

# Proposed Rules

Federal Register

Vol. 65, No. 61

Wednesday, March 29, 2000

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## FEDERAL ELECTION COMMISSION

### 11 CFR Parts 104 and 111

[Notice 2000-6]

#### Administrative Fines

**AGENCY:** Federal Election Commission.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Treasury and General Government Appropriations Act, 2000, amended the Federal Election Campaign Act of 1971 (hereinafter "the Act" or "FECA") to permit the Federal Election Commission to impose civil money penalties for violations of the reporting requirements of the FECA that occur between January 1, 2000, and December 31, 2001. The amendments are intended to expedite and streamline the Commission's enforcement procedures. The Commission is proposing amendments to its compliance regulation to implement the new program. Please note that the proposed rules that follow do not represent a final decision by the Commission on the issues presented by this rulemaking. Further information is provided in the supplementary information that follows.

**DATES:** Comments must be received on or before April 28, 2000.

**ADDRESSES:** All comments should be addressed to Rosemary C. Smith, Assistant General Counsel, and must be submitted in either written or electronic form. Written comments should be sent to the Federal Election Commission, 999 E Street, N.W., Washington, DC 20463. Faxed comments should be sent to (202) 219-3923, with printed copy follow-up. Electronic mail comments should be sent to [adminfine@fec.gov](mailto:adminfine@fec.gov). Commenters sending comments by electronic mail must include their full name, electronic mail address and postal service address within the text of their comments. Comments that do not contain the full name, electronic mail address and postal service address of the commenter will not be considered. The Commission will make every effort to have public

comments posted on its website within ten (10) business days of the close of the comment period.

**FOR FURTHER INFORMATION CONTACT:** Ms. Rosemary C. Smith, Assistant General Counsel, or Ms. Mai T. Dinh, Attorney, 999 E Street, N.W., Washington, D.C. 20463, (202) 694-1650 or (800) 424-9530.

**SUPPLEMENTARY INFORMATION:** The Treasury and General Government Appropriations Act, 2000, Public Law No. 106-58, 106th Cong., § 640, 113 Stat. 430, 476-77 (1999), amended section 309(a)(4) of the FECA, 2 U.S.C. 437g(a)(4) to provide for a modified enforcement process for violations of reporting requirements. The amended procedure provides that if the Commission finds a violation of 2 U.S.C. 434(a) it may:

(i) require the person to pay a civil money penalty in an amount determined under a schedule of penalties which is established and published by the Commission and which takes into account the amount of the violation involved, the existence of previous violations by the person, and such other factors as the Commission considers appropriate.

(ii) The Commission may not make any determination adverse to a person under clause (i) until the person has been given written notice and an opportunity to be heard before the Commission.

(iii) Any person against whom an adverse determination is made under this subparagraph may obtain a review of such determination in the district court of the United States for the district in which the person resides, or transacts business, by filing in such court (prior to the expiration of the 30-day period which begins on the date the person receives notification of the determination) a written petition requesting that the determination be set aside.

The Commission is seeking public comments on the proposed rules at 11 CFR part 111, subpart B, that would implement this amendment to the Act and would establish a new streamlined procedure for only those enforcement matters that involve alleged violations of the reporting requirements of 2 U.S.C. 434(a). The new rules would also impose civil money penalties in accordance with the schedules of penalties. The current enforcement

procedures in 11 CFR 111.1 through 111.24 would be designated as 11 CFR part 111, subpart A—Enforcement, and would continue to apply to other types of alleged violations of the FECA.

#### Applicability

The amendment to the Act applies only to violations that occur between January 1, 2000 and December 31, 2001. The Commission would have discretion to apply these new procedures to reporting violations of 2 U.S.C. 434(a). These reporting violations include failure to file or timely file monthly, quarterly, pre-election, post-general election, mid-year and year-end reports, and 48 hour notices regarding contributions after the 20th day but more than 48 hours before the election. While the Commission anticipates that it would use these new procedures to handle most of its non-filer and late filer enforcement matters, the Commission may decide not to apply the new procedures to certain violations because of unusual circumstances. The Commission also contemplates that complaint generated matters that deal only with alleged 2 U.S.C. 434(a) violations would be processed under the new procedures. Complaints that contain allegations of 2 U.S.C. 434(a) violation(s) as well as violation(s) of other provisions of the FECA would be processed under the current enforcement procedures.

#### Enforcement Procedures

##### 1. Due Process Considerations

In developing the procedures to implement this amendment to the FECA, the Commission is taking into consideration the requirements of the Administrative Procedure Act (hereinafter "APA"), 5 U.S.C 551 *et seq.*, and the Due Process Clause of the U.S. Constitution, *U.S. Const.* amend. XIV, § 1, and the intent of Congress in enacting this amendment.

Because the only procedures specified in the amendment to section 434(a) of the FECA are "written notice and an opportunity to be heard by the Commission," it is quite clear that the statute on its face does not trigger the formal adjudication provisions of the APA. Section 554(a) of the APA states that the relevant program statute must require an opportunity for a hearing "on the record," before the APA's formal adjudication procedures are triggered.

Although the Supreme Court has never interpreted this language in section 554(a), it has so interpreted the almost identical language pertaining to formal rulemaking in section 553(c) of the APA in *United States v. Florida East Coast Railway Co.*, 410 U.S. 224 (1973). Furthermore, the leading court of appeals decisions, *City of West Chicago v. NRC*, 701 F.2d 632 (7th Cir. 1983), and *Chemical Waste Management, Inc. v. EPA*, 873 F.2d 1477 (D.C. Cir. 1989), have required the presence of the phrase "on the record" unless there is some extraordinary indication of congressional intent that formal APA procedures should apply. Nothing extraordinary in the amendment or the legislative history indicates that Congress intended to require the Commission to follow the formal APA adjudication procedures.

