

Rules and Regulations

Federal Register

Vol. 69, No. 212

Wednesday, November 3, 2004

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FEDERAL ELECTION COMMISSION

11 CFR Parts 102, 106, and 109

[Notice 2004–14]

Coordinated and Independent Expenditures by Party Committees

AGENCY: Federal Election Commission.

ACTION: Final rules.

SUMMARY: The Federal Election Commission is removing its rules restricting the ability of political party committees to make both independent expenditures and coordinated party expenditures with respect to the same candidate's general election campaign for Federal office. The Commission is also repealing its rules prohibiting political party committees that make coordinated party expenditures with respect to a candidate from transferring funds to, or assigning authority to make coordinated party expenditures to, or receiving a transfer of funds from, a political party committee that has made or intends to make an independent expenditure with respect to that candidate. These rules were originally promulgated to implement section 213 of the Bipartisan Campaign Reform Act of 2002. However, in *McConnell v. FEC*, the U.S. Supreme Court held that section 213 is unconstitutional. Therefore, the Commission is now removing the rules implementing section 213. Further information is provided in the **SUPPLEMENTARY INFORMATION** that follows.

DATES: *Effective Date:* December 3, 2004.

FOR FURTHER INFORMATION CONTACT: Mr. Brad C. Deutsch, Assistant General Counsel, or Mr. Ron B. Katwan, Attorney, 999 E Street NW., Washington, DC 20463, (202) 694–1650 or (800) 424–9530.

SUPPLEMENTARY INFORMATION: The Notice of Proposed Rulemaking (“NPRM”), on which these final rules

are based, was published in the **Federal Register** on June 30, 2004. 69 *FR* 39,373 (June 30, 2004). The comment period closed on July 30, 2004. The Commission received three written comments on the proposed rules. These Final Rules are identical to the rules proposed in the NPRM.

Under the Administrative Procedures Act, 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 October 28, 2004.

Explanation and Justification

To conform its regulations to the Supreme Court's invalidation of section 213 of the Bipartisan Campaign Reform Act of 2002 (Pub. L. 107–155 (Mar. 27, 2002)) (“BCRA”) in *McConnell v. FEC*, 540 U.S. 93, 199–205 (2003), the Commission is removing its regulations at 11 CFR 109.35 and deleting any cross-references to that section in other regulations.

I. 11 CFR 102.6—Transfer of Funds; Collecting Agents

The Commission is revising section 102.6 by deleting the cross-reference to section 109.35, which is being removed.

II. 11 CFR 106.8—Allocation of Expenses for Political Party Committee Phone Banks That Refer to Clearly Identified Federal Candidate

The Commission is revising section 106.8 by deleting the cross-reference to section 109.35, which is being removed.

III. 11 CFR 109.30—How Are Political Party Committees Treated for Purposes of Coordinated and Independent Expenditures?

The Commission is revising section 109.30 by deleting the cross-references to section 109.35, which is being removed.

IV. 11 CFR 109.33—May a Political Party Committee Assign Its Coordinated Party Expenditure Authority to Another Political Party Committee?

The Commission is revising section 109.33 by deleting the cross-reference to section 109.35, which is being removed.

V. 11 CFR 109.35—What Are the Restrictions on a Political Party Committee Making Both Independent Expenditures and Coordinated Party Expenditures in Connection With the General Election of a Candidate?

Under the Federal Election Campaign Act of 1971 (the “Act”), as amended, 2 U.S.C. 431 *et seq.*, a national committee, State committee, or a subordinate committee of a State committee of a political party may make expenditures in coordination with a Federal candidate for that candidate's general election campaign¹ up to prescribed limits without these expenditures counting against the party committee's contribution limits. 2 U.S.C. 441a(d)(1)–(3); 11 CFR 109.32. While the Act limits coordinated expenditures, the Supreme Court has determined that political party committees may make unlimited “independent expenditures,”² which are not coordinated with a candidate or a candidate's authorized committees or agents. *See Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604 (1996) (“Colorado I”).³

BCRA section 213 amended 2 U.S.C. 441a(d), by prohibiting political party committees, under certain conditions, from making both coordinated party expenditures and independent expenditures with respect to the same candidate, and from making transfers

¹ See 2 U.S.C. 441a(a)(7)(B)(i)–(ii) for a definition of coordinated party expenditures. *See also* 11 CFR 109.20(b).

