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FEDERAL ELECTION COMMISSION
Washington, DC 20463

**AGENDA ITEM**

October 23, 2015

**For Meeting of** 10-29-15

**SUBMITTED LATE**

**MEMORANDUM**

TO: The Commission

FROM: Daniel A. Petalas DP by jjs
Acting General Counsel

Adav Noti AN
Associate General Counsel

Amy L. Rothstein ALR by AN
Assistant General Counsel

Esther D. Gyory EDG by AN
Neven F. Stipanovic NFS by AN
Tony Buckley TB
Attorneys

SUBJECT: REG 2014-01 Outline of Draft NPRM Implementing Party Segregated Accounts

Attached is an outline of a draft Notice of Proposed Rulemaking for Implementing Party Segregated Accounts. We request that this outline be placed on the agenda for October 29, 2015.

Attachment

FEDERAL ELECTION COMMISSION
Washington, DC 20463

October 23, 2015

**MEMORANDUM**

TO: Regulations Committee

FROM: Daniel A. Petalas DAP by ljs
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Attorneys

SUBJECT: Outline of Draft NPRM Implementing Party Segregated Accounts

The Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, 128 Stat. 2130, 2772 (2014) (the "Appropriations Act"), amended the Federal Election Campaign Act, 52 U.S.C. §§ 30101-46 ("FECA"), by establishing separate limits on contributions to three types of segregated accounts of national party committees (collectively "party segregated accounts"). The party segregated accounts are for expenses incurred with respect to presidential nominating conventions ("convention accounts"); party headquarters buildings ("headquarters accounts"); and election recounts or contests and other legal proceedings ("recount accounts"). 52 U.S.C. § 30116(a)(9). The party segregated accounts are in addition to any other federal accounts maintained by a national party committee ("general accounts").

As explained further below, this Office recommends that the Commission publish a notice of proposed rulemaking ("NPRM") to implement the Appropriations Act, as well as to implement certain provisions of the Gabriella Miller Kids First Research Act, Pub. L. No. 113-94, 128 Stat. 1085 (2014) (the "Research Act"). Our recommended outline of an NPRM follows.

## I. Background

The NPRM would begin by briefly describing the basis for the existing regulatory structure of spending by party committees on nominating conventions, party headquarters buildings, and recounts and election contests, and would identify other regulatory provisions affected by the Appropriations Act.

### *A. Presidential Nominating Conventions*

The NPRM would summarize the history of the public funding of national nominating conventions through the Presidential Election Campaign Fund Act, 26 U.S.C. §§ 9001-9013 (the "Funding Statute") and would generally explain the current implementing regulations at 11 C.F.R. part 9008. This section of the NPRM would describe convention committees and the regulations governing them, as well as host committees and municipal funds and their relationship to the national party committees. *See* 11 C.F.R. part 9008 subpart B. The NPRM would next describe the Research Act's termination of the public funding program for conventions. The NPRM would also summarize Advisory Opinion 2014-12 (Democratic National Committee *et al.*) ("DNC"), which addressed the financing of convention committees after the Research Act.

### *B. Party Headquarters Buildings*

The NPRM would describe the statutory and regulatory treatment of spending by national party committees for the purchase or construction of an office building or facility. The NPRM would explain that prior to the Bipartisan Campaign Reform Act, Pub. L. No. 107-155, 116 Stat. 81 (2002) ("BCRA"), FECA exempted from the definition of "contribution" any donation to, or spending by, a national party committee "to defray any cost for construction or purchase of any office facility" if that spending was not "for the purpose of influencing the election of any candidate in any particular election for Federal office." 2 U.S.C. § 431(8)(B)(viii) (2002); *see also* 11 C.F.R. §§ 100.7(b)(12), 100.8(b)(13) (2002) (exempting costs for construction or purchase of office facility from definitions of "contribution" and "expenditure"); Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed. Reg. 49,064, 49,100 (Jul. 29, 2002) (discussing repeal of statutory exemption). The NPRM would explain that BCRA repealed this exception, *see* BCRA § 103(b)(1), 116 Stat. 87 (repealing former 2 U.S.C. § 431(8)(B)(viii)), and the Commission promulgated new regulations to "make clear that these exceptions no longer apply to national party committees." *See* Reorganization of Regulations on "Contribution" and "Expenditure," 67 Fed. Reg. 50,582, 50,584 (Aug. 5, 2002).

### *C. Recounts, Election Contests, or Other Legal Proceedings*

The NPRM would describe the current regulations exempting receipts and disbursements for recounts and election contests from the definitions of "contribution" and "expenditure." 11 C.F.R. §§ 100.91, 100.151. The NPRM would also describe the Commission's advisory opinions addressing recounts and election contests, including Advisory Opinion 2006-24 (National Republican Senatorial Committee *et al.*) ("NRSC") (determining that donations to recount funds are subject to source-and-amount limitations and reporting requirements but not aggregated with contributions from same person), Advisory Opinion 2010-14 (Democratic Senatorial Campaign Committee) ("DSCC") (finding that recount-related expenses may be

incurred before date of election and committees may allocate expenses between principal campaign account and recount fund), and Advisory Opinion 2010-18 (Minnesota Democratic-Farmer-Labor Party) ("DFL") (concluding that committee may request redesignation of recount donations to federal campaign account provided that donations are aggregated with contributions to federal campaign account).

