



FEDERAL ELECTION COMMISSION
Washington, DC 20463

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AGENDA ITEM

APR 05 2002 For Meeting of: 4-11-02

SUBMIT AS LATE

MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkonig
Staff Director

FROM: Lawrence H. Norton
General Counsel

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SUBJECT: Rulemaking Plan to Implement the Bipartisan Campaign Reform Act of 2002;
Revised Regulations Priorities

Last month, Congress passed and the President signed the Bipartisan Campaign Reform Act of 2002 (BCRA), Public Law 107-155. The new law contains extensive and detailed amendments to the FECA, which necessitate wholesale revisions to many portions of the Commission's regulations in Title 11 of the *Code of Federal Regulations*. Section 402 of BCRA establishes a 90-day deadline for the Commission to promulgate new soft money rules. Moreover, section 402 imposes a 270-day period to promulgate rules to carry out the other provisions of BCRA that are under the Commission's jurisdiction. These deadlines were established so that key regulations would be promulgated well before the soft money provisions of the new law take effect on November 6, 2002, and so that rules will be in place when the other sections of BCRA take effect on January 1, 2003.¹

The Office of General Counsel has prepared this memorandum recommending the initiation of a substantial number of new top-priority rulemakings to implement BCRA. This will necessitate corresponding modifications to the Commission's current rulemaking priorities, as adopted on February 28, 2002. See Agenda Doc. #02-16. This Office is working closely with the Staff Director on developing a plan to implement the BCRA.

¹ 148 Cong. Rec. S2142 (daily ed. March 20, 2002 (statement of Sen. McCain)).

Rulemaking Plan

At the request of Chairman Mason and the Regulations Committee, the Office of General Counsel has prepared a plan for implementing the far-reaching statutory changes. The plan divides this undertaking into several discrete rulemakings, which are described in more detail in Attachment A. This approach is intended to meet the statutory deadlines for completing the new soft money regulations in 90 days, which is June 25, 2002, and all the rest of the rulemakings in 270 days, which is December 22, 2002.² OGC envisions that the following discrete rulemakings proceed simultaneously:

- 1) Soft money
- 2) Electioneering communications
- 3) Coordinated and independent expenditures
- 4) Millionaire's amendment
- 5) Increase in contribution limits
- 6) Other amendments regarding minors, foreign nationals, U.S. nationals, inaugural committees, fraudulent solicitations, disclaimers, personal use, and civil penalties.

In addition, there are many new reporting requirements in the new campaign finance law. This Office suggests that each of the substantive NPRMs include its own proposed rules on reporting. This will enable forms development to begin based on proposed rules. Once comments are received, OGC envisions a consolidated NPRM that will be devoted only to reporting, to give a clearer idea as to how all the new reporting requirements will work together. Thus, a second round of public comments could be obtained before promulgating final reporting rules.³ The attached rulemaking calendars reflect this approach.

OGC has determined that it is necessary to make substantial additions and amendments to the rules in Title 11 of the *Code of Federal Regulations*. This will involve the creation of several new parts to address topics such as soft money and the millionaire's amendment, as well as the addition of new sections and subparts to parts 100, 104, 106, 110 and possibly 114. We also expect to divide up sections that are already long and complex, such as 100.7,

² The new law requires the Commission to "promulgate" regulations within 90 and 270 days of the "enactment" of the legislation. See H.R. 2356, 107th Cong. § 402(c) (2002). The term "enactment" is generally defined as "the action or process of making into law." *Black's Law Dictionary*, 7th Ed. (1999). A legislative provision is therefore "enacted" when it assumes the authority and force of law. The United States Constitution requires that "[e]very Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States ..." for signature or veto. U.S. CONST. art. I, § 7, cl. 2. Thus, the President's signature enacts the bill into law. See also *Gardner v. Collector of Customs*, 73 U.S. 499, 506 (1867) ("The simple signing [of the President's] name at the appropriate place is the one act which the Constitution requires of him as the evidence of his approval, and upon his performance of this act the bill becomes a law.").

The D.C. Court of Appeals has provided guidance about the meaning of "promulgate." The general rule is that unless a statute specifies otherwise, the date an agency "promulgates" a regulation is the date that the regulation is published in the *Federal Register*. See *Horsehead Resource Development Co. v. EPA*, 130 F.3d 1090, 1095 (D.C. Cir. 1997).

Based on the explanations above, H.R. 2356 was enacted into law on the date the President signed the bill: March 27, 2002. Therefore, the Commission's regulations should be published in the *Federal Register* on or before 90 days or 270 days from that date.

³ This approach should enable the *Federal Register* to more easily determine the precise contents of the final reporting rules than if over time they were presented with a series of changes to the same sections of the regulations, which will all have the same effective date.

100.8, and 104.3, to make it easier for the reader to locate various topics. While some current rules will be repealed outright, we are evaluating whether it may be preferable to retain others while adding language indicating that they will cease to be in force and effect after November 5 and December 31, 2002. Attachment A lists the regulations that must be altered. We anticipate that additional sections will be added to the list.

This Office has concluded that 90 days and 270 days simply do not permit sufficient time to address in a comprehensive fashion every issue that may arise under the new legislation. Accordingly, OGC envisions that some of the details will need to be deferred until there is more time next year to engage in a second round of rulemaking. Indeed, the full ramifications of the new law will only become evident over the next several years.

