



FEDERAL ELECTION COMMISSION
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March 18, 2009

MEMORANDUM

AGENDA ITEM
For Meeting of: 03-19-09
SUBMITTED LATE

TO: The Commission

THROUGH: Robert A. Hickey, Staff Director *[Signature]*
Arthur C. Forster, Chief Communications Officer *ACF*

FROM: J. Duane Pugh, Director *[Signature]*
Amy E. Pike, Deputy Director *AE*
Congressional, Legislative and Intergovernmental Affairs

SUBJECT: Draft Legislative Recommendations 2009

Attached for your approval are four draft Legislative Recommendations. All six Commissioners supported the inclusion of each of these proposals in the Commission's Legislative Recommendations for 2009. The recommendations are:

- Electronic Filing of Senate Reports
- Fraudulent Misrepresentation of Campaign Authority
- Conversion of Campaign Funds
- Senior Executive Service

Once the Commission has approved the draft Legislative Recommendations, we will prepare transmittal letters to the President and Congress for the Chairman's signature.

Attachment

**Legislative Recommendations of the
Federal Election Commission
2009**

Chairman Steven T. Walther
Vice Chairman Matthew S. Petersen
Commissioner Cynthia L. Bauerly
Commissioner Caroline C. Hunter
Commissioner Donald F. McGahn II
Commissioner Ellen L. Weintraub

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Adopted March __, 2009

Electronic Filing of Senate Reports

Sections: 2 U.S.C. §§ 432(g) and 434(a)(11)

Recommendation: Congress should require electronic filing for all Senate candidates and their authorized committees (and for those persons and political committees filing designations, statements, reports or notifications pertaining only to Senate elections) if they have, or have reason to expect to have, aggregate contributions or expenditures in excess of the threshold amount determined by the Commission.

Explanation: The Treasury and General Government Appropriations Act, 2000, Public Law 106-58, § 639, 113 Stat. 430, 476 (1999), required that the Commission make electronic filing mandatory for political committees and other persons required to file with the Commission who, in a calendar year, have, or have reason to expect to have, total contributions or total expenditures exceeding a threshold amount set by the Commission (which is currently \$50,000). However, because Senate candidates file with the Secretary of the Senate, the mandatory electronic filing provisions do not apply to Senate candidates and their committees. The Commission notes that legislation has been introduced in the 111th Congress to mandate electronic filing by Senate campaigns. See Senate Campaign Disclosure Parity Act, S. 482, 111th Cong. (2009).

Data from electronically filed reports is received, processed and disseminated more easily and efficiently, resulting in better use of resources. In fact, the Commission estimates at least \$250,000 per year in costs directly attributable to current Senate filing procedures would be saved by requiring electronic filing. Reports that are filed electronically are normally available, and may be downloaded, within minutes. In contrast, the time between the receipt of a report filed through the paper filing system and its appearance on the Commission's web site is 48 hours. Moreover, a Senate campaign filing often consists of thousands of pages, and data from the filings themselves take up to 30 days to be integrated into the Commission's searchable databases. If such reports were electronically filed, the data could be integrated within a few days.

Electronic filing (by means other than mailing a diskette) is not affected by disruptions in the delivery of mail, such as those arising from security measures put in place after the discovery of anthrax powder and Ricin in mail in 2001 and 2004. Because of these security measures, the Commission's actual receipt of mailed paper filings by Senate campaigns is delayed. In contrast, electronic filings are received and processed in a timely manner.

Legislative Language:

S. 482 provides legislative language for this Legislative Recommendation.

Fraudulent Misrepresentation of Campaign Authority

Section: 2 U.S.C. § 441h

Recommendation: Congress should revise the prohibitions on fraudulent misrepresentation of campaign authority to encompass all persons purporting to act on behalf of candidates and real or fictitious political committees and political organizations. In addition, Congress should remove the requirement that the fraudulent misrepresentation must pertain to a matter that is “damaging” to another candidate or political party.

Explanation: FECA prohibits a Federal candidate or his or her agents or employees from fraudulent misrepresentation such as speaking, writing or otherwise acting on behalf of a candidate or political party committee on a “matter which is damaging to such other candidate or political party” or an employee or agent of either. *See* 2 U.S.C. § 441h(a). The Commission recommends that this prohibition be extended to any person who would disrupt a campaign by such unlawful means, rather than being limited to candidates and their agents and employees. Proving damages as a threshold matter is often difficult and unnecessarily impedes the Commission’s ability to pursue persons who employ fraud and deceit to undermine campaigns. Fraudulent solicitations of funds on behalf of a candidate or political party committee were recently prohibited without any required showing of damage to the misrepresented candidate or political party committee. *See* Bipartisan Campaign Reform Act of 2002, § 309, Public Law 107-155, 116 Stat. 81, 104 (2002) (“BCRA”), *codified at* 2 U.S.C. § 441h(b).

In addition, while both subsections (a) and (b) of 2 U.S.C. § 441h directly address fraudulent actions “on behalf of any other candidate or political party,” they do not address situations where a person falsely claims to represent another type of political committee or claims to be acting on behalf of a fictitious political organization, rather than an actual political party or a candidate. For example, the narrow scope of the existing language does not bar fraudulent misrepresentation or solicitation on behalf of a corporate or union separate segregated fund or a non-connected political committee.

Legislative Language:

Section 322 of the Federal Election Campaign Act of 1971 (2 U.S.C. § 441h) is amended:

- (1) in subsection (a), by striking “who is a candidate for Federal office or an employee or agent of such a candidate”;
- (2) in paragraph (a)(1), by striking “or political party or employee or agent thereof on a matter which is damaging to such other candidate or political party or employee or agent thereof” and inserting “, political party, other real or fictitious political committee or organization, or employee or agent of any of the foregoing,”; and

- (3) in paragraph (b)(1), by striking “or political party or employee or agent thereof” and inserting “, political party, other real or fictitious political committee or organization, or employee or agent of any of the foregoing.”.