*D. Appropriations Act*

The NPRM would detail the Appropriations Act's provisions governing the three new party segregated accounts, including the higher limits on contributions to the accounts, their exemption from the party coordinated expenditure limits, and the limit on expenditures from convention accounts. The NPRM would also provide a general explanation of the current regulations potentially implicated by the Appropriations Act, other than those already addressed above, including:

- 11 C.F.R. §§ 110.1(c), 110.2(c) (contributions from single person to national party committee are subject to single limit per calendar year);
- 11 C.F.R. § 110.3(c)(1) (contribution limits do not apply to transfers of funds between and among national committees of same political party); and
- 11 C.F.R. §§ 109.30-109.34 (party coordinated expenditures).

## II. Party Segregated Accounts

The NPRM would propose to revise the rules in part 102 to specify how national party committees may establish and maintain the party segregated accounts. Most significantly, the NPRM would propose to create new section 102.18, which would (1) provide for establishment of the three party segregated accounts; (2) state the applicable limitations, prohibitions, and reporting requirements; (3) explain how the funds in the accounts may be used; and (4) cross-reference other Commission rules on reporting, deposit, allocation, and redesignation, as appropriate.

*A. Convention Accounts*

Proposed section 102.18(XX)[1] would cover convention accounts. The proposed regulation would track the language of 52 U.S.C. § 30116(a)(9)(A) to provide that a national party committee, other than a national congressional campaign committee of a political party, may create a separate, segregated account that is used "solely to defray expenses incurred with respect to a presidential nominating convention."

- *Permissible Expenses.* The Appropriations Act provides that funds in a convention account may be used to pay deposits, repay loans the proceeds of which were used to defray convention expenses, and "otherwise to restore funds used to defray [convention] expenses." 52 U.S.C. § 30116(a)(1)(A). Similar language currently appears in 11 C.F.R. § 9008.7(a)(1)-(3). Accordingly, the proposed regulation would define "expenses

[1] The exact designations of the proposed subsections discussed in Part II of this memorandum would be determined based on the overall structure of new section 102.18.

incurred with respect to a presidential nominating convention" in a manner consistent with current 11 C.F.R. § 9008.7(a), with technical changes to reflect that convention spending will now be made through convention accounts rather than convention committees. Like current section 9008.7, the list of permissible convention expenses in the proposed regulation would not be exhaustive. *See* 11 C.F.R. § 9008.7(a)(4) (stating that convention expenses "include, but are not limited to" listed expenses). The NPRM would also ask whether other expenses should be added to the list.

- *Fundraising Costs.* The proposed regulation would allow funds in a convention account to be used to raise funds for the convention account. This would be consistent with statements by House and Senate leaders that they intended "these funds to be used . . . to pay for the costs of fundraising for this segregated account." 113 Cong. Reg. H9286 (daily ed. Dec. 11, 2014) (statement of Rep. Boehner); 113 Cong. Rec. S6814 (daily ed. Dec. 13, 2014) (statement of Sen. Reid) (collectively, "Congressional Statements"). It also would be in line with other Commission determinations that funds raised for specialized purposes may be used to defray the costs of raising those funds. *See, e.g.*, 11 C.F.R. § 9003.3 (permitting contributions to general election legal and accounting compliance fund to be used to defray costs of soliciting contributions to fund); Advisory Opinion 2010-14 (DSCC) at 5 (noting that "Commission regulations generally permit (and in some cases require) the proceeds of fundraising activities to be used to defray the costs of those activities"); *cf.* Advisory Opinion 2003-15 (Majette *et al.*) (permitting use of donations to legal defense fund to solicit for fund).

- *Prohibited Uses.* To implement the Appropriations Act's restriction that funds in a convention account may be used solely to finance a convention, the proposed regulation would prohibit the use of such funds to make independent expenditures or contributions or for general campaign expenses. The NPRM would also ask whether the proposed regulation at 11 C.F.R. § 102.18(XX) should retain any of the prohibitions on payments that previously applied to public funds used by convention committees under 11 C.F.R. § 9008.7(b) or identify any other expenses that may not be paid from the convention account.

- *Expenditure Limitation.* The proposed regulation would limit expenditures from the convention account to $20,000,000 per convention, pursuant to 52 U.S.C. § 30116(a)(9)(A). The proposed regulation would make clear, however, that convention expenditures from a national committee's general account are not subject to this limitation.

- *Host Committees and Municipal Funds.* Current convention funding regulations provide that convention-related expenditures made by host committees and government agencies or municipal funds are not expenditures by the national committee of a political party and do not count against the national committee's expenditure limitation, provided that the expenditures are made in accordance with the requirements of current 11 C.F.R.

§§ 9008.52 and 9008.53.[2] 11 C.F.R. § 9008.8(b)(1), (2). The Commission has long viewed goods and services provided by host committees and municipal funds pursuant to these regulations as "in-kind donations" to a convention committee — rather than in-kind contributions — because the goods and services are not provided for the purpose of influencing a federal election.[3] The proposed regulation would similarly exclude qualifying goods and services provided by host committees and municipal funds from counting towards a national committee's expenditure limitation or as contributions to the committee.

- *Spending from General Account.* The proposed regulation would note that a national party committee may use funds in its general account to pay for presidential nominating conventions, in addition to using funds in its convention account.

- *Transfers from Convention Account.* As discussed further in Part IV below, the proposed regulation would prohibit a national party committee from transferring funds from its convention account to any other account of the national party committee (other than to pay for allocable expenses), or to any other political committee.

- *Allocable Expenses.* The proposed regulation would allow national party committees to allocate expenses according to the proposed allocation rules described in Part V below, or to pay allocable expenses entirely with funds from their general accounts.

