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May 28, 2002

Via Facsimile and First Class Mail

Rosemary C. Smith, Esq.
Assistant General Counsel
Federal Election Commission
999 E Street, N.W.
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Re: Notice of Proposed Rulemaking: Administrative Fines

Dear Ms. Smith:

This comment is submitted in response to the Commission's above-referenced Notice of Proposed Rulemaking, 67 Fed. Reg. 20461 (April 25, 2002), proposing amendments to the Commission's regulations regarding its recently enacted administrative fine program for late filings.

In general, I believe the Commission is taking the right step to ensure that committee's with minimal activity be granted more lenient treatment under the propose. schedule. As the Commission's notice notes, these committees are often defunct, moribund or winding down, and are usually staffed by volunteer treasurers who are not able to deal with the complex federal election laws and regulations.

Although, prior to the administrative fine program, the Commission would likely not have pursued many late filings with low levels of activity, the Commission's progr[illegible] has significantly reduced late filings in general and is an important tool in ensuring compliance with the reporting deadlines.

Specifically, I would like to implore the Commission to amend 11 C.F.R. § 111.43 to limit its scope solely to federal activity. The current regulation unfairly punishes state and local party committees, a large proportion of whose activities, are generally in connection with state and local elections. Indeed, in a non-presidential cycle some local party committees currently pay their administrative and generic get-out-the-vote expenses on a ballot composition ratio which may be as low as 11% federal. Under the current regulation, if such a committee files an untimely report, the Commission's administrative fine calculation not only counts the federal portion of such activity, but also the non-federal portion of the activity, as well as the transfer of the non-federal portion of the activity. This result occurs because the Commission's regulations, at 11 C.F.R. §§ 106.5 & 106.6, require party committees and other committees who allocate their expenses to pay such expenses from a federal account and then reimburse the federal account for the non-federal portion of such expenditures.

Thus, for example, if a local party committee, that has an 11% allocation ratio makes a $1,000 disbursement for a generic get-out-the-vote activity, only $110 of that activity is considered federal activity. However, since federal regulations require that th activity be paid for solely from the federal account, and then ultimately be reimbursed b the non-federal account, this same expenditure ultimately counts as $1,890 of activity fo purposes of calculating the administrative fine level for such a disbursement (The $1,00 disbursement + $890 transfer of the non-federal portion). This formulation results in a 1,618% inflation in the committee's level of receipts and disbursements for purposes of making calculations under section 111.43.

In examining the original record in connection with the promulgation of section 111.43, I have been unable to locate any discussion by the Commission or commenters that addresses the distinction between committees that allocate expenses and those who do not. Therefore, it is likely that the Commission did not recognize the unfair disparit that its own allocation regulations create for purposes of calculations made under secti 111.43.

Thus, the allocation process unfairly penalizes committees who allocate expenses when compared to committees who do not make such allocations by counting the entire portion of an allocable expense, as well as the transfer of the non-federal portion to reimburse the federal account for purposes of calculating the level of activity under section 111.43. Ultimately, the Commission must either create a separate, more lenient schedule for committees that allocate expenses, or exclude non-federal activity and allocation transfers from its method of calculating the level of financial activity under section 111.43 of its regulations.

Respectfully submitted,

Neil P. Reiff

May 28, 2002

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Dear Ms. Smith:

FEC Watch, a project of the Center for Responsive Politics, submits these comments in response to the Commission's Notice of Proposed Rulemaking (NPRM) on Administrative Fines. 67 Fed. Reg. 20461 (April 25, 2002).

For the reasons set forth below, FEC Watch urges the Commission to delay implementation of final rules until the proposed rules can be more fully considered and an adequate administrative record can be established, or in the alternative, to reject the proposed rules.

Procedural comments

1. Timing of the NPRM

FEC Watch urges the Commission to delay any reductions in the administrative fines schedules until a time when the reductions can be more fully considered.

The Commission published the NPRM on April 25, 2002 and set the comment deadline for May 28, 2002. This comment deadline is one day before comments are due in the rulemaking to implement the soft money provisions of Bipartisan Campaign Reform Act of 2002, the most significant campaign finance law revision since 1976. This schedule has forced interested parties to divide their efforts between two very important rulemakings, and will negatively impact the quality and quantity of comments on this rulemaking.

The Commission's decision to proceed with a reduction in the administrative

fines schedules at this time, and over the staff's objections, suggests that the Commission believes that the reductions are of little concern to the public. However, this rulemaking should not be seen solely as an effort to reduce the impact of the fine schedule on late and nonfiling committees. It should also be seen as reducing the incentive for committees to satisfy their obligation to disclose their campaign finance activity in a timely manner. The likely result is that less campaign finance information will be placed on the public record at a time when it might be meaningful to potential voters. This is ironic, since both supporters and opponents of campaign finance regulations generally view complete and timely disclosure as a worthwhile goal. No rules that are likely to bring about this result should be lightly considered.

For these reasons, we strongly urge the Commission to defer this rulemaking until a time when all interested parties can give it the attention it deserves.

