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FEDERAL ELECTION COMMISSION

11 CFR Part 100

[Notice 2005–29]

Electioneering Communications

AGENCY: Federal Election Commission.

ACTION: Final rules.

SUMMARY: The Federal Election Commission is amending its rules defining ''electioneering communication'' under the Federal Election Campaign Act of 1971, as amended (''FECA'' or the ''Act''). The changes modify the definition of ''publicly distributed'' and the exemptions to the definition of ''electioneering communication'' consistent with the ruling of the U.S. District Court for the District of Columbia in *Shays* v. *FEC,* portions of which were affirmed by the U.S. Court of Appeals for the District of Columbia Circuit. Specifically, the changes eliminate the exemption from the electioneering communication provisions for certain tax-exempt organizations and revise the definition of ''publicly distributed,'' a term used in the regulatory definition of ''electioneering communication.'' The Commission is not adopting any other regulatory exemptions considered in this rulemaking. The Commission is also deferring further consideration of a proposed exemption for advertisements promoting films, books and plays until after completing the rulemakings that respond to *Shays* v. *FEC.* Further information is provided in the supplementary information that follows.

DATES: The rules at 11 CFR 100.29 will become effective on January 20, 2006.

FOR FURTHER INFORMATION CONTACT: Ms. Mai T. Dinh, Assistant General Counsel, Mr. J. Duane Pugh Jr., Senior Attorney, Ms. Margaret G. Perl, Attorney, or Mr. Daniel K. Abramson, Law Clerk, 999 E Street, NW., Washington, DC 20463, (202) 694–1650 or (800) 424–9530.

SUPPLEMENTARY INFORMATION: The Bipartisan Campaign Reform Act of 2002 (''BCRA''), Public Law 107–155, 116 Stat. 81 (2002), amended FECA by adding a new category of communications, ''electioneering communications,'' to those already regulated by the Act. *See* 2 U.S.C. 434(f)(3). Electioneering communications are television and radio communications that refer to a clearly identified candidate for Federal office, are publicly distributed within 60 days before a general election or 30 days before a primary election, and are targeted to the relevant electorate. *See* 2 U.S.C. 434(f)(3)(A)(i); 11 CFR 100.29(a)(1) through (3). Electioneering communications carry certain reporting obligations and funding restrictions. *See* 2 U.S.C. 434(f)(1) and (2), and 441b(a) and (b)(2).

BCRA exempts certain communications from the definition of ''electioneering communication,'' 2 U.S.C. 434(f)(3)(B)(i) to (iii), and specifically authorizes the Commission to promulgate regulations exempting other communications as long as the exempted communications do not promote, support, attack or oppose (''PASO'') a candidate. 2 U.S.C. 434(f)(3)(B)(iv), *citing* 2 U.S.C. 431(20)(A)(iii).

On October 23, 2002, the Commission promulgated regulations to implement BCRA's electioneering communications provisions. *Final Rules and Explanation and Justification on Electioneering Communications,* 67 FR 65190 (Oct. 23, 2002) (''*EC E&J*''). In those regulations, the Commission defined electioneering communications as limited to communications that are publicly distributed ''for a fee.'' Former 11 CFR 100.29(b)(3)(i). The Commission also exempted from the electioneering communication provisions any communication that is paid for by any organization operating under section 501(c)(3) of the Internal Revenue Code of 1986 (''IRC''). Former 11 CFR 100.29(c)(6).

These two rules were invalidated in *Shays* v. *FEC,* 337 F. Supp. 2d 28 (D.D.C. 2004) (''*Shays District*''), *aff'd,* 414 F.3d 76 (D.C. Cir. 2005), *reh'g en banc denied,* No. 04–5352 (DC Cir. Oct. 21, 2005) (''*Shays Appeal*''). In *Shays District,* the court held that the regulation limiting electioneering communications to communications publicly distributed for a fee did not satisfy the requirements set out in *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984) (''*Chevron*''). The court further held that the explanation supporting the section 501(c)(3) exemption did not satisfy the Administrative Procedure Act, 5 U.S.C. 706(2) (''APA''). *Shays District* at 124–29. The District Court remanded the case for further action consistent with its decision. The Commission appealed the District Court's decision regarding the limitation to communications publicly distributed ''for a fee,'' but did not appeal the decision regarding the exemption for section 501(c)(3) organizations. The U.S. Court of Appeals for the District of Columbia Circuit affirmed the District Court, holding again that the ''for a fee'' regulation did not satisfy *Chevron. Shays Appeal* at 108.