In addition to the topics listed above, we have determined that the requirement of section 306 of BCRA (2 U.S.C. 434(a)(12)) to "promulgate standards" for computer software vendors and the use of this software by certain candidates and political committees will require the Commission to take certain steps. For example, the current rules on e-filing will need to be updated through notice-and-comment rulemaking. However, the full text of the new software standards does not need to be codified in Title 11 of the *Code of Federal Regulations*. Instead, new computer standards can be made publicly available and incorporated by reference into the rules. This Office is preparing a separate memorandum explaining more fully the legal requirements regarding public availability and a comment period on software standards before they are finalized.

There are additional provisions in the new law that will not necessitate FEC rulemaking, such as:

- 1) the severability and judicial review provisions (BCRA sections 401 and 403);
- 2) the amendments to the FECA regarding 24-hour and 48-hour posting on the Internet of reports filed with the FEC (BCRA section 501);
- 3) the maintenance of a central website for election-related reports and coordination with other agencies (BCRA section 502);
- 4) the amendments to section 607 of Title 18 regarding fundraising on Federal property (BCRA section 302);
- 5) the amendments to the Communications Act of 1934 (47 U.S.C. 315), administered by the Federal Communications Commission (BCRA sections 305 and 504);
- 6) the study and report to be conducted by the Comptroller General pertaining to clean money clean elections laws (BCRA section 310); and
- 7) new sentencing guidelines to be promulgated by the United States Sentencing Commission (BCRA section 314).

Timetables

This Office has prepared preliminary timelines regarding each of the discrete rulemaking projects, which are found in Attachments B (Soft Money Timetable), C-1 (Rulemaking Calendar - April 2002 through January 2003) and C-2 (Convention Committee and Reporting Calendars). The timelines take into account that virtually all other divisions of the FEC will be significantly affected by the new law, and will thus need sufficient time to prepare changes to their operations. Quite a number of these program changes are dependent upon the substance of the regulations. Accordingly, OGC is working with the Staff Director

to prioritize various portions of the new legislation and to determine which of the 270-day regulations will need to be completed, or substantially completed, before November 6, 2002, December 22, 2002, and January 1, 2003. This would permit other divisions to have time to prepare new and revised forms, design and begin work on changes to current computer programs and databases, and prepare for the substantial educational and outreach efforts. In accordance with 2 U.S.C. 438(f) and sections 101(a), 201(a), and 203(b) of BCRA, this Office will also be coordinating with the Internal Revenue Service regarding those provisions that affect 527 and 501(c)(4) organizations.

With respect to the 90-day soft-money rulemaking, OGC has prepared for the Commission's consideration three options, which are described in more detail in Attachment B. Option 1 contemplates publication of an NPRM, a brief comment period, a public hearing held a few days after the last day of that comment period, and the issuance of final rules by June 25. Option 2 is similar, except that it omits the public hearing. Under Option 3, interim final rules would be promulgated by June 25, and would be followed by a 30-day comment period, a public hearing, and amendments to the final rules prior to the November 6 effective date. This Office recommends Option 1 for the reasons explained in Attachment B.

We recommend that the changes pertaining to the rules pertaining to national nominating conventions proceed along the same time line as the soft money rulemaking, given that BCRA necessitates significant changes to the rules at 11 C.F.R. Part 9008. The Federal Reports Elimination and Sunset Act of 1995 (PL 104-66) eliminated the requirement of 2 U.S.C. 438(d) and 26 U.S.C. 9039(c) that the Commission wait thirty legislative days before prescribing rules and regulations. *See* Agenda Doc. #97-43. Please note that the corresponding requirement in 26 U.S.C. 9009(c) was not eliminated. Thus, the 30-legislative day provision still applies to any modifications of the rules governing convention committees and host committees. Please note that this requirement is reflected in the attached rulemaking calendar in Attachment C-2.

As Attachments B, C-1 and C-2 illustrate, 90 days and 270 days are rather short amounts of time to complete all stages of the rulemakings, particularly given the complexity of the legal issues presented, the high level of public interest in the issues to be resolved, and the need to create entirely new programs. By way of comparison, this Office notes that the initial rulemaking creating the administrative fine program was completed in 233 days with intensive work by three OGC staff attorneys on a nearly full-time basis for most of that period. Similarly, the electronic filing rulemaking took 265 days, while the election-cycle reporting rulemaking was completed in 285 days. These last two projects were considerably less complex than many of the provisions of the new legislation. Accordingly, it will be necessary to modify our current rulemaking practices in the following respects:

- 1) Everyone involved in drafting, reviewing, considering and approving rulemaking documents will need to work with significantly less lead time than usual and will need to give these projects top priority, so that we may keep to the timetables as much as possible.
- 2) With the exception of the soft money rulemaking, we will try to provide a 30-day comment period for each project, but it is unlikely that we will be able to have more than thirty days. With respect to the release of rulemaking documents and late-submitted comments, Attachment E describes the Commission's longstanding policy.

- 3) All final rules will be submitted Congress, as required by the Congressional Review Act, but in some cases it is not possible to wait the customary 30-legislative days before the new rules will take effect.⁴ Given that the effective dates will be either November 6, 2002 or January 1, 2003, we will announce the effective date for each new rule in its Explanation and Justification, rather than preparing a separate Effective Date Notice.

