant to section 553(b) of [the APA], or any other law ...." 5 U.S.C. § 601(2). As discussed above, interpretive rules seldom, if ever, warrant the publication of general notice of a proposed rulemaking and are specifically exempted from the publication requirements of section 553(b). *See* 5 U.S.C. § 553(b)(3)(A). Furthermore, an agency is not required to conduct a RFA flexibility analysis for an interpretive rule because interpretive rules are exempted from the section 553 publication requirements and the analysis is only mandated "whenever an agency is *required* by section 553 of this title, or an other law, to publish general notice of proposed rulemaking for any proposed rule ...." 5 U.S.C. § 603(a) (emphasis added). Thus, an interpretive rule is not normally subject to the requirements of the RFA. *See National Ass'n for Home Care v. Shalala*, 135 F.Supp.2d 161, 164 (D. D.C. Feb. 2001) ("[I]nterpretive rules, because they are exempted from the APA's notice and comment procedures, are exempted from the RFA's strictures as well").

F. Executive Order 12,866

Agencies are required by Executive Order No. 12,866 (1993) to submit rules proposing "significant regulatory actions" to the Office of Information and Regulatory Affairs ["OIRA"], a part of the Office of Management and Budget ["OMB"]. *See id.* at Section 6. Section 3(d) of the Executive Order defines "regulation" or "rule" to mean "an agency statement of general applicability and future effect, which the agency intends to have the force and effect of law, that is designed to implement, interpret, or prescribe law or policy or to describe the procedure or practice requirements of an agency." If an agency intends for a rule to have the force and effect of law, it would be required to promulgate the rule as a legislative rule using notice and comment. A true interpretive rule, however, would not have the force and effect of law, and thus would fall outside the scope of the Executive Order. Thus, it appears unlikely that an agency is required to submit an interpretive rule to the OIRA pursuant to the Executive Order.

[16] It is unclear whether the elimination of the two congressional submission requirements also had the effect of eliminating the requirement to wait thirty legislative days before putting the rules into effect. The Federal Reports Elimination and Sunset Act does not specifically address this question.

G. Summary

The foregoing cases provide the following general guidelines for distinguishing substantive rules from interpretive rules.

1. Substantive Rules

A substantive rule modifies or adds to a legal norm based on agency authority flowing from a congressional delegation to promulgate substantive rules. A substantive or legislative rule establishes a binding norm that has the force of law, must be promulgated with notice and comment procedures, and is entitled to full *Chevron* deference.

2. Interpretive rules

An interpretive rule is narrow tool with limited weight and use. Most simply, it is an agency's construction of a legal norm articulated by Congress in a statutory provision and entrusted the agency to administer. An interpretive rule is "drawn linguistically" from the norm. It may interpret an ambiguous norm, but it may not modify that norm, nor does it add to that norm by filling in gaps. As such, it is not the creation of positive law. In the absence of an interpretive rule, there remains an adequate basis to interpret the norm. In fact, if an agency must rely on a purported interpretive rule in order to bring an enforcement action, then the rule is substantive rather than interpretive.

An interpretive rule is entitled to limited judicial deference. If an interpretive rule purports to construe a substantive rule, it will likely require notice and comment. Rules that effectively amend, repeal or are otherwise inconsistent with existing legislative rules are not interpretive rules.

V. Draft Interpretive Rule of Travel Expense Allocation at §106.3(b)

A. Existing Regulations and the Draft Interpretive Rule

Section 106.3 of the Commission's regulations sets out a series of rules relating to the allocation of expenses between campaign and non-campaign-related travel. Paragraph (b)(1) addresses the scope of the reporting requirement for candidate travel expenses, while paragraphs (b)(2) and (b)(3) establish the method for allocating these expenses.

(1) Travel expenses paid for by a candidate from personal funds, or from a source other than a political committee, shall constitute reportable expenditures if the travel is campaign-related.

