

group of unrelated individuals, who reside in a particular housing unit. For the purpose of this definition:

(1) *Group quarters* means living quarters that are occupied by an institutional group of 10 or more unrelated persons, such as a nursing home, military barracks, halfway house, college dormitory, fraternity or sorority house, convent, shelter, jail or correctional institution.

(2) *Housing unit* means a house, an apartment, a group of rooms, or a single room occupied as separate living quarters, but does not include group quarters.

(3) *Separate living quarters* means living quarters:

(i) To which the occupants have access either:

(A) Directly from outside of the building, or

(B) Through a common hall that is accessible to other living quarters and that does not go through someone else's living quarters, and

(ii) Occupied by one or more persons who live and eat separately from occupant(s) of other living quarters, if any, in the same building.

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FEDERAL ELECTION COMMISSION

11 CFR Parts 100 and 106

[Notice 2010-08]

Funds Received in Response to Solicitations; Allocation of Expenses by Separate Segregated Funds and Nonconnected Committees

AGENCY: Federal Election Commission.

ACTION: Final rules.

SUMMARY: The Federal Election Commission ("Commission") is removing its rule regarding funds received in response to solicitations. The Commission is also removing two additional rules regarding the allocation of certain expenses by separate segregated funds and nonconnected committees. The United States District Court for the District of Columbia ordered that these rules are vacated, in accordance with a Court of Appeals decision. Further information is provided in the supplementary information that follows.

DATES: Effective: April 19, 2010.

FOR FURTHER INFORMATION CONTACT: Mr. Robert M. Knop, Assistant General Counsel, or Mr. Neven F. Stipanovic, Attorney, 999 E Street, NW.,

Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

SUPPLEMENTARY INFORMATION: The Commission is revising its regulations to conform to the decision of the United States Court of Appeals for the District of Columbia Circuit in *EMILY's List v. FEC*, 581 F.3d 1 (DC Cir. 2009). On September 18, 2009, the court ruled that 11 CFR 100.57, 106.6(c), and 106.6(f) violated the First Amendment of the United States Constitution. See *EMILY's List v. FEC*, 581 F.3d 1 (DC Cir. 2009). The court also ruled that 11 CFR 100.57 and 106.6(f), as well as one provision of 106.6(c), exceeded the Commission's authority under the Federal Election Campaign Act ("Act"). See *id.* At the direction of the Court of Appeals, the United States District Court for the District of Columbia ordered that these rules are vacated. See *Final Order, EMILY's List v. FEC*, No. 05-0049 (D.D.C. Nov. 30, 2009).

The Commission published a Notice of Proposed Rulemaking ("NPRM") on December 29, 2009, in which it sought public comment on the proposed removal of rules at 11 CFR 100.57, 106.6(c), and 106.6(f). See Notice of Proposed Rulemaking on Funds Received in Response to Solicitations; Allocation of Expenses by Separate Segregated Funds and Nonconnected Committees, 74 FR 68720 (Dec. 29, 2009) ("NPRM"). The comment period closed on January 28, 2010. The Commission received two comments on the proposed rules, one of which was a comment from the Internal Revenue Service ("IRS") stating that the proposed rules did not conflict with Internal Revenue Code or IRS regulations. The comments are available on the Commission's website at http://www.fec.gov/law/law_rulemakings.shtml#emilyslistrepeal.

For the reasons explained below, the Commission has decided to delete the rules at 11 CFR 100.57, 106.6(c), and 106.6(f). The Commission's final rules are identical to the proposed rules in the NPRM.

Under the Administrative Procedure 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 March 15, 2010.

Explanation and Justification

I. Deletion of 11 CFR 100.57—Funds Received in Response to Solicitations

The Commission promulgated 11 CFR 100.57 to specify when funds received in response to solicitations are considered to be contributions for purposes of the Act. Under paragraph (a) of section 100.57, funds provided in response to a communication were treated as contributions if the communication indicated that any portion of the funds received would be used to support or oppose the election of a clearly identified Federal candidate. Paragraph (b)(1) of section 100.57 provided that all funds received in response to a solicitation described in section 100.57(a) that referred to both a clearly identified Federal candidate and a political party, but not to any non-Federal candidates, had to be treated as contributions. Paragraph (b)(2) stated that if a solicitation described in section 100.57 referred to at least one clearly identified Federal candidate and one or more clearly identified non-Federal candidate, then at least fifty percent of the funds received in response to the solicitation had to be treated as contributions. Paragraph (c) of section 100.57 provided an exception for certain solicitations for joint fundraisers conducted between or among authorized committees of Federal candidates and the campaign organizations of non-Federal candidates.

The Commission is removing section 100.57 in its entirety from its regulations because the Court of Appeals held that section 100.57 is unconstitutional and that it exceeded the Commission's statutory authority under the Act. See *EMILY's List v. FEC*, 581 F.3d 1 (D.C. Cir. 2009). Accordingly, the District Court ordered that 11 CFR 100.57 is vacated. See *Final Order, EMILY's List v. FEC*, No. 05-0049 (D.D.C. Nov. 30, 2009).

The Commission received one comment on the proposal to remove section 100.57. That commenter agreed with the Commission that 11 CFR 100.57 should be removed in its entirety.