Although the FECA does not require a formal APA procedure, the U.S. Constitution requires the Commission to afford respondents adequate due process prior to assessment of a civil money penalty. Because the APA is silent on what type of procedure agencies must follow in informal adjudication, the Commission must look to case law to determine what procedure will satisfy the due process requirements. Under *Mathews v. Eldridge*, 424 U.S. 319, 334–335 (1976), the Supreme Court stated that courts must employ a balancing test to determine the adequacy of an agency's procedures, once a protected property or liberty interest has been shown to be affected. The balance involves the following three factors: (1) The private interest affected by the official action, (2) the risk of an erroneous result and the probable value of additional procedural safeguards, and (3) the government's interest in avoiding administrative burdens. Because the APA does not prescribe procedures for informal adjudications, the Commission is left with devising a procedure that meets the *Mathews* balancing test.

Another consideration is congressional intent. The legislative history suggests that a purpose for the amendment is to streamline the process for reporting violations in order to redirect more resources to more complex violations. Congressman William Thomas, Chairman of the Committee of House Administration, stated the following on the floor of the House of Representatives on September 15, 1999:

Allowing the FEC to impose administrative fines for reporting violations without the lengthy procedural steps required in a normal enforcement case will free critical FEC resources for more important disclosure

and enforcement efforts. The rights of those under these regulations are protected by preserving the option of appeal to a U.S. District Court for those who believe the FEC erred.

The Commission believes it has developed procedures in this proposed rule that address these considerations. The private interests involved in this rulemaking are protected. The risk of erroneous results is relatively low in most cases given that reporting violations are relatively straightforward. Absent extraordinary circumstances, there are basically only three issues—whether the respondent was required to submit a report, whether the report was timely filed, and whether the civil money penalty was calculated correctly. The opportunity for the respondent to submit a written response and to have the enforcement matter reviewed by an independent reviewing officer will protect the respondent from an erroneous result as will the opportunity for the respondents to appeal to federal district court. This streamlined process will ensure that the Commission does not devote too many resources to these relatively minor, straightforward violations. The streamlined process will also meet the requirements of the amendment. The Commission seeks comments on the adequacy of the procedures proposed to protect respondents' due process rights.

#### 2. Notification to Respondents of Reason To Believe Finding

The amendment to the FECA did not change the 2 U.S.C. 437g(a)(2) requirements pertaining to reason to believe findings and notifying respondents of the reason to believe findings. Thus, under the proposed 11 CFR 111.32, the Commission would continue to authorize the Chairman or Vice-Chairman to notify the respondents in writing if it finds reason to believe that a violation has occurred. The notification would contain the factual and legal basis for the reason to believe finding and the proposed civil money penalty in accordance with the applicable schedule of penalties. Before the reports are due, the Commission intends to follow its current procedures of informing all committees of their duty to submit the reports and the filing deadlines. Thus, all committees will have prior notification of the requirements and an adequate opportunity to meet the requirements before the Commission finds reason to believe and commences an enforcement action.

Under the proposed 11 CFR 111.34, if the respondent does not wish to challenge the reason to believe finding,

the respondent may pay the proposed civil money penalty within forty days of the Commission's reason to believe finding. The Commission would then send the respondent an acknowledgment of the payment and its final determination. The matter would then be closed and the information placed on the public record.

#### 3. Respondent's Written Response

If, however, the respondent wants to challenge the reason to believe finding and/or the proposed civil money penalty, the respondent under the proposed 11 CFR 111.35 would be required to submit a written notice of intent to challenge the reason to believe finding and/or the proposed civil money penalty to the Commission within twenty days of the Commission's reason to believe finding. The respondent would also be required to submit a written response to the Commission within forty days of the Commission's reason to believe finding. The written response must set forth one or more of the following arguments: alleged factual and/or legal errors in the reason to believe finding; and/or reasons why the proposed civil money penalty was improperly calculated; and/or extraordinary circumstances that were out of the control of the respondent and that were for a duration of at least 48 hours and that prevented the respondent from filing the report in a timely manner. Extraordinary circumstances would not include negligence, illness of staff, computer failures, problems with contractors and vendors, and other similar occurrences. Respondents would be required to include all supporting documentation with their written response.

#### 4. Reviewing Officer

The respondent's written response would be forwarded to a reviewing officer under proposed 11 CFR 111.36. To ensure impartiality, the reviewing officer would not be someone who was involved in developing the reason to believe finding. The reviewing officer would review the reason to believe finding with supporting documentation and the respondent's written response with supporting documentation. The reviewing officer would also be allowed to request that other Commission staff and the respondent submit supplemental information. The reviewing officer would draft a written recommended decision and forward it to the Commission along with the reason to believe finding with supporting documentation, the respondent's written response with the supporting documentation, and

supplemental information, if any. These materials along with the Commission's final determination and any statement(s) of reasons, subject to any claims of privilege, would constitute the entire administrative record.

The amendment to the FECA requires that a respondent have "an opportunity to be heard" before the Commission makes a final adverse determination. The Commission believes that this requirement would be satisfied by the respondent's opportunity to submit a written response to the reason to believe finding with a review by an impartial reviewing officer. The Commission recognizes, however, the possibility that respondents may want the opportunity for an oral hearing before the reviewing officer in those infrequent situations where there may be a disputed issue of material fact. The Commission seeks comments on whether oral hearings should be incorporated into the new procedural rules. If so, under what circumstances should an oral hearing be held? Who should preside over an oral hearing? What procedures should be followed? What topics should be addressed in an oral hearing?