In response to the District Court's decision, the Commission published a Notice of Proposed Rulemaking on August 24, 2005. *See Notice of Proposed Rulemaking on Electioneering Communications,* 70 FR 49508 (Aug. 24, 2005) (''*NPRM*''). The NPRM raised a range of options for a number of regulatory exemptions to the definition of ''electioneering communication.'' The comment period closed on September 30, 2005. The Commission received 47 comments from 113 commenters with regard to the various issues raised in the NPRM. The Commission held a public hearing on October 20, 2005, at which seven witnesses testified. The comments and a transcript of the public hearing are available at *http://www.fec.gov/law/law_rulemakings.shtml* under ''Electioneering Communications 2005.'' For purposes of this document, the terms ''comment'' and ''commenter'' apply to both written comments and oral testimony at the public hearing.

Under the APA, 5 U.S.C. 553(d), and the Congressional Review of Agency Rulemaking Act, 5 U.S.C. 801(a)(1), agencies must submit final rules to the Speaker of the House of Representatives and the President of the Senate and publish them in the **Federal Register** at least 30 calendar days before they take effect. The final rules that follow were transmitted to Congress on December 15, 2005.

Explanation and Justification

Former 11 CFR 100.29(c)(6)—Exemption for Section 501(c)(3) Organizations

BCRA provides three exemptions from the ''electioneering communication'' definition. 2 U.S.C. 434(f)(3)(B)(i) through (iii). In addition, BCRA permits, but does not require, the Commission to promulgate regulations exempting other communications ''to ensure the appropriate implementation'' of the electioneering communication provisions. 2 U.S.C. 434(f)(3)(B)(iv). BCRA limits this exemption authority to communications that do not PASO any clearly identified candidate for Federal office. *Id.*

Pursuant to this authority, the Commission exempted from the ''electioneering communication'' definition any communication that is paid for by any organization operating under section 501(c)(3) of the IRC. *See* 26 U.S.C. 501(c)(3); former 11 CFR 100.29(c)(6). The Commission explained that it believed ''the purpose of BCRA is not served by discouraging such charitable organizations from participating in what the public considers highly desirable and beneficial activity, simply to foreclose a theoretical threat from organizations that has not been manifested, and which such organizations, by their very nature, do not do.'' *EC E&J,* 67 FR at 65200. Under the IRC, organizations described in IRC section 501(c)(3) may not ''participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.'' *See* 26 U.S.C. 501(c)(3).

In considering a challenge to the exemption for section 501(c)(3) organizations, the District Court held that the Explanation and Justification for 11 CFR 100.29(c)(6) did not provide a sufficient analysis under the APA. *See Shays District* at 128. The District Court remanded this regulation to the Commission for further action consistent with its order. *Id.* at 130. Instead of appealing this aspect of the District Court decision, the Commission chose to initiate this rulemaking to determine whether the Commission should retain the exemption for section 501(c)(3) organizations.

In these Final Rules, the Commission is eliminating the exemption for section 501(c)(3) organizations from the definition of ''electioneering communications'' by removing paragraph (c)(6) from 11 CFR 100.29. In BCRA, Congress defined ''electioneering communication'' in terms that are easily understood and objectively determinable. 2 U.S.C. 434(f)(3). The U.S. Supreme Court upheld all of BCRA's electioneering communication provisions, and rejected a challenge based on unconstitutional overbreadth. *See McConnell* v. *FEC,* 540 U.S. 93, 189–211 (2003).

Many commenters addressed the overlap between the IRC section 501(c)(3) prohibition on political activity and BCRA's requirement that any exemption for section 501(c)(3) organizations not permit PASO communications. There was no consensus among the commenters on this issue. Some supported retaining the exemption and argued that as a matter of law this prohibition in the IRC prevents section 501(c)(3) organizations from engaging in communications that PASO Federal candidates. Some urged the Commission to distinguish between communications that PASO individuals in their capacities as candidates, and communications that PASO individuals in their capacities as legislators or public officials. The commenters asserted that the IRS recognizes this distinction.

