This document is scheduled to be published in the Federal Register on 10/17/2014 and available online at **http://federalregister.gov/a/2014-24660**, and on **FDsys.gov**

FEDERAL ELECTION COMMISSION

11 CFR Part 110

[NOTICE 2014–12]

Aggregate Biennial Contribution Limits

AGENCY: Federal Election Commission.

ACTION: Advance Notice of Proposed Rulemaking.

SUMMARY: In addition to publishing in today's Federal Register an Interim Final Rule to remove the aggregate contribution limits from the Commission's regulations, the Commission requests comments on whether to begin a rulemaking to revise other regulations in light of certain language from the Supreme Court's recent decision in McCutcheon v. FEC. The Commission intends to review the comments it receives as it decides what revisions, if any, it will propose making to its rules.

DATES: Comments must be received on or before [INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. The Commission will hold a hearing on these issues on February 11, 2015. Anyone wishing to testify at the hearing must file written comments by the due date and must include a request to testify in the written comments.

ADDRESSES: All comments must be in writing. Comments may be submitted electronically via the Commission's website at sers.fec.gov, reference REG 2014-01. Commenters are encouraged to submit comments electronically to ensure timely receipt and consideration. Alternatively, comments may be submitted in paper form. Paper comments must be sent to the Federal Election Commission, Attn.: Amy L. Rothstein, Assistant General Counsel, 999 E Street, NW., Washington, DC 20463. All comments must include the full name and postal service address of a commenter, and of each commenter if filed jointly, or they will not be

considered. The Commission will post comments on its website at the conclusion of the comment period.

FOR FURTHER INFORMATION CONTACT: Ms. Amy L. Rothstein, Assistant General Counsel, or Mr. Theodore M. Lutz, Attorney, 999 E Street, NW., Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

SUPPLEMENTARY INFORMATION:

Background

The Federal Election Campaign Act, 52 U.S.C. 30101-46 (formerly 2 U.S.C. 431-57) ("FECA"), imposes two types of limits on the amount that individuals may contribute in connection with federal elections. The "base limits" restrict how much an individual may contribute to a particular candidate or political committee per election or calendar year. See 52 U.S.C. 30116(a)(1) (formerly 2 U.S.C. 441a(a)(1)). The "aggregate limits" restrict how much an individual may contribute to all candidate committees, political party committees, and other political committees in each two-year election cycle.[1] See 52 U.S.C. 30116(a)(3) (formerly 2 U.S.C. 441a(a)(3)). The Commission has implemented the aggregate limits in its regulations at 11 CFR 110.5.

On April 2, 2014, the United States Supreme Court held that the aggregate contribution limits at 52 U.S.C. 30116(a)(3) (formerly 2 U.S.C. 441a(a)(3)) are unconstitutional. McCutcheon v. FEC, 572 U.S. __, 134 S. Ct. 1434, 1442, 1450-59 (2014) (plurality op.). The Court's decision did not affect the base limits. See id. at 1442. Accordingly, in an Interim Final Rule published today in the Federal Register, the Commission deleted 11 CFR 110.5 and made

[1] Under the aggregate limits, as indexed for inflation in the 2013-14 election cycle, an individual could contribute up to $48,600 to candidates and their authorized committees, and up to $74,600 to other political committees, of which no more than $48,600 could be contributed to political committees other than national party committees. See Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold, 78 FR 8530, 8532 (Feb. 6, 2013).

technical and conforming changes to 11 CFR 110.1(c), 110.14(d) and (g), 110.17(b), and 110.19 to conform its regulations to the McCutcheon decision.

The Commission also seeks comment on whether it should further modify its regulations or practices in response to certain language from the McCutcheon decision.[2] The Commission acknowledges that these issues are not presented in this Advance Notice of Proposed Rulemaking in a way to fully apprise interested parties with sufficient clarity and specificity for the Commission to enact a final rule.

Although it held the aggregate limits to be unconstitutional, the Supreme Court indicated that there are "multiple alternatives available to Congress that would serve the Government's interest in preventing circumvention while avoiding 'unnecessary abridgment' of First Amendment rights." McCutcheon, 134 S. Ct. at 1458 (quoting Buckley v. Valeo, 424 U.S. 1, 25 (1976)). The Court identified mechanisms that could be implemented or amended to prevent circumvention of the base limits, including: earmarking regulations, 11 CFR part 110; affiliation factors, 11 CFR 100.5; joint fundraising committee regulations, 11 CFR 102.17; and disclosure regulations, 11 CFR part 104. The Commission seeks comment on whether it should modify its regulations or practices in these areas, as discussed below. The Commission also seeks comment on whether it should make any other regulatory changes in light of the decision.