A broader concern is that oral hearings would necessitate increasing the resources the Commission devotes to these straightforward reporting violations, thereby defeating the congressional intent to streamline the process. Hearings may also increase the respondent's expenses and unduly prolong the enforcement process. Comments are requested on ways to reduce the amount of resources needed if the process includes an opportunity for an oral hearing, and ways to avoid procedural delays.

##### *5. Final Determination by the Commission*

Proposed 11 CFR 111.37 contemplates that once the Commission receives the respondent's written response, if any, to the reason to believe finding, the reviewing officer's written recommendation, and all supporting and supplemental documents and information, the Commission would then make a final determination, by a vote of at least four of its members, as to whether a violation of 2 U.S.C. 434(a) has occurred. If the Commission determines that a violation has occurred, then it would assess a civil money penalty in accordance with the schedules of penalties in proposed 11 CFR 111.43. For purposes of judicial review, the final determination would be the final agency action.

The Commission would modify the proposed civil money penalty if the respondent can demonstrate that the

proposed civil money penalty was incorrectly calculated. An example of an incorrectly calculated civil money penalty is when the respondent can convincingly demonstrate that it filed the required report earlier than the filing date alleged in the reason to believe finding, though the report is still filed late. Then the Commission would reduce the fine to the appropriate amount based on a recalculation of the number of days late.

The Commission may also determine that there was no violation. Finally, the Commission may determine, by a vote of at least four of its members, that a violation of 2 U.S.C. 434(a) has occurred but waive the civil money penalty because the respondent has convincingly demonstrated the existence of extraordinary circumstances that were beyond the respondent's control and that were for a duration of at least 48 hours.

The proposed rules do not include provisions for mitigating factors that may reduce the civil money penalty. The Commission believes that this is the simplest, most straightforward way to effectuate statutory intent, particularly since the new administrative fine program is limited to a two-year period. The Commission is also concerned that the inclusion of mitigating factors would result in a lack of uniformity and certainty in the imposition of civil money penalties. Nevertheless, comments are sought as to whether the Commission should include mitigating factors, what those factors should be and how the factors should be applied.

##### *6. Failure To Submit Payment or Written Response*

If the respondent fails to pay the proposed civil money penalty within forty days of the Commission's reason to believe finding or to submit a notice of intent to challenge the reason to believe finding or to submit the written response within the time stated in proposed 11 CFR 111.35, the Commission would, under proposed 11 CFR 111.40, issue a final determination with a civil money penalty consistent with the appropriate schedule of penalties. The respondent would then have thirty days from receipt of the final determination either to submit payment of the civil money penalty or to seek judicial review.

##### **Judicial Review**

As provided in the statutory amendments to the FECA and section 111.38 of the Commission's proposed regulations, the respondent may seek judicial review of the Commission's final determination within thirty (30)

days of receipt of the final determination. The respondent may seek judicial review in a U.S. district court where the respondent resides or conducts business. The review would be limited to issues and facts raised during the enforcement process. This is consistent with the Commission's procedures for presidential repayment determinations at 11 CFR 9007.5(b) and 9038.5(b) where the failure to timely raise issues constitutes a waiver of the right to raise the issues in future proceedings.

##### **Schedules of Penalties for Reports Other Than 48-Hour Notices**

The amendment to the Act requires the Commission to take into account the amount of the violation and the existence of previous violations by the respondent in developing the schedules of penalties. In establishing the proposed schedules of penalties set forth in 11 CFR 111.43, the Commission considered its past enforcement of 2 U.S.C. 434(a) violations and the civil penalties involved in those enforcement cases and the fine schedules of state agencies for similar reporting violations. In addition, the Commission believes that it is vital that civil money penalties not be set at a level so low that they will be treated as merely "the cost of doing business." Conversely, the penalties must not be so high that they become unduly burdensome.

The Commission also considered the election sensitivity of a report. While it is important that all reports should be filed in a timely manner, it is especially important that reports due just before an election, i.e., pre-primary, pre-general, October quarterly, and October monthly, be filed in a timely manner to maintain the integrity of the campaign finance system. Therefore, the Commission proposes to subject these election sensitive reports, which are defined in proposed 11 CFR 111.43(e) as the October quarterly and October monthly, and the pre-election reports under 11 CFR 104.5 to a higher civil money penalty. Election sensitive reports and the pre-election reports under the schedules of penalties in proposed 11 CFR 111.43 would be assessed an additional 50% of the base amounts. An alternative method of handling election sensitive reports would be to add a flat \$1000 to the base amounts. The Commission seeks comments on which alternative the Commission should adopt.

The schedules of penalties in proposed 11 CFR 111.43 for late filers and non-filers would have four components. The first is a base amount depending on the level of activity on the

report. The level of activity is the amount of receipts plus the amount of disbursements in the report. The base amounts would range from \$100 to \$5000 for all reports except for election sensitive reports and from \$150 to \$7500 for election sensitive reports. This component would satisfy the statutory requirement that the schedules of penalties take into account the amount of the violation.

The second component is a set amount depending on the level of activity on the report multiplied by the number of days the report is filed late up to thirty days. This set amount ranges from \$25 per day to \$200 per day for all reports. This component would also satisfy the statutory requirement that the schedules of penalties take into account the amount of the violation.

The third component is a set amount for respondents who are non-filers. The Commission considers respondents to be non-filers if they do not file their election sensitive reports prior to four (4) days before the election or if they do not file any other report within thirty days of its due date. This set amount ranges from \$1,600 to \$17,000 for all reports except election sensitive reports and from \$1,650 to \$19,500 for election sensitive reports. These amounts were achieved by doubling the per day penalty and multiplying this penalty by thirty days and then adding the base amount of the first component.