Staffing and Resource Considerations

As you know, OGC is taking steps to increase its current staff of five Regulations attorneys immediately. We estimate that we will need approximately twelve to thirteen attorneys for the most intense phase of this undertaking. This figure anticipates that the advisory opinion attorneys will be able to devote considerable time to rulemakings, even though this is an election year. An estimate of the number of staff attorneys needed for each discrete rulemaking is set forth in Attachment A. This Office expects that it will be possible for some attorneys, but not all, to work on more than one of these discrete rulemakings, depending on the complexity and timing of each project. For example, once the 90-day deadline for the soft money rules is past, we will likely be able to shift those attorneys to other new rulemakings.

The Office of General Counsel is moving forward with plans to reassign attorneys from the PFESP and Enforcement Divisions. We anticipate staff reassigned will begin working on regulations the second week of April. OGC is also in the process of hiring attorneys for several divisions, which may include one to two attorneys who have rulemaking experience at other Federal agencies. Hopefully, external hiring can be completed by the end of the month. Any newly hired attorneys will almost certainly need to spend time learning the intricacies of the FECA. While attorneys from other OGC divisions have FECA experience, they will need to learn how to draft regulations and other rulemaking documents and how to perform other key aspects of notice-and-comment rulemaking. Consequently, we expect that all new Policy staff attorneys will need to devote some time to getting up to speed. To aid in this process, we are scheduling a two-day external training course on regulations drafting. In addition, OGC anticipates that all the current Regulations attorneys will need to devote some time to training the new recruits, in addition to their rulemaking assignments.

In addition to more attorneys, the Policy Division expects to add one or two paralegals for the most intensive phase of this project. We have also looked into the possibility of contracting with an outside expert to advise us regarding certain APA requirements. This was the approach taken when the FECA was amended to permit the FEC to establish a new program to adjudicate certain reporting violations. We have concluded that BCRA does not present a similar need for an expert as to administrative procedures under the APA.

Impact on Ongoing Rulemakings

OGC recommends that work on all ongoing rulemakings be suspended immediately to the extent that these rulemakings address topics not clearly encompassed by the new

⁴ We do, of course, intend to provide the thirty calendar day lead time contemplated by the APA. 5 U.S.C. §553(d).

legislation, with one exception.⁵ Attachment D contains a list of the current rulemakings, with a brief indication of the progress to date on each of them and the impact of Public Law 107-155 on the issues presented. We make this recommendation for three reasons. First, our initial review of the new legislation reveals that it significantly affects the contents of virtually all of the top priority and second priority rulemakings.⁶ Secondly, the extraordinary amount of work that will need to be done to implement the complex new legislation, which includes drafting proposed rules, obtaining and analyzing public comments, conducting rulemaking hearings, and preparing final rules and their Explanations and Justifications, will place great demands on our Office, the Regulations Committee and the Commission. Moreover, the tight schedule will necessitate shorter than usual public comment periods on some very significant regulatory proposals. Abbreviated comment periods are unfortunate, particularly since commenters must focus on other pressing demands during this election year. It would, however, be even more unfortunate if commenters and would-be commenters were simply unable to give adequate attention to other ongoing rulemakings at the same time. Thirdly, as noted above, the other divisions of the FEC that have vital roles to play in implementing the new laws will need to know the contents of the new regulations as soon as possible, in some cases well before the 270 day deadline.

RECOMMENDATIONS

The Office of General Counsel recommends that the Commission

1. Initiate the rulemakings described in this memorandum and attachments for implementing the Bipartisan Campaign Finance Reform Act of 2002 and make them top priority projects;
2. Approve Option 1 in Attachment B regarding the soft money rulemaking; and
3. Direct OGC to begin work on the new rulemakings immediately in accordance with the timetables set out in the attachments.

⁵ OGC-Policy staff would be able to complete the *Federal Register* Notice to announce a public hearing on topics pertaining to the Commission's enforcement practices and procedures. Given the large amount of work to do to implement BCRA by the statutory deadlines, however, one option would be to defer the enforcement hearing until next year.

⁶ This Office has been asked to look at whether certain aspects of some of our current rulemakings, such as disgorgement of illegal contributions, could be incorporated into the new rulemakings without too much additional work. While OGC is willing to look into this to the extent feasible, we must caution that the addition of any additional topics or issues to the large number presented by the new legislation is likely to be extremely problematic, even with the additional staff to be reassigned to the Policy Division.

McCain-Feingold / Shays-Meehan Regulations Projects

1. Soft Money

BCRA Title I, Sections 101, 102, 103, Title 4, § 402

2 U.S.C. § 431(8)(B), (20) through (24), § 434(e), § 441a(a)(1), § 453

Regs-11 C.F.R. §100.7(b)(12), § 100.8, § 102.5, § 104.10, § 106.5, § 106.6; § 108.7, part 9008

Topics- Prohibit national party committees from raising, receiving, and spending soft money for any federal election or for any other purpose; address inclusion of officers or agents of the national committee and entities directly or indirectly established, financed, maintained, or controlled by the national committee

Revise convention and host committee rules to implement soft money ban

Require state, district and local committees to fund "federal election activities" with hard money

Implement Levin amendment allowing soft money up to \$10,000 per donor for state and local party committee generic voter registration and GOTV drives, subject to several further restrictions; receipts, disbursements, and transfers between accounts of the same committee; permit federal candidates or office holders to be present when Levin amendment funds are raised