*B. Headquarters Accounts*

Proposed section 102.18(YY) would cover headquarters accounts. The proposed regulation would track the language of 52 U.S.C. § 30116(a)(9)(B) to provide that a national party committee, including a national congressional campaign committee of a political party, may create a separate, segregated account that is used "solely to defray expenses" incurred (1) for "the construction, purchase, renovation, operation, and furnishing of one or more headquarters buildings of the party," or (2) to "repay loans the proceeds of which were used to defray such expenses" (including expenses for obligations incurred during the two-year period that ended on the date of the enactment of the Appropriations Act).

- *Permissible "Construction" and "Purchase" Expenses.* The proposed regulation would define permissible expenses incurred for the "construction" and "purchase" of a party headquarters building in a manner consistent with the Commission's prior guidance. As

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[2] As discussed further below, the NPRM would propose to delete most of 11 C.F.R. part 9008 subpart A and to move the remaining regulations, along with the regulations governing host committees and municipal funds in 11 C.F.R. part 9008 subpart B, to 11 C.F.R. part 107.

[3] *See, e.g.*, 1977 Amendments to the Federal Election Campaign Act of 1971, H.R. Doc. No. 95-44, 135-36 (1977); Presidential Election Campaign Fund and Federal Financing of Presidential Nominating Conventions, 44 Fed. Reg. 63,036, 63,037-38 (Nov. 1, 1979); Presidential Election Campaign Fund and Federal Financing of Presidential Nominating Conventions, 59 Fed. Reg. 33,606, 33,615 (Jun. 29, 1994); Public Financing of Presidential Candidates and Nominating Conventions; Final Rule, 68 Fed. Reg. 47,386, 47,399-400 (Aug. 8, 2003); *see also* Advisory Opinion 1975-01 (Democratic National Committee *et al.*); Advisory Opinion 1975-47 (Democratic National Committee); Advisory Opinion 1980-21 (New York Yankee Baseball Club); Advisory Opinion 1980-53 (Kelly Services).

noted above, FECA and the Commission's pre-BCRA regulations excluded from the definition of "contribution" "any cost incurred for construction or purchase of any office facility." 2 U.S.C. § 431(8)(B)(viii) (2002); 11 C.F.R. § 100.7(b)(12) (2002). In a number of pre-BCRA advisory opinions, the Commission found that the following types of expenses would fall within this exception:

- Headquarters expenses constituting "capital expenditures" under the Internal Revenue Code and related Internal Revenue Service regulations. Advisory Opinion 1998-07 (Pennsylvania Democratic Party) at 5.[4]

- Renovation of party headquarters building, including construction management expenses and architectural fees "directly and solely related" to the restoration and renovation of party headquarters building. *See* Advisory Opinion 2001-01 (North Carolina Democratic Party) at 3.

- Mortgage payments on a new party headquarters building. Advisory Opinion 1998-08 (Iowa Democratic Party) at 3; *see also* Advisory Opinion 1993-09 (Michigan Republican State Committee) (allowing use of building fund to purchase or construct new party headquarters building and to pay off balance of land contract on current headquarters building, and to use proceeds from sale of land to purchase new headquarters building).

The NPRM would propose to codify these categories of permissible construction and purchase expenses for headquarters buildings and would seek comment as to whether the proposed regulation should identify other categories of permissible expenses.

- *Permissible "Operation" Expenses.* The proposed rule would define permissible "operation" expenses in a manner consistent with the Commission's prior guidance. The Commission described the following as headquarters operating expenses in the context of the pre-BCRA building fund:

  - Expenses such as rent, building maintenance, utilities, and other expenses necessary to administer a party headquarters building. Advisory Opinion 1988-12 (Empire of America Federal Savings Bank) at 4; *see also* Advisory Opinion 2001-01 (North Carolina Democratic Party) at n.5; Advisory Opinion 2001-12 (Democratic Party of Wisconsin) at 5-6 (addressing lease of party office building).

  - Property taxes and assessments related to the construction or purchase of a headquarters facility. Advisory Opinion 1991-05 (Tennessee Democratic Party) at n.1; Advisory Opinion 1998-08 (Iowa Democratic Party) at n.4; Advisory

[4] More specifically, the Commission concluded that the requestor's plan to construct a new roof, install new electrical wiring, and expand the headquarters building would have constituted capital expenditures. Advisory Opinion 1998-07 (Pennsylvania Democratic Party) at 5. The Commission described capital expenditures under IRS rules to include "the cost of the acquisition, construction, or erection of buildings, machinery and equipment, furniture and fixtures and similar property," as well as "wholesale restoration or renovation of a structure." *Id.*

Opinion 1983-08 (National Republican Senatorial Committee) (including expenses of trust that operated committee headquarters building).

Because the pre-BCRA building fund exception did *not* apply to operating expenses, the Commission's determination that the above expenses were operating expenses precluded the use of building funds to pay them. *See, e.g.*, Advisory Opinion 1983-08 (National Republican Senatorial Committee) at 2 (explaining that "any donations received by the NRSC . . . to defray its operating expenses" do not fall within building fund exception). By contrast, the Appropriations Act provides that "operation" expenses of party headquarters *may* be paid from the headquarters account, so the NPRM would propose to codify the above-listed expenses as permissible uses of that fund and would seek comment on whether the proposed regulation should identify other categories of permissible operation expenses.

- *Permissible "Renovation" and "Furnishing" Expenses.* Consistent with previous Commission interpretations of the building fund exception, the NPRM would propose to define permissible "renovation" expenses to include interior and external renovations of a party headquarters building. *See* Advisory Opinion 2001-01 (North Carolina Democratic Party) at 1 (approving use of building funds to pay for "extensive" renovations to party headquarters building that required "external and interior work of both a structural and cosmetic nature"). The proposed rule would define permissible "furnishing" expenses to include expenses treated as capital expenditures under IRS regulations. *See, e.g.*, Advisory Opinion 1998-07 (Pennsylvania Democratic Party) at 5 (explaining that capital expenditures falling under building fund exception included "furniture and fixtures and similar property").