The fourth component is an additional premium for each prior civil money penalty that was assessed against the respondent for failure to file timely reports. This component would satisfy the requirement that the schedules of penalties take into account the existence of previous violations. This premium would be an additional 25% of the civil money penalty for each prior civil money penalty that had been assessed under this subpart during the current two-year election cycle and prior two-year election cycle.

For non-filers, the Commission would estimate their level of activity by adding the total receipts and total disbursements reported in the current election cycle and then dividing by the number of reports received in the current election cycle. If the respondents have not filed any reports in the current election cycle, then the Commission would estimate the level of activity by adding the total receipts and total disbursement reported in the most recent election cycle and then dividing by the number of reports received in the most recent election cycle.

### Examples of Civil Money Penalties

*Example 1:* The respondent files an October quarterly report 20 days late. The level of activity on the report is \$105,000. The civil money penalty would be calculated as follows. The base amount would be \$900. The per day amount would be \$125 multiplied by 20 days, which equals \$2500. The civil money penalty would be the sum of these two amounts, which would be \$3400.

*Example 2:* The respondent in the above example has one prior violation in the current two-year election cycle. The premium for the one prior violation would be 25% of the civil money penalty calculated in example 1, which would equal \$850. The civil money penalty would be the sum of this premium and the civil money penalty from example 1, which would be \$4250.

*Example 3:* Instead of being subject to the proposed schedule of penalties that adds 50% of the base to the civil money penalty, the respondent in example 1 would be subject to a schedule of penalties that adds \$1000 to the base amounts for election sensitive reports. The civil money penalty would be calculated as follows. The base amount would be \$1600. The per day amount would be \$125 multiplied by 20 days, which equals \$2500. The civil money penalty would be the sum of these two amounts, which would be \$4100. *Example 4:* The respondent in the example 3 had one prior violation in the current two-year election cycle. The premium for the one prior violation would be 25% of the civil money penalty calculated in example 3, which would equal \$1025. The civil money penalty would be the sum of this premium and the civil money penalty from example 3, which would be \$5125.

The Commission believes that these proposed schedules of penalties reflect a reasonable approach. The additional premium that is added for those respondents who have had previous civil money penalty assessments is intended to ensure that the schedules of penalties would not be viewed as "the cost of doing business." The Commission seeks comments on the reasonableness of the schedules of penalties in the proposed rule; the comprehensiveness of the schedules of penalties; additional factors that the Commission should consider; and alternative means to develop the schedules of penalties.

### Schedule of Penalties for 48-Hour Notices

Under 2 U.S.C. 434(a)(6), principal campaign committees are required to report within 48 hours contributions of \$1000 or more that are received after the 20th day but more than 48 hours before an election. It has been the Commission's experience that in the cases regarding alleged violations of the 48-hour notice requirement, the respondents generally fail to file these notices rather than file them late. Also,

because of the unique nature and timing of this reporting requirement, the Commission believes that failure to file these 48-hour notices in a timely manner is tantamount to failing to file them at all. Thus, the proposed schedule of penalties does not make a distinction between late filers and non-filers for violations of 2 U.S.C. 434(a)(6). The schedule of penalties set forth in proposed 11 CFR 111.44 would be calculated based on the number of previous civil money penalties assessed against the respondent in the current two-year election cycle and the prior two-year election cycle, as well as a percentage of contribution(s) not timely reported. The Commission seeks comments on this approach to handling the failure to file timely the 48 hour notices.

### Debt Collection Improvement Act

The Debt Collection Improvement Act of 1996 (hereinafter "DCIA"), Pub. L. 104-134, 110 Stat. 1321-358 (1996), codified at 31 U.S.C. 3711(g), requires Federal agencies to transfer to the Department of the Treasury for debt collection action any non-tax debt that is over 180 days delinquent, subject to certain exemptions. The DCIA also permits the voluntary transfer of debts less than 180 days delinquent to the Department of the Treasury or, with the consent of the Department of the Treasury, to a Treasury-designated debt collection center for debt collection services. Section 111.44 of the proposed rules would incorporate, by reference, the Department of Treasury's debt collection regulations and the Federal Claims Collection Standards.

After a final determination as to the amount of the civil money penalty, the Commission intends to utilize the DCIA to collect civil money penalties from respondents who fail to pay within a reasonable time. This debt collection procedure, however, would not preclude the Commission from filing suit under 2 U.S.C. 437g(a)(6) in the appropriate United States district court to collect the civil money penalty where it determines that this is preferable to transferring the debt to the Department of Treasury for collection under the DCIA.

### Conforming Amendments

The proposed rules contain conforming amendments to the existing regulations. The current sections of part 111 would be designated as "subpart A—Enforcement." Paragraph (d) would be added to 11 CFR 111.8 to allow the Commission to apply proposed subpart B of part 111 to internally generated matters relating to violations of 2 U.S.C.

434(a). Paragraph (c) would be added to 11 CFR 111.20 to provide for public disclosure of non-exempt 2 U.S.C. 437g investigatory materials within thirty (30) days after the final disposition of a civil action. This paragraph, if promulgated, would not be limited to civil actions arising from enforcement actions undertaken under subpart B of part 111 but would be applied to all civil actions.

The Commission welcomes comments on these and any other issues raised by the new statutory provisions on administrative fines for reporting violations.