² “Independent expenditure” is defined in 2 U.S.C. 431(17). *See also* 11 CFR 100.16.

³ The holding of *Colorado I* is limited to independent expenditures in connection with Congressional campaigns. The opinion in *Colorado I* did not address the issue of whether regulation of independent expenditures is constitutionally permissible in connection with Presidential campaigns. (“Since this case involves only the provision concerning congressional races we do not address issues that might grow out of the public funding of presidential campaigns.”) 518 U.S. at 612. Thus, the opinion in *Colorado I* did not reach the issue of whether former 11 CFR 110.7(a)(5) which prohibited independent expenditures by the national committee of a political party in connection with a Presidential campaign was constitutional. Subsequently, however, BCRA effectively repealed section 110.7(a)(5) and the Commission replaced the section with 11 CFR 109.36, which prohibits a national committee of a political party from making independent expenditures in connection with a presidential campaign only in certain circumstances in which the national committee of a political party serves as the principal campaign committee or authorized committee of its Presidential candidate. *See* Coordinated and Independent Expenditures; Final Rules, 68 *FR* 421, 447–48 (January 3, 2003).

and assignments to other political party committees. 2 U.S.C. 441a(d)(4).

In 2002, the Commission promulgated rules at 11 CFR 109.35 to implement BCRA section 213. Coordinated and Independent Expenditures, Final Rules, 68 FR 421, 422 (January 3, 2003).

Subsequently, in *McConnell v. FEC*, the Supreme Court found BCRA section 213 unconstitutional. The Court held that by requiring political parties to choose between coordinated and independent expenditures during the post-nomination, pre-election period, BCRA section 213 placed an unconstitutional burden on the parties' right to make unlimited independent expenditures. 540 U.S. at 199–205. Accordingly, the NPRM proposed removing the regulations at 11 CFR 109.35, which implemented BCRA section 213.

The Commission received three comments on this rulemaking. The Internal Revenue Service submitted a comment informing the Commission that it had no comments. A second comment, while urging the Commission to remove the regulations implementing BCRA section 213 on the grounds that it was unconstitutional, primarily addressed issues beyond the scope of this rulemaking. A third brief comment concerned issues also not within the scope of this rulemaking. The Commission received no comments opposing the removal of its regulations at 11 CFR 109.35 as proposed in the NPRM. Accordingly, the Commission is removing and reserving section 109.35 because the statutory foundation for this section, 2 U.S.C. 441a(d)(4), has been invalidated by the Supreme Court in *McConnell v. FEC*.

VI. 11 CFR 109.36—Are There Circumstances Under Which a Political Party Committee Is Prohibited From Making Independent Expenditures?

The Commission is revising section 109.36 by deleting the word “additional” in the heading of section 109.36, because, as a result of the removal of section 109.35, the circumstances described in section 109.36 are the only circumstances under which a political party committee is prohibited from making independent expenditures.

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

The attached rules will not have a significant economic impact on a substantial number of small entities. The basis of this certification is that the national, State, and local party committees of the two major political

parties are not small entities under 5 U.S.C. 601 because they are not small businesses, small organizations, or small governmental jurisdictions.

To the extent that political party committees may fall within the definition of “small entities,” their number is not substantial. In addition, the rules do not add but remove restrictions applicable to political party committees.

List of Subjects

11 CFR Part 102

Political committees and parties, reporting and recordkeeping requirements.

11 CFR Part 106

Political candidates, campaign funds, political committees and parties.

11 CFR Part 109

Coordinated expenditures, independent expenditures, political committees and parties.

■ For the reasons set out in the preamble, the Federal Election Commission is amending Subchapter A of Chapter I of Title 11 of the *Code of Federal Regulations* as follows:

PART 102—REGISTRATION, ORGANIZATION, AND RECORDKEEPING BY POLITICAL COMMITTEES (2 U.S.C. 433)

■ 1. The authority citation for part 102 continues to read as follows:

Authority: 2 U.S.C. 432, 433, 434(a)(11), 438(a)(8), 441d.