Consider the impact of the new law on current regime of federal, nonfederal and allocation accounts and the 70-day transfer window

Bar Federal candidates, officeholders, and agents from soliciting any soft money for national, state, or local parties or nonfederal candidates or Levin amendment funds; add special rules on fundraising for nonprofits depending on the purpose of the solicitation

Add rules on § 501(c) and certain § 527 organizations conducting federal election activity

Bar national parties from donating to or soliciting funds for nonprofits and certain 527s that make expenditures or disbursements in connection with Federal elections (including federal election activity)

In the "contribution" and "expenditure" definitions, remove the "office facility" exemptions for national parties; specify that state law governs state and local political party "office building" funds

Evaluate the impact on the soft money accounts of leadership PAC

Increase the limit for contributions to state party committees to \$10,000 per year effective 1/1/03- not indexed for inflation

Add definitions of "federal election activity," "generic campaign activity," "public communications," "mass mailing," "telephone bank," "solicitation" (which may depend on the context), and any other terms needing definitions

Add new reporting requirements for national, state and local party committees as to federal election activity, Levin amendment funds, and certain nonfederal accounts for nonfederal committees

Assess the impact of the new law on the current allocation ratios, including fundraising and administrative costs

Make new rules effective Nov. 6, 2002, including transition rules from section 402

Staff - 5 attorneys

Timing- 90 days

2. Electioneering Communications/Issue Ads

BCRA Title II, Section 201, 202, 203, 204

2 U.S.C. § 434(f), § 441a(a)(7), § 441b(b)(2) and (c), § 441d

Regs- New part, new sections in part 100

- Topics- Add rules to treat electioneering communications as contributions if coordinated with a candidate or party committee
- Add special rules so that corporations and labor organizations can no longer use soft money and must use SSF hard dollars for electioneering communications referring to clearly identified federal candidates within 60 days of a general election and 30 days of the primary, and that are targeted to the candidate's electorate
 - Add special rules regarding § 501(c)(4) and certain § 527 organizations that make electioneering communications referring to clearly identified federal candidates within 60 days of a general election and 30 days of a primary, and include a provision regarding a segregated account
 - Prepare new rules requiring state and local parties and state and local candidates to raise and spend hard money for public communications promoting, supporting, attacking, or opposing a federal candidate
 - Prepare new rules requiring all candidates and officeholders to raise and spend only hard money for public communications promoting, supporting, attacking, or opposing a federal candidate
 - Add definitions of "electioneering communication," "applicable electioneering communication," "targeted communication," "targeted to the relevant electorate," and "referring to"
 - Add new reporting provisions for individuals and unincorporated groups who spend \$10,000 or more on "electioneering communications"
 - Evaluate the impact of the new legislation on Internet communications
 - If-and only if-the primary definition is held unconstitutional, draft a backup definition of "electioneering communication," and include definitions of "promote or support" and "attack or oppose" a candidate

Staff- 2-3 attorneys

Timing- 270 days

3. Coordinated and Independent Expenditures

BCRA Title II, Section 211, 212, 213, 214

2 U.S.C. § 431(17), § 434(g), § 441a(a)(7), § 441a(d), § 441b(b)(2)

Regs- 11 C.F.R. § 100.17, § 100.23, § 104.4, § 109.1, § 109.2, § 110.3, § 110.7, § 114.1, § 114.4

Topics- Revise the definition of "independent expenditure"

Create a definition of "coordination" for party committees

Bar a party committee from making coordinated expenditures for a candidate in the general election after it has made independent expenditures for that candidate in the same election cycle, and *vice versa*

Evaluate how an independent expenditure by a local, state, or national party committee affects the coordinated spending limits of party committees at other levels

Revise rules on transfer between party committees and assignment of coordinated spending limits when one of the committees chooses to make independent expenditures; address the ramifications of this choice on party committees' abilities to make electioneering communications

Repeal current 100.23 on coordination and replace it with new rules addressing 4 factors, but not requiring "agreement or formal collaboration"

Revise 24-hour reporting of last-minute independent expenditures of \$1,000 or more

Add new 48-hour reporting of independent expenditures of \$10,000 or more

Staff- 2-3 attorneys

Timing- 270 days

4. Millionaire's Amendment

BCRA Title III, Section 304 (Senate), Section 319 (House), 316

2 U.S.C. § 431(25) & (26), § 434(6)(B), § 441a(i) and (j)

Regs- current 11 C.F.R. § 110.10(b); new part

Topics- Increase contribution limits for Senate candidates in phases up to a set amount, and increase the § 441a(d) coordinated spending limit up to a set amount at ten times the threshold amount when an opposing candidate spends more than a given amount using personal funds

Increase contribution limits for House candidates up to a set amount and increase the § 441a(d) limit up to a set amount if an opposing candidate spends more than a given amount using personal funds

Provide for notification to candidates (and party committees) of opposing candidate's intended and actual expenditures of personal funds

Provide for the effect of withdrawal of an opposing candidate

Add rules explaining how to determine which excess contributions must be returned to their contributors, and consider whether contributions received under the increased limits must be accounted for separately

Add definitions of "threshold amount," "opposition personal funds amount" and "gross receipts advantage"