II. Deletion of 11 CFR 106.6(c) and 106.6(f)—Allocation of Expenses Between Federal and Non-Federal Activities by Separate Segregated Funds and Nonconnected Committees

The Commission promulgated 11 CFR 106.6 to provide separate segregated funds (SSFs) and nonconnected committees making disbursements in connection with both Federal and non-Federal elections with instructions as to how to allocate their administrative

expenses and costs for combined Federal and non-Federal activities. The rule at 11 CFR 106.6(c) required nonconnected committees and SSFs to use at least fifty percent Federal funds to pay for administrative expenses, generic voter drives, and public communications that referred to a political party, but not to any Federal or non-Federal candidates.¹ Paragraph (f) of section 106.6 specified that nonconnected committees and SSFs had to pay for public communications and voter drives that referred to both Federal and non-Federal candidates using a percentage of Federal funds proportionate to the amount of the communication that was devoted to the Federal candidates. *See id.*

The Commission is now removing paragraphs (c) and (f) from section 106.6 because the Court of Appeals held that these provisions are unconstitutional. *See EMILY's List v. FEC*, 581 F.3d 1 (DC Cir. 2009). Accordingly, the District Court ordered that paragraphs (c) and (f) of section 106.6 are vacated. *See Final Order, EMILY's List v. FEC*, No. 05-0049 (D.DC Nov. 30, 2009).

The Commission sought public comment on whether the Court of Appeals' decision extends to SSFs as well as to nonconnected committees. *See EMILY's List NPRM* at 68721. The Commission noted that section 106.6's allocation rules, including paragraphs (c) and (f), apply to nonconnected committees and to SSFs. *See id.* EMILY's List is a non-profit non-connected political committee, not an SSF. The *EMILY's List* decision stated that "this case concerns the FEC's regulation of *non-profit entities* that are not connected to a * * * for-profit corporation." *See EMILY's List*, 581 F.3d at 8. Moreover, in footnote 7 of the decision, the court stated: "In referring to non-profit entities, we mean non-connected non-profit corporations * * * as well as unincorporated non-profit groups. 'Non-connected' means that the non-profit is not a * * * committee established by a corporation or labor union." *See id.* n.7. The Commission asked whether these

aspects of the opinion provided any basis for treating SSFs differently from the non-connected committee at issue in the *EMILY's List* case. *See EMILY's List NPRM* at 68721. Alternatively, the Commission asked whether the court's order vacating 11 CFR 106.6(c) and (f) is so clear that the Commission has no discretion to do anything but repeal those provisions in their entirety. *Id.*

The Commission received one comment on this issue. That commenter agreed with the Commission's proposal to remove paragraphs (c) and (f) from section 106.6. The commenter argued that the *EMILY's List* decision applies to SSFs as well as to nonconnected committees. According to the commenter, the Court of Appeals ruled that the regulations were invalid in their entirety and the court did not provide any exception for SSFs. The commenter further noted that paragraphs (c) and (f) of section 106.6 applied to both SSFs and to nonconnected committees, and that these regulations were challenged on their face. Accordingly, the court's reasoning applies with equal force to SSFs as to nonconnected committees. As to the court's statement in footnote 7, the commenter argued that this statement was simply a description of how the term "non-profit entities" was to be used in the opinion because the term "non-profit entities" does not appear in the Act. However, the explanation of the court's terminology did not limit the reach of the decision.

The Commission agrees with the commenter that the court's holding applies to SSFs as well as to nonconnected committees. Although the court defined the term non-profit entities as not including SSFs, the court explicitly ordered the District Court to "vacate the challenged regulations," referring to section 106.6(c) and section 106.6(f) in their entirety. The court's order provides no exception for SSFs. Accordingly, the Commission is removing paragraphs (c) and (f) in their entirety.

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

The Commission certifies that the attached final rules will not have a significant economic impact on a substantial number of small entities. Few, if any, small entities will be affected by these final rules, which apply to Federal candidates and their campaign committees, political committees of political parties, nonconnected committees, and separate segregated funds. Candidates, party committees, separate segregated funds, and nonconnected committees are not

"small entities" under 5 U.S.C. 601. They are not independently owned and operated because they are not financed and controlled by a small identifiable group of individuals; rather, they rely on contributions from a variety of persons to fund committee activities. However, to the extent that any committees might be considered "small entities," it is also the case that the final rules do not add any new substantive provisions to the current regulations, but instead remove existing regulations pursuant to a Federal court order that they be vacated. Accordingly, removing these regulations will not have a significant impact on a substantial number of small entities.

List of Subjects

11 CFR Part 100

Elections.

11 CFR Part 106

Campaign funds, Political committees and parties, Reporting and recordkeeping requirements.

■ For the reasons set out in the preamble, subchapter A of chapter I of title 11 of the *Code of Federal Regulations* is amended as follows:

PART 100—SCOPE AND DEFINITIONS (2 U.S.C. 431)

■ 1. The authority citation for part 100 continues to read as follows:

Authority: 2 U.S.C. 431, 434, 438(a)(8), and 439a(c).

§ 100.57 [Removed and Reserved]

■ 2. Section 100.57 is removed and reserved.

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).

§ 106.6 Allocation of expenses between Federal and non-Federal activities by separate segregated funds and nonconnected committees.

■ 4. In § 106.6, paragraphs (c) and (f) are removed and reserved.

Dated: March 15, 2010.

On behalf of the Commission.

Matthew S. Petersen,
Chairman, Federal Election Commission.

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¹ Section 106.6(a) defines a non-connected committee as "any committee which conducts activities in connection with an election but which is not a party committee, an authorized committee of any candidate for Federal election, or a separate segregated fund." A separate segregated fund is a political committee established, administered, or financially supported by a corporation or labor organization. 2 U.S.C. 441b(b)(2)(C); 11 CFR 114.1(a)(2)(iii). A generic voter drive includes voter identification, voter registration, and get-out-the-vote drives, or any other activities that urge the general public to register, vote or support candidates of a particular party or associated with a particular issue, without mentioning a specific candidate. 11 CFR 106.6(b)(1)(iii).