AGENDA DOCUMENT NO. 01-61

FEDERAL ELECTION COMMISSION
Washington, DC 20463

AGENDA ITEM

For Meeting of: 11-29-01

MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkon
Staff Director

FROM: Lawrence H. Norton
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SUBJECT: Statement of Enforcement Policy Regarding Party Committee Transfers of Nonfederal funds for Payment of Allocable Expenses

I. Introduction

On November 2, 2001 the Commission issued a Request for Comment on Draft Statement of Policy Regarding Party Committee Transfers of Nonfederal Funds for Payment of Allocable Expenses ("Draft Statement" or "Statement of Policy") in which it sought comments on its proposal to exercise its prosecutorial discretion by temporarily not pursuing *prima facie* violations of the 60-day time limit for party committee transfers of nonfederal funds in light of the terrorist attacks of September 11, 2001. 66 *Federal Register* 56247 (November 7, 2001). The Request for Comment proposed that the Commission not pursue untimely party committee transfers for allocable expenses paid

between August 27 and November 1, 2001 (or alternatively December 31, 2001) if the transfers are made no later than December 31, 2001 (or alternatively, March 1, 2002) and are fully disclosed on the party committees' year end reports or other applicable reports. *Id.* at 56248. The Commission specifically invited comment "on the scope and duration, or on any other circumstance arising out of the attacks of September 11 that should be addressed." *Id.*

Written comments were received from ten individuals. In addition, the American Conservative Union, Inc. and the American Conservative Union Foundation, Inc. (collectively "ACU") submitted a joint comment, as did Common Cause and Democracy 21. Comments were also received from the Center for Responsive Politics (CRP), the DNC Services Corporation/Democratic National Committee (DNC), and the James Madison Center for Free Speech. The comments are summarized and discussed below.

II. Summary of Comments on the 60 Day Transfer Window (11 CFR Part 106)

One commenter supported the adoption of the Statement of Policy with the inclusion of the alternative deadline for transfers (March 1, 2002). The commenter suggested, however, that the Commission may have intended to list May 1, 2002 (120 days from December 31, 2001) as the deadline, rather than March 1, 2002. This commenter also asserted that it would be appropriate and consistent with the Commission's previous advisory opinions for the Commission to grant the relief requested through an advisory opinion, but suggested that, in the alternative, a policy statement would suffice and would be likewise appropriate. The commenter explained that the situation described in the original request for an advisory opinion was "likely not unique" to one party and amounted to more than an inconvenience. If the DNC used its available non-federal funds to pay for administrative and overhead expenses, the commenter stated, it would violate the trust of donors who had contributed that money for the purpose of supporting the Democratic Party in connection with the 2001 general elections for state and local offices. The commenter further asserted that the proposals in the Draft Policy Statement were consistent with the policy behind the 60-day transfer window regulations in that the transfer would still be reported and tracked. However, the parties would not be permitted to use any more non-federal money for allocable expenses than they would otherwise be permitted to use under the regulations.

In contrast, nine of the individual commenters and five of the other commenters urged the Commission not to permit party committees to transfer nonfederal funds outside the 60-day window set forth in 11 CFR 106.5(g)(2)(ii)(B), notwithstanding the purported impact on fundraising activities attributable to the attacks on September 11, 2001. Two of the commenters argued that adoption of the Draft Statement would provide the DNC with an unfair advantage over other parties that did not anticipate any change in the Commission's enforcement policies, and six commenters asserted that the DNC was simply using the September 11 attacks as an excuse to gain a political advantage through its use of "soft money." Several of these commenters suggested that the DNC was already experiencing financial difficulties prior to September 11. Two other commenters

questioned how much the September 11 attacks actually affected the parties' ability to raise funds, and one of these commenters argued that the parties could explore other options for raising funds, such as borrowing money or paying for expenses from a federal account, rather than transferring money outside the normal 60-day window. Three other commenters expressed their view that the 60-day transfer window is already overly permissive, and any further expansion of the time period for such transfers would further undermine existing soft money regulations and force the Commission to respond similarly to future requests made in light of natural disasters, poor performance by party leaders, or a bad economy.

