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REGULATIONS

ALLOCATION OF SPENDING BETWEEN FEDERAL AND NONFEDERAL ACCOUNTS: NOTICE OF PROPOSED RULEMAKING

On September 22, 1988, the Commission approved the publication of a notice of proposed rulemaking in the Federal Register that seeks comments on possible revisions to Part 106 of its regulations. In the notice, the agency also announced that it planned to hold a public hearing on December 14, 1988.*

The proposed revisions would provide guidelines for the allocation of disbursements made by political committees to influence both federal and nonfederal elections. In particular, the agency seeks comments on the allocation of disbursements between federal and nonfederal accounts by party committees, nonconnected committees and separate segregated funds for:

- o Administrative expenses (see 11 CFR 106.1(e));
- o Exempt party activities (11 CFR 100.7(b)(9), (b)(15), (b)(17) and 100.8(b)(10), (b)(16) and (b)(18)); and
- o Other activities, such as general voter identification, voter registration and get-out-the-vote activities, conducted by party committees in federal election years.

The Commission also seeks comments on:

- o Methods of payment of allocated expenses; and
- o Reporting procedures.

Written comments on the FEC's notice of proposed rulemaking should be submitted to Ms. Susan E. Propper, Assistant General Counsel, by November 30, 1988. Those interested in testifying at the public hearing should so indicate on their written comments. Ms. Propper may be contacted at: FEC, 999 E Street, N.W., Washington, D.C. 20463 or by calling 202/376-5690 or, toll free, 800/424-9530.

**In a recent decision in Common Cause v. FEC (Suit Six), the U.S. District Court for the District of Columbia held that the FEC must report on its progress in promulgating these rules every 90 days. The FEC's first report is due November 25, 1988. See p. 6 of this issue of the Record for a summary of the suit.*

Format of Proposed Rules

The notice of proposed rulemaking solicits comments on four alternative approaches to allocating expenses between a political committee's federal and nonfederal accounts. Alternatives A and D are set forth in regulatory language in the notice. The other two alternatives (B and C) are described in narrative form. In both sets of proposed rules, section 106.1(e), which currently contains the provisions for allocating federal and nonfederal expenses, would be revised to cross-reference a new section 106.5. This new section of the rules would set forth the various allocation methods for the three categories of activities covered by the allocation rules.

General Rules for Allocating Disbursements

Under Alternatives A, B and C, proposed section 106.5(a)(1) would set forth general rules governing the allocation methods to be used by party committees, nonconnected committees and separate segregated funds when they make disbursements for activities (described above) that

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influence both federal and nonfederal elections. For example, proposed subsection 106.5(a)(1)(i) would require committees to choose one allocation method per year for all disbursements made for a particular type of activity (e.g., administrative expenses or exempt party activities). Moreover, once a committee chose a method for allocating these expenses, it would continue to use that method for the remainder of the year.

Another proposed subsection to the general rules (106.5(a)(1)(ii)) would require committees to allocate administrative expenses every year. This proposal is based on the assumption that committees conduct numerous activities in a nonfederal election year that benefit their federal election activities, such as fundraising and voter registration activities. Moreover, many special elections for federal office occur during nonfederal election years.

Under the proposed rules, disbursements for general voter activities, such as voter identification, voter registration and get-out-the-vote drives, would only be allocated during federal election years.

Percentage Allocations

Note that the allocation methods under Alternatives A, B and C envision using percentage formulas to allocate disbursements between a committee's federal and nonfederal accounts, but they provide no specific percentage formula. (Alternative D does not use percentages at all.)

In the rulemaking notice, the agency suggested several possible ways to set fixed percentages. The agency could: (1) require a 50-50 split of expenses between a committee's federal and nonfederal accounts, (2) base a fixed or minimum percentage allocation on committee type (e.g., a local party committee could have a different percentage than a nonconnected committee) or (3) base a fixed or minimum percentage allocation on whether the activities were conducted during a federal election year, a nonelection year or a Presidential election year.

Alternative A

Special Provisions for Party Committees. Under this alternative, proposed subsection 106.5(a)(2) would permit a local party committee that has a low level of federal activity to allocate all administrative expenses and expenses for general voter registration and get-out-the-vote activities on a fixed percentage basis between its federal and nonfederal accounts.

Proposed subsection 106.5(a)(3) explains that committees would allocate voter drive activities which mention specific candidates by using the method set forth at section 106.1(a) of the current rules. If the Commission ultimately approves this version of the proposed rules, section 106.1(a) may be revised in a way similar to proposed section 106.5(c).*

Allocation of Administrative Expenses. Proposed subsection 106.5(b) describes several permissible methods that party committees, nonconnected committees and separate segregated funds could use to allocate their administrative expenses between their federal and nonfederal accounts.

For example, a committee would have the option of paying all its administrative expenses from its federal account. Alternatively, a committee could use the method described in current section 106.1(e); that is, the committee could allocate its administrative expenses between its federal and nonfederal accounts based on the ratio of funds it spent for federal elections to funds spent for nonfederal elections. The new provision would, however, make clear which expenses the committee had to include when determining that portion allocated to federal elections. The regulation would also establish a four-year base period during which a fixed percentage of all administrative expenses would be paid from the federal account, to correct for any under-allocation made to the federal account during a Presidential election year. (The four-year period would also establish an information base for new committees.) After this four-year period, the committee could use an allocation formula based on actual disbursements for federal election activities four years earlier (e.g., its expenses for a current Presidential election year would be based on the ratio of federal to nonfederal disbursements for the last Presidential year).

