

**AGENDA DOCUMENT NO. 12-31**



FEDERAL ELECTION COMMISSION  
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May 3, 2012

**MEMORANDUM**

**AGENDA ITEM**

TO: The Commission

THROUGH: D. Alec Palmer, Staff Director *AP*

FROM: J. Duane Pugh, Director *JDP*  
Amy E. Pike, Deputy Director *AEP*  
Congressional, Legislative and Intergovernmental Affairs

SUBJECT: Draft Legislative Recommendations 2012

For Meeting of 5-10-12

Attached for your approval are five draft Legislative Recommendations. The recommendations are:

- Electronic Filing of Senate Reports
- Making Permanent the Administrative Fine Program for Reporting Violations
- Fraudulent Misrepresentation of Campaign Authority
- Conversion of Campaign Funds
- Authority to Create Senior Executive Service Positions

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

Attachment

## 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 again in the 112<sup>th</sup> Congress to mandate electronic filing by Senate campaigns. *See* Senate Campaign Disclosure Parity Act, S. 219, 112<sup>th</sup> Cong. (2011).

Compared to data from paper reports, 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 \$430,000 per year in costs directly attributable to current Senate filing procedures would be saved by requiring electronic filing. In addition to these savings for the Commission, the Secretary of the Senate would also realize savings, and committees that file reports could substantially reduce their processing costs. 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 initial 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 receipt of mailed paper filings by Senate campaigns is delayed. In contrast, electronic filings are not subject to these delays.

*Legislative Language:*

S. 219 provides legislative language for this Legislative Recommendation.

## **Making Permanent the Administrative Fine Program for Reporting Violations**

*Section:* 2 U.S.C. § 437g

*Recommendation:* Congress should make permanent the Commission's authority to assess administrative fines for straightforward violations of the law requiring timely reporting of receipts and disbursements. The Commission's current Administrative Fine Program only covers violations that relate to reporting periods through December 31, 2013.

*Explanation:* On October 16, 2008, President Bush signed legislation that extended the Administrative Fine Program to cover violations of 2 U.S.C. § 434(a) that relate to reporting periods through December 31, 2013. *See* Public Law 110-433, 122 Stat. 4971 (2008). Since the Administrative Fine program was implemented in 2000 through the end of fiscal year 2011, the Commission has processed and made public 2,350 cases, with \$4,134,740 in fines assessed. The Administrative Fine Program has been remarkably successful: over the course of the program, the number of late and nonfiled reports has dramatically decreased. For election cycles 1992 through 2000, an average of 21% of campaign finance reports were filed late. Since the inception of the Administrative Fine Program, the percentage of late reports has dropped to below 10%. As a result, the Administrative Fine Program has become an integral part of the Commission's mission to administer and enforce the Act. With fewer late reports and fewer challenges to administrative fines, the Commission has been able to reduce the number of employees who work on this program. By making the program permanent, Congress would ensure that the Commission would not lose one of the most cost-effective and successful programs in its history.

Under the Administrative Fine Program, the Commission considers reports to be filed late if they are received after the due date, but within 30 days of that due date. Election-sensitive reports are considered late if they are filed after their due date, but at least five days before the election. (Election sensitive reports are those filed immediately before an election and include pre-primary, pre-special, pre-general, October quarterly and October monthly reports.) Committees filing reports after these dates are considered nonfilers. Civil money penalties for late reports are determined by the amount of activity on the report, the number of days the report was late and any prior penalties for violations under the administrative fine regulations. Penalties for nonfiled reports are determined by the estimated amount of activity on the report and any prior violations. Committees have the option to either pay the civil penalty assessed or challenge the Commission's finding and/or proposed penalty.

*Legislative Language:*

Section 309(a)(4)(C) of the Federal Election Campaign Act of 1971 (2 U.S.C. § 437g(a)(4)(C)) is amended to read as follows: "(iv) This subparagraph shall apply with respect to violations that relate to reporting periods that begin on or after January 1, 2000."

## Authority to Create Senior Executive Service Positions

*Section:* 5 U.S.C. § 3132(a)(1)

*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:* The Commission believes that this statutory change is needed to bring the Commission's personnel structure in line with that of other comparable federal agencies. This would ensure that the Commission is better able to compete with other government agencies 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) the agency currently has several top management positions that the Commission believes would fully satisfy the criteria for SES positions set forth in 5 U.S.C. § 3132 (*e.g.*, directing the work of an organizational unit, monitoring progress toward organizational goals, etc.); and (2) the SES system would provide 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 current Senior Level positions (the Chief Financial Officer, 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 ten top management positions are designated as Senior Level, because supervisory and executive responsibilities occupy 100% of the time of the employees filling these positions, the positions would be more appropriately designated as SES.<sup>1</sup>

The Commission is also cognizant of a recently launched Senior Executive Service Initiative.<sup>2</sup> This initiative includes a collaborative, cross-agency reinvigoration in the training, development and qualification of SES-certified employees to meet the staffing needs of the government in view of the anticipated loss of SES qualified personnel due to attrition in the near future. This request will afford existing agency staff and future staff the opportunity to participate in and benefit professionally from this

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<sup>1</sup> In fact, OPM's guidance on the Senior Level positions indicates that the Senior Level system is generally for positions in which supervisory duties occupy less than 25% of the employee's time. See [www.opm.gov/ses/recruitment/slpositions.asp](http://www.opm.gov/ses/recruitment/slpositions.asp) (last visited April 20, 2012). OPM's guidance does note, however, that "in a few agencies [such as the Federal Election Commission] that are statutorily exempt from inclusion in the Senior Executive Service (SES), executive positions are staffed with SL employees."

<sup>2</sup> See OMB/OPM Memorandum for the Senior Executive Service (Feb. 18, 2011) available at [www.opm.gov/ses/OMB\\_OPM\\_SESMemo.pdf](http://www.opm.gov/ses/OMB_OPM_SESMemo.pdf) (last visited April 20, 2012).

initiative, and should allow the agency to develop an increasing level of competence in its labor force.

Additionally, 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.

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.

Accordingly, the Commission believes that the positions of Staff Director and General Counsel, as well as the current Senior Level positions within the agency, would be more appropriately categorized as SES positions and that any future Senior Level positions should be created in the SES. Because salary ranges for Senior Executive Service employees and Senior Level employees are in parity, as discussed above, permitting the Commission to convert its Senior Level positions into Senior Executive Service positions will not require an increase in the Commission's appropriation request.

*Legislative Language:*

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

## 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:* The Federal Election Campaign Act of 1971, Public Law 92-225, 86 Stat. 3 (1972), as amended (“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 have been 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), *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 current statute 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 “candidate 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 “candidate, 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 “candidate or political party or employee or agent thereof” and inserting “candidate, 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 (7<sup>th</sup> 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, including through theft or embezzlement. While other provisions of FECA are sometimes available to address these types of unauthorized disbursements, sometimes they are not.

The Commission proposes to revise 2 U.S.C. § 439a(b) to address this growing problem by prohibiting the use by any person of any political committee's receipts for expenses that would exist irrespective of the political committee's political activities. Political activities would include activities in connection with a Federal election, as well as activities in furtherance of a political committee's policy or educational objectives and other legitimate committee functions. Such an amendment would 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 any other political committee” after “subsection (a)”;
- (2) in paragraph (b)(2), by striking “contribution or donation” and replacing with “contribution, donation, or receipt”;



- (3) in paragraph (b)(2), by striking “campaign or individual’s duties as a holder of Federal office,” and inserting “campaign, individual’s duties as a holder of Federal office, or political committee’s political activities,”.