Earmarking

The Act provides that "all contributions made by a person, either directly or indirectly, on behalf of a particular candidate, including contributions which are in any way earmarked or otherwise directed through an intermediary or conduit to such candidate," are contributions from that person to the candidate. 52 U.S.C. 30116(a)(8) (formerly 2 U.S.C. 441a(a)(8)). The Commission's regulations define the term "earmarked" to mean "a designation, instruction, or

[2] McCutcheon, 134 S. Ct. at 1453-54, 1458-60.

encumbrance, whether direct or indirect, express or implied, oral or written, which results in all or any part of a contribution or expenditure being made to, or expended on behalf of, a clearly identified candidate or a candidate's authorized committee." 11 CFR 110.6(b)(1).

In analyzing whether the aggregate contribution limits served to prevent circumvention of the base limits, the Court relied on this "broad[]" definition of "earmarked" at 11 CFR 110.6(b)(1) to conclude that Commission rules already cover "implicit agreements to circumvent the base limits." McCutcheon, 134 S. Ct. at 1447, 1452-56, 1459; see also id. at 1453 ("[A donor] cannot . . . even imply that he would like his money recontributed to [a candidate]."). In enforcement actions, however, the Commission has determined that funds are considered to be "earmarked" only when there is "clear documented evidence of acts by donors that resulted in their funds being used" as contributions.[3] Should the Commission revisit the manner in which it enforces its earmarking regulations to encompass the "implicit agreements" addressed by the Court?

In its discussion of the Commission's earmarking regulations, the Court also considered 11 CFR 110.1(h). McCutcheon, 134 S. Ct. at 1453-56. That rule "governs the circumstances under which contributions to a candidate . . . must be aggregated with contributions to other political committees for purposes of the [Act's] contribution limits." Contribution and Expenditure Limitations and Prohibitions; Contributions by Persons and Multicandidate Political Committees, 52 FR 760, 765 (Jan. 9, 1987). Section 110.1(h) provides that a person may contribute both to a candidate for a given election and to a political committee that supports the

[3] Factual & Legal Analysis at 6-7, MUR 5732 (Matt Brown for U.S. Senate) (Apr. 4, 2007) (concluding that there was no reason to believe earmarking had occurred where "there were no cover letters or other instructions accompanying the checks" or "on the checks themselves") (citing MURs 4831/5274 (Nixon)); see also First General Counsel's Report at 14-16, MUR 5445 (Geoffrey Davis for Congress) (Feb. 2, 2005); First General Counsel's Report at 9, MUR 5125 (Paul Perry for Congress) (Dec. 20, 2002) (finding no reason to believe where there was no "designation, instruction, or encumbrance on the contribution").

same candidate for the same election so long as: (1) the political committee is not an authorized committee or a single-candidate committee; (2) the contributor does not give with the knowledge that a substantial portion of the contribution will be contributed to, or expended on behalf of, that candidate for the same election; and (3) the contributor does not retain control over the funds. 11 CFR 110.1(h).[4] These criteria help to "disarm" the risk of circumvention, McCutcheon, 134 S. Ct. at 1453, and the Court accordingly suggested that the Commission "might strengthen" 11 CFR 110.1(h)(2) by "defining how many candidates a PAC must support in order to ensure that 'a substantial portion' of a donor's contribution is not rerouted to a certain candidate." Id. at 1459. Should the Commission make such a change to 11 CFR 110.1(h), for example, by establishing a minimum number of candidates a PAC must support or by establishing a maximum percentage of a PAC's funds that can go to a single candidate?[5] Would such a change unnecessarily limit the ability of PACs to associate with candidates? In light of the McCutcheon decision and discussion above, should the Commission revise any of its other earmarking rules? If so, how?