Proposed subsection 106.5(b)(3) provides a third alternative—the "candidates method"—for allocating administrative expenses. Administrative expenses would be allocated based on the proportion of federal candidates to all other types of candidates on the ballot in a particular state during the election year. This method, limited to party committees, would require a minimum percentage of administrative expenses to be allocated to the federal account. It would also specify the kinds of elective offices that should be included when calculating the amount of expenses to be allocated between the party committee's federal and nonfederal accounts. (See AO 1978-28.)

*Section 106.1(a) would also contain new language to cover allocation of expenditures made for broadcast ads.

The Commission welcomes suggestions for applying the "candidates method" to other kinds of committees as well.

Finally, a committee could request Commission approval of any other allocation method through the advisory opinion process.

Allocation of Expenses for Exempt Party Activities. Under proposed subsection 106.5(c)(2), disbursements for exempt party activities (e.g., sample ballots or slate cards) would be allocated based on the proportion of the communication devoted to federal candidates or elections. This method would require a minimum percentage of the costs to be allocated to federal candidates. Proposed subsection 106.5(c)(2)(i) would specify how this allocation method could be used for specific kinds of communications. (Since exempt activities do not include communications made through public political advertising, this subsection includes no method for allocating those costs.)

Allocation of Expenses for General Voter Activities. Proposed subsection 106.5(d) would govern the allocation of disbursements for general voter drives and other activities that urge support of a party or the party's candidates but that do not mention specific candidates. The allocation methods proposed for these activities parallel those set forth in section 106.5(b) (see above) for allocating administrative expenses. A fixed minimum percentage of all expenses for these activities would be allocated in alternate (i.e., federal election) years during a four-year period. As in the case of administrative expenses, expenses for these activities could be subsequently allocated on the basis of the actual amount of disbursements made during the election year four years earlier.

Alternative B

Under Alternative B, committees with non-federal and federal accounts (other than separate segregated funds) would have to allocate their administrative expenses and expenses for general voter drive activities on a fixed percentage basis between the two accounts. During a Presidential election year, a higher percentage of general voter drive expenses would be allocated to federal elections. If the Commission adopts this approach, it may decide to distinguish between

types of committees in determining the actual allocation formula that a committee would be required to use.

Alternative C

Alternative C would establish different methods for allocating expenses in federal and non-federal election years. During a nonfederal election year, committees would allocate administrative expenses and general voter drive expenses based on the ratio of funds the committee received for the federal account to the total amount of funds received. In a federal election year, the allocation of these expenses would be based on the ratio of federal to nonfederal candidates on the ballot. However, in a Presidential election year, committees would be required to allocate a fixed minimum percentage of the costs of general voter drive activities to their federal accounts.

Alternative D

Alternative D would only apply to party committees. It would establish two allocation methods, each depending on the type of expense. With regard to its administrative expenses and expenses for nonexempt activities, a party committee could allocate expenses according to: (1) a "ballot-office" ratio, (2) a "prior comparable year" method or (3) any other reasonable basis approved by the Commission through its advisory opinion process.

Using the "ballot-office" ratio method, a party committee would allocate expenses based on the ratio of federal offices to state offices listed on the state's ballot in the election year. The offices included in the calculation would be the same as under Alternative A. However, this method would not fix a minimum percentage of expenses to be allocated to the federal account.

Using the "prior comparable year" method, a party committee could allocate its expenses based on the ratio of its federal to nonfederal expenses in a prior comparable year. For example, allocable disbursements made for a prior Presidential election year could be used to gauge the federal expenses for the current Presidential election year. At the end of each year, the committee would reconcile its estimated allocable disbursements with its actual disbursements.

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Concerning the allocation of expenses for exempt party activities (e.g., slate cards and sample ballots), party committees could allocate expenses based on the proportion of the total communication activity that is devoted to federal candidates or elections. The allocation would be made on a project-by-project basis.

Payment Methods

This proposed subsection describes how each account could pay its share of allocable expenses. Under Alternatives A, B and C, proposed section 106.5(e) would permit a nonfederal account to pay for the committee's administrative expenses, provided the federal account reimbursed the nonfederal account for its share of the expenses within 10 days. However, for activities that impact directly on federal elections, as, for example, exempt party activities and general voter drives, each account would have to pay the vendor directly for its share of costs incurred. The committee could use one of the allocation methods proposed for each of these types of activities (see above).

This proposed subsection would also explain how groups that are not political committees should pay for such expenses.

Under the payment method proposed in Alternative D, a committee's federal account and its nonfederal account could each pay its share of allocated expenses directly to the vendor or payee. Alternatively, the nonfederal account could pay the entire expense, with the federal account reimbursing the nonfederal account within 10 days after the bill was paid.