Add a special definition of "election cycle" for limited purposes

Revise the definition of "personal funds"

Add reporting provisions for House and Senate candidates to file with Commission and with other candidates (and national party for House candidates) a declaration of intent, an initial notification, additional notifications, and to file with the Commission only a notification of disposal of excess contributions; specify the contents of these declarations and notifications

Implement the new limitation on repayment of personal loans from candidates using post-election contributions

Staff - 2-3 attorneys

Timing- 270 days

5. Increase in Contribution Limits

BCRA Title III, Section 307

2 U.S.C. § 441a(a), (c) and (h)

Regs- 11 C.F.R. § 110.1, § 110.5, § 110.9

Topics- Increase individual contribution limit to candidates to \$2,000* per election effective 1/1/03

Replace \$25,000 total individual contribution limit per year with \$95,000 per 2-year election cycle effective 1/1/03 with further restrictions of \$37,500* for candidates, and \$57,500* for contributions to unauthorized committees (but no more than \$37,500* in contributions to political committees that are not national party committees)

Increase individual contribution limits to national party committees to \$25,000* per year effective 1/1/03

Increase Republican and Democratic Senatorial Campaign Committee contribution limits to \$35,000* per Senate candidate in the election year effective 1/1/03

* indicates the amount will be indexed for inflation

Staff - 1 attorney

Timing- 270 days

6. Other New and Amended Provisions, Including Contribution Prohibitions and Reporting

BCRA Title III, Section 301, 303, 306, 308, 309, 312, 315, 317, 318, and 503

2 U.S.C. § 434(a)(2), (a)(12), & (h), § 437g, § 439a, § 441d, § 441e, and § 441h

36 U.S.C. § 510

Regs- 11 C.F.R. § 100.19, § 104.3, § 104.5, § 104.18, § 110.1(i), § 110.4, § 110.11, § 111.24, and § 113.1(g)

Topics- Amend foreign money ban to clearly apply to nonfederal elections & to cover solicitations

Clarify the rights of U.S. nationals

Ban fraudulent solicitation of funds

Expand current disclaimer requirements, and draft new "stand by your ad" rules

Add new civil penalty amounts for knowing and willful violations of name-of-another prohibition to § 111.24 if required by Civil Penalty Inflation Adjustment Act

Prohibit contributions and donations by minors to candidates and political party committees

Revise the definition of "personal use"

Update E-filing rules to require all Presidential and House candidates who exceed the e-filing threshold to use software meeting FEC standards to file electronically once it is made available to them

Increase non-election year reporting for House and Senate campaign committees to quarterly

Add new rules requiring inaugural committees to file reports with the FEC and to prohibit foreign national donations to inaugural committees

Staff - 7 attorneys

Timing- 270 days

Timetable to Promulgate Soft Money Rules – Three Options

This Office has prepared three options regarding the soft money rulemaking. Option 1 provides for public notice, a 17-day public comment period, and a one-day public hearing¹ before promulgating final rules on June 25, 2002. To accomplish these tasks in 90 days, Option 1 departs from the usual practice of requiring comments to be submitted well before the public hearing. Instead, witnesses would have to submit requests to testify and written comments just five days before the hearing. This approach contemplates a very short period for Commission consideration of final rules. Option 2 is similar to Option 1 except that it omits the public hearing, shortens the comment period to sixteen days, and provides a little more time for Commission consideration of final rules. Both Options 1 and 2 have the advantage of freeing OGC staff to work on the other impending rulemakings sooner than under Option 3, and thereby provide more time for other Divisions to complete the work needed to update paper and electronic forms.

Under Option 3, the Commission would issue interim-final rules by June 25, 2002 with a public comment period to follow. This would enable the Commission to provide a 30-day or 45-day post-promulgation comment period and to schedule at least two days for the public hearing, while still having time to make revisions to the interim-final rules prior to their November 6, 2002 effective date. This may provide the public a more meaningful opportunity to participate than they would otherwise have. It would also allow the Commission more time to evaluate comments and testimony. OGC has determined that the "good cause" exception to notice and comment in the Administrative Procedures Act (APA) permits the Commission to adopt interim-final rules because the notice and public procedures are impracticable in this case. *See* 5 U.S.C. 553(b)(3)(B).² Thus, it would be appropriate to conclude that the complex nature of the issues involved in the soft money rulemaking, and the need for adequate opportunity for public participation, particularly during an election year, may make it impracticable and contrary to the public interest to complete all phases of this rulemaking in 90 days. Moreover, the effective date of the final rules would not be until November 6, 2002.

While each of the options has advantages and disadvantages, on balance, OGC concludes that Option 1 is the preferred approach.

Option 1 -- NPRM, Public Hearing, Final Rules

March 27	Bipartisan Campaign Reform Act of 2002 signed into law
April 24	draft NPRM circulated to Regulations Committee and all Commissioners
April 29	draft NPRM discussed by Regulations Committee

¹ Given the magnitude of public interest in soft money, it is likely that the time available for each witness would need to be shorter than usual.

² Tight statutory deadlines, coupled with the interim nature of the rules and good faith efforts by the agency to finalize the rules promptly with public participation, support findings of "good cause". *See, Mid-Tex Electric Cooperative, Inc., et al. v. Federal Energy Regulatory Commission*, 822 F.2d 1123, 1132 (D.C. Cir. 1987); *Council of the Southern Mountains v. Donovan*, 653 F.2d 573, 581-582 (D.C. Cir. 1981).