Conversion of Campaign Funds

Section: 2 U.S.C. § 439a

Recommendation: Congress should amend FECA's prohibition of the personal use of campaign funds to extend its reach to all political committees.

Explanation: In 2007, the Department of Justice noted, "[r]ecent years have seen a dramatic rise in the number of cases in which candidates and campaign fiduciaries steal money that has been contributed to a candidate or political committee for the purpose of electing the candidate or the candidates supported by the political committee." See U.S. Department of Justice, *Federal Prosecution of Election Offenses*, 194-95 (7th ed. May 2007). In fact, the Commission has seen a substantial number of instances where individuals with access to the funds received by political committees have used such funds to make unauthorized disbursements to pay for their own personal expenses.

FECA makes it illegal for an individual to use contributions accepted by a candidate or a candidate's committee for his or her own personal use, *i.e.* to fulfill any commitment, obligation, or expense that would exist irrespective of the candidate's election campaign or duties as a holder of Federal office. See 2 U.S.C. § 439a(b). However, no corresponding provision covers individuals who convert contributions received by party committees, separate segregated funds, leadership PACs and other political committees, to their own personal use. While other provisions of FECA are sometimes available to address these types of unauthorized disbursements, sometimes they are not. Such an amendment would remedy this growing problem and provide for coherent and consistent application of FECA.

Legislative Language:

Section 313 of the Federal Election Campaign Act (2 U.S.C. § 439a) is amended:

- (1) in paragraph (b)(1), by inserting "or a receipt of a political committee" after "subsection (a) of this section";
- (2) in paragraph (b)(2), by inserting "described in subsection (a) of this section" after "a contribution or donation"; and
- (4) by inserting after paragraph (b)(2) the following:
 - “(3) Conversion of political committee receipts

For the purposes of paragraph (b)(1), a receipt of a political committee, other than a contribution or donation described in subsection (a) of this section, shall be considered to be converted to personal use if the receipt is

used to fulfill any obligation, or expense of a person that would exist irrespective of –

- (A) the political committee's actions to support or oppose candidates;
- (B) the political committee's actions to address policy or political issues; or
- (C) establishing, administering, or soliciting contributions to the political committee.”.

Senior Executive Service

Sections: 5 U.S.C. § 3132(a)(1)(C)

Recommendation: Congress should delete the exclusion of the Federal Election Commission from eligibility for the Senior Executive Service under the Civil Service Reform Act of 1978 (as amended by the Federal Election Campaign Act Amendments of 1979). See Public Law 96-187, § 203, 93 Stat. 1339, 1368 (1980), *codified at* 5 U.S.C. § 3132(a)(1)(C).

Explanation: This statutory change would bring the Commission's personnel structure and practices in line with that of other comparable Federal agencies. This would ensure that the Commission can compete with other government agencies and the private sector in recruiting and retaining key management personnel.

Currently, the Commission is prohibited by law from creating Senior Executive Service positions within the agency. 5 U.S.C. §3132(a)(1)(C). The Commission recommends that it be made eligible to create Senior Executive Service positions because: (1) those who would be placed in such positions are now operating under a category that is inappropriate for their duties; and (2) the SES system provides institutional benefits to the agency and agency employees.

As a result of the current prohibition, the Commission's senior managers other than the Staff Director and the General Counsel are employed in Senior Level positions. The persons in the Senior Level positions (four Deputy Staff Directors, a Deputy General Counsel, and four Associate General Counsels) oversee major programmatic areas and supervise not only staff, but other managers as well. Although these nine executive positions are designated as Senior Level, OPM's guide to the Senior Executive Service indicates that the Senior Level system is for non-executive positions. In fact, the OPM guide provides that supervisory duties should occupy less than 25% of a Senior Level employee's time.¹ At the Commission, by contrast, supervisory and executive responsibilities occupy 100% of the time of Senior Level employees. Hence, the FEC's usage of the Senior Level category remains inconsistent with the stated purpose of the Senior Level designation.

Recent legislation has put the salary ranges for Senior Executive Service employees and Senior Level employees in parity. See Senior Professional Performance Act of 2008, Public Law 110-372, 122 Stat. 4043 (2008). In addition, like SES employees, Senior Level employees may now carry over 720 hours of annual leave into the next year, rather than the previous Senior Level limit of 240. Nonetheless, the SES system would provide institutional benefits to the Commission and its employees by enhancing the quality and quantity of the pool of persons available to fill vacancies that may arise.

¹ See OPM, *The Senior Executive Service*, 7 (Feb. 2004) (available at: <http://www.opm.gov/ses/references/SESGUIDE04.pdf>).

SES candidates must go through a competitive selection process in order to enter a Candidate Development Program (“CDP”). Completion of a CDP by candidates within the agency ensures that there is a cadre of SES-approved employees to select from and thereby assists in good succession planning. In addition, a fundamental concept underlying the SES system is enabling agencies to hire experienced and skilled leaders from a *government-wide*, not just intra-agency, pool with relative ease and with the assurance that all such employees have met the same standards of development and experience. For example, because SES-certified applicants from outside the agency will have met all of the Executive Core Qualifications, the Commission would be able to evaluate their applications with the assurance that fundamental competencies have already been developed.

Legislative Language:

Section 3132(a)(1)(C) of Title 5, United States Code, is amended by striking “the Federal Election Commission, or”.