Finally, the Commission also welcomes comments on an alternative payment method that would involve the establishment of an escrow account* for a committee's combined federal and nonfederal activities.

Reporting Methods

Under the proposed reporting provision in Alternatives A, B and C (11 CFR 106.5(f)), when the committee first reported one of the three categories of allocable expenses, it would have to submit a letter with that report providing detailed information on the allocation method it used for that category of expenses (e.g., administrative expenses). Reports of allocated disbursements would have to include the full amount of the allocated disbursement, the date the nonfederal portion was paid and a cross-reference to the itemized federal payment.

The Commission also seeks comments on whether it should develop a new form for reporting allocation methods or merely require

the disclosure of this information as a memo entry on Schedule B of Form 3X.

Finally, the Commission seeks comments on another reporting method proposed in Alternative D. This method would require committees to disclose, as a memo entry, the allocation method and the percentage applied for each allocable disbursement.

FEC PROPOSES REVISIONS OF THREE REGULATED ACTIVITIES

On September 8, 1988, the Commission decided to publish a notice in the Federal Register which seeks comments on three proposed revisions to its regulations at 11 CFR 100.7(b)(8), 100.8(b)(9), 110.11(a)(1)(iv)(A) and 114.8(f). See 53 Fed. Reg. 35827.

The Commission has published proposed changes to three unrelated areas of its regulations in a single notice of proposed rulemaking because these discrete issues do not require a larger-scale rulemaking procedure.

Written comments on the proposed rules must be filed by October 17, 1988. They should be addressed to Ms. Susan E. Propper, Assistant General Counsel, FEC, 999 E Street, N.W., Washington, D.C. 20463. Ms. Propper may be contacted at 202/376-5690 or, toll free, 800/424-9530.

Travel Exemption

11 CFR 100.7(b)(8) and 100.8(b)(9)

These rules allow all individuals, including paid campaign staff and volunteers, to incur a limited amount of unreimbursed expenses for travel on behalf of a candidate or party.* These limited expenses are not considered contributions or expenditures on behalf of the candidate or party.

The rules also permit volunteers to make unlimited expenditures from their personal funds to cover their subsistence expenses. The proposed revisions to these rules would permit paid staff to incur unreimbursed subsistence expenses while they are paying for their travel under the limited exemption permitted for transportation costs.

A new definition would restrict subsistence expenses to an individual's personal living expenses, such as food and lodging.

Disclaimer Notice Requirements

11 CFR 110.11(a)(1)(iv)(A)

Under the current provision, if a person solicits the general public for contributions to a

*This payment method is described in the FEC's notice of inquiry, published in the February 23, 1988 issue of the Federal Register. 52 Fed. Reg. 5277.

*Individuals may spend up to \$1,000 per election on travel expenses related to a candidate's campaign and up to \$2,000 per calendar year for travel on behalf of all the political committees of each political party.

political committee that is not authorized by a candidate, that person's full name must be clearly stated on the solicitation. Under a proposed addition to this rule, the solicitation must also state whether or not it was authorized by a candidate or any of his or her authorized committees or agents—even if the solicitation does not expressly advocate the candidate's election or defeat. This new authorization requirement for solicitations would conform with the authorization notice requirements of 2 U.S.C. §441d(a).

**Trade Association Solicitations
11 CFR 114.8(f)**

Under this provision, a trade association may solicit the restricted class* of its member corporations, provided certain conditions are met. A proposed amendment would make clear that, if a subsidiary corporation is a member of the trade association but its parent corporation is not, the trade association may not solicit the parent corporation's restricted class. Current rules already make clear that, if the parent is a member but the subsidiary is not, the trade association may not solicit the restricted class of the subsidiary corporation.

AOR	Subject
1988-39	Commodity exchange's solicitation of members who have leased their seats. (Date made public: August 25, 1988; Length: 10 pages, plus 62-page supplement)
1988-40	House campaign's use of "coattail exception" for mailing done by volunteers. (Date made public: August 31, 1988; Length: 3 pages, plus 2-page supplement)
1988-41	Retiring Congressman's reporting/disposal of excess funds of 1988 committee. (Date made public: September 1, 1988; Length: 1 page, plus 20-page supplement)
1988-42	Title for PAC established by two corporations. (Date made public: September 6, 1988; Length: 1 page, plus 2-page supplement)

ADVISORY OPINIONS: SUMMARIES

AO 1988-28: Corporation's "900" Line Telephone Service for Political Clients

Tele/900, Inc. (Teleline), a California corporation, may not enter into two proposed contractual arrangements with various federal candidates and committees to provide a "900" line telephone service for their political messages. Both of the contractual arrangements proposed by Teleline for providing the "900" line service would result in prohibited corporate contributions from Teleline to the candidates and committees. See 2 U.S.C. §441b. Since the proposed arrangements are impermissible, the Commission did not address the issue of whether an individual paying for the "900" line service would be making a contribution to the candidate or committee sponsoring the message.

Teleline has leased a number of information channels from AT&T. Teleline, in turn, packages and sells "900" line telephone services to clients who wish to sponsor a "900" line message. Teleline, in association with a client, advertises and markets the client's "900" line service. Teleline pays AT&T tariff rates for establishing a "900" line service and monthly bills for calls made to the "900" line. AT&T permits Teleline, in turn, to bill callers who use one of the "900" line services. In some cases, Teleline pays a royalty to a client based on the volume of callers who use the "900" line service.