- *Permissible Repayment of Loans.* Consistent with prior Commission guidance for the building fund exception, the proposed rule would define permissible expenses to include mortgage payments incurred on the construction or purchase of party headquarters buildings. *See* Advisory Opinion 1998-08 at 3 (Iowa Democratic Party); Advisory Opinion 1993-09 (Michigan Republican State Committee). It would also propose to include the repayment of loans that a national party committee uses to finance headquarters renovation, furnishing, or operation expenses that may permissibly be paid from the building fund. Finally, the proposed rule would refer to Commission regulations at 11 C.F.R. §§ 116.3 and 116.4 that explain when loans are treated as contributions.

- *Prohibited Uses.* The proposed regulation would prohibit the use of funds in a headquarters account to make independent expenditures or contributions or for general campaign expenses. The NPRM would ask whether the proposed regulation should specifically identify any other expenses that may not be paid from the headquarters account.

- *Fundraising Costs.* The proposed regulation would allow funds in a headquarters account to be used to raise funds for the headquarters account. As noted above, this

would be in line with analogous Commission determinations and with the Congressional Statements.

- *Spending from General Account.* The proposed regulation would note that a national party committee may use funds in its general account to pay building costs, in addition to using funds in its headquarters account.

- *Transfers from Headquarters Account.* As discussed further in Part IV below, the proposed regulation would prohibit a national party committee from transferring funds from its headquarters account to any other account of the national party committee or to other political committees, with two exceptions. Under the proposal, a national party committee would be able to transfer funds from its headquarters account to its general account to pay allocable expenses, and to the headquarters accounts of congressional campaign committees of the same political party.

- *Definition of "Headquarters."* The proposed regulation would define "headquarters" to mean the administrative center from which a political party directs and controls its activities at the national level. Neither the Appropriations Act nor existing Commission regulations define the term "headquarters." The pre-BCRA building fund exception applied to spending for the construction or purchase of an "office facility," which the Commission interpreted broadly to include multiple buildings in multiple locations. *See* Advisory Opinion 1998-07 (Pennsylvania Democratic Party) at 5 (concluding that state party committee could use building funds to purchase or construct buildings in three cities across state). But "headquarters" is necessarily a narrower term than "office facility." *See, e.g., Random House Webster's Unabridged Dictionary* 881 (2nd ed. 2001) (2005 reprint) (defining "headquarters" to include "the center of operations . . . from which orders are issued; the chief administrative office of an organization"); *Merriam-Webster Dictionary* 346 (5th ed. 1997) (defining "headquarters" to include "the administrative center of an enterprise").

- *Allocable Expenses.* The proposed regulation would allow national party committees to allocate expenses according to the proposed allocation rules described in Part V below, or to pay allocable expenses entirely with funds from their general accounts.

### *C. Recount Accounts*

Proposed section 102.18(ZZ) would cover recount accounts. The proposed regulation would track the language of 52 U.S.C. § 30116(a)(9)(C) to provide that a national party committee, including a national congressional campaign committee of a political party, may create a separate, segregated account that is used to defray expenses incurred with respect to election recounts and contests and other legal proceedings.

- *Permissible Expenses.* The proposed regulation would define "election recounts and contests and other legal proceedings" in a manner consistent with the Commission's prior guidance. In its most detailed description of recount funds, the Commission explained that such funds may be used to pay expenses "'resulting from a recount, election contest, counting of provisional and absentee ballots and ballots cast in polling places,' as well as

'post-election litigation and administrative-proceeding expenses concerning the casting and counting of ballots during the Federal election, fees for the payment of staff assisting the recount or election contest efforts, and administrative and overhead expenses in connection with recounts and election contests.'" Advisory Opinion 2006-24 (NRSC) at 2-3. The Commission has also allowed recount funds to be used to defray legal expenses relating to reapportionment, *see* Advisory Opinion 1982-37 (Edwards), and to set up a reapportionment account, *see* Advisory Opinion 1982-14 (Michigan State Republican Committee). The NPRM would propose to codify these permissible expenses and would ask for comment on whether other permissible expenses should be included in the regulation, as well.

- *Prohibited Uses.* The proposed regulation would prohibit the use of funds in a recount account to make independent expenditures or contributions or for general campaign expenses. The NPRM would ask for comment on whether the regulation should specifically identify other expenses that may not be paid from the recount account.

- *Spending from General Account.* The proposed regulation would note that a national party committee may use funds from its general account to pay the costs of an election recount, contest, or other legal proceeding, in addition to using funds in its recount account.

- *Fundraising Costs.* The proposed regulation would allow funds in a recount account to be used to raise funds for the recount account. As noted above, this would be in line with analogous Commission determinations and with statements about the Appropriations Act by House and Senate leaders.

- *Transfers from Recount Account.* As discussed further in Part IV below, the proposed regulation would prohibit a national party committee from transferring funds from its recount account to any other account of the national party committee or to other political committees, with two exceptions. Under the proposal, national party committees would be able to transfer funds from their recount accounts to their general accounts to pay allocable expenses, and to the recount accounts of other national committees of the same political party.

- *Allocable Expenses.* The proposed regulation would allow national party committees to allocate expenses according to the proposed allocation rules described in Part V below, or to pay allocable expenses entirely with funds from their general account.

*D. Conforming Amendments*

The NPRM would propose to make conforming amendments to existing regulations, such as 11 C.F.R. §§ 110.1(c) and 110.2(c), which limit contributions to national party committees.