Three commenters suggested that the Draft Statement was too broad. One of these commenters complained that the Draft Statement, unlike the responses of other agencies, was not narrowly targeted to situations where affected persons had neither control nor options. Another of these commenters implied that the Commission should not adopt the Draft Statement because the September 11 attacks had merely created an inconvenience for party fundraising, as opposed to making it impossible to comply with Commission regulations. The third of these commenters noted that the Statement of Policy would apply to party committees regardless of whether they have actually experienced any adverse effects from the September 11 attacks.

Five commenters expressed concerns that the Commission's announcement of its enforcement intentions through a Statement of Policy might create a dangerous and perhaps illegal precedent because it would amount to a functional suspension of a duly promulgated regulation without the safeguards of normal rulemaking procedures. These commenters questioned the Commission's authority to issue such general statements of policy following the 1979 repeal of 2 U.S.C. § 437d(a)(9), which had previously authorized the Commission to "formulate general policy with respect to administration of the Act." Similarly, one commenter stated that it would not be lawful for the Commission to disregard its statutory obligation to enforce its regulations, particularly when it issues an advisory opinion that comes to a contrary conclusion regarding the same matter. This commenter also expressed concern that the Commission might believe that the transfer window regulations are not required by law and that, if true, those regulations might then be invalid as beyond the statutory authority conferred on the Commission by Congress.

Another commenter asserted that the Draft Statement is actually an invalid rule that cannot be "put into effect" by the Commission because it was not promulgated in accordance with the requirements of the Administrative Procedure Act (APA) and was not submitted to Congress for review as required by section 438(d)(1) of the Federal Election Campaign Act, 2 U.S.C. § 431 *et seq.* ["FECA" or "the Act"]. This commenter further argued that the Statement cannot be a true "policy statement" because it does not apply prospectively and it has a substantial impact on existing rights and obligations of the affected parties. The Commission's policy, explained the commenter, would affect elections because it would cause shifts in spending patterns. The same commenter also questioned the purpose of implementing such a policy, noting that it could not be binding

and would therefore continue to expose parties to the risk of Commission enforcement while still not relieving the Commission of the obligation to address each enforcement matter separately.

III. Discussion

The comments above raise a number of issues previously considered by the Office of General Counsel prior to its initial recommendation that the Commission adopt the Draft Statement of Policy. Several comments indicate, however, that there is some confusion about the precise nature of the Commission's proposal. To be clear, the Draft Statement, if adopted, would not promulgate a new rule, and it does not technically or functionally repeal or suspend any existing regulation. The regulation would remain in force throughout the time period at issue and could be legally enforced against those who follow the guidance of the Commission as well as those who attempt to make transfers outside the 60-day window without adhering to the other conditions set forth in the Statement. A Statement of Policy would merely provide a timely and equitable vehicle for announcing the Commission's intentions to its staff, party committees and other members of the regulated community. Specifically, the Commission would announce that, in light of the unprecedented events of September 11, it intends to exercise its prosecutorial discretion by declining to bring enforcement actions based on *prima facie* violations of a specific regulation that occur during a fixed time period, as long as the party committees adhere to certain stated requirements. There can be no doubt that the Commission, like other agencies, may exercise its discretion to determine where to allocate its resources and whether to pursue specific enforcement actions. *See Heckler v. Chaney*, 470 U.S. 821, 832-833 (1985) (noting that enforcement decisions have "traditionally been 'committed to agency discretion' (citation omitted)"). By announcing its enforcement intentions prospectively, the Commission can provide fair notice to all parties and thus minimize the potential for disparate treatment of different committees.