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

The attached proposed rules would not, if promulgated, have a significant economic impact on a substantial number of small entities. The basis for this certification is that the attached proposed rules, if promulgated, would impose penalties which are scaled to take into account the size of the political committees. Thus, committees with less financial activity would be subject to lower fines than committees with more financial activity. Also, the Commission anticipates that there will not be a large number of small committees that would be subject to the process in the proposed rules. Therefore, the attached proposed rules, if promulgated, will not have a significant economic impact on a substantial number of small entities.

#### **List of Subjects**

##### *11 CFR Part 104*

Campaign funds, Political committees and parties, Reporting and recordkeeping requirements.

##### *11 CFR Part 111*

Administrative practice and procedures, Elections, Law enforcement.

For reasons set out in the preamble, it is proposed to amend subchapter A, Chapter I of Title 11 of the Code of Federal Regulations as follows:

#### **PART 104—REPORTS BY POLITICAL COMMITTEES (2 U.S.C. 434)**

1. The authority for part 104 continues to read as follows:

**Authority:** 2 U.S.C. 431(1), 431(8), 431(9), 432(i), 434, 438(a)(8), 438(b), 439a.

2. 11 CFR 104.5 would be amended by adding new paragraph (i) to read as follows:

##### **§ 104.5 Filing dates (2 U.S.C. 434(a)(2)).**

\* \* \* \* \*

(i) Committees should retain proof of mailing or other means of transmittal of the reports to the Commission.

#### **PART 111—COMPLIANCE PROCEDURES (2 U.S.C. 437g, 437d(a))**

3. The authority for part 111 continues to read as follows:

**Authority:** 2 U.S.C. 437g, 437d(a), 438(a)(8).

4. 11 CFR 111.8 would be amended by adding new paragraph (d) to read as follows:

##### **§ 111.8 Internally generated matters; referrals (2 U.S.C. 437g(a)(2)).**

\* \* \* \* \*

(d) Notwithstanding §§ 111.9 through 111.19, for violations of 2 U.S.C. 434(a), the Commission, when appropriate, may review internally generated matters under subpart B of this part.

5. 11 CFR 111.20 would be amended by adding new paragraph (c) to read as follows:

##### **§ 111.20 Public disclosure of Commission action (2 U.S.C. 437g(a)(4)).**

\* \* \* \* \*

(c) For any compliance matter in which a civil action is commenced, the Commission will make public the non-exempt 2 U.S.C. 437g investigatory materials in the enforcement and litigation files no later than thirty (30) days from the date on which the Commission sends the complainant and the respondent(s) the required notification of the final disposition of the civil action. The final disposition may consist of a judicial decision which is not reviewed by a higher court.

6. 11 CFR 111.24(a) would be revised to read as follows:

##### **§ 111.24 Civil Penalties (2 U.S.C. 437g(a)(5), (6), (12), 28 U.S.C. 2461 nt.).**

(a) Except as provided in 11 CFR 111.44 and in paragraph (b) of this section, a civil penalty negotiated by the Commission or imposed by a court for a violation of the Act or chapters 95 or 96 of title 26 (26 U.S.C.) shall not exceed the greater of \$5,500 or an amount equal to any contribution or expenditure involved in the violation. In the case of a knowing and willful violation, the civil penalty shall not exceed the greater of \$11,000 or an amount equal to 200% of any contribution or expenditure involved in the violation.

\* \* \* \* \*

7. 11 CFR 111.25 through 111.29 would be added and reserved.

8. Part 111 would be amended by designating 11 CFR 111.1 through 111.24 as subpart A—Enforcement—and by adding new subpart B to read as follows:

#### **Subpart B—Administrative Fines**

Sec.

111.30 When will subpart B apply?

111.31 Does this subpart replace subpart A of this part for violations of the reporting requirements of 2 U.S.C. 434(a)?

111.32 How will the Commission notify respondents of a reason to believe finding and a proposed civil money penalty?

111.33 What are the respondent's choices upon receiving the reason to believe finding and the proposed civil money penalty?

111.34 If the respondent decides to pay the civil money penalty and not to challenge the reason to believe finding, what should the respondent do?

111.35 If the respondent decides to challenge the alleged violation or proposed civil money penalty, what should the respondent do?

111.36 Who will review the respondent's written response?

111.37 What will the Commission do once it receives the respondent's written response and the reviewing officer's recommendation?

111.38 Can the respondent appeal the Commission's final determination?

111.39 When must the respondent transmit payment of the civil money penalty?

111.40 What happens if the respondent does not pay the civil money penalty pursuant to 11 CFR 111.34 and does not submit a written response to the reason to believe finding pursuant to 11 CFR 111.35?

111.41 To whom should the civil money penalty payment be made payable?

111.42 Will the enforcement file be made available to the public?

111.43 What are the schedules of penalties?

111.44 What is the schedule of penalties for 48-hour notices?

111.45 Will the Debt Collection Improvement Act of 1996 be used to collect unpaid civil money penalties?

##### **§ 111.30 When will subpart B apply?**

Subpart B applies to violations of the reporting requirements of 2 U.S.C. 434(a) committed by political committees and their treasurers on or after [the effective date of the final rule], and on or before December 31, 2001.

##### **§ 111.31 Does this subpart replace subpart A of this part for violations of the reporting requirements of 2 U.S.C. 434(a)?**

(a) No; §§ 111.1 through 111.8 and 111.20 through 111.24 shall apply to all compliance matters. This subpart will apply, rather than §§ 111.9 through 111.19, when the Commission, on the basis of information ascertained by the Commission in the normal course of carrying out its supervisory responsibilities, and when appropriate, determines that the compliance matter should be subject to this subpart. If the Commission determines that the violation should not be subject to this

subpart, then the violation will be subject to all sections of subpart A of this part.