Other commenters urged the Commission to eliminate the exemption for section 501(c)(3) organizations. Some argued that section 501(c)(3) organizations are permitted under the IRC to engage in PASO communications, and that some section 501(c)(3) organizations do, in fact, make PASO communications. Some asserted that the boundaries of the IRC prohibition on campaign participation or intervention are not clear.

In written comments submitted in this rulemaking, the IRS stated that the tax laws and regulations do not allow section 501(c)(3) organizations to promote or oppose candidates for Federal office, but do permit grass roots lobbying. The IRS explained that all the facts and circumstances must be considered to determine whether a communication by a section 501(c)(3) organization constitutes prohibited campaign intervention or permissible lobbying. The IRS comments referred to Revenue Ruling 2004–6, 2004–6 I.R.B. 328, that identifies a non-exhaustive list of 11 factors that ''tend to show'' whether a communication would be permissible for a section 501(c)(3) organization. The IRS comments also make clear that its use of the phrase ''promote or oppose candidates for Federal office'' was in the context of tax law, and not campaign finance law, and that its use of this phrase was not necessarily synonymous with PASO.

The comments submitted in this rulemaking suggest, but do not establish, that the IRC prohibition on political activity by section 501(c)(3) organizations and BCRA's requirement that no exemption permit PASO communications are not perfectly compatible. Rescinding the blanket exemption for section 501(c)(3) organizations does not represent a conclusion that the IRC prohibition on political activity and the BCRA prohibition on exempting PASO communications are incompatible as a matter of law or administrative practice, only that no such compatibility was demonstrated to a reasonable certainty in this rulemaking.

Some commenters argued that an exemption for section 501(c)(3) organizations is needed so that these organizations may produce or cooperate in the production of public service announcements (''PSAs''). The Commission understands that in many instances Federal candidates and officeholders participate in PSAs motivated by a desire to support the charitable or other public service endeavor discussed in the PSA. However, as the Court of Appeals noted, ''such broadcasts could 'associate a Federal candidate with a public-spirited endeavor in an effort to promote or support that candidate.' '' *See Shays Appeal* at 109.

The Commission's experience in the last election cycle suggests that section 501(c)(3) organizations do not engage in many electioneering communications, which calls into question the present need for the exemption. Many commenters agreed that section 501(c)(3) organizations rarely refer to Federal candidates in television and radio advertisements. In fact, none of the commenters provided an example of a broadcast, cable or satellite communication by a section 501(c)(3) organization that was publicly distributed after BCRA's effective date and that referred to a Federal candidate during the 30-day and 60-day electioneering communication time frames.

The comments persuade the Commission that the best course, at this time, is to rescind the exemption and apply the same general electioneering communication rules to section 501(c)(3) organizations as were upheld in *McConnell.* Removing the regulatory exemption for section 501(c)(3) organizations will mean that communications by these organizations will be subject to BCRA's electioneering communications provisions, including any other statutory or regulatory exemptions that may apply.

11 CFR 100.29(b)(3)(i)—''For a Fee''

BCRA defines ''electioneering communication,'' in part, as a communication ''*made* within (aa) 60 days before a general or runoff election * * * or (bb) 30 days before a primary or preference election.'' 2 U.S.C. 434(f)(3)(A)(i)(II) (emphasis added). In implementing this provision, the Commission's rules interpret ''made'' as ''publicly distributed'' so that an electioneering communication is, in part, a communication that is ''*publicly distributed* within 60 days before a general election * * * or within 30 days before a primary or preference election.'' 11 CFR 100.29(a)(2) (emphasis added); *see also EC E&J,* 67 FR at 65191.

The former rules further defined ''publicly distributed'' as ''aired, broadcast, cablecast or otherwise disseminated *for a fee* through the facilities of a television station, radio station, cable television system, or satellite system.'' Former 11 CFR 100.29(b)(3)(i) (emphasis added). The Commission included the ''for a fee'' requirement because ''[m]uch of the legislative history and virtually all of the studies cited in legislative history and presented to the Commission in the course of [the 2002] rulemaking focused on paid advertisements in considering what should be included within electioneering communications.'' *EC E&J,* 67 FR at 65192 (citations to studies omitted). Both the District Court and the Court of Appeals held that the ''for a fee'' provision created an additional element in the electioneering communication test, and accordingly did not satisfy *Chevron* step one.[1] *Shays District* at 128–129; *Shays Appeal* at 109.