Under the two plans proposed by Teleline, political clients would have produced their own

continued

ADVISORY OPINIONS

ADVISORY OPINION REQUESTS

The following chart lists recent requests for advisory opinions (AORs). The full text of each AOR is available to the public in the Commission's Office of Public Records.

AOR	Subject
1988-37	Affiliated status of two corporate PACs. (Date made public: August 23, 1988; Length: 4 pages, plus 15-page supplement)
1988-38	Commodity exchange's solicitations and partisan communications to its membership categories. (Date made public: August 24, 1988; Length: 22 pages)

*A corporation's restricted class includes its executive and administrative personnel, its stockholders and the respective families of both groups.

political messages and included a tagline on their political advertisements promoting the "900" line service to potential callers. While Teleline would have charged individual callers for accessing the service, it would have been solely liable for AT&T's tariffs and billings for calls.

The two proposed plans differed with regard to the payment of a royalty. Under one plan, Teleline would not have paid any royalty to a political client from the revenues Teleline earned on the "900" line service. Under a second proposed contractual arrangement, Teleline would have paid the political client a royalty representing a percentage of the revenue generated above the amount needed to pay AT&T's tariffs and charges. Commissioner Lee Ann Elliott filed a dissenting opinion and Commissioner Joan D. Aikens filed a concurring opinion. (Date issued: August 8, 1988; Length: 11 pages, including concurring and dissenting opinions)

COURT CASES

COMMON CAUSE v. FEC (Suit Six)

On August 25, 1988, the U.S. District Court for the District of Columbia decided to hold in abeyance Common Cause's motion to enforce the district court's previous order that the FEC promulgate rules on "soft money."* Instead, the court retained jurisdiction in the case and ordered the FEC to submit, at 90-day intervals, concise reports on the agency's progress toward promulgating the rules.** (The FEC must submit its first report by November 25, 1988.)

Background

Common Cause filed its petition for rulemaking on soft money in November 1984. On April 29, 1986, after taking a number of steps in response to the petition,*** the FEC denied Common Cause's petition for rulemaking (see 51 Fed. Reg.

**In its original complaint, Common Cause defined the term "soft money" as "funds from sources prohibited under the FECA that are given to political committees and party organizations ostensibly for use at the state and local level, but which are actually used in connection with and to influence federal elections in violation of the FECA."*

***See p. 1 for an article on the new Notice of Proposed Rulemaking published by the FEC.*

****For a summary of the steps taken by the FEC in response to the petition, see the January 1986 Record, p. 6, and the June 1986 Record, p. 6.*

15915). On June 30, 1986, Common Cause filed an action with the district court pursuant to the Administrative Procedure Act, 5 U.S.C. §706. (This provision provides that an agency action that is "not in accordance with the law" must be set aside by the reviewing court.)

In the suit it filed with the district court, Common Cause argued that the FEC:

- o Improperly construed the Federal Election Campaign Act (the Act) by: (a) improperly considering "intent" as a requisite factor when it concluded that nonfederal funds had not been transferred to the state and local level with the intent to influence federal elections and (b) allowing the allocation of expenditures made in connection with federal and nonfederal elections;
- o Inadequately regulated the allocation of federal and nonfederal funds, thereby creating a loophole through which "soft money" could be used in connection with federal elections; and
- o Acted arbitrarily and capriciously in denying the petition for rulemaking, given ample evidence to justify a rulemaking.

District Court Ruling: August 1987

On August 3, 1987, the district court issued an order which granted the FEC's motion for summary judgment on all issues in this case except one: the allocation, between the federal and non-federal accounts of state party committees, of expenses of certain specified activities (e.g., voter registration, "get out the vote" efforts and campaign materials used in connection with volunteer activities). (Common Cause v. FEC; Civil Action No. 86-1838).

Specifically, the court maintained that the Commission's regulations provide "no guidance whatsoever on what allocation methods a state or local party committee may use." Concluding that a revision of the Commission's regulations was warranted with respect to this one issue, the court remanded the matter to the Commission.

District Court Ruling: August 1988

In petitioning the district court to enforce its order of August 1987, Common Cause asked the court to impose a timetable on the FEC which would require the agency to:

- o Propose allocation rules within 30 days of the court's order; and
- o Make the proposed rules final as soon as possible.

The FEC argued that it had begun to respond to the court's 1987 order by publishing a Notice of Inquiry in the Federal Register that sought comments on its proposed rulemaking. The FEC pointed out that the election law had established no timetable for rulemakings. Furthermore, under the law, Common Cause could file a documented administrative complaint to remedy any alleged abuses of the allocation rules. Addi-

tionally, the FEC argued that its delay (of seven months) did not approach the three- and five-year agency delays that courts have found to be reasonable. Finally, the agency cited demands on the FEC's resources during a Presidential election year.

The court concluded that "Common Cause ha[d] not shown that the Commission's delay thus far warrant[ed] the intrusive relief sought by the plaintiffs." Nevertheless, the court ruled that the FEC should submit a report to the court every 90 days on its progress toward promulgating the rules.

