



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

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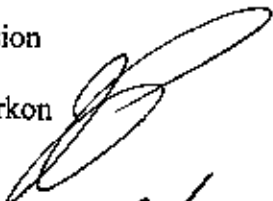
# AGENDA ITEM


For Meeting of: 2-28-02


## MEMORANDUM


FEB 21 2002

TO: The Commission

THROUGH: James A. Pehrkon  
Staff Director 

FROM: Lawrence H. Norton  
General Counsel 

N. Bradley Litchfield  
Associate General Counsel 

Rosemary C. Smith   
Assistant General Counsel

SUBJECT: Updated Regulations Priorities

The Commission last considered rulemaking priorities on August 23, 2001. See Agenda Doc. # 01-44. Since that time, a number of projects have been completed including:

- a rule implementing the statutory extension of the administrative fine pilot program to December 31, 2003
- an interpretive rule on payments from appropriated funds for travel
- a proposed policy statement regarding transfers between federal and non-federal accounts
- technical amendments to the election-cycle reporting regulations
- a review of rules affected by the Civil Penalties Inflation Adjustment Act.

In addition, other rulemakings are close to completion and several possible new projects have been suggested. Consequently, the Office of General Counsel has prepared for the Commission's consideration the following updated list of priorities regarding current and future rulemakings. These priorities do not take into account possible regulations that may be needed to implement new campaign finance legislation. At this point, it appears that the pending legislation would affect virtually all of our active rulemakings.

### Possible New Projects

The following three new rulemakings have been proposed. In considering the initiation of these or any other new rulemakings and their placement in the priority list, this

Office notes that there are presently four top priority projects, eight second priority projects, and nine third priority rulemakings. Consequently, if new rulemakings are added to the top priority or second priority category, other current projects will need to be postponed or held in abeyance.

### 1. **Enforcement Hearing**

Chairman Mason has suggested holding an informal workshop-style hearing (no later than mid-June) on a wide range of topics pertaining to the Commission's enforcement practices and procedures. This would enable practitioners and other interested parties to participate in a public forum. It would entail significant preparation work by OGC. This is in part because there is no precedent at the Commission for this type of hearing, and workshop-style hearings held by other agencies involve very different formats. Most notably, Commissioners or agency heads do not generally lead the interactions with the participants.

### 2. **Administrative Fines**

It has been suggested that a new rulemaking be initiated to consider decreasing the fines for late filers and non-filers, either across the board or for reports showing low levels of financial activity. A variety of other suggestions have also been made for revising aspects of the administrative fine program, as well as every section of the rules at 11 C.F.R. part 111, subpart B. The amount of time and OGC resources needed to complete all stages of a possible new rulemaking would depend, in part, on the scope and complexity of the issues to be included in a rulemaking. We estimate a NPRM could be ready for the Regulations Committee in April if its scope is fairly limited, given the large number of competing projects. This Office also notes that the administrative fine program would be affected by the enactment of the campaign finance reform legislation currently pending.

### 3. **Contribution Designations, Redesignations and Reattributions; Supporting Documentation; and Solicitations**

The Staff Director has forwarded to OGC a number of possible revisions to the regulations at 11 C.F.R. §§ 110.1 and 110.2 that have come from various FEC divisions and Commissioners, including the following: 1) attribution of contributions to persons other than the signatory on the contribution check; 2) attribution of undesignated contributions for elections other than the next election in certain situations; 3) additional recordkeeping requirements for joint contributions or those over a specified dollar amount; and 4) new requirements for solicitations in order to promote contributor designation for specific elections and attribution to specific contributors.

### **Ongoing Rulemakings—Top Priority Projects**

#### 4. **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, enacted on October 23, 2000. Final rules and an Explanation and Justification were forwarded to the Regulations Committee on February 14, 2002. The Office of General Counsel recommends that this rulemaking continue to be a top priority until completion.

**5. 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 on independent expenditure reporting. Final rules and an Explanation and Justification are scheduled for Commission consideration on February 28, 2002. The Office of General Counsel recommends that this rulemaking remain a top priority until completion.

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

OGC-Policy is preparing a Notice of Proposed Rulemaking in consultation with the Regulations Committee, OGC-PFESP, and the Audit Division. This Office expects to forward the NPRM to the Regulations Committee in April. We recommend that this rulemaking remain a top priority project.

**7. The Internet and Federal Election Campaigns** (11 C.F.R. Part 117) [Richard Ewell]

A public hearing on the Notice of Proposed Rulemaking has been scheduled for March 20, 2002. This Office recommends that the Internet rulemaking remain a top priority.

**Ongoing Rulemakings—Secondary Priority Projects**

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

The Office of General Counsel expects to have a revised Notice of Proposed Rulemaking to the Regulations Committee shortly. We recommend that the disgorgement rulemaking remain a second priority

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

This rulemaking was initiated last year to address questions 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). In light of the District Court's decision in *AFL-CIO v. FEC*, 177 F.Supp.2d 48 (D.D.C. 2001), we recommend that this rulemaking remain a second priority project, pending the outcome of further litigation.

**10. Coordinated and Independent Expenditures - Part 2** (11 C.F.R. § 110.7) [Richard Ewell]

Part 2 of the coordination rulemaking addresses party committee expenditures made on behalf of candidates. It was initiated in response to a Petition for Rulemaking filed by the Democratic Senatorial Campaign Committee and the Democratic Congressional Campaign Committee following the Supreme Court's decision in *Colorado Republicans I*. OGC is currently preparing a memorandum to the Regulations Committee explaining which topics

from the 1997 rulemaking are still open. This Office is also continuing to work with Vice Chairman Sandstrom regarding a possible policy statement.