To address the courts' concerns, the NPRM proposed eliminating the phrase ''for a fee'' from the definition of ''publicly distributed'' in 11 CFR 100.29(b)(3)(i). *See* 70 FR at 49509. Some commenters supported the removal of the ''for a fee'' language. One commenter supported exempting unpaid communications that do not PASO any Federal candidate because this approach would be preferable to eliminating the ''for a fee'' concept entirely.

The Commission is adopting the proposed rule removing the ''for a fee'' language from the definition of ''publicly distributed'' in 11 CFR 100.29(b)(3)(i). As noted above, the underlying electioneering communication provision in BCRA provides a bright-line test that was upheld against constitutional challenges in *McConnell* v. *FEC,* 540 U.S. 93 (2003). Revised section 100.29(b)(3)(i) will make all unpaid communications subject to BCRA's electioneering communications provisions and any statutory or regulatory exemptions that may apply.[2]

Some commenters noted that section 501(c)(3) organizations that create and distribute PSAs often retain little or no control over when their PSAs will be broadcast. As a result, these commenters are concerned that a broadcast, cable, satellite system or radio station operator (collectively ''broadcaster'') will publicly distribute a PSA that refers to a Federal candidate within the electioneering communications timeframes, without the knowledge of the section 501(c)(3) organization. Additionally, one commenter suggested that broadcasters may not always be able to review the content of PSAs to determine whether they constitute electioneering communications. The commenter was concerned that broadcasters would be held responsible in these circumstances for making electioneering communications.

The Web site of the Advertising Council, Inc. (''Ad Council''), presents information that is useful in analyzing section 501(c)(3) organizations' and broadcasters' liability.[3] The Web site lists expiration dates for thousands of PSAs and explains that ''[o]ur PSAs should never be run past their expiration dates.'' The site also ''encourage[s] all PSA Directors [of broadcasters] to check their inventories for expired materials.'' *See* ''PSA Expiration Dates'' at *http://psacentral.adcouncil.org* (visited Dec. 2, 2005).

The Commission encourages section 501(c)(3) organizations to provide broadcasters with either an expiration date or some indication that the PSA should not be run in the applicable 30- or 60-day electioneering communication periods, if the PSA features a Federal candidate. In these circumstances, the Commission would not hold the section 501(c)(3) organization liable for making an electioneering communication if the broadcaster publicly distributes the PSA contrary to those instructions. Additionally, if a section 501(c)(3) organization produces a PSA that features an individual who becomes a Federal candidate after the PSA has been provided to broadcasters, then the section 501(c)(3) organization will not be responsible for making an electioneering communication if the PSA is publicly distributed as an electioneering communication.

If an incorporated broadcaster provides free airtime for a PSA that satisfies the definition of ''electioneering communication,'' then the broadcaster may be responsible for making an electioneering communication. *See* 2 U.S.C. 434(f)(3) and 2 U.S.C. 441b(b)(2). The Ad Council's Web site indicates that many broadcasters have PSA directors who review PSAs and who are encouraged to check for expiration dates. It will not be burdensome for these PSA directors to review PSAs that refer to clearly identified Federal candidates and ensure that the PSAs are not publicly distributed as electioneering communications.

BCRA's definition of ''electioneering communication'' also includes an exemption for ''a communication appearing in a news story, commentary, or editorial distributed through the facilities of any broadcasting station, unless such facilities are owned or controlled by any political party, political committee, or candidate.'' 2 U.S.C. 434(f)(3)(B)(i) and 11 CFR 100.29(c)(2). The Commission has recognized that, under certain circumstances, a broadcaster's public distribution of a communication made by another person will qualify for the press exemption from the definitions of ''contribution'' and ''expenditure.'' *See* AOs 1982–44 and 1987–8 (applying 2 U.S.C. 431(9)(B)(i) and the corresponding regulations). Similarly, the Commission has recognized that the provision of free airtime to candidates or appearances on interview shows can fall within the press exemption at 2 U.S.C. 431(9)(B)(i). *See* AOs 1998–17 and 1996–16, respectively. An unpaid communication that is indistinguishable in all its material aspects from AOs 1998–17, 1996–16, 1987–8 or 1982–44 is also entitled to the press exemption from the ''electioneering communication'' definition.