This Office continues to be mindful that Congress intended to require the Commission to follow certain procedures when issuing general rules of law, but the comments offer no persuasive evidence that those procedures are applicable when the Commission announces its contemplated exercise of prosecutorial discretion. It is worth noting that the Commission's decision to provide a comment period did not transform this process into informal notice and comment rulemaking in accordance with the APA or 2 U.S.C. § 438(d). While the Commission has the authority to invite and consider additional information before choosing how to exercise its enforcement discretion, the commenters correctly point out that the Statement of Policy would not have a binding effect on either the Commission or party committees. It is perhaps even more important to note that the Statement of Policy is not intended to sanction any activity other than the transfer of funds during the limited time period as described in the Draft Statement. For example, the Statement of Policy would not in any way discharge, modify or extinguish the obligation of any party committee, person, or other committee to pay a civil penalty or an administrative fine, to pay any obligation derived from a conciliation agreement with

the Commission, to make any repayments under the Presidential election funding statutes, or to pay any other debts or obligations owed to vendors or any other persons or entities.

Several commenters contend that the implementation of the Draft Statement of Policy might result in different uses of "soft money" and the unfair treatment of parties. First, it is important to recognize that the permissible uses of "soft money" are not the subject of this Statement of Policy. The Commission's regulatory docket includes a pending rulemaking on that topic. *See* Notice of Proposed Rulemaking, 63 *Federal Register* 37722 (July 1998). Second, as discussed above, one of the reasons that the Commission is considering a Statement of Policy is to avoid disparate treatment of the various party committees. The Request for Comments provided an opportunity for all party committees to bring to the Commission's attention any actual or perceived harm or inequity that might result from the proposed policy. The only party committee to respond strongly favored the adoption of the Draft Statement and stated that the difficulties it faced after September 11 were "likely not unique." In light of that comment, the widespread impact of the tragic events of September 11, and an absence of any complaint about unfair treatment from other party committees, this Office concludes that the draft Statement represents a reasonable and even-handed approach to the circumstances presented.

This Office also affirms its opinion that the Commission has authority to publicly declare a policy to forebear from enforcement of the Act or Commission regulations in specific and narrowly circumscribed situations, and to do so before actual cases arise in the enforcement process. *See generally* 2 U.S.C. § 437g and 11 CFR Part 111; *see also* Memorandum from General Counsel to the Commission, October 26, 2001. Contrary to the assertions of one commenter, the policy would apply only prospectively. As discussed above, the Statement of Policy would merely announce how the Commission intends to proceed in the future if and when a party committee makes a transfer that is a *prima facie* violation of the 60-day time limit in certain limited situations.

Another commenter likewise misconstrued the nature of the Draft Statement when that commenter suggested that it would cause the Commission to abandon its statutory obligation to enforce its regulations. Again, enforcement decisions are matters of agency discretion. The same commenter further misinterprets the significance of the Commission's proposed action by asserting that the Commission could not issue a policy statement that comes to a different conclusion than an advisory opinion issued on the same matter. An advisory opinion is an entirely different and distinct vehicle from a policy statement. The Commission is authorized to issue an advisory opinion to respond to specific requests concerning the application of existing law. *See* 2 U.S.C §§ 473d(a)(7) and 473f(a)(1). A policy statement, however, may be used "to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power." Attorney General's Manual on the Administrative Procedure Act 15, at 30 n.3 (1947). It would be entirely appropriate for the Commission to inform a party that the action it proposes is not permitted under current law, and then issue a general statement that the agency intends to exercise its enforcement discretion in the

future by declaring that it is not inclined to pursue enforcement action in consideration of a particularly compelling set of circumstances.