(b) Subpart B will apply to compliance matters resulting from a complaint filed pursuant to 11 CFR 111.4 through 111.7 if the complaint alleges a violation of 2 U.S.C. 434(a) and does not allege violations of any other provision of any statute or regulation over which the Commission has jurisdiction.

**§ 111.32 How will the Commission notify respondents of a reason to believe finding and a proposed civil money penalty?**

If the Commission determines, by an affirmative vote of at least four (4) of its members, that it has reason to believe that a respondent has violated 2 U.S.C. 434(a), it shall authorize the Chairman or Vice-Chairman to notify such respondent of the Commission's finding. The written notification shall set forth the following:

(a) The alleged factual and legal basis supporting the finding including the type of report that was due, the filing deadline, the actual date filed (if filed), and the number of days the report was late (if filed);

(b) The applicable schedule of penalties;

(c) The number of times the respondent has been assessed a civil money penalty under this subpart during the current two-year election cycle and the prior two-year election cycle;

(d) The amount of the proposed civil money penalty based on the schedules of penalties set forth in 11 CFR 111.43; and

(e) An explanation of the respondent's right to challenge both the reason to believe finding and the proposed civil money penalty.

**§ 111.33 What are the respondent's choices upon receiving the reason to believe finding and the proposed civil money penalty?**

The respondent must either send payment in the amount of the proposed civil money penalty pursuant to 11 CFR 111.34 or submit a written response pursuant to 11 CFR 111.35.

**§ 111.34 If the respondent decides to pay the civil money penalty and not to challenge the reason to believe finding, what should the respondent do?**

(a) The respondent shall transmit payment in the amount of the civil money penalty to the Commission within forty (40) days of the Commission's reason to believe finding.

(b) Upon receipt of the respondent's payment, the Commission shall send the respondent a final determination that

the respondent has violated the statute or regulations and the amount of the civil money penalty and an acknowledgment of the respondent's payment.

**§ 111.35 If the respondent decides to challenge the alleged violation or proposed civil money penalty, what should the respondent do?**

(a) Within twenty (20) days of the Commission's reason to believe finding, the respondent shall submit to the Commission a written notice of intent to challenge the reason to believe finding and/or the proposed civil money penalty.

(b) Within forty (40) days of the Commission's reason to believe finding, the respondent shall submit to the Commission a written response.

(c) The written response shall contain the following:

(1) Reason(s) why the respondent is challenging the reason to believe finding and/or civil money penalty which may consist of:

(i) The existence of factual errors; and/or

(ii) The improper calculation of the civil money penalty; and/or

(iii) The existence of extraordinary circumstances that were beyond the control of the respondent and that were for a duration of at least 48 hours and that prevented the respondent from filing the report in a timely manner;

(2) The factual basis supporting the reason(s); and

(3) Supporting documentation.

(4) Examples of circumstances that will not be considered extraordinary include, but are not limited to, the following:

(i) Negligence;

(ii) Problems with vendors or contractors;

(iii) Illness of staff;

(iv) Computer failures; and

(v) Other similar circumstances.

**§ 111.36 Who will review the respondent's written response?**

(a) The reviewing officer shall review the respondent's written response. The reviewing officer shall be a person who has not been involved in the reason to believe finding.

(b) The reviewing officer shall review the reason to believe finding with supporting documentation and the respondent's written response with supporting documentation. The reviewing officer may request supplemental information from the respondent and/or the Commission staff. The respondent shall submit the supplemental information to the reviewing officer within a time specified by the reviewing officer.

(c) Upon completion of the review, the reviewing officer shall forward a written recommendation to the Commission along with all documents required under this section and 11 CFR 111.32 and 111.35.

**§ 111.37 What will the Commission do once it receives the respondent's written response and the reviewing officer's recommendation?**

(a) If the Commission, after having found reason to believe and after reviewing the respondent's written response and the reviewing officer's recommendation, determines by an affirmative vote of at least four (4) of its members, that the respondent has violated 2 U.S.C. 434(a) and the amount of the civil money penalty, the Commission shall authorize the reviewing officer to notify the respondent by letter of its final determination.

(b) If the Commission, after reviewing the reason to believe finding, the respondent's written response, and the reviewing officer's written recommendation, determines by an affirmative vote of at least four (4) of its members, that no violation has occurred, or otherwise terminates its proceedings, the Commission shall authorize the reviewing officer to notify the respondent by letter of its final determination.

(c) The Commission will modify the proposed civil money penalty only if the respondent is able to demonstrate that the amount of the proposed civil money penalty was calculated on an incorrect basis.

(d) The Commission may determine, by an affirmative vote of at least four of its members, that a violation of 2 U.S.C. 434(a) has occurred but waive the penalty because the respondent has convincingly demonstrated the existence of extraordinary circumstances that were beyond the respondent's control and that were for a duration of at least 48 hours. The Commission shall authorize the reviewing officer to notify the respondent by letter of its final determination.

**§ 111.38 Can the respondent appeal the Commission's final determination?**

Yes; within thirty (30) days of receipt of the Commission's final determination under 11 CFR 111.37, the respondent may submit a written petition to the district court of the United States for the district in which the respondent resides, or transacts business, requesting that the final determination be modified or set aside. The respondent's failure to raise an argument in a timely fashion during

the administrative process shall be deemed a waiver of the respondent's right to present such argument in a petition to the district court under 2 U.S.C. 437g.

**§ 111.39. When must the respondent transmit payment of the civil money penalty?**

(a) If the respondent does not submit a written petition to the district court of the United States, the respondent must remit payment of the civil money penalty within thirty (30) days of receipt of the Commission's final determination under 11 CFR 111.37.

