

# Proposed Rules

Federal Register

Vol. 71, No. 171

Tuesday, September 5, 2006

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## FEDERAL ELECTION COMMISSION

### 11 CFR Part 100

[Notice 2006–15]

#### Exception for Certain “Grassroots Lobbying” Communications From the Definition of “Electioneering Communication”

**AGENCY:** Federal Election Commission.

**ACTION:** Notice of disposition of Petition for Rulemaking.

**SUMMARY:** The Commission announces its disposition of a Petition for Rulemaking (“Petition”) filed on February 16, 2006, by the AFL–CIO, the Alliance for Justice, the Chamber of Commerce of the United States, the National Education Association, and OMB Watch. The Petition asks the Commission to revise its regulations by exempting from the definition of “electioneering communication” certain communications consisting of “grassroots lobbying.” The Commission has decided not to initiate a rulemaking in response to the Petition at this time. The Petition is available for inspection in the Commission’s Public Records Office and on its Web site, <http://www.fec.gov/>. Further information is provided in the **SUPPLEMENTARY INFORMATION** that follows.

**FOR FURTHER INFORMATION CONTACT:** Ms. Amy L. Rothstein, Acting 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 Bipartisan Campaign Reform Act of 2002 (“BCRA”), Public Law 107–55, 116 Stat. 81 (2002), added provisions regarding “electioneering communications” to the Federal Election Campaign Act of 1971, as amended. See 2 U.S.C. 434(f)(3). Electioneering communications are television and radio communications that refer to a clearly identified candidate for Federal office, are publicly distributed within 60 days before a

general election or 30 days before a primary election, and are targeted to the relevant electorate. See 2 U.S.C. 434(f)(3)(A)(i); 11 CFR 100.29(a). BCRA exempts certain communications from the definition of “electioneering communication,” 2 U.S.C. 434(f)(3)(B)(i) through (iii), and specifically authorizes the Commission to promulgate regulations exempting other communications as long as the exempted communications do not promote, support, attack or oppose (“PASO”) a Federal candidate, 2 U.S.C. 434(f)(3)(B)(iv), citing 2 U.S.C. 431(20)(A)(iii). Section 100.29(c) of the Commission’s regulations contains the regulatory exemptions to the definition of “electioneering communication.”

On February 16, 2006, the Commission received a Petition for Rulemaking (“Petition”) from the AFL–CIO, the Alliance for Justice, the Chamber of Commerce of the United States, the National Education Association, and OMB Watch (collectively, “Petitioners”). The Petitioners asked the Commission to revise 11 CFR 100.29(c) to exempt from the definition of “electioneering communication” certain “grassroots lobbying” communications that reflect all of the following six principles: (1) “The ‘clearly identified federal candidate’ is an incumbent public officeholder;” (2) “The communication exclusively discusses a particular current legislative or executive branch matter;” (3) “The communication either (a) calls upon the candidate to take a particular position or action with respect to the matter in his or her incumbent capacity, or (b) calls upon the general public to contact the candidate and urge the candidate to do so;” (4) “If the communication discusses the candidate’s position or record on the matter, it does so only by quoting the candidate’s own public statements or reciting the candidate’s official action, such as a vote, on the matter;” (5) “The communication does not refer to an election, the candidate’s candidacy, or a political party;” and (6) “The communication does not refer to the candidate’s character, qualifications or fitness for office.”

On March 16, 2006, the Commission published a Notice of Availability (“NOA”) seeking comment on whether to initiate a rulemaking on this proposed exception to the definition of

“electioneering communication.” *Notice of Availability on Rulemaking Petition: Exception for Certain “Grassroots Lobbying” Communications From the Definition of “Electioneering Communication,”* 71 FR 13557 (Mar. 16, 2006). The Commission received nine timely comments and two late comments in response to the NOA. In addition to these comments, the Commission received 180 form letter comments. Most of the commenters supported the Petition primarily on the grounds that the current electioneering communication rules limit the ability of organizations to run ads whose purpose is not to influence Federal elections, but to support or defeat legislation at the most critical time (*i.e.*, when the legislation is before Congress, regardless of the election cycle). These commenters argued that such “grassroots lobbying” ads are entitled to First Amendment protection and should therefore be exempt from the electioneering communication rules. However, one group of commenters opposed the Petition, arguing that the Commission had already considered this question in the 2002 rulemaking that adopted the current electioneering communication rules and had concluded correctly that it lacked statutory authority to promulgate a “grassroots lobbying” exemption.<sup>1</sup> These commenters further asserted that “there are no changed circumstances that warrant reconsideration of that decision.” Copies of the comments are available on the Commission’s Web site at [http://www.fec.gov/law/law\\_rulemakings.shtml#lobbying](http://www.fec.gov/law/law_rulemakings.shtml#lobbying).