May 9 NPRM approved by Commission
 May 14 NPRM published in Federal Register / public comment period begins
 May 31 deadline to submit requests to testify
 June 3 deadline to submit public comments
 June 5 public hearing
 June 10 final rules and E&J circulated to Regulations Committee and all Commissioners
 June 13 final rules & E&J discussed by Regulations Committee
 June 19 final rules and E&J approved by Commission
 June 20 final rules transmitted to Congress
 June 25 final rules promulgated / E&J published in the Federal Register
 June 25 90-day deadline for promulgating soft money final rules
 November 6 most of soft money final rules take effect
 January 1 party committee increased contribution limits take effect

Option 2 -- NPRM, No Hearing, Final Rules

March 27 Bipartisan Campaign Reform Act of 2002 signed into law
 April 24 draft NPRM circulated to Regulations Committee and all Commissioners
 April 29 draft NPRM discussed by Regulations Committee
 May 9 NPRM approved by Commission
 May 14 NPRM published in Federal Register / public comment period begins
 May 30 deadline to submit public comments
 June 5 final rules and E&J circulated to Regulations Committee and all Commissioners
 June 10 final rules & NPRM discussed by Regulations Committee
 June 19 final rules and E&J approved by Commission
 June 20 final rules transmitted to Congress
 June 25 final rules promulgated / E&J published in the Federal Register
 June 25 90-day deadline for promulgating soft money final rules
 November 6 most of soft money final rules take effect
 January 1 party committee increased contribution limits take effect

Option 3 – Interim-Final Rules with Subsequent Comment Period

March 27 Bipartisan Campaign Reform Act of 2002 signed into law
 May 6 draft interim final rules circulated to Regulations Committee & all Commissioners
 May 17 draft interim final rules discussed by Regulations Committee
 June 6 draft interim final rules discussed by Commission
 June 18-19 draft interim final rules approved by Commission
 June 20 interim final rules transmitted to Congress
 June 25 interim final rules promulgated; E&J w/ request for comments published in the Fed. Reg.
 June 25 90-day deadline for promulgating soft money final rules
 July 1 public comment period begins
 August 1 deadline to submit comments and requests to testify
 August 21-22 public hearing
 September 13 revised final rules and E&J discussed by Regulations Committee

October 3 revised final rules and E&J approved by Commission
November 6 revised final rules take effect, except increased contribution limits
January 1 party committee increased contribution limits take effect

RULEMAKING CALENDAR - APRIL 2002 THROUGH JANUARY 2003

	Soft Money (excluding conventions)	Electioneering communications	Coordinated & Independent Expenditures	Millionaire's Amendment	Increased Contribution Limits	Other Provisions*
Apr.	4/8 reassignment of OGC staff 4/11 Commission discussion of rulemaking plans 4/16 & 4/17 training for new Regulations staff 4/24 NPRM to Reg C 4/29 Reg C discussion					
May	5/9 approve NPRM 5/14 begin comments 5/31 req. to testify 5/31 public comm due	5/20 NPRM to Reg C 5/29 Reg C discussion	5/27 NPRM to Reg C			
June	6/5 hearing 6/10 final reg to Reg C 6/13 Reg C discussion 6/19 approve final rule 6/25 publish final rule 6/25 90 days	6/7 Reg C discussion 6/20 approve NPRM 6/26 begin comments	6/7 Reg C discussion 6/27 approve NPRM 7/3 begin comments	6/24 NPRM to Reg C		
July		7/26 public comm due		7/10 Reg C discussion	7/29 NPRM to Reg C	7/8 NPRM to Reg C 7/17 Reg C discussion
Aug.		8/7- 8/8 hearing 8/26 final reg to Reg C	8/2 comments due 8/14-8/15 hearing	8/1 approve NPRM 8/7 begin comments	8/9 Regs C discussion 8/29 approve NPRM	8/8 approve NPRM 8/14 begin comments
Sept.		9/6 Reg C discussion 9/19 approve final rule 9/25 publish final rule	9/3 final reg to Reg C 9/13 Reg C discussion 9/26 approve final rule	9/6 comments due 9/18-9/19 hearing	9/5 begin comments	9/13 public comm due 9/25-9/26 hearing
Oct.			10/2 publish final rule	10/2 final reg to Reg C 10/11 Reg C discussion 10/24 approve final rule 10/29 publish final rule	10/7 public comm due 10/23 hearing	10/9 final reg to Reg C 10/18 Reg C discussion 10/31 approve final rule

	Soft Money (including conventions)	Electioneering communications	Coordinated & Independent Expenditures	Millionaire's Amendment	Increased Contribution Limits	Other Provisions*
Nov.	11/6 BCRA eff date 11/6 regs eff date	11/6 BCRA eff date	11/6 BCRA eff date	11/6 BCRA eff date	11/8 final reg to Reg C 11/20 Reg C discusses	11/6 BCRA eff date 11/6 publish final rule
Dec.					12/12 approve final rule 12/18 publish final rule 12/22 270 days	
Jan.	1/1/03 contribution limit effective date	12/22 270 days	12/22 270 days	12/22 270 days	1/1 BCRA eff date	12/22 270 days

* Other provisions include minors, foreign nationals, U.S. nationals, inaugural committees, fraudulent solicitations, disclaimers, personal use and civil penalties.