COMMON CAUSE v. FEC (Suit Three)

On July 15, 1988, in response to an order by the U.S. District Court for the District of Columbia, three FEC Commissioners submitted a second set of statements of reason to the court and to Common Cause. The statements set forth the Commissioners' reasons and justification for dismissing an administrative complaint filed by Common Cause against President Reagan's 1984 reelection campaign. (The Commissioners' first statements of reason were submitted to Common Cause on October 27, 1986, in response to the court's remand order in *Common Cause v. FEC* [Civil Action No. 86-3465], a suit brought by Common Cause to challenge the agency's dismissal of the administrative complaint.)

In ordering the Commissioners who voted to dismiss the complaint to resubmit their statements of reason within 30 days of the court's July 1988 order, the court held that the Commissioners must explain in greater detail:

- o Why they chose to apply the test they had used to determine whether an officeholder/candidate's appearance was campaign related, rather than related to his or her official duties as a federal officeholder; and
- o Why that test was consistent or inconsistent with prior FEC advisory opinions.

In response to the court's second remand order, Commissioners Joan D. Aikens and John W. McGarry submitted a joint statement of reasons, while Commissioner Lee Ann Elliott submitted a separate statement. The fourth dissenting Commissioner in the case, Frank P. Reiche, did not submit a statement of reasons because he left the Commission in April 1985.

In issuing its second remand order, the court retained jurisdiction over the suit, while dismissing motions for summary judgment filed by both Common Cause and the FEC.

Background

On September 20, 1984, Common Cause filed an administrative complaint with the FEC against the Reagan-Bush '84 General Election Committee (the Reagan campaign), President Reagan's princi-

pal campaign committee for his 1984 general election campaign. In the complaint, Common Cause alleged that the travel costs related to a speech President Reagan gave before the Veterans of Foreign Wars (V.F.W.) in Chicago constituted "qualified campaign expenses"* incurred for Mr. Reagan's publicly funded general election campaign. Consequently, Common Cause claimed that the Reagan campaign had to: (1) pay for and report the costs of the Chicago trip as "qualified campaign expenses" and (2) reimburse the government for President Reagan's use of a government airplane to make the trip.

On December 24, 1984, the FEC's General Counsel recommended that the Commission find "reason to believe" that the Reagan campaign and its treasurer had violated provisions of the election law and public funding statutes by failing to report these expenses. On January 15, 1985, however, the Commission decided, by a vote of four to two, to find "no reason to believe" the Reagan campaign and its treasurer had violated federal election laws. Consistent with past practice, the Commission did not issue a formal statement of reasons for its decision to dismiss Common Cause's administrative complaint.

On March 22, 1985, Common Cause challenged the FEC's dismissal decision by filing suit against the Commission with the district court. In its suit, Common Cause asked the court to: (1) declare that the FEC's dismissal of its administrative complaint was contrary to law and (2) order the agency to act on the allegations in its complaint.

In arguing that the FEC's dismissal was contrary to law, Common Cause said that, in determining whether President Reagan's Chicago trip was campaign related, the Commission should have considered the "totality of circumstances" surrounding his Chicago speech rather than using a standard, which focused on: (1) whether President Reagan's speech expressly advocated his reelection and (2) whether he solicited contributions in conjunction with his speech.

The District Court's First Ruling

Although accepting the legal standard which the parties agreed had been applied by the FEC in its dismissal of Common Cause's complaint (i.e., the "two-prong" standard), the court observed that it still had to "determine whether the agency has presented a rational basis for its decision." In this regard, the court noted that "the record before us prevents that threshold determination." In its June 1986 ruling, the court therefore remanded the case to the FEC "both for an explana-

*FEC regulations define "qualified campaign expenses" as those expenditures made to further the general election campaign of a publicly funded Presidential candidate. See 11 CFR 9002.11.

tion of the legal standard actually applied and...a statement of reasons demonstrating how the Commission applied such legal standards to the facts before it."

The District Court's Second Ruling

In response to the court's first remand order, three of the Commissioners who originally voted to dismiss Common Cause's administrative complaint submitted statements of reason to the court.

After reviewing these statements, the court found that they did not adequately explain why: (1) two of the Commissioners had used the "totality-of-circumstances" test, which had previously been applied in a series of FEC advisory opinions* and (2) one of the Commissioners had used a "two-prong" standard. The court said that the Commissioners' use of two different standards "somewhat compounded" the court's task of discerning "the Commission's exact policy or practice" for determining when an officeholder's appearance is campaign related.

The court noted that, although "an agency is free to depart from established practice or policy, it must provide a statement of reasons indicating that such change is in fact occurring, and for articulated reasons." Otherwise, the agency's decisions appear to be "shaped arbitrarily" and deprive the court of a foundation for judicial review when complainants challenge the agency's decisions in court.**

Mindful of the FEC's "role as formulator of general policy under federal election laws," the court decided to order the agency to provide a fuller explanation of its reasons for dismissing Common Cause's administrative complaint. In doing so, the court rejected Common Cause's motion to have the FEC reconsider its action in the administrative complaint, based on the "totality-of-circumstances" test.