■ 2. Section 102.6 is amended by revising paragraph (a)(1)(ii) to read as follows:

§ 102.6 Transfers of funds; collecting agents.

(a) * * *

(1) * * *

(ii) Subject to the restrictions set forth at 11 CFR 300.10(a), 300.31 and 300.34(a) and (b), transfers of funds may be made without limit on amount between or among a national party committee, a State party committee and/or any subordinate party committee whether or not they are political committees under 11 CFR 100.5 and whether or not such committees are affiliated.

* * * * *

PART 106—ALLOCATIONS OF CANDIDATE AND COMMITTEE ACTIVITIES

■ 3. The authority citation for part 106 continues to read as follows:

Authority: 2 U.S.C. 438(a)(8), 441a(b), 441a(g).

■ 4. Section 106.8 is amended by revising paragraph (b)(2)(ii) to read as follows:

§ 106.8 Allocation of expenses for political party committee phone banks that refer to a clearly identified Federal candidate.

* * * * *

(b) * * *

(2) * * *

(ii) A coordinated expenditure or an independent expenditure, subject to the limitations, restrictions, and requirements of 11 CFR 109.10, 109.32, and 109.33; or

* * * * *

PART 109—COORDINATED AND INDEPENDENT EXPENDITURES (2 U.S.C. 431(17), 441a(a) AND (d), AND PUB. L. 107–155 SEC. 214(c))

■ 5. The authority citation for Part 109 continues to read as follows:

Authority: 2 U.S.C. 431(17), 434(c), 438(a)(8), 441a, 441d; Sec. 214(c) of Pub. L. 107–155, 116 Stat. 81.

■ 6. Section 109.30 is revised to read as follows:

§ 109.30 How are political party committees treated for purposes of coordinated and independent expenditures?

Political party committees may make independent expenditures subject to the provisions in this subpart. *See* 11 CFR 109.36. Political party committees may also make coordinated party expenditures in connection with the general election campaign of a candidate, subject to the limits and other provisions in this subpart. *See* 11 CFR 109.32 through 11 CFR 109.34.

■ 7. Section 109.33 is amended by revising paragraph (a) to read as follows:

§ 109.33 May a political party committee assign its coordinated party expenditure authority to another political party committee?

(a) *Assignment.* The national committee of a political party and a State committee of a political party, including any subordinate committee of a State committee, may assign its authority to make coordinated party expenditures authorized by 11 CFR 109.32 to another political party committee. Such an assignment must be made in writing, must state the amount of the authority assigned, and must be received by the assignee committee before any coordinated party expenditure is made pursuant to the assignment.

* * * * *

■ 8. Section 109.35 is removed and reserved.

§ 109.35 [Removed and reserved]

■ 9. Section 109.36 is amended by revising the heading to read as follows:

§ 109.36 Are there circumstances under which a political party committee is prohibited from making independent expenditures?

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Dated: October 28, 2004.

Bradley A. Smith,

Chairman, Federal Election Commission.

[FR Doc. 04-24475 Filed 11-2-04; 8:45 am]

BILLING CODE 6715-01-P

SMALL BUSINESS ADMINISTRATION

13 CFR Part 105

RIN 3245-AF24

Standards of Conduct and Employee Restrictions and Responsibilities

AGENCY: U.S. Small Business Administration.

ACTION: Direct final rule.

SUMMARY: The Small Business Administration (SBA) amends its regulations governing employee standards of conduct by deleting references to Supplemental Standards of Ethical Conduct and revising the descriptions of the headings for Office of the Government Ethics (OGE) regulations. The effect of these amendments is to make SBA's Standards of Conduct and Employee Restrictions and Responsibilities a more precise statement of existing authorities applicable to the ethical conduct of SBA employees.

DATES: This direct final rule is effective January 3, 2005, without further action, unless adverse comment is received by December 3, 2004. If adverse comment is received, SBA will publish a timely withdrawal of the direct final rule in the **Federal Register**.