**RULEMAKING CALENDAR FOR
CONVENTION COMMITTEES AND REPORTING RULES
APRIL 2002 THROUGH DECEMBER 2002**

	Conventions and Host Committee Soft Money Rules	Reporting Provisions*
April	4/24 NPRM to Reg C 4/29 Reg C discussion	
May	5/9 approve NPRM 5/14 begin comments 5/31 req. to testify 5/31 public comm due	
June	6/5 hearing 6/10 final reg to Reg C 6/13 Reg C discussion 6/19 approve final rule 6/21 begin legislative days 6/25 publish final rule 6/25 90 days	
July		
Aug.		8/12 Consolidated NPRM to Reg C 8/19 Reg C. discussion 8/29 approve consolidated NPRM
Sept.	9/16-9/20 end legislative days	9/3 publish consolidated NPRM 9/23 public comment due
Oct.	10/3 approve effective date notice	10/9 final reg to Reg C 10/18 Reg C discussion 10/31 approve final rule
Nov.	11/6 BCRA eff date 11/6 regs eff date	11/6 BCRA eff date
Dec.	12/22 270 days	12/22 270 days

Ongoing Rulemakings

Top Priority Projects

1. Lines of Credit for Loans to Candidates (11 C.F.R. §§ 100.7, 100.8, 104.3, 104.8, and 104.9) – OGC had planned to circulate revised final rules and an Explanation and Justification to the Regulations Committee the week of April 15. We have concluded that the new campaign finance legislation significantly affects these final rules in a number of key respects, including the repayment of amounts the candidate loaned to his or her campaign committee. Also, these rules would amend sections that will be further amended by the BCRA rules. Therefore, we recommend that this rulemaking be incorporated into the new project.
2. Independent Expenditure Reporting (11 C.F.R. §§ 100.19, 104.4, 104.5, 104.18, 109.1 and 109.2) – Final rules and an Explanation and Justification were transmitted to Congress on March 15, 2002. The new campaign finance legislation will make several modifications to these new rules, effective November 6, 2002.
3. Substantive and Procedural Changes to the Public Financing Rules - Major Party Issues (11 C.F.R. Parts 9001 - 9039) – A draft NPRM has been reviewed by OGC-PFESP and the Audit Division. OGC had planned to circulate this document to the Regulations Committee in April. At present, the soft money provisions of the new legislation appear to have a substantial impact on the current rules pertaining to the national nominating conventions, which will necessitate rethinking the regulations pertaining to both convention committees and host committees. Accordingly, OGC recommends suspension of work on the remaining portions of this rulemaking.
4. The Internet and Federal Election Campaigns (11 C.F.R. Part 117) – The next step in this rulemaking is preparation of a summary of the written comments and testimony from the March 20, 2002 hearing. Questions have been raised regarding the impact of several provisions of the campaign finance reform legislation on communications conducted using the Internet. Accordingly, this Office believes it is advisable to address these questions in the new rulemaking and to defer the remaining Internet issues until a later point.
5. Administrative Fines (11 C.F.R. Part 111, Subpart B) – OGC has prepared an NPRM addressing the five topics discussed by the Commission on March 21, 2002, which was circulated on tally. The campaign finance reform legislation is structured so that some but not all of the new reporting requirements could be added to the administrative fine pilot program. OGC expects to make recommendations regarding this project at a later point, after consulting with the Staff Director as to the impact of these amendments.

Secondary Priority Projects

6. Disgorgement of Illegal Contributions (11 C.F.R. § 102.5 and Part 103) – This NPRM is awaiting additional input from Commissioners via the Regulations Committee. The campaign finance reform legislation requires considerable reworking of the regulations regarding solicitations and transfers of funds to non-federal accounts, as well as other topics.

This Office recommends that all aspects of the disgorgement rulemaking not implicated by BCRA be deferred until after November 6, 2002.

7. FOIA/Privacy Act/Protection of Trade Secrets Act (11 C.F.R. Parts 4 and 5) -- This project is awaiting the outcome of the litigation in *FEC vs. AFL-CIO*. It appears unlikely that it will be substantively affected by the new campaign finance laws.
8. Coordinated and Independent Expenditures – Party Committee Provisions (11 C.F.R. § 110.7) -- The campaign finance reform legislation requires extensive reworking of draft regulations under development by OGC. Accordingly, this rulemaking must be subsumed within the new BCRA rulemaking.
9. The Debt Collection Improvement Act – At this time, the new campaign finance laws do not appear to be likely to affect the substance of this project. Nevertheless, OGC recommends that work on this project be suspended.
10. Party Committee Filing of 12-Day Pre-General Election Reports (11 C.F.R. § 104.5) -- OGC will need to assess the impact of the new legislation on these and other reports filed by party committees. This rulemaking must be subsumed within the new BCRA rulemaking.
11. Substantive and Procedural Changes to the Public Financing Rules - Independent Candidates and Minor and New Parties (11 C.F.R. Part 9001 - 9039) – Work is well underway on this NPRM. This Office will need to determine the extent to which the provisions of BCRA banning soft money may affect sources of funding for minor party conventions. We recommend that this project be deferred until after November 6, 2002.
12. Voting Records and Voter Guides (11 C.F.R. § 114.4(c)(4) and (c)(5)) – OGC is assessing the impact of the new coordination provisions of BCRA on these and other types of corporate and labor organization activities.
13. Soft Money (11 C.F.R. Parts 100, 102, 104, 106, 110 and 114) -- The campaign finance reform legislation requires extensive reworking of draft regulations submitted by OGC to the Regulations Committee in 2000. Accordingly, this rulemaking must be subsumed within the new BCRA rulemaking.
14. Contribution Designations; Redesignations and Reattributions; Supporting Documentation; and Solicitations (11 C.F.R. §§ 110.1 and 110.2) – This rulemaking was just approved by the Commission on February 28, 2002 and staff have not yet been assigned to work on it. Consequently, OGC doesn't know what, if any, changes may be needed in these areas as a result of the new campaign finance legislation.