Commissioners' Second Statements of Reason

Responding to the court's second remand order, on July 15, 1988, the three Commissioners submitted a second set of statements of reason to the court and to Common Cause. While the three Commissioners all agreed that President Reagan's speech before the V.F.W.'s annual convention was not campaign related, they were not in unanimous accord concerning the standard that should have been applied to reach this determination. Commissioners Joan D. Aikens and John W. McGarry

*The court cited, for example, AOs 1984-13 and 1978-15.

**The court noted that, although the appeals court had ruled in *Orloski v. FEC* (795 F.2d at 167) that the FEC had used the "two-prong" test consistently since 1977, that court did not have the Commissioners' statement of reasons citing the agency's use of a broader standard.

concluded that they had applied a "totality-of-circumstances" standard. On the other hand, Commissioner Elliott concluded that, in the case of an officeholder, the "two-prong" test was appropriate.

Statement of Reasons: Commissioners Aikens and McGarry. The Commissioners stated their views that, in determining whether an officeholder's speech was campaign related, the Commission "has consistently applied a legal standard that has been described as a 'totality of circumstances' test, involving examination of external factors." While they agreed that an examination of the elements of the "two-prong" test was a necessary first step, they maintained that they had to "look further to the timing, the setting and the purpose of the event as integral components of the 'totality of circumstances' test and as necessary to the ultimate determination that certain activity is or is not campaign-related." Citing agency precedents,* the Commissioners stated that their use of the "totality-of-circumstances" standard was "totally consistent with the approach recommended by the General Counsel in his Report...and adopted by the Commission in many advisory opinions."

Based on these standards, the Commissioners concluded that President Reagan's speech was made in performance of his official duties, rather than to further his reelection. The speech did not expressly advocate President Reagan's election or solicit contributions to his campaign. Nor did the timing, setting or purpose of the President's speech support the complainant's allegations that the speech was campaign related.

With regard to the timing of the speech, the Commissioners noted that the V.F.W. convention was an annual event and that the invitation to attend it had been extended to President Reagan six months before the Republican National Convention. They concluded, "To argue that the timing of this appearance makes it a campaign event would mean that no incumbent President could make an official appearance to perform officeholder duties after the renomination."

Statement of Reasons: Commissioner Elliott. In explaining her view that the Commission should apply only the "two-prong" test to determine whether President Reagan's speech was campaign-related, Commissioner Elliott stated that "an officeholder's speech will be considered campaign-related if it expressly advocates the election or defeat of a clearly identified candidate or solicits contributions on behalf of a federal candidate. This 'two-prong' test is sensible and workable

*For example, the Commissioners cited as precedent Advisory Opinions 1977-42, 1977-54, 1978-4, 1978-15, 1980-16, 1980-22, 1981-37, 1982-15, 1982-56 and 1984-13.

Commission precedent and has repeatedly been held a permissible construction of the Act. Further, the 'two-prong' test avoids subjective or imponderable considerations when evaluating an officeholder's speech."

Commissioner Elliott cited as precedent for the test the Supreme Court's decision in Buckley v. Valeo, as well as a series of other federal court cases and FEC actions, including Commission advisory opinions.* The Commissioner noted that "the reasonableness of this policy is enhanced when viewed against 11 years of even-handed application."

Commissioner Elliott concluded that the totality of circumstances approach "is really not applicable for officeholders. Its objective elements are already part of the 'two-prong' test's legal inquiry into 'express advocacy' and its subjective elements are too vaporous upon which to rest a legal conclusion."

Finally, the Commissioner stated that the "totality-of-circumstances" test could not be appropriately applied to the Reagan speech. In the past, the Commissioner explained that this test had been applied only to: (1) nonincumbent candidates, (2) officeholders who were engaging in activities that were not normally part of their duties and (3) officeholders who were invited to make appearances as candidates, rather than in their official capacities. Commissioner Elliott therefore concluded that "following Counsel's recommendation in this case would not have been following Commission precedent."

Commissioner Elliott found that, based on the two-prong test, President Reagan had not made a campaign-related speech at the convention. "I concluded that the speech [did] not advocate the re-election of the President or the defeat of his opponent...His appearance was that of a head-of-state and his remarks were on issues of importance to America's veterans."

NRA v. FEC

On August 5, 1988, the U.S. Court of Appeals for the District of Columbia Circuit issued a decision in National Rifle Association of America (NRA) v. FEC (Civil Action No. 87-5373), which affirmed an October 1987 decision by the U.S. District Court for the District of Columbia. In its decision, the district court found that a petition for review of the Commission's dismissal of an administrative complaint that NRA had filed against Handgun Control, Inc. (HCI) constituted an untimely appeal of an earlier FEC dismissal of

another administrative complaint also filed by NRA against HCI. See 2 U.S.C. §437g(a)(8)(B).

Background

NRA's suit challenged the FEC's dismissal of NRA's third administrative complaint against HCI. NRA's third administrative complaint had alleged violations of the election law by HCI, an incorporated membership organization that supports restrictions on gun ownership. All three of NRA's administrative complaints challenged HCI's status as a membership organization under the election law.