[1] The first step of the *Chevron* analysis, which courts use to review an agency's regulations, asks whether Congress has directly spoken to the precise questions at issue. The second step considers whether the agency's resolution of an issue not addressed in the statute is based on a permissible construction of the statute. See Shays District at 51–52 (citing Chevron).

[2] To the extent that Advisory Opinions (''AO'') 2004–7 and 2004–14 relied on the ''for a fee'' provision in 11 CFR 100.29(b)(3)(i) to determine that a communication was not an electioneering communication, those portions of the AOs are superseded.

[3] The Advertising Council, Inc., is a private, non-profit organization that describes itself as ''the leading producer of PSAs since 1942.'' It uses donated funds and services to produce, distribute, and promote ''thousands'' of PSAs on behalf of non-profit organizations and government agencies. *See About the Ad Council, http://www.adcouncil.org/about* (visited Dec. 2, 2005).

11 CFR 100.29(c)(5)—Exemption for State and Local Candidates

In 2002, the Commission promulgated a limited exemption from the electioneering communication rules for State and local candidates, consistent with the authority Congress granted to the Commission to create exemptions. *See* 2 U.S.C. 434(f)(3)(B)(iv); 11 CFR 100.29(c)(5), *EC E&J,* 67 FR at 65199. In this NPRM, the Commission proposed to either clarify the exemption in 11 CFR 100.29(c)(5), or to repeal it as part of a proposal to rely on only the statutory exemptions. *See* 70 FR at 49513.

Of the commenters that addressed this exemption, one took no position. The others described the exemption as ''a proper exercise of the Commission's clause (iv) authority,'' and called its repeal permissible, but not necessary. Those commenters who addressed the proposed clarifications to the exemption did not object to the changes.

The Commission has decided that it will retain the exemption for State and local candidates. In the time since this exemption took effect, the Commission is not aware of any instances in which this exemption enabled State or local candidates to circumvent BCRA. Section 100.29(c)(5), however, is being amended to incorporate certain clarifications proposed in the NPRM. These changes remove a reference to a statutory provision and rearrange portions of the rule to improve readability without substantively changing the rule. *See* final 11 CFR 100.29(c)(5).

As an additional clarification to this exemption, the Commission is adding a cross reference to 11 CFR 300.71 for communications paid for by State or local candidates that PASO a Federal candidate. In 2002, the Commission determined that such communications are governed by Title I of BCRA, and not by the electioneering communication provisions in subtitle A of Title II of BCRA. *See EC E&J,*\ 67 FR at 65199. The new cross reference refers readers to the Title I regulation that addresses PASO communications by a State or local candidate.

Exemption for All Communications That Do Not PASO a Federal Candidate

The NPRM sought comment on exempting all communications that do not PASO a Federal candidate. *See* 70 FR at 49513. Unlike exemptions that focus on the maker of the communication, this proposal would have focused on the communication's content and treated all speakers equally.

Several comments addressed this proposal. These commenters opposed this proposal, either on the grounds that it would be inconsistent with Congressional intent or that it would not be useful without a definition of PASO.

The Commission is not adopting such an exemption. To do so, the Commission would replace entirely Congress's preferred bright-line definition of ''electioneering communication'' with the standard that Congress relegated to the back-up definition. Such an across-the-board replacement of Congress's standard with its second choice standard would impermissibly contravene Congressional intent.

Petition for Rulemaking To Exempt Advertisements Promoting Films, Books and Plays

The Commission received a Petition for Rulemaking requesting the creation of an exception to the electioneering communications regulations for the promotion and advertising of ''political documentary films, books, plays and similar means of expression.'' The Commission published a Notice of Availability seeking comment on the petition. *See Notice of Availability of Rulemaking Petition: Exception for the Promotion of Political Documentary Films from ''Electioneering Communications,''* 69 FR 52461 (Aug. 26, 2004). The comments received were summarized in the NPRM. At that time, the Commission proposed 11 CFR 100.29(c)(7) to exempt communications promoting films, books or plays, provided the communications are run within the ordinary course of business of the persons paying for such communications, and provided the communications do not PASO a Federal candidate. *See* 70 FR at 49514. The proposed exemption would have applied beyond ''political'' works to include advertising for any film, book or play. *See NPRM*, 70 FR at 49514.