(b) If the respondent submits a written petition to the district court of the United States and, upon the final disposition of the civil action, is required to pay a civil money penalty, the respondent shall remit payment of the civil money penalty to the Commission within thirty (30) days of the final disposition of the civil action. The final disposition may consist of a judicial decision which is not reviewed by a higher court.

(c) Failure to pay the civil money penalty may result in the commencement of a collection action under 31 U.S.C. 3701 *et seq.* (1996), or

a civil suit pursuant to 2 U.S.C. 437g(6)(A), or any other legal action deemed necessary by the Commission.

**§ 111.40. What happens if the respondent does not pay civil money penalty pursuant to 11 CFR 111.34 and does not submit a written response to the reason to believe finding pursuant to 11 CFR 111.35?**

(a) If the Commission, after the respondent has failed to pay the civil money penalty and has failed to submit a written response, determines by an affirmative vote of at least four (4) of its members that the respondent has violated 2 U.S.C. 434(a) and determines the amount of the civil money penalty, the Commission shall authorize the reviewing officer to notify the respondent by letter of its final determination.

(b) The respondent shall transmit payment of the civil money penalty to the Commission within thirty (30) days of receipt of the Commission's final determination.

(c) Failure to pay the civil money penalty may result in the commencement of a collection action under 31 U.S.C. 3701 *et seq.* (1996), or a civil suit pursuant to 2 U.S.C. 437g(6)(A), or any other legal action deemed necessary by the Commission.

**§ 111.41. To whom should the civil money penalty payment be made payable?**

Payment of civil money penalties shall be made in the form of a check or money order made payable to the Federal Election Commission.

**§ 111.42. Will the enforcement file be made available to the public?**

(a) Yes; the Commission shall make the enforcement file available to the public.

(b) If neither the Commission nor the respondent commences a civil action, the Commission shall make the enforcement file available to the public pursuant to 11 CFR 4.4(a)(3).

(c) If a civil action is commenced, the Commission shall make the enforcement file available pursuant to 11 CFR 111.20(c).

**§ 111.43. What are the schedules of penalties?**

(a) The civil money penalty for all reports that are filed late or not filed, except election sensitive reports and pre-election reports under 11 CFR 104.5, shall be calculated in accordance with the following schedule of penalties:

If the level of activity in the report was	And the report was filed late, the fine is	Or the report was not filed, the fine is
\$1–24,999.99 .....	[\$100+(\$25×Number of days late)]×[1+(.25×Number of previous violations)].	\$1600×[1+(.25×Number of previous violations)]
\$25,000–49,999.99 .....	[\$200+(\$50×Number of days late)]×[1+(.25×Number of previous violations)].	\$3200×[1+(.25×Number of previous violations)]
\$50,000–74,999.99 .....	[\$300+(\$75×Number of days late)]×[1+(.25×Number of previous violations)].	\$4800×[1+(.25×Number of previous violations)]
\$75,000–99,999.99 .....	[\$400+(\$100×Number of days late)]×[1+(.25×Number of previous violations)].	\$6400×[1+(.25×Number of previous violations)]
\$100,000–149,999.99 .....	[\$600+(\$125×Number of days late)]×[1+(.25×Number of previous violations)].	\$8100×[1+(.25×Number of previous violations)]
\$150,000–199,999.99 .....	[\$800+(\$150×Number of days late)]×[1+(.25×Number of previous violations)].	\$9800×[1+(.25×Number of previous violations)]
\$200,000–249,999.99 .....	[\$1,000+(\$175×Number of days late)]×[1+(.25×Number of previous violations)].	\$11,500×[1+(.25×Number of previous violations)]
\$250,000–349,999.99 .....	[\$1500+(\$200×Number of days late)]×[1+(.25×Number of previous violations)].	\$13,500×[1+(.25×Number of previous violations)]
\$350,000–449,999.99 .....	[\$2000+(\$200×Number of days late)]×[1+(.25×Number of previous violations)].	\$14,000×[1+(.25×Number of previous violations)]
\$450,000–549,999.99 .....	[\$2500+(\$200×Number of days late)]×[1+(.25×Number of previous violations)].	\$14,500×[1+(.25×Number of previous violations)]
\$550,000–649,999.99 .....	[\$3000+(\$200×Number of days late)]×[1+(.25×Number of previous violations)].	\$15,000×[1+(.25×Number of previous violations)]
\$650,000–749,999.99 .....	[\$3500+(\$200×Number of days late)]×[1+(.25×Number of previous violations)].	\$15,500×[1+(.25×Number of previous violations)]
\$750,000–849,999.99 .....	[\$4000+(\$200×Number of days late)]×[1+(.25×Number of previous violations)].	\$16,000×[1+(.25×Number of previous violations)]
\$850,000–949,999.99 .....	[\$4500+(\$200×Number of days late)]×[1+(.25×Number of previous violations)].	\$16,500×[1+(.25×Number of previous violations)]
\$950,000 or over .....	[\$5000+(\$200×Number of days late)]×[1+(.25×Number of previous violations)].	\$17,000×[1+(.25×Number of previous violations)]

(b) The civil money penalty for election sensitive reports that are filed late or not filed shall be calculated in accordance with the following schedule of penalties:

If the level of activity in the report was	And the report was filed late, the fine is	Or the report was not filed, the fine is
\$1–24,999.99 .....	[\$150 + (\$25 × Number of days late)] × [1 + (.25 × Number of previous violations)].	\$1,650 × [1 + (.25 × Number of previous violations)]
\$25,000–49,999.99 .....	[\$300 + (\$50 × Number of days late)] × [1 + (.25 × Number of previous violations)].	\$3,300 × [1 + (.25 × Number of previous violations)]
\$50,000–74,999.99 .....	[\$450 + (\$75 × Number of days late)] × [1 + (.25 × Number of previous violations)].	\$4,950 × [1 + (.25 × Number of previous violations)]
\$75,000–99,999.99 .....	[\$600 + (\$100 × Number of days late)] × [1 + (.25 × Number of previous violations)].	\$6,600 × [1 + (.25 × Number of previous violations)]
\$100,000–149,999.99 .....	[\$900 + (\$125 × Number of days late)] × [1 + (.25 × Number of previous violations)].	\$8,400 × [1 + (.25 × Number of previous violations)]
\$150,000–199,999.99 .....	[\$1,200 + (\$150 × Number of days late)] × [1 + (.25 × Number of previous violations)].	\$10,200 × [1 + (.25 × Number of previous violations)]
\$200,000–249,999.99 .....	[\$1,500 + (\$175 × Number of days late)] × [1 + (.25 × Number of previous violations)].	\$12,000 × [1 + (.25 × Number of previous violations)]
\$250,000–349,999.99 .....	[\$2,250 + (\$200 × Number of days late)] × [1 + (.25 × Number of previous violations)].	\$14,250 × [1 + (.25 × Number of previous violations)]
\$350,000–449,999.99 .....	[\$3,000 + (\$200 × Number of days late)] × [1 + (.25 × Number of previous violations)].	\$15,000 × [1 + (.25 × Number of previous violations)]
\$450,000–549,999.99 .....	[\$3,750 + (\$200 × Number of days late)] × [1 + (.25 × Number of previous violations)].	\$15,750 × [1 + (.25 × Number of previous violations)]
\$550,000–649,999.99 .....	[\$4,500 + (\$200 × Number of days late)] × [1 + (.25 × Number of previous violations)].	\$16,500 × [1 + (.25 × Number of previous violations)]
\$650,000–749,999.99 .....	[\$5,250 + (\$200 × Number of days late)] × [1 + (.25 × Number of previous violations)].	\$17,250 × [1 + (.25 × Number of previous violations)]
\$750,000–849,999.99 .....	[\$6,000 + (\$200 × Number of days late)] × [1 + (.25 × Number of previous violations)].	\$18,000 × [1 + (.25 × Number of previous violations)]
\$850,000–949,999.99 .....	[\$6,250 + (\$200 × Number of days late)] × [1 + (.25 × Number of previous violations)].	\$18,750 × [1 + (.25 × Number of previous violations)]
\$950,000 or over .....	[\$7,500 + (\$200 × Number of days late)] × [1 + (.25 × Number of previous violations)].	\$19,500 × [1 + (.25 × Number of previous violations)]

(c) If the respondent fails to file a required report and the Commission cannot calculate the level of activity under paragraph (e) of this section, then the civil money penalty shall be \$5,500.

(d) *Definitions.* For this section only, the following definitions will apply:

*Election Sensitive Reports* means third quarter reports due on October 15th before the general election (unless the candidate does not participate in that general election), monthly reports due October 20th before the general election (unless the candidate does not participate in that general election), and pre-election reports under 11 CFR 104.5.

*Estimated level of activity* means total receipts and disbursements reported in the current election cycle divided by the number of reports filed to date covering the activity in the current two-year election cycle. If the respondent has not filed a report covering activity in the current two-year election cycle, estimated level of activity means total receipts and disbursements reported in the prior two-year election cycle divided by the number of reports filed covering the activity in the prior two-year election cycle.

*Level of activity* means the total amount of receipts and disbursements for the period covered by the late report. If the report is not filed, the level of activity is the estimated level of activity.

*Number of previous violations* mean all prior final civil money penalties assessed under this subpart during the current two-year election cycle and the prior two-year election cycle.

(e) For purposes of the schedules of penalties in paragraphs (a) and (b) of this section,

(1) Reports that are not election sensitive reports are considered to be filed late if they are filed after their due dates but within thirty (30) days of their due dates. These reports are considered to be not filed if they are filed after thirty (30) days of their due dates or not filed at all.

(2) Election sensitive reports are considered to be filed late if they are filed after their due dates but prior to four (4) days before the primary election for pre-primary reports, or prior to four (4) days before the general election for all other election sensitive reports. These reports are considered to be not filed if they are not filed prior to four (4) days before the primary election for pre-primary reports, or prior to four (4) days before the general election for all other election sensitive reports.

**§ 111.44. What is the schedule of penalties for 48-hour notice?**

(a) If the respondent fails to file timely a notice regarding contribution(s) received after the 20th day but more than 48 hour hours before the election as required under 2 U.S.C. 434(a)(6), the

civil money penalty will be calculated as follows:

(1) Civil money penalty = \$100 + (.15 × amount of the contribution(s) not timely reported)

(2) The civil money penalty calculated in paragraph (a)(1) of this section shall be increased by twenty-five percent (25%) for each prior violation.

(b) For purposes of this section, prior violation means a civil money penalty that has been assessed against the respondent under this subpart in the current two-year election cycle or the prior two-year election cycle.

**§ 111.45. Will the Debt Collection Improvement Act of 1996 be used to collect unpaid civil money penalties?**

Yes; The debt collection regulations issued by the Department of Treasury at 31 CFR part 285 and the Federal Claims Collection Standards issued jointly by the Department of Justice and the Government Accounting Office at 4 CFR parts 101 through 104 also apply.

Dated: March 23, 2000.

**Darryl R. Wold,**

*Chairman, Federal Election Committee.*

[FR Doc. 00-7618 Filed 3-28-00; 8:45 am]

**BILLING CODE 6715-01-P**