On August 29, 2006, the Commission voted to decline to initiate a rulemaking at this time on the proposed exception for certain “grassroots lobbying” communications from the definition of “electioneering communication,” given the Commission’s other administrative priorities. The Commission recognized, however, that it has the statutory authority to create exemptions to the electioneering communication rules (provided the exemptions do not permit PASO communications) and that it may

<sup>1</sup> The Commission considered several proposals for “grassroots lobbying” exemptions in the 2002 rulemaking but did not adopt any of them. See *Notice of Proposed Rulemaking on Electioneering Communications*, 67 FR 51131, 51136, 51145 (Aug. 7, 2002); *Final Rules on Electioneering Communications*, 67 FR 65190, 65201 (Oct. 23, 2002).

consider initiating a rulemaking on this subject in the future.

Initiating a rulemaking at this time would not be an efficient or effective use of the Commission's resources. See 11 CFR 200.5(e). The Commission is currently defending the constitutionality of BCRA's electioneering communication provisions against two as-applied challenges to the statute involving communications that the plaintiffs claim are "grassroots lobbying" communications. See *Wisconsin Right to Life v. FEC*, Civ. No. 04-1260 (D.D.C.); *Christian Civic League of Maine v. FEC*, Civ. No. 06-614 (D.D.C.). Even if the Commission were to grant the Petitioners' request to begin a rulemaking to create a "grassroots lobbying" exemption, the plaintiffs in these cases may well continue to pursue litigation or to initiate new litigation, particularly if the Commission were to craft an exemption narrower than that contemplated by the plaintiffs. Moreover, any eventual court decisions in these lawsuits may provide the Commission with guidance on whether and how the Commission should exercise its discretion in this area. Judicial guidance may well necessitate a reevaluation of any rules the Commission were to propose now. Therefore, in light of the pending as-applied challenges to the constitutionality of the electioneering communication provisions, the Commission believes that initiating a rulemaking at this time would not be an effective use of its resources or an appropriate way to proceed.

Dated: August 29, 2006.

**Michael E. Toner,**

*Chairman, Federal Election Commission.*

[FR Doc. E6-14638 Filed 9-1-06; 8:45 am]

**BILLING CODE 6715-01-P**

## **SMALL BUSINESS ADMINISTRATION**

### **13 CFR Part 120**

#### **RIN 3245-AF49**

#### **Business Loan Program; Lender Examination and Review Fees**

**AGENCY:** U.S. Small Business Administration.

**ACTION:** Proposed rule.

**SUMMARY:** This proposed rule implements a recent amendment to the Small Business Act authorizing the Small Business Administration (SBA) to assess fees to lenders participating in SBA's 7(a) loan guarantee program (Lenders) to cover the costs of

examinations, reviews, and other Lender oversight activities. The proposed rule describes the methodology for fee assessment. Under the proposed rule, Lenders would pay the actual costs to SBA of the on-site examinations and reviews, and would be allocated off-site review/monitoring costs based on each Lender's proportionate share of loan dollars that SBA has guaranteed in the SBA portfolio. The proposed rule also describes the billing and payment processes.

**DATES:** Comments must be received on or before October 5, 2006.

**ADDRESSES:** You may submit comments, identified by [RIN number 3245-AF49], by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- Agency Web Site: [proprule@sba.gov](mailto:proprule@sba.gov). Follow the instructions for submitting comments.
- E-mail: [lender.oversight@sba.gov](mailto:lender.oversight@sba.gov).
- Fax: (202) 205-6831.
- Mail: Bryan Hooper, Associate Administrator for Lender Oversight, Small Business Administration, 409 3rd Street, SW., 8th floor, Washington, DC 20416.
- Hand Delivery/Courier: 409 3rd Street, SW., 8th floor, Washington, DC 20416.

**FOR FURTHER INFORMATION CONTACT:** John White, Deputy Associate Administrator for Lender Oversight, (202) 205-6345, [john.white@sba.gov](mailto:john.white@sba.gov); or Paul Bishop, Financial Analyst, Office of Lender Oversight, (202) 205-7516, [paul.bishop@sba.gov](mailto:paul.bishop@sba.gov).

#### **SUPPLEMENTARY INFORMATION:**

##### **I. Background**

Section 7(a) of the Small Business Act, 15