ADDRESSES: You may submit comments, identified by RIN number, by any of the following methods: (1) Federal eRulemaking Portal: <http://www.regulations.gov>; (2) e-mail: robert.gangwere@sba.gov. Include RIN number in the subject line of the message; (3) Fax: (202) 481-5275; (4) mail: Robert L. Gangwere, Deputy General Counsel, Office of General Counsel, U.S. Small Business Administration, 409 3rd Street, SW., Washington, DC 20416; (5) hand delivery/courier: 409 3rd Street, SW., Washington, DC 20416.

FOR FURTHER INFORMATION CONTACT:

Susan L. Sundberg, Alternate Designated Agency Ethics Official, Office of General Counsel, U.S. Small Business Administration, 409 3rd Street, SW., Washington, DC 20416; (202) 619-0585; e-mail: susan.sundberg@sba.gov.

SUPPLEMENTARY INFORMATION: SBA issued regulations governing employee standards of conduct on January 26, 1996, at 61 FR 2399 based on its independent authority under the Small Business Act, 15 U.S.C. 631 *et seq.*, and Executive Order 11222, May 8, 1965. According to 5 CFR 2635.105, an agency may also issue regulations that supplement OGE's regulations on standards of conduct for Executive branch employees, which the agency determines are necessary and appropriate in view of its programs and operations. Although SBA's standards of conduct regulations currently make general and specific references to supplemental regulations, SBA has no current plans to issue such supplemental regulations. Therefore, it is necessary to amend the regulations so as not to imply that such supplemental regulations exist. The current regulations also cross-reference two parts of OGE's regulations, 5 CFR part 2634 and 5 CFR part 2635, and describe them as the Uniform Financial Disclosure regulations and the Uniform Standards of Ethical Conduct for Executive Branch employees, respectively. This direct final rule will revise these descriptions to make them consistent with the actual headings used by OGE in its regulations.

SBA is publishing this rule as a direct final rule because the Agency believes that this rule is non-controversial; it merely makes the Agency's regulations consistent with existing authorities. SBA expects no adverse comments on this rule. If, however, adverse comments are received, SBA will publish a timely notice of withdrawal in the **Federal Register**.

Section-by-Section Analysis

Section 105.101 notifies employees that 5 CFR part 2635 codifies the "Uniform Standards of Ethical Conduct for Executive Branch employees" and that 5 CFR part 2634 codifies the "Uniform Financial Disclosure regulation for Executive Branch employees." Because these headings do not accurately reflect the headings found at 5 CFR parts 2634 and 2635, this direct final rule amends § 105.101 to indicate the accurate headings for these OGE regulations. Section 105.101 also refers employees to SBA Supplemental Standards of Ethical

Conduct at 5 CFR XLIV. This direct final rule deletes that reference because such regulations do not exist.

Section 105.402 identifies the Designated Agency Ethics Official as the official who serves as SBA's Standards of Conduct Counselor, delegates authority to that official to designate Assistant Standards of Conduct Counselors, and describes their responsibilities under OGE and SBA regulations, including SBA's supplemental regulations. Paragraph (b)(4) of this section will be removed in order to delete the provision directing standards of conduct counselors to rely on SBA's Supplemental Standards of Ethical Conduct in making decisions on outside employment. SBA will also make minor grammatical changes to this section to improve clarity.

Compliance With Executive Orders 13132, 12988 and 12866, the Regulatory Flexibility Act (5 U.S.C. 601-612) and the Paperwork Reduction Act (44 U.S.C. Ch. 35)

This direct final rule will not have substantial direct effects on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of Government. Therefore, for the purposes of Executive Order 13132, SBA determines that this direct final rule has no federalism implications warranting preparation of a federalism assessment.

This direct final rule meets applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden. The direct final rule does not have retroactive or preemptive effect.

The Office of Management and Budget (OMB) has determined that this direct final rule does not constitute a significant regulatory action under Executive Order 12866.

SBA certifies that this direct final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601-612 because the direct final rule applies to SBA employees, not small entities.

SBA has determined that this direct final rule will not impose any new reporting or recordkeeping requirements under the Paperwork Reduction Act, 44 U.S.C. Ch. 35.

List of Subjects in 13 CFR Part 105

Conflicts of interest, Conduct standards, Ethical conduct, Financial disclosure, Government employees.