Several commenters supported the proposed rule and no commenters objected to it. All of the commenters who addressed this proposal suggested revisions to the proposed rule to either expand or limit the scope of the exemption.

The Commission has decided to defer any final decision regarding the proposed exemption for advertisements promoting films, books and plays until after the Commission has completed all rulemakings required by the *Shays District* and *Shays Appeal* rulings. Accordingly, the Commission intends to address the issues presented in the Petition for Rulemaking in the near future.

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

The Commission certifies that the attached rules will not have a significant economic impact on a substantial number of small entities. The basis for this certification is that there are few ''small entities'' affected by these final rules, and these rules do not impose any significant costs. The Commission's revisions to the electioneering communications rules could affect individuals (not within the definition of ''small entities'') and some non-profit organizations. Based on the record before it, the Commission believes there are not a substantial number of ''small entities'' that are affected by these final rules.

First, removing the ''for a fee'' requirement from the definition of ''publicly distributed'' only affects the small number of communications that qualify as electioneering communications and that are publicly distributed without charge. There are very few small non-profit organizations that receive donated time for such advertising or participate in public access programming. Large national non-profit organizations that run public service announcements on donated time are not ''small organizations'' under section 601(4) of the Regulatory Flexibility Act. Similarly, to the extent these rules affect media organizations donating the time or running their own programming, they do not fall within the definition of ''small business.''

Second, removing the exemption for communications paid for by section 501(c)(3) organizations does not affect a substantial number of small organizations because the factual record developed by the Commission in these proceedings indicates that few, if any, section 501(c)(3) organizations make broadcast, cable or satellite communications that refer to Federal candidates during the electioneering communication time frames to the targeted audience. Additionally, many of these organizations may not be able to afford expensive radio and television advertising. To the extent they can afford such advertisements, they are already limited in what campaign activity they may engage in under the IRC.

Even if the number of small organizations affected by the rules were substantial, these small entities would not feel a significant economic impact from the final rules. There is no indication in the record before the Commission that the inability of any small non-profit organizations to

publicly distribute communications that refer to Federal candidates (such as public service announcements, public access programming, and lobbying ads) during the electioneering communications windows would decrease available funds, or hamper fundraising, or otherwise economically disadvantage these organizations. Therefore, the Commission certifies that the attached rules will not have a significant economic impact on a substantial number of small entities.

List of Subjects

11 CFR Part 100

Elections.

■ For reasons set out in the preamble, Subchapter A of Chapter 1 of title 11 of the *Code of Federal Regulations* is amended as follows:

PART 100—SCOPE AND DEFINITIONS (2 U.S.C. 431)

■ 1. The authority citation for 11 CFR part 100 continues to read as follows:

Authority: 2 U.S.C. 431, 434, and 438(a)(8).

■ 2. Section 100.29 is amended by:
■ (a) Revising paragraph (b)(3)(i);
■ (b) Revising the introductory text of paragraph (c);
■ (c) Adding the word ''or'' to follow the semi-colon in paragraph (c)(4);
■ (d) Revising paragraph (c)(5); and
■ (e) Removing paragraph (c)(6).

Revisions read as follows:

§ 100.29 Electioneering communication (2 U.S.C. 434(f)(3)).

* * * * *

(b) * * *

(3)(i) *Publicly distributed* means aired, broadcast, cablecast or otherwise disseminated through the facilities of a television station, radio station, cable television system, or satellite system.

* * * * *

(c) The following communications are exempt from the definition of electioneering *communication*. Any communication that:

* * * * *

(5) Is paid for by a candidate for State or local office in connection with an election to State or local office, provided that the communication does not promote, support, attack or oppose any Federal candidate. *See* 11 CFR 300.71 for communications paid for by a candidate for State or local office that promotes, supports, attacks or opposes a Federal candidate.

Dated: December 15, 2005.

Scott E. Thomas,

Chairman, Federal Election Commission.

[FR Doc. 05–24297 Filed 12–20–05; 8:45 am]

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FEDERAL ELECTION COMMISSION

11 CFR Part 111

[Notice 2005–30]

Extension of Administrative Fines Program

AGENCY: Federal Election Commission.