## III. Convention Committees

The NPRM would propose a number of revisions to the existing regulations at 11 C.F.R. part 9008, which implemented the Funding Statute. After the Research Act and the Appropriations Act, these regulations require modification and, in some cases, may no longer be necessary.

### *A. Proposed Removal of Regulations Implementing the Public Funding of Presidential Nominating Conventions*

The NPRM would propose to remove the regulations governing convention committees. The Commission's regulations established convention committees "as a necessary requirement in order to enable the Commission to know who has initial responsibility for handling public funds and incurring expenditures." Presidential Election Campaign Fund and Federal Financing of Presidential Nominating Conventions, 44 Fed. Reg. 63,036, 63,038 (Nov. 1, 1979) ("Convention E&J"). In 2014, the Research Act terminated the longstanding entitlement of national party committees to public funds to finance their presidential nominating conventions, while leaving in place the statutory framework that implemented the entitlement system. In the Appropriations Act, however, Congress effectively replaced the public convention funding framework with the convention accounts, which have separate, higher contribution limits that enable national party committees to make up for the loss of public funding. Thus, convention accounts now constitute the statutory mechanism for financing quadrennial conventions, and the Commission's regulations regarding convention committees appear to be obsolete.

The NPRM would also propose removing a number of other regulations in 11 C.F.R. part 9008 subpart A that appear to have no legal significance in light of the Research Act's termination of the convention financing program. These regulations, which encompass the great majority of 11 C.F.R. part 9008, are as follows.

- Paragraph 9008.1(a): This paragraph describes the scope of the convention funding program that the Research Act terminated.

- Paragraphs 9008.2(a)-(f), (h): These paragraphs (except for paragraph (e)) define certain terms as they are used only in the context of regulations that implement the convention funding program, *i.e.*, regulations that the NPRM would propose to delete. Paragraph (e) defines "national committee," which is already expressly defined in 11 C.F.R. § 100.13. *See infra* Part III.

- Sections 9008.4 and 9008.5: These regulations relate to payouts of public convention funds.

- Section 9008.6: This regulation governs a national committee's option to decline some or all of its public convention funds and to accept private contributions in their place to finance its convention.

- Sections 9008.7 and 9008.8: These regulations implement 2 U.S.C. § 9008(d), which provides that a national party committee cannot spend more on its

presidential nominating convention than the amount of public funds to which a major party is entitled under the Funding Statute.

- Paragraph 9008.9(d): This paragraph provides an exception to the spending limit for national parties.

- Section 9008.10: This regulation imposes heightened disclosure requirements on the expenses of convention committees to ensure that the entitlement to public funds is calculated accurately and that the expenses paid with public funds are proper.

- Sections 9008.11 and 9008.13: These sections provide for automatic and for-cause audits, respectively, of convention committees.

- Sections 9008.12, 9008.14, and 9008.16: These regulations relate to repayments of (1) public convention funds, (2) private convention funds that exceed the convention spending limit, and (3) uncashed checks written by a committee for publicly funded convention expenses.

- Section 9008.15: This procedural regulation relates to extensions of time for filings made under part 9008.

- Sections 9012.1(b), 9012.3(b), and 9012.5(b): These sections implement the criminal penalties that the Research Act explicitly repealed.

In addition to proposing to remove these and other potentially obsolete provisions (and making conforming revisions to the remaining regulations), the NPRM would propose to remove 11 C.F.R. § 9008.1(b). Section 9008.1(b) implements FECA's requirement that committees or organizations that represent party committees in making arrangements for a presidential nominating convention file with the Commission a "full and complete financial statement," including the sources of their funds and the purposes of their expenditures, within 60 days after the convention. 52 U.S.C. § 30105. Section 9008.1(b) currently implements 52 U.S.C. § 30105 by requiring "each committee or organization which represents a national party" in arranging the party's nominating convention to file disclosure reports. National party committees, however, already are required to file monthly disclosure reports, 11 C.F.R. § 104.5(c)(4), which will include information about the activity of their convention accounts along with other party committee activity. *See infra* Part VII. Thus, the statutory reporting requirement at 52 U.S.C. § 30105 will be satisfied, and the additional regulatory reporting requirement at 11 C.F.R. § 9008.1(b) will no longer be necessary.

The NPRM would explain that the Commission believes that the proposed regulatory revisions would render Advisory Opinion 2014-12 (DNC) inoperative. That advisory opinion was issued in response to a request filed shortly after the Research Act terminated the public funding program for presidential nominating conventions without providing a substitute funding mechanism. In the request, the national committees of the two major political parties asked whether, to "address[] the gap" created by the Research Act, they could fund their subsequent nominating conventions by raising contributions to segregated accounts under a separate

contribution limit or, alternatively, by establishing convention committees to raise funds under a separate contribution limit. Advisory Opinion Request at 2, Advisory Opinion 2014-12 (DNC) (Aug. 15, 2014). The Commission concluded that the requestors could establish convention committees to raise funds under a separate contribution limit because convention committees would be "national committees" under FECA and Commission regulations. Advisory Opinion 2014-12 (DNC) at 1. That conclusion was based, in significant part, on the parties' need for new convention committees to "operate in the same space as publicly-financed convention committees" had operated in prior to the Research Act. *Id.* at 5; *see also id.* at 2 (noting elimination of convention funding mechanism as predicate for request). Because the Appropriations Act gave the national party committees a new structural vehicle for convention spending that provides the financing option they sought in the advisory opinion — along with a much higher contribution limit — the fundamental basis for the Commission's conclusion in Advisory Opinion 2014-12 (DNC) no longer exists. Thus, the NPRM would note that the proposed convention account regulations would replace the now-unnecessary convention committee mechanism in all respects.

