



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

FEDERAL ELECTION  
COMMISSION  
SECRETARIAT

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**AGENDA ITEM**

May 24, 2012

**MEMORANDUM**

For Meeting of 5-24-12

**TO:** The Commission

**SUBMITTED LATE**

**FROM:** Chair Caroline C. Hunter *CC/H*  
Vice Chair Ellen L. Weintraub *ELW/dw*

**SUBJECT:** Rulemaking Priorities for 2012

Attached is a draft Rulemaking Priorities for 2012 for placement on the agenda for May 24, 2012.

Attachment



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## **RULEMAKING PRIORITIES FOR 2012**

- Independent Expenditures and Electioneering Communications by Corporations and Labor Organizations

The Commission issued a notice of proposed rulemaking (NPRM) in December 2011 seeking comments on proposed changes to its rules regarding corporate and labor organization funding of expenditures, independent expenditures, and electioneering communications. These and other proposed changes are in response to a Petition for Rulemaking filed by the James Madison Center for Free Speech urging the Commission to amend its regulations in response to the Supreme Court's decision in *Citizens United v. FEC*. See 76 Fed. Reg. 80803 (Dec. 27, 2011).

The Commission held a public hearing on March 7, 2012. See "Corporate/Labor Independent Expenditures and Electioneering Communications," Federal Election Commission, at [http://www.fec.gov/pages/hearings/corplabor\\_indexp\\_ec.shtml](http://www.fec.gov/pages/hearings/corplabor_indexp_ec.shtml).

The Commission is in the process of considering the issues raised in written comments and at the hearing, and is preparing to adopt a final rule.

- Political Committees That Engage in Independent Spending

Several cases, including two cases decided by the United States Court of Appeals for the District of Columbia Circuit – *SpeechNow.org v. FEC* and *EMILY's List v. FEC* – affect portions of the Commission's regulations regarding contributions to, and disbursements by, certain committees not authorized by candidates. The proposed rulemaking would provide guidance to these committees on how to establish and maintain a separate account for their independent spending, how to allocate their administrative and fundraising expenses, and how to report their receipts and disbursements.

## **ADDITIONAL RULEMAKING PROJECTS**

- Treatment of Limited Liability Partnerships

LLPs are created under state law and share certain characteristics with both partnerships and corporations. In Advisory Opinion 2008-05 (Holland & Knight), the Commission concluded that, in the absence of Commission regulations governing the treatment of LLPs, the requestor was a partnership for the purposes of the Act, because the requestor was organized and operated as an LLP, and not as a

corporation, under State law. This rulemaking would consider whether to treat all LLPs as partnerships under the Act, unless an LLP has opted for Federal corporate tax treatment pursuant to the Internal Revenue Service's "check the corporate box" provisions.

- Reporting of Electioneering Communications

On March 30, 2012, the U.S. District Court for the District of Columbia invalidated one of the Commission's regulations for reporting electioneering communications in *Van Hollen v. FEC*. The rule at 11 CFR 104.20(c)(9) required the disclosure of donations of \$1,000 or more to corporations or labor organizations when the donation "was made for the purpose of furthering electioneering communications." Intervenors are currently appealing the decision before the United States Court of Appeals for the District of Columbia Circuit, with briefing scheduled to be completed in August 2012 and oral argument scheduled for September 2012.

The Commission intends to issue interim guidance on how electioneering communications are to be reported in light of the District Court's ruling, and will issue a notice of proposed rulemaking, if appropriate, upon conclusion of the appellate process.

- Party Coordinated Communications

The Commission revised its coordinated communications rules at 11 CFR 109.21 in 2010 in response to a ruling from the United States Court of Appeals for the District of Columbia Circuit in *Shays v. FEC* ("*Shays III*"). See Coordinated Communications, 75 Fed. Reg. 55947 (Sep. 15, 2010). That rulemaking did not address the separate rules at 11 CFR 109.37 concerning communications coordinated between political party committees and candidates. This rulemaking would consider whether the Commission should amend its party coordinated communications regulations to permit an adjusted degree of interaction between political parties and their candidates.

- Electronic Transactions

This rulemaking would consider whether to update rules in various sections that were written with paper instruments or cash in mind in order to address electronic transactions such as debit/credit cards, gift cards, Internet-based payment processing, online banking, etc. This includes rules pertaining to receipt, deposit, accounting, recordkeeping, reporting, and redesignating and reattributing these transactions, as well as matching funds and conduit activity. It may also be broadened to generally ask whether there are other places where the Commission's regulations should be updated to reflect the diminished use of technologies such as fax machines, etc. The rule also may address contributions made by text messages.

- Internet Communication Disclaimers

Communications technologies have developed rapidly since the adoption of the Commission's current disclaimer rules. Application of the current disclaimer regulations to communications made over the Internet has often proven difficult for the Commission. On October 13, 2011, the Commission issued an Advance Notice of Proposed Rulemaking seeking comments on whether and how the Commission should revise its rules at 11 CFR 110.11 regarding disclaimers on Internet communications. Specifically, the Commission is considering whether to modify the disclaimer requirements for certain Internet communications, or to provide exceptions thereto, consistent with the Federal Election Campaign Act, 2 U.S.C. 431 et seq., as amended ("the Act").

- MUR Disclosure

The Commission published an interim disclosure policy for closed matters under review (MURs) in 2003 in response to a United States Court of Appeals for the District of Columbia Circuit opinion in *AFL-CIO v. FEC*, which struck down the Commission's disclosure regulation at 11 CFR 5.4(a)(4). *See* 68 Fed. Reg. 70,426 (Dec. 18, 2003). In 2009, the Commission also resumed its prior practice of placing all First General Counsel's Reports on the public record in closed MURs. *See* 74 Fed. Reg. 66,132 (Dec. 14, 2009). Section 5.4(a)(4) has not been amended since the D.C. Circuit's ruling. This rulemaking would address the types of documents that the Commission will disclose for closed MURs, administrative fine cases, and ADR cases.

- Mixed purpose travel expense allocation

The Commission is considering revising its regulations addressing the allocation of mixed purpose travel expenses at 11 C.F.R. § 106.3. The Commission stated in AO 2002-05 (Hutchinson), that an aspect of the allocation method for candidates in current section 106.3(b)(3) produces a result that "would be inconsistent with or even contrary to" the prohibition on personal use of campaign funds. The Commission has adopted an Interpretative Rule that applies to official and campaign travel of candidates covered by section 106.3(b). *See Interpretation of Allocation of Candidate Travel Expenses*, 67 Fed. Reg. 5445 (Feb. 6, 2002). However, the Interpretation is limited to official travel that is paid for with funds of the federal government. Official travel is increasingly funded by private sponsors, which are usually corporations. Authorized committees of incumbent Members of Congress frequently seek guidance on the proper allocation of these expenses. Through a rulemaking, the Commission may address the apparent conflict between the allocation regulation and the personal use prohibition.