The first administrative complaint resulted in a conciliation agreement between the FEC and HCI. In dismissing NRA's second administrative complaint, the FEC found that HCI had qualified as a membership organization by taking the steps specified in the conciliation agreement resulting from the first complaint, even though it had improperly applied the membership requirements retroactively to past contributors. With respect to NRA's third administrative complaint, the FEC found that the allegations were virtually identical to those raised in NRA's second complaint. Consequently, the agency dismissed the third complaint.

District Court Ruling

In a brief filed with the district court, the FEC argued that, under section 437g(a)(8)(B) of the election law, a party challenging the agency's dismissal of an administrative complaint must file suit within 60 days after the date of dismissal. NRA did not petition for review of the FEC's dismissal of its second administrative complaint within the statutory time period. Instead, NRA reasserted its previously dismissed claim in a third administrative complaint which, the FEC contended, amounted to nothing more than an attempt to obtain review beyond the 60-day period.

In dismissing NRA's suit, the court concurred with the FEC's argument. On October 26, 1987, NRA filed an appeal of the district court's decision with the U.S. Court of Appeals for the D.C. Circuit.

Appeals Court Ruling

In affirming the district court's dismissal of NRA's suit, the appeals court found that "the second and third NRA complaints [were] substantially similar by virtue of the fact that the legal question posed by both was the same: whether an organization that does not provide for an annual meeting at which members may participate in the conduct of corporate business may qualify as a membership organization under section 441b(b)(4)-(C)...Having raised that issue in the second complaint and [having] failed to appeal the Commission's order, the NRA cannot obtain judicial re-

*For example, the Commissioner cited as precedent Buckley v. Valeo, 424 U.S. 1, 84 n.112 (1976) and Advisory Opinions 1977-42, 1977-54, 1978-4, 1979-25, 1980-16, 1980-22, 1980-89 and 1981-37.

view of the issue by the expedient of bringing it (albeit in a more concrete context) before the FEC once again."

The appeals court concurred with NRA's argument that, because it had again dismissed the merits of NRA's argument in rejecting its third administrative complaint, the FEC had effectively reopened the issue and had rendered a decision that was, in principle, subject to court review. Nevertheless, the appeals court noted that NRA had failed to make this argument with the district court when the FEC moved to dismiss NRA's suit on grounds that the court lacked subject matter jurisdiction over it. The appeals court concluded that, "having failed to raise the reopening argument as the basis for jurisdiction in the District Court, the NRA is not at liberty to raise it for the first time on appeal."

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COMPLIANCE

MUR 2454: Transfer from State to Federal Account of Corporate PAC

This MUR, resolved through conciliation, involved a separate segregated fund's receipt of funds transferred from its nonfederal account.

Complaint

The MUR was internally generated by the Commission in the normal course of carrying out its administrative responsibilities. A review of the separate segregated fund's report disclosed receipts from an affiliated committee. An amended report disclosed that the transfer was from the fund's nonfederal account.

General Counsel's Report

The FEC conducted an investigation after it found reason to believe that the federal PAC had violated 11 CFR 102.5(a)(1)(i), which prohibits a federal PAC from receiving a transfer from its affiliated nonfederal account, and 2 U.S.C. §441b(a), which bans the use of corporate funds in federal elections.

Pursuant to 11 CFR 102.5(a)(1)(i), an organization that finances political activity in connection with both federal and nonfederal elections may choose to establish a separate federal account pursuant to the requirements of 11 CFR 102 and 104. Only funds subject to the prohibitions and limitations of the Act may be deposited into such a federal account. Further, no transfers may be made to the federal account from any nonfederal account(s) maintained by such organization. The General Counsel concluded, in this case, that the PAC had transferred \$10,000 from its nonfederal account in violation of 11 CFR 102.5(a)(1)(i).

The respondents contended that they were unaware that the transfer from the state account was a prohibited transaction, and they attempted to rectify the error immediately after Commission notification. In addition, the respondents asserted that only contributions from individuals were deposited into the nonfederal account, to substantiate that 2 U.S.C. §441b(a) had not been violated.

Commission Determination

A conciliation agreement was concluded prior to the Commission's finding "probable cause to believe" the Act had been violated. The agreement stated that the separate segregated fund had violated 11 CFR 102.5(a)(1)(i) by transferring nonfederal funds into its federal account. The respondents agreed to pay a \$1,000 civil penalty.

STATISTICS

ACTIVITY OF 1987-88 CONGRESSIONAL CAMPAIGNS

A study released by the FEC on August 11 showed that, during the first 18 months of the 1987-88 election cycle, House candidates increased their total financial activity, as compared with House candidates active during the same period in the 1985-86 cycle. On the other hand, 1988 Senate candidates showed an overall decline in activity, in comparison with candidates campaigning in 1986 Senatorial races.*

By the end of June 1988, spending by House candidates active in the 1987-88 election cycle totaled \$111 million, an 11 percent increase over spending by House candidates active during the same 18-month period in the 1985-86 cycle. Total funds raised by the candidates (i.e., \$154 million) increased 12 percent over total funds raised by House candidates in the last election cycle.