Finally, the NPRM would propose removing provisions in 11 C.F.R. § 9008.54 mandating post-convention audits of host committees and municipal funds. The automatic audit provision for host committees at 11 C.F.R. § 9008.54 was premised on conventions being financed with public funds. Convention E&J, 44 Fed. Reg. at 63,038. In the absence of public funds, automatic audits are no longer necessary.

*B. Placement of Remaining Provisions of Current 11 C.F.R. Part 9008*

The NPRM would propose to move the few remaining regulations regarding presidential nominating conventions from the public financing provisions at part 9008. As discussed above, certain provisions currently located in 11 C.F.R. § 9008.7 concerning the types of expenditures deemed "convention expenses" and 11 C.F.R. § 9008.8 concerning expenditures by host committees and municipal funds would be retained in modified form in the proposed regulation for segregated convention accounts at 11 C.F.R. § 102.18(XX). The NPRM would propose to move the remaining provisions — *i.e.*, those that are not being proposed for deletion or for transfer to section 102.18 — to part 107.[5] The provisions moved from part 9008 to part 107 would be:

- Paragraph 9008.2(g): Defines "nominating convention," which is used in other regulations that would be retained and is not otherwise defined in the Commission's regulations.

- Section 9008.9: Sets forth rules regarding national parties' receipt of goods and services from commercial vendors in the context of nominating conventions. These rules do not appear to be affected by the Research Act or Appropriations Act and apply generally to the national parties' convention activities regardless of whether they utilize convention accounts. Under the proposal, this section (except paragraph (d), which relates to the

[5] Part 107 (entitled "Presidential Nominating Convention, Registration and Reports") currently consists of two brief, general provisions regarding registration and reporting of convention committees and host and municipal committees. As discussed above, the NPRM would propose removing the provision pertaining to convention committees.

obsolete spending limit for convention committees under the Funding Statute) would be moved to part 107.

- Sections 9008.50-.53, 9008.55: Set forth rules regarding host and municipal committees that remain effective after the Research Act and are not affected by the Appropriations Act. The NPRM would propose that they be included in revised part 107.

The NPRM would propose certain technical and conforming changes to these provisions to reflect that convention committees no longer exist and that national party committees may make expenditures for conventions from their convention accounts.

## IV. Transfers

The proposed rules would prohibit national party committees from transferring funds from their party segregated accounts to their general accounts, and between party segregated accounts established for different purposes, except to pay for allocable expenses. The proposed rules would not restrict transfers from a national party committee's general account to its party segregated accounts, or between party segregated accounts established for the same purpose.

FECA's contribution limits generally "do not apply to transfers between and among political committees which are national, State, district, or local committees . . . of the same political party." 52 U.S.C. § 30116(a)(4). This provision operates as an exception to FECA's antiproliferation rule, which treats contributions from committees established, financed, maintained, or controlled by one person or group of persons as having been made by a single committee for purposes of the contribution limits. *See* 1976 Amendments to the Federal Election Campaign Act of 1971, 94 Cong. Rec. H3777 (daily ed. May 3, 1976) (statement of Rep. Hayes) ("The so-called antiproliferation rules . . . are modified . . . [t]o permit unlimited transfers between the political committees of a single political party . . . ."). Congress was concerned that treating party committees of the same political party as a single committee would limit their ability to make contributions. *See* H.R. Doc. No. 94-1057 at 58 (1976) (conference committee report) ("[F]or the purpose of these [antiproliferation] rules," contributions by party committees "are treated separately and are not regarded as contributions by one committee.").

Subsequently, however, both Congress and the Commission have imposed certain restrictions on party committee transfers. BCRA, for example, prohibits state and local committees from transferring nonfederal funds to their national party committees, even though they are committees of the same political party. *See* 52 U.S.C. § 30125(a) (prohibiting national party committees from receiving nonfederal funds). Similarly, state and local party committees may not transfer funds from their nonfederal accounts to their federal accounts. *See* 11 C.F.R. § 300.30(b)(3)(v). And in the convention context, the Commission last year premised its approval of separate contribution limits for the parties' convention committees on the condition that "the convention committees will not transfer funds to other political committees, which do not limit their spending to convention expenses." *See* Advisory Opinion 2014-14 (DNC) at 5.

The purpose-specific accounts created by the Appropriations Act are similarly premised on the funds in those accounts not being transferred to other committees or accounts established

for different purposes. The Appropriations Act provides that the funds may be "used solely"[6] for the designated purposes of the respective accounts. Transferring the funds to a general account in which they are "used" for other purposes would appear to render this statutory limitation meaningless. Thus, to give effect to Congress's recent and specific direction regarding the limited uses of the funds raised into the party segregated accounts, the NPRM would propose to implement the Appropriations Act by prohibiting transfers from the party segregated accounts to the national party committee's general accounts, and between party segregated accounts established for different purposes.

## V. Allocation of Mixed Campaign and Party Segregated Account Activity

The NPRM would propose a new allocation rule to address situations in which national party committees finance activities that are partially, but not entirely, permissible uses of funds in the party segregated accounts.

### *A. Proposal to Delete Current Section 106.5*

Due to BCRA's prohibition on raising and spending soft money, 52 U.S.C. § 30125(a), national party committees do not maintain federal and nonfederal accounts, *see* 11 C.F.R. § 102.5(c), and thus do not allocate between federal and nonfederal expenses. Section 106.5 set out transitional allocation rules after BCRA was enacted, and that section is no longer in effect. *See* 11 C.F.R. § 106.5(h) (establishing sunset date of Dec. 31, 2002). The NPRM would propose to delete section 106.5 and replace it with a new rule that would allow national party committees to allocate certain joint expenses between their party segregated accounts and general accounts.