The one commenter who responded to the Commission's specific request for comments about the duration of the policy recommended that the Commission adopt May 1, 2002, as the deadline for transfers and suggested that the Commission had committed an inadvertent error in publishing the deadline as March 1, 2002. The selection of the alternative March 1 cut-off date for transfers was intentionally different from the date put forward by the DNC in its request for an advisory opinion. *See* Advisory Opinion Request No. 2001-016 (Sept. 2001). The March 1, 2002 date permits the party committees a shorter period of time in which to make transfers relating to expenses incurred in November or December 2001. However, transfers relating to expenses incurred in September and October 2001 could be made more than 120 days beyond the date they were incurred. This approach attempts to reflect the reality that party committees faced particularly difficult challenges when fundraising activities were suspended immediately following the events of September 11, but those difficulties have (and will likely continue to) become less of a concern with the passage of time. The duration limits in the proposed policy are therefore fixed dates that are intended to be not only administratively convenient, but also accurately reflective of the actual needs of the parties. Therefore, the Office of the General Counsel recommends that the Commission adopt the March 1, 2002 alternative for making transfers.

IV. Additional Comments

One commenter responded to the Commission's invitation to comment on any other circumstances arising out of the September 11 attacks. The commenter noted that 11 CFR 105.2 instructs U.S. Senate candidates to file Statements of Candidacy, Statements of Organization and other FEC reports with the Secretary of the Senate. The commenter argued that it is currently impossible to comply with the requirements of 11 CFR 105.2 because the office of the Secretary of the Senate is located in the Senate's Hart Building, which has been closed for several weeks. The commenter suggested that the Commission establish a temporary filing procedure that would allow for timely and perfected filing of Senate forms and documents at a location other than that which is stated in the regulations.

Contrary to the commenter's implication, however, the regulations do not specifically mandate that any documents be filed in the Hart building; rather, the regulations require that appropriate documents be filed "in original form with, and received by, the Secretary of the Senate ...." 11 CFR 105.2. Compliance with the regulation is therefore not at all impossible as the Secretary of the Senate currently accepts the required documents via hand delivery or certified mail at an alternative location, room B-15 in the Senate Russell building. The Office of General Counsel has also been informed that the normal office in the Hart building is expected to re-open before year-end reports are due in January. Further inquiries about this matter may be

directed to Pam Gavin, Superintendent of Public Records in the Office of the Secretary of the Senate, (202) 224-0762.

V. Final Statement of Policy

After reviewing the comments received on the Draft Statement, the Office of General Counsel has prepared a final Statement of Policy regarding future enforcement of the sixty-day time limit for transfers to pay for allocable expenses. The final Statement uses the alternative deadline of March 1, 2002 (instead of December 31, 2001) as the cut-off for the transfer period under the policy. No other substantive changes from the Draft Statement are included. The final Statement again takes notice that the Commission is taking this action only in response to these particular circumstances, and that this action should not be viewed as a precedent for similar action in the future. The Office of General Counsel recommends that the Commission issue this Statement of Policy and implement it immediately.

This Office further recommends that, in accordance with section 552(a)(1)(D) of the APA and section 801(a) of the Congressional Review Act, the Statement of Policy be transmitted for publication in the *Federal Register* and submitted to Congress. As noted in the Memorandum from General Counsel to the Commission, October 26, 2001, the Statement can be put into effect immediately upon publication, because the legislative review provision in 2 U.S.C. § 438(d) does not apply.

VI. Recommendation

The Office of the General Counsel recommends that the Commission take the following actions:

1. Approve the attached Statement of Policy for publication in the Federal Register.

2. Direct the Office of General Counsel to transmit the Statement of Policy to Congress in accordance with the Congressional Review Act, 5 U.S.C. § 801 *et seq.*

Attachment

FEDERAL ELECTION COMMISSION

11 CFR Part 106

[NOTICE 2001 -]

STATEMENT OF POLICY REGARDING PARTY COMMITTEE TRANSFERS OF NONFEDERAL FUNDS FOR PAYMENT OF ALLOCABLE EXPENSES

AGENCY: Federal Election Commission.

ACTION: Statement of Policy.