**11. The Debt Collection Improvement Act [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. OGC is researching the steps the Commission would need to take to expand the coverage of the DCIA, possibly including new regulations. This Office recommends that this rulemaking remain a second priority project.

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

This Office recommends that this rulemaking remain a second priority project. We anticipate forwarding a document to the Regulations Committee in May or June if work on higher priority projects permits.

**13. Substantive and Procedural Changes to the Public Financing Rules - Independent Candidates and Minor and New Parties (11 C.F.R. Part 9001 - 9039) [Rita Reimer]**

This Office recommends that issues regarding the public financing of independent and minor party candidates remain a second priority rulemaking project, to be taken up once work on the major party candidate funding rules permits.

**14. Voting Records and Voter Guides (11 C.F.R. § 114.4(c)(4) and (c)(5)) [Rita Reimer]**

OGC recommends that this rulemaking remain a second priority project to be taken up once the coordination rulemaking is completed.

**15. Soft Money (11 C.F.R. Parts 100, 102, 104, 106, 110 and 114) [reassignment pending]**

Alternative versions of draft final rules were circulated to the Commission on February 4, 2000 and September 21, 2000. This Office recommends that the soft money rulemaking remain a second priority project.

**Ongoing Rulemakings—Third Priority Projects**

The Office of General Counsel recommends that the following nine rulemakings continue to be considered third priority projects. Before activating any of them, OGC would consult with the Regulations Committee to obtain input as to issues to be addressed and the overall approach to be taken.

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

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

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

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

**18. Disclaimers (11 C.F.R. § 110.11)**

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

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

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

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

This regulation would be amended to replace the after-the-fact reimbursement with advance payment. This rulemaking would also clarify whether "person" includes the separate segregated fund.

**21. Ethics Rules (11 C.F.R. Part 7)**

OGC-PFESP and OGC-Policy would work together on a rulemaking 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.

**22. Qualification as a State Party Committee**

A new rule would 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.

**23. Touhy Regulations**

New regulations would allow the Commission to quash subpoenas ordering Commission staff to appear as witnesses in civil cases.

**24. Allocation of Travel Expenses (11 C.F.R. § 106.3)**

This rulemaking concerns the allocation of travel expenses incurred for trips with combined campaign and noncampaign purposes under 11 C.F.R. § 106.3. A Notice of Proposed Rulemaking would update these rules, and would also track the changes in the travel rules for Title 26 campaigns. This project would also examine whether to add a 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. On August 23, 2001, the Commission voted to address issues relating to the use of corporate aircraft in presidential campaigns in this rulemaking. This includes issues relating to the use of corporate subsidiaries operating aircraft on a time-share basis, the use of an aircraft for charter purposes when the owners are not using it, and recordkeeping by companies providing travel as to the ownership, management, or leasing arrangements of a particular flight. This Office recommends that the travel rules remain a third priority project.

**Rulemaking Projects Being Held in Abeyance**

The Office of General Counsel recommends that the following rulemakings continue to be held in abeyance due to resource constraints and a variety of other considerations noted below.

**25. Political Organizations (11 C.F.R. § 100.5) [Rita Reimer]**

This rulemaking addresses the possible expansion of the definition of "political committee" found at 11 C.F.R. § 100.5 to cover additional entities. After the receipt of public comments on an Advance Notice of Proposed Rulemaking, the Commission voted to hold this rulemaking in abeyance pending changes in legislation, future judicial decisions, or other action.

**26. Candidate Debates (11 C.F.R. § 110.13) [Dawn Odrowski]**

On May 25, 1999, the Commission received a Petition for Rulemaking from Mary Clare and William T. Wohlford and Martin T. Mortimer regarding the rules governing Presidential and Vice Presidential debates. After the publication of a Notice of Availability in the *Federal Register* and the receipt of approximately 1300 public comments, the Commission voted to instruct this Office to hold the petition for rulemaking in abeyance pending the resolution of ongoing litigation. The last of the debate cases, *Committee For A Unified Independent Party, Inc. v. FEC*, has now been closed.

**27. Recordkeeping and Reporting (11 C.F.R. Parts 102 and 104) [unassigned]**

On December 14, 2000, the Commission voted to hold this rulemaking 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.

**“MCFL Corporations” Rules (11 C.F.R. § 114.10) [unassigned]**

The rules governing qualified nonprofit corporations could be amended to permit a small amount of corporate contributions. On August 23, 2001, the Commission approved a recommendation to postpone a decision on beginning a new rulemaking until the resolution of *Beaumont v. FEC* and the now-completed *FEC v. National Rifle Association*.

**28. Express Advocacy Definition (11 C.F.R. § 100.22(b)) [unassigned]**

It has been suggested that the Commission repeal part of the definition of “express advocacy” located at 11 C.F.R. 100.22(b). The rulemaking priorities the Commission approved on August 23 included a recommendation that a decision be deferred until completion of the litigation in *Virginia Society for Human Life v. FEC*, which has now taken place.

**29. Alternative Dispute Resolution (11 C.F.R. Part 111) [unassigned]**

A new subpart C could be added to 11 C.F.R. Part 111 to set forth procedures on alternative dispute resolution. This project is being held in abeyance until the Commission has more experience with the ADR program.

**Rulemaking Projects To Be Terminated**

**30. Compliance Procedures (11 C.F.R. Part 111, Subpart A) [Dawn Odrowski]**

On July 13, 2000, the Commission voted to direct this Office to prepare a Notice of Disposition to close the rulemaking on compliance procedures. On August 23, 2001, the Commission reaffirmed this decision. Accordingly, OGC intends to forward a draft Notice of Disposition to the Regulations Committee in March.

**Recommendation**

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