Third Priority Projects

At best, only preliminary work has been done on the following lower priority projects. This Office recommends that they be deferred until after November 6, 2002 at the earliest. OGC notes, however, that as our intensive work progresses on BCRA regulations, there may be several issues inherent in these projects that will be addressed to some extent, or even quite comprehensively, in the new regulations. These are identified below. It is also possible,

although not definite at this time, that the forthcoming BCRA regulations may moot the need for launching some or many of these projects at any future time.

15. Joint Fundraising (11 C.F.R. § 102.17(c)) - The new campaign finance laws will require revisions to the current joint fundraising rules.
16. Aiding and Abetting Other Violations (11 C.F.R. Part 110)
17. Disclaimers (11 C.F.R. § 110.11) - The new campaign finance laws will require revisions to the current disclaimer rules.
18. Permissible Sources of Civil Penalties (11 C.F.R. § 111.24)
19. Use of Corporate and Labor Organization Facilities (11 C.F.R. § 114.9(d))
20. Ethics Rules (11 C.F.R. Part 7)
21. Qualification as a State Party Committee
22. Touhy Regulations
23. Allocation of Travel Expenses (11 C.F.R. § 106.3)

Rulemaking Projects Currently Being Held in Abeyance

As work on BCRA regulations progresses, OGC anticipates there may be several issues inherent in these projects that will be addressed to some extent, or even quite comprehensively, in the new regulations. These are identified below. It is also possible, although not definite at this time, that the forthcoming BCRA regulations may moot the need for launching some or many of these projects at any future time.

24. Political Organizations (11 C.F.R. § 100.5) – This project was put on hold after the issuance of an ANPRM and the receipt of public comments. OGC will need to assess the impact of the new legislation on this rulemaking.
25. Candidate Debates (11 C.F.R. § 110.13)
26. Recordkeeping and Reporting (11 C.F.R. Parts 102 and 104) – The new legislation requires extensive changes to the reporting provisions. OGC is assessing the extent to which modifications to the recordkeeping rules may be needed.
27. “MCFL Corporations” Rules (11 C.F.R. § 114.10)
28. Express Advocacy Definition (11 C.F.R. § 100.22(b)) BCRA makes no specific changes to this regulation.
29. Alternative Dispute Resolution (11 C.F.R. Part 111)

Rulemaking Projects To Be Terminated

30. Compliance Procedures (11 C.F.R. Part 111, Subpart A) OGC had been in the process of preparing a Notice of Disposition to terminate this rulemaking, which dates back to 1993. We recommend that work on the Notice of Disposition be suspended until after November 6, 2002.

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**SUBMITTED LATE
AGENDA ITEM**

For Meeting of: MAR 3 1994



FEDERAL ELECTION COMMISSION

March 1, 1994

MEMORANDUM

TO: The Commission

THROUGH: John C. Surina
Staff Director

FROM: Lawrence M. Noble
General Counsel

N. Bradley Litchfield
Associate General Counsel

Susan E. Propper
Assistant General Counsel

ATTACHMENT E
Page 1 of 2

SUBJECT: Public Release of Regulations Agenda Documents

Based on the discussion at the Commission's February 17 meeting, we propose the following procedures for public release of regulations agenda documents:

1) Regulations agenda documents will be made available to the public at the same time they are circulated to the Commission.

2) This early release of regulations agenda documents will not extend the public comment period on any rulemaking project.

3) If a majority of the Commission agrees that further comments on a rulemaking are warranted after a draft final rule document has been circulated, the agenda document will be published in the Federal Register for a new comment period.

4) When a document containing draft final rules has been circulated to the Commission, all comments received after that date will be forwarded to the Commission Secretary to be returned to the commenter unless the comment period has been reopened under paragraph (3).

5) The Staff Director, General Counsel and Commission Secretary will consult to amend whatever Commission directives are necessary, consistent with these procedures.

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
Public Release of Regulations) Agenda Documents
Agenda Documents.) #94-14 and #94-14-A

CORRECTED CERTIFICATION

I, Delores Hardy, recording secretary for the Federal Election Commission open meeting on Thursday, March 3, 1994, do hereby certify that the Commission decided by a vote of 4-0, to approve the General Counsel's proposed procedures for public release of regulations agenda documents, as recommended in Agenda Document #94-14-A.

Commissioners Elliott, McDonald, Potter, and Thomas voted affirmatively for the decision; Commissioners Aikens and McGarry were not present.

Attest:

April 29, 1994
Date

Delores Hardy
Delores Hardy
Administrative Assistant