(2) Where a candidate's trip involves both campaign-related and non-campaign-related stops, the expenditures allocable for campaign purposes are reportable, and are calculated on the actual cost-per-mile of the means of transportation actually used, starting at the point of

origin of the trip, via every campaign-related stop and ending at the point of origin.

(3) Where a candidate conducts any campaign-related activity in a stop, the stop is a campaign-related stop and travel expenditures made are reportable. Campaign-related activity shall not include any incidental contacts.

11 CFR 106.3(b).

The attached draft interpretive rule relating to the calculation of travel expenses notes that the FECA applies to expenditures made by a "person" for the purposes of influencing an election, and 2 U.S.C. § 431(11) specifically excludes the Federal Government from the definition of "person." The draft interpretive rule therefore expresses that the travel allocation requirements of 11 CFR 106.3(b) are not applicable to the extent that a candidate pays for travel expenses using funds authorized and appropriated by the Federal Government.

B. Analysis

The draft interpretation of section 106.3(b) is derived from the definitions of "person," "contribution" and "expenditure" in the FECA. Section 431(11) of the Act states that "the term 'person' includes an individual, partnership, committee, association, corporation, labor organization, or any other organization or group of persons, but such term does not include the Federal Government or any authority of the Federal Government." Sections 431(8) and (9) state that the terms "contribution" and "expenditure" include payments "made by any person for the purpose of influencing any election for Federal office." The draft interpretive rule reads these definitions in combination, deriving the principle that the Act does not apply to travel expenses paid entirely with funds appropriated by Congress for use by any branch of the Federal government. Thus, the first sentence is "drawn linguistically from the actual language of the statute or rule," *Paralyzed Veterans of America*, 117 F.3d at 588, and does not modify or add to the definitions in the statute. *Syncor International Corp.*, 127 F.3d at 95. Furthermore, even in the absence of the draft rule, the statutory definitions themselves provide an adequate basis to conclude that the Act does not apply to travel financed exclusively with appropriated funds. *See American Mining Congress*, 995 F.2d at 1112. Therefore, the draft interpretation of section 106.3 appears to be an interpretive rule that could be issued without using notice and comment procedures.

C. Changes From the Draft Interpretive Rule Submitted by Commissioner Sandstrom's Office

The attached draft interpretive rule includes a number of alterations from the draft sent to the Office of General Counsel. In particular, in addition to interpreting paragraphs (2) and (3) of 11 C.F.R. 106.3(b), this Office has also included paragraph (1) in the attached interpretation of the 106.3(b) travel allocation requirements. The reference to travel expenses that are paid for by "a source other than a political committee" in paragraph (1) could potentially include Federal funds.

Secondly, the draft sent to this Office included an explanation of several congressional rules. We suggest making only very limited reference to those rules and declining to interpret them. Interpretations of congressional rules are beyond the Commission's statutory authority and subject to modification without regard to the public notice features of APA rulemaking discussed above.

D. Conclusion

Based on the foregoing, this Office concludes that the attached draft interpretation of section 106.3 could be properly issued as an interpretive rule. If so, the interpretation must be published in the *Federal Register* to comply with the requirements of the APA. The interpretation is not required to be published in the *Code of Federal Regulations*, and this Office recommends that the Commission not do so in order to avoid any implication that the Commission is attempting to invalidly promulgate a legislative rule without proper notice and comment procedures.

A summary of the draft interpretation should be submitted to the Office of Information and Regulatory Affairs to confirm that it does not meet the definition of a "major rule," and the draft interpretation should be transmitted to Congress in compliance with the Congressional Review Act. The Commission is not, however, required to delay the implementation of its interpretation.

Finally, this Office believes that the Commission is not obligated to subject its interpretation of section 106.3 to the strictures of the Regulatory Flexibility Act or Executive Order 12,866. While the Commission may not be required to provide a copy of this interpretation to the Internal Revenue Service, this Office recommends that it do so on a voluntary basis.

Attachment