Affiliation

In addition to the earmarking provisions discussed above, the Court cited the anti-proliferation provisions of the Act and Commission regulations as mechanisms that limit circumvention of the base limits. McCutcheon, 134 S. Ct. at 1453-54 (citing former 2 U.S.C. 441a(a)(5); 11 CFR 100.5(g)). Commission regulations provide that "[a]ll committees

[4] In Advisory Opinion 2010-09 (Club for Growth) at 5, the Commission concluded that "11 CFR 110.1(h) and its rationale do not apply to [an independent-expenditure-only political committee's] solicitations or any contributions it receives that are earmarked for specific independent expenditures."

[5] In 1985, the Commission proposed revising 11 CFR 110.1(h) to clarify its interpretation of the regulation and included a proposal to articulate "indicia of a contributor's 'knowledge.'" See Contribution and Expenditure Limitations and Prohibitions: Contributions by Persons and Multicandidate Political Committees, 50 FR 15169, 15172-75 (Apr. 17, 1985). Ultimately, the Commission decided not to revise that section. Contribution and Expenditure Limitations and Prohibitions; Contributions by Persons and Multicandidate Political Committees, 52 FR 760, 765 (Jan. 9, 1987).

. . . established, financed, maintained, or controlled, by the same . . . person, or group of persons . . . are affiliated," and thus are subject to a single contribution limit. 11 CFR 100.5(g)(2), 110.3(a)(1)(ii). These regulations include a number of affiliation factors, see 11 CFR 100.5(g)(4), 110.3(a)(3), which the Court indicated the Commission could use — when presented with "suspicious patterns of PAC donations" — to determine whether political committees are affiliated. See McCutcheon, 134 S. Ct. at 1454. Are the current affiliation factors at 11 CFR 100.5(g)(4) and 110.3(a)(3) adequate to prevent circumvention of the base contribution limits? Should the Commission revisit its affiliation factors? If so, how?

Joint Fundraising Committees

The Act and Commission regulations authorize the creation of joint fundraising committees, see 52 U.S.C. 30102(e)(3)(A)(ii) (formerly 2 U.S.C. 432(e)(3)(A)(ii)); 11 CFR 102.17, as well as the transfer of funds between and among participating committees. See 11 CFR 102.6(a)(1)(iii), 110.3(c)(2). The Court noted that these rules could be revised to limit the opportunity for using joint fundraising committees to circumvent the base limits. See McCutcheon, 134 S. Ct. at 1458-59. The Court suggested, for instance, that joint fundraising committees could be limited in size, or that funds received by participants in a joint fundraising committee could be spent only "by their recipients." Id.

The Act includes the following provisions that can affect transfers between committees engaged in joint fundraising. Candidates may transfer contributions they receive, "without limitation, to a national, State, or local committee of a political party." 52 U.S.C. 30114(a)(4) (formerly 2 U.S.C. 439a(a)(4)). The limits on contributions found at 52 U.S.C. 30116(a)(1) and (2) (formerly 2 U.S.C. 441a(a)(1) and (2)) do not apply to transfers "between and among political committees which are national, State, district or local committees (including any

subordinate committee thereof) of the same political party." 52 U.S.C. 30116(a)(4) (formerly 2 U.S.C. 441a(a)(4)). The Act provides that contributions made by political committees that are "established or financed or maintained or controlled" by the same entity shall be considered to have been made by a single committee, except that this provision does not "limit transfers between political committees of funds raised through joint fundraising efforts." 52 U.S.C. 30116(a)(5)(A) (formerly 2 U.S.C. 441a(a)(5)(A)).

In light of the McCutcheon decision and the statutory provisions described above, can or should the Commission revise its joint fundraising rules? If so, how?

Disclosure

The Supreme Court observed that disclosure requirements "may . . . 'deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity.'" McCutcheon, 134 S. Ct. at 1459-60 (quoting Buckley v. Valeo, 424 U.S. 1, 67 (1976)). Particularly due to developments in technology — primarily the internet — the Court observed that "disclosure offers much more robust protections against corruption" because "[r]eports and databases are available on the FEC's Web site almost immediately after they are filed." Id. at 1460.

Given these developments in modern technology, what regulatory changes or other steps should the Commission take to further improve its collection and presentation of campaign finance data?

On behalf of the Commission,

Dated: October 9, 2014.

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Lee E. Goodman,

Chairman,

Federal Election Commission.

BILLING CODE: 6715-01-P

[FR Doc. 2014-24660 Filed 10/16/2014 at 8:45 am; Publication Date: 10/17/2014]