SUMMARY: In light of the suspension of fundraising activities by some party committees after the terrorist attacks of September 11, 2001, the Commission intends, in certain limited circumstances, to exercise its discretion by not pursuing prima facie violations of the 60 day time limit for party committee transfers of nonfederal funds to pay for the nonfederal share of allocable expenses. The limitations on the scope and duration of the policy are discussed in detail below.

DATE: November >, 2001.

FOR FURTHER INFORMATION CONTACT: Rosemary C. Smith, Assistant General Counsel, or Richard Ewell, Staff Attorney, 999 E Street, NW, Washington, D.C. 20463, (202) 694-1650 or (800) 424-9530.

SUPPLEMENTARY INFORMATION: Sections 106.1 and 106.5 of the Commission's regulations (11 CFR 106.1 and 106.5) allow party committees to defray the costs of activities that relate to both federal and nonfederal elections by allocating the costs between their federal and

nonfederal accounts, so long as they pay an amount equal to or greater than the federal portion of these expenses with funds that are permissible under the Federal Election Campaign Act, 2 U.S.C. § 431 et seq. ["FECA" or "the Act"].

Party committees allocate these expenses by paying the entire amount of the expense from a federal account or allocation account, and transferring funds from a nonfederal account to cover the nonfederal portion of the allocable expense. 11 CFR 106.5(g)(1)(i) and (ii). The regulations establish a time period, or "window," during which these nonfederal transfers may be made. "[S]uch funds may not be transferred more than 10 days before or more than 60 days after the payments for which they are designated are made." 11 CFR 106.5(g)(2)(ii)(B). Any transfer made more than 60 days after payment of the related allocable expense "shall be presumed to be a loan or contribution from the non-federal account to a federal account, in violation of the Act." 11 CFR 106.5(g)(2)(iii).

In many instances, party committees plan and execute allocable activities based, in part, on the expectation that they will subsequently receive nonfederal funds that can be transferred to their federal or allocation accounts before the expiration of the 60 day time limit in section 106.5(g)(2)(ii)(B). In most instances, committees' expectations are realized.

However, some party committees voluntarily suspended their fundraising activities in the immediate aftermath of the September 11, 2001 terrorist attacks. See e.g., FEC Advisory Opinion Request 2001-16; Rachel Van Dongen, Shoptalk, Roll Call, October 11, 2001 <http://www.rollcall.com/pages/politics/shoptalk/>. As a result, some party committees may not have sufficient funds in their nonfederal accounts to make transfers to their federal

accounts or allocation accounts in a timely manner, i.e., within 60 days of when the committee pays the allocable expense for which those funds would be transferred.[1]

The Commission recognizes that this situation is the result of the unprecedented events of September 11, 2001, which have had a significant impact on many aspects of American life, and could not have been anticipated.

In light of these circumstances, the Commission intends to exercise its discretion by not pursuing prima facie violations of the 60 day time limit in certain limited situations. Under this policy, the Commission does not intend to pursue an untimely party committee transfer made to cover the nonfederal share of an allocable expense paid between August 27, 2001 and December 31, 2001, if the transfer is made no later than March 1, 2002, and is fully disclosed on the party committee's applicable report.

After requesting comments on a substantively similar draft Statement of Policy (66 *Federal Register* 56247) and carefully reviewing the resulting comments, the Commission is taking this action in response to the unique circumstances described above.

[1] The Commission notes that the rules permit but do not require party committees to transfer nonfederal funds to cover the nonfederal portion of an allocable expense, since the effect of not making such a transfer would be that federal funds are used to defray the full amount of the allocable expense, a result that is permissible under the Act and regulations. See Methods of Allocation Between Federal and Non-Federal Accounts; Payments; Reporting, 55 FR 26058, 26063 (June 26, 1990) (explaining that "allocating a portion of certain costs to a committee's non-federal account is a permissive rather than a mandated procedure").

Consequently, this action should not be viewed as a precedent for any similar action in the future.

Danny L. McDonald
Chairman
Federal Election Commission

DATED: _____

BILLING CODE: 6715-01-U