2. Inadequate Administrative Record

We also believe a delay is needed so that the Commission can establish an administrative record upon which a reasoned determination can be made. In the NPRM, the Commission states that

> [b]ased on its experience with the administrative fines program to date, the Commission is concerned that fines for committees with lower levels of activity, generally below $50,000 in a reporting program, may be too high. . . The fines may create a hardship for some committees and their treasurers, since many losing candidates lack fundraising ability and their treasurers, who are sometimes volunteers, are legally liable for the fines. Given the current level of civil money penalties, it may be possible to lower the fines at the lower levels of activity without significantly reducing the incentive to file reports.

Id. at 20462. Later, the NPRM states that

> [m]ore generally, the Commission is concerned that the overall civil money penalty schedules may result in fines that are substantial compared with civil penalties for other types of FECA violations approved in enforcement conciliation agreements.

Id.

The desire to ensure that the fine schedules are properly adjusted is a laudable goal. However, the Commission has credited the Administrative Fines program with reducing the percentage of committees filing late reports from 24% to 11% between 1998 and 2000. Commission seeks comments on proposal to reduce administrative fines, FEC Press Release, April 25, 2002. These are significant gains in the disclosure process. The Commission should not take steps that might undermine these gains without providing substantial justification.

As the Commission is no doubt aware, FEC Watch has submitted a Freedom of Information Act (FOIA) request seeking information showing whether the FEC has established a record upon which reductions in the fine schedule could be based. We urge the Commission to delay final action on these rules until it has responded to this FOIA request. We also urge the Commission to provide the public with an additional opportunity to comment on the NPRM in light of any materials provided.

As stated above, the purpose of the fine schedule is to promote complete and timely disclosure of campaign finance data. The Commission should not reduce fines unless it can be assured that the reduced fines will serve as an adequate incentive to committees to file timely reports.

Substantive comments

FEC watch has several comments on the substantive issues raised in the NPRM.

1. Impact of administrative fines relative to other civil penalties

In the NPRM, the Commission states its concern that the fines under the current schedule may be substantial when compared with civil penalties for other types of FECA violations approved in conciliation agreements.

However, the NPRM offers no explanation as to why this proves that the administrative fines are too high. This could just as easily be interpreted as an indication that the civil penalties assessed in conciliation agreements are too low.

The standard that should be applied in adjusting the fine schedule is whether the fines are higher than they need to be to serve as an incentive to file timely reports. Even at the now reduced 11%, the percentage of committees that file their reports late is still too high. Thus, a further reduction in the fine schedule is not warranted at this time.

2. Selective versus across-the-board reductions

Initially, NPRM expresses the view that the fines at lower end may be too high. Later it seeks comments on across-the-board reductions. If Commission decides to reduce the fines, we urge the Commission to limit this reduction to the fines at the lower end of the schedule, and leave the fines at the higher end of the schedule as they are now. Selective reductions targeted at the portion of the schedule which has produced the most undesirable results would be preferable to an across the board reduction, and would also be easier to justify. Furthermore, by leaving the fines at the higher end of the schedule as they are now, the Commission increases the chances that the downward trend in late filings will continue.

3. Impact of the recidivist factor

The NPRM states that the Commission's concern about excessive fines is exacerbated by the 25% recidivist factor that is now taking effect for repeat violations. However, the NPRM does not explain why this should be seen as an inappropriate result.

The purpose of the recidivist factor is to serve as an incentive for committees that have already filed late reports to get their houses in order and file subsequent reports in a timely fashion. By design, the factor should be "painful" for committees to which it applies. If the factor were not painful, it would not have the desired effect.

If the Commission has concluded that the factor is too harsh, perhaps it should consider reducing the multiplier. However, some form of recidivist factor is needed, and it should be severe enough to serve as a significant disincentive to repeated late filing or nonfiling.

4. Changes in the method of calculating levels of activity

The NPRM proposes to exclude nonfederal receipts and disbursements from the levels of activity used to calculate the amount of a late filing or nonfiling violation. Under this proposal, amounts that are not federal receipts or disbursements, such as amounts transferred to a federal account in payment of the nonfederal portion of an allocable expense, would be subtracted from the level of activity on a late filed or nonfiled report before the amount of the violation is calculated. The NPRM asserts that including these amounts in the calculation unfairly impacts certain types of committees.

However, in the Explanation and Justification (E & J) for the administrative fines rules, issued in May of 2000, the Commission explicitly rejected this exact argument. 65 Fed. Reg. 31787 (May 19, 2000). At that time, the Commission noted that section 434 of the FECA requires committees to report all receipts and disbursements, and concluded "that the 'amount of the violation involved' is equal to receipts and disbursements." *Id.* at 31792.

The Commission's April 2002 NPRM contains no explanation of why it has now decided that its previous conclusion is incorrect. The Commission's reporting requirements include the obligation to report nonfederal disbursements when those disbursements are transferred to a federal account to pay the nonfederal portion of an allocable expense. Thus, this information is part of a committee's reporting obligation. Excluding these amounts would effectively treat the disclosure of some types of receipts and disbursements as less important than other types of receipts and disbursements. The Commission specifically rejected this approach in the E & J.

Conclusion

For these reasons, FEC Watch urges the Commission to delay implementation of final rules until the proposed rules can be more fully considered and an adequate administrative record can be established, or in the alternative, to reject the proposed rules.

Sincerely,

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Executive Director

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Paul Sanford
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