ACTION: Final rule and transmittal of rules to congress.

SUMMARY: Section 721 of the Transportation, Treasury, Housing and Urban Development, Judiciary, District of Columbia, and Independent Agencies Appropriations Act, 2006 (''2006 Appropriations Act'') amended the Treasury and General Government Appropriations Act, 2000, to extend the expiration date for the Administrative Fines Program (''AFP''). Under the AFP, the Federal Election Commission (''Commission'') may assess civil monetary penalties for violations of the reporting requirements of section 434(a) of the Federal Election Campaign Act (''Act'' or ''FECA''). Accordingly, the Commission is extending the applicability of its rules and penalty schedules in implementing the AFP. Further information is provided in the Supplementary Information that follows.

DATES: *Effective Date:* December 21, 2005.

FOR FURTHER INFORMATION CONTACT: Ms. Mai T. Dinh, Assistant General Counsel, or Ms. Margaret G. Perl, Attorney, 999 E Street, NW., Washington, DC 20463, (202) 694–1650 or (800) 424–9530.

SUPPLEMENTARY INFORMATION:

Explanation and Justification for 11 CFR 111.30

Section 640 of the Treasury and General Government Appropriations Act, 2000, Public Law 106–58, 113 Stat. 430, 476–77 (1999) (''2000 Appropriations Act''), amended 2 U.S.C. 437g(a)(4) to provide for a modified enforcement process for violations of certain reporting requirements. Under 2 U.S.C. 437g(a)(4)(C), the Commission may assess a civil monetary penalty for violations of the reporting requirements of 2 U.S.C. 434(a). These amendments to 2 U.S.C. 437g(a)(4) originally applied only to violations occurring between January 1, 2000 and December 31, 2001. See 2000 Appropriations Act, § 640(c). Congress, however, extended authorization for the AFP several times, with the most recent extension expiring on December 31, 2005. See Consolidated Appropriations Act, 2004, Public Law 108–199, § 639, 118 Stat. 3, 359 (2004).

Commission regulations governing the AFP can be found at 11 CFR part 111, subpart B. The Commission incorporated the legislative sunset date into its rule describing the applicability of the AFP in 11 CFR 111.30, and has consistently revised section 111.30 to extend the AFP sunset date in accordance with these statutory amendments. See, *e.g.*, *Final Rule on Extension of Administrative Fines Program*, 69 FR 6525 (Feb. 11, 2004) (changing sunset date in 11 CFR 111.30 to December 31, 2005).

Section 721 of the 2006 Appropriations Act amended the 2000 Appropriations Act by extending the sunset date to include most reports that cover activity between July 14, 2000 and December 31, 2008. *See* 2006 Appropriations Act, Public Law 109–115, 119 Stat. 2396 (Nov. 30, 2005). This final rule amends 11 CFR 111.30 to reflect the extended sunset date of December 31, 2008. The Commission is not making any other revisions to the AFP rules at this time.

The Commission is promulgating this final rule without notice or an opportunity for comment because it falls under the ''good cause'' exemption in the Administrative Procedure Act, 5 U.S.C. 553(b)(3)(B). This exemption allows agencies to dispense with notice and comment when ''impracticable, unnecessary, or contrary to the public interest.'' *Id.* The 2006 Appropriations Act was enacted only a month before the AFP's sunset date of December 31, 2005. A notice and comment period for this final rule is impracticable because it would result in a gap in the applicability of the AFP between when the current regulation expires on December 31, 2005 and the date when a new final rule could be effective after additional notice and comment. *See Administrative Procedure Act: Legislative History*, S. Doc. No. 248 200 (1946) (''‘Impracticable' means a situation in which the due and required execution of the agency functions would be unavoidably prevented by its undertaking public rule-making proceedings'').

In addition, this final rule merely extends the applicability of the AFP and does not change the substantive regulations themselves. Those regulations were already subject to notice and comment when they were proposed in March 2000, 65 FR 16534, and adopted in May 2000, 65 FR 31787, and again when substantive revisions to the AFP were proposed in April 2002, 67 FR 20461, and adopted in March 2003, 68 FR 12572. Thus, this final rule satisfies the ''good cause'' exemption, and it is appropriate and necessary for