### *B. Proposed New Allocation Rule*

Because national party committees may not use funds in their party segregated accounts to pay general campaign expenses or other expenses outside the permissible scopes of the respective accounts, the proposed rule would provide a mechanism for national party committees to pay joint expenses, such as the monthly salary of a party employee working on both the party's presidential nominating convention and campaign activity. The Commission has allowed national party committees to allocate joint expenses in similar circumstances. *See* Advisory Opinion 2010-14 (DSCC) at 6 (allowing national party committee to allocate staff salaries and benefits between recount and general accounts). The NPRM would not propose to *require* any allocation of funds from the segregated party accounts; a national party committee would retain the option to pay for mixed expenses entirely from its general account.

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[6] The statutory provisions establishing convention accounts and headquarters accounts provide that the funds must be "used solely to defray [the described] expenses." 52 U.S.C. § 30116(a)(9)(A), (B). The recount account provision does not use the word "solely." 52 U.S.C. § 30116(a)(9)(C). The NPRM would note that this difference in phrasing does not appear significant, however, because Congress intended the Appropriations Act's recount provision to codify the Commission's recount advisory opinions, *see* Congressional Statements, and these opinions have consistently prohibited national party committees from using their recount funds to pay for campaign activities. *See* Advisory Opinion 2010-14 (DSCC) at 7; Advisory Opinion 2006-24 (NRSC) at 9. By codifying these advisory opinions, Congress enabled the use of recount funds for uses that the Commission has deemed permissible for such funds, which necessarily rules out transferring recount funds to political committees or accounts that are used to finance election activity or any other activity that the Commission has found would not be a permissible use of recount funds.

The proposed rule would allow a national party committee to allocate mixed expenses between its general account and party segregated account based on the amount of activity attributable to each (the "activity-based" method).[7] Under this proposed method, a national party committee could initially finance the cost of mixed administrative or other expenses from any of the relevant accounts. Then, at the conclusion of the reporting period, the national party committee would calculate how much of this spending was attributable to specific activities (*e.g.*, how much of an employee's salary was attributable to convention activity versus campaign activity). Finally, the national party committee would make corrective transfers as needed between accounts.

The proposed rule would also allow a national party committee to allocate mixed fundraising expenses based on the "funds-received" method. *See, e.g.*, 11 C.F.R. §§ 106.5(f) (prescribing funds-received method for allocating costs of mixed federal/nonfederal fundraising by national party committees), 106.6(d)(1) (same for nonconnected committees and separate segregated funds), 106.7(c)(4) (same for state, district, and local party committees). Under this proposed method, committees would allocate their fundraising costs based on the ratio of funds received into each relevant account to total receipts for each fundraising program or event. *Id.*; *see also* Methods of Allocation Between Federal and Non-Federal Accounts; Payments; Reporting, 55 Fed. Reg. 26,058, 26,063 (Jun. 26, 1990) (explaining difference in allocation methodology for administrative and fundraising costs).

## VI. Redesignation

The proposed rules would allow national party committees to obtain redesignations of contributions designated for their party segregated accounts or their general accounts. Current Commission regulations allow *authorized* committees to obtain redesignations of contributions for different elections pursuant to 11 C.F.R. § 110.1(b)(5) to avoid receiving excess contributions. *See* Limitations and Prohibitions, 67 Fed. Reg. 69,928, 69,931 (Nov. 19, 2002) ("Redesignation E&J") (redesignation rules "ensure that no person contributes more than the individual contribution limit to any candidate"). Allowing redesignation also eases an administrative burden of authorized committees "by eliminating the need to refund impermissible contributions and then solicit contributions for another election." *See* Contribution and Expenditure Limitations and Prohibitions; Contributions by Persons and Multicandidate Political Committees, 52 Fed. Reg. 760, 763 (Jan. 9, 1987).

Now that the Appropriations Act has made it possible for national party committees to accept contributions into party segregated accounts, the committees could face similar problems of receiving designated contributions that exceed the limit for the designated account but that would be permissible if designated for a different account. The option of redesignating

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[7] The activity-based method differs from how political committees allocate expenses between their federal and nonfederal accounts. Commission regulations generally require, or have required, party committees to pay a certain minimum percentage of their mixed administrative costs with federal funds. *See* 11 C.F.R. §§ 106.5(b), (c)(2) (prescribing minimum percentages of expenses to be allocated to federal accounts by national party committees, no longer in force), 106.7(d)(1)-(3) (prescribing minimum percentages of expenses to be allocated to federal accounts by state, district, and local party committees). Such a requirement would not appear to be necessary here because all of the funds at issue are subject to FECA's amount limitations, source prohibitions, and reporting requirements. *See* Advisory Opinion 2010-14 (DSCC) at 7 n.6 (concluding that minimum allocation percentage did not apply to allocation among federal accounts).

contributions for another election, however, generally is not available to party committees, which are limited in the amount that they may receive per calendar year, rather than per election. Nonetheless, in Advisory Opinion 2010-18 (DFL), the Commission determined that a state party committee could ask donors to its recount fund to redesignate their donations as contributions to its federal account, provided that the redesignated contributions did not cause the donors to exceed their contribution limits.

Similarly, for the same reasons that the Commission permits authorized committees to redesignate among elections — and to codify the Commission's determination in Advisory Opinion 2010-18 (DFL) — the NPRM would propose to allow national party committees to redesignate contributions and donations among their party segregated accounts, and among their party segregated accounts and general accounts, following redesignation provisions equivalent to those in section 110.1(b)(5). The NPRM would propose to do this by adding either a new provision to 11 C.F.R. § 110.1 or a new section to 11 C.F.R. part 110 to address redesignation in this particular context. For contributions that a contributor designates for a particular account, the proposed rule would allow a national party committee to ask the contributor to redesignate some or all of the contribution if, when aggregated with all other contributions by the contributor to the designated account, the contribution would exceed the limitations for the designated account. In this situation, the proposed rule would require the national party committee to obtain a written redesignation and to give the contributor or donor the alternative option of obtaining a refund. *Cf.* 11 C.F.R. §§ 110.1(b)(5)(i)(A)-(B), 110.1(b)(5)(ii)(A) (governing redesignation of contributions designated in writing for particular election).

For undesignated contributions, the proposed rules would allow a national party committee to deposit such contributions into any of its accounts, as long as doing so would not exceed applicable limits. As the Commission has explained, however, contributors need to know if their contributions are redesignated so they can avoid inadvertently making an excessive contribution. Redesignation E&J at 69,931. Thus, as with contributions to candidates, *see* 11 C.F.R. § 110.1(b)(5)(ii)(B)(5)-(6), under the proposed rule the party committee would have to notify the contributor in writing within a given time period about the amount of the contribution deposited into each account and give the contributor an opportunity to request a refund.

## VII. Reporting

The NPRM would propose to codify in the Commission's regulations the general reporting obligations of national committees with regard to the party segregated accounts, *i.e.*, that contributions to and expenditures from the accounts must be reported on the national committees' regular reports. As to the details of such reporting — such as form numbers, line numbers, etc. — the Commission has issued interim instructions for national committees to report contributions to and expenditures from their party segregated accounts. Press Release, FEC Issues Interim Reporting Guidance for National Party Committee Accounts (Feb. 13, 2015), http://www.fec.gov/press/press2015/news_releases/20150213release.shtml. The NPRM would note that the Commission will likely change Forms 3X and 4 and their instructions to more fully address the party segregated accounts, but the NPRM would not propose specific forms revisions because such changes are not effected through the rulemaking process.

## VIII. Party Coordinated Expenditures

An expenditure that is coordinated with a candidate is either an-kind contribution to, or a coordinated party expenditure with, that candidate. 11 C.F.R. §§ 109.20(b), 109.21(b). "[O]rdinarily, a party's coordinated expenditures would be subject to the $5,000 limitation" on multicandidate political committee contributions to candidates under 52 U.S.C. § 30116(a)(2)(A). *See Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 610-11 (1996). However, FECA exempts from this $5,000 limitation coordinated expenditures by party committees "in connection with the general election campaign of candidates for Federal office." 52 U.S.C. § 30116(d)(1); *see also* 11 C.F.R. § 109.32. These general election coordinated expenditures are known as "coordinated party expenditures," and they are subject to separate, higher limits than other coordinated expenditures. 52 U.S.C. § 30116(d)(2)-(4); *see also* 11 C.F.R. § 109.32.

The Appropriations Act added to FECA a new clause providing that the coordinated party expenditure limits in paragraphs 30116(d)(2)-(4) do not apply to expenditures made from the new party segregated accounts. 52 U.S.C. § 30116(d)(5). Pursuant to paragraph 30116(d)(1), coordinated party expenditures are also not subject to "any other provision of law with respect to limitations on expenditures or limitations on contributions." Accordingly, the NPRM would propose to revise 11 C.F.R. § 109.32 to provide that coordinated party expenditures made from the party segregated accounts, if such expenditures are permissible uses of the funds in those accounts, would not be subject to either the coordinated party expenditure limits or the general limits on coordinated expenditures.

## IX. Definitions of "Contribution" and "Expenditure"

The Appropriations Act refers to funds given to the party segregated accounts as "contributions made." 52 U.S.C. § 30116(a)(1)(B). Commission regulations already provide that money given to a party for headquarters buildings or convention purposes is a contribution, *see* 11 C.F.R. §§ 100.56 ("[A]nything of value [given] to a national party committee for the purchase or construction of an office building or facility is a contribution."), 9008.6(a) (referring to "private contributions" to convention committees), but a long line of Commission precedent provides that money given to recount funds is not a contribution. Almost forty years ago, the Commission determined that funds given for recounts did not meet the statutory definition of "contribution" because they were not for the purpose of influencing an election. *See, e.g.*, 1977 Amendments to Federal Election Campaign Act of 1971, H.R. Doc. No. 95-44, at 40 (1977) ("Also excluded from the definition of contribution is a donation to cover costs of recounts and election contests, since, although they are related to elections, [recounts and election contests] are not Federal elections as defined by the Act."); *see also* Advisory Opinion 2010-18 (DFL) at 2; Advisory Opinion 2010-14 (DSCC) at 3; Advisory Opinion 2006-24 (NRSC) at 5. Such funds have accordingly been exempted from the definitions of "contribution" since 1977. *See* 11 C.F.R. § 100.4(b)(15) (1977); *see also* 11 C.F.R. § 107.7(b)(20) (1980) (exempting recount spending from definition of "expenditure"); 11 C.F.R. §§ 100.91, 100.151.

The NPRM would acknowledge the statutory reference to "contributions" in section 30116(a)(1)(B) but would not propose to modify the Commission's recount regulations at 11 C.F.R. §§ 100.91 and 100.151. Statements by House and Senate leaders indicate that Congress was specifically aware of — and did not intend to modify — the Commission's regulations and

other precedents regarding recounts when it passed the Appropriations Act. *See* Congressional Statements (citing Advisory Opinion 2006-24 (NRSC) and Advisory Opinion 2009-04 (Al Franken for U.S. Senate *et al.*) and stating that "recount and legal proceeding expenses . . . are not for the purpose of influencing federal elections").