Senate candidates spent \$70 million during the first 18 months of the current cycle, a 23.9 percent decrease from spending by Senate candidates during the same period in the last election cycle. Total funds raised by 1988 Senate candidates (i.e., \$116 million) declined 6.5 percent from total receipts of candidates running in 1986 races.

During the current cycle, political action committees (PACs) increased their contributions to Democratic House and Senate candidates and to incumbents. (See the comparative chart on p. 12.)

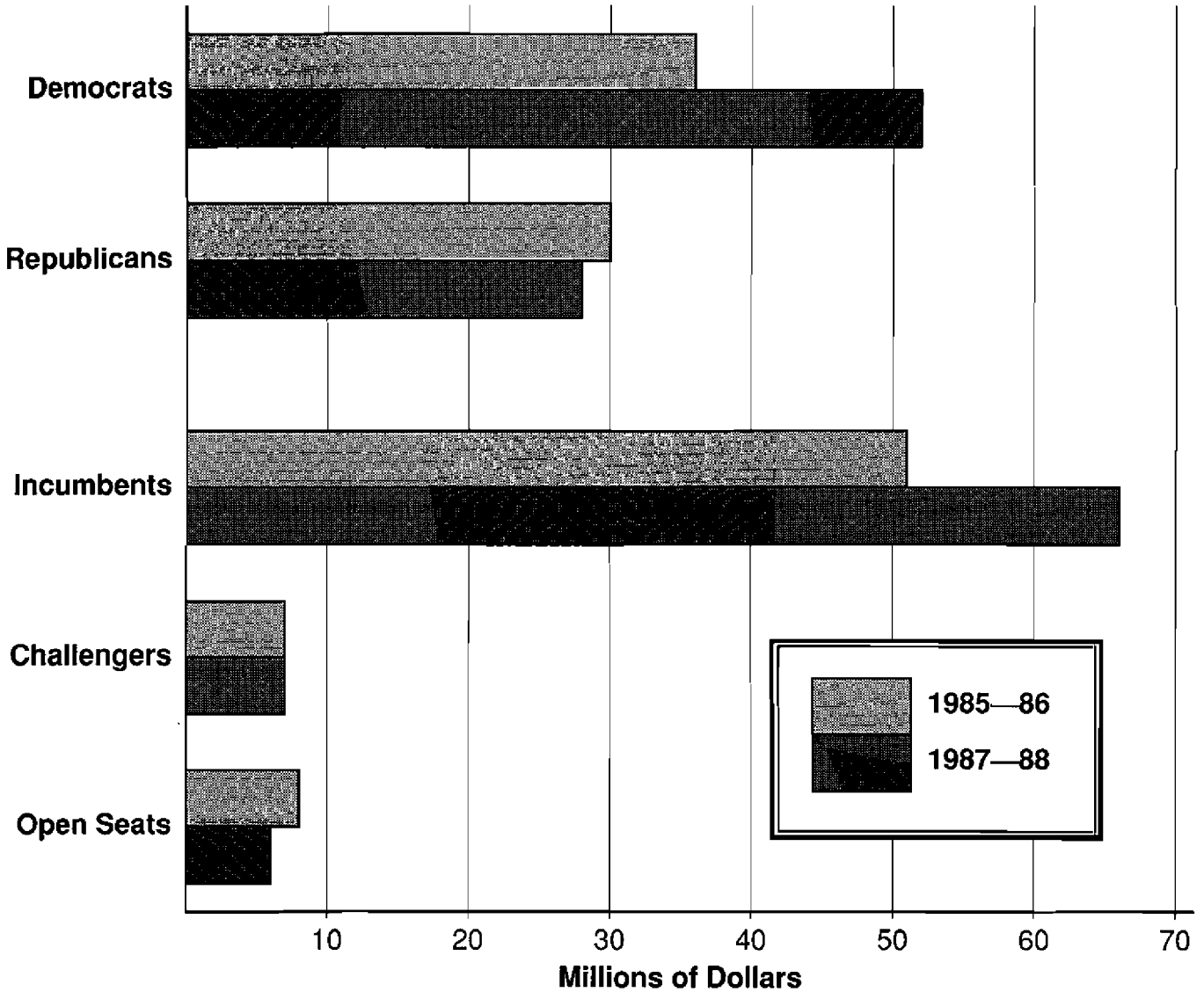
By contrast, PACs gave less to candidates in open seat races in 1988, as compared with PAC contributions to candidates running in open seat races during the last election cycle. Fewer open seat races in the current cycle account for some of this decline.

More detailed information on Congressional campaign activity may be obtained from the FEC's August 11, 1988, press release. For a copy of the release, call the FEC's Public Records Office at 202/376-3120 or, toll free, 800/424-9530.

continued

*This decline in activity may be accounted for, in part, by fewer open seat Senate races in 1988 and by the different states involved in Senate races during the current cycle.

PAC CONTRIBUTIONS TO CONGRESSIONAL CANDIDATES Through June 30 of the Election Year



FEDERAL ELECTION COMMISSION
999 E Street, NW
Washington, DC 20463

Official Business

Bulk Rate Mail
Postage and Fees Paid
Federal Election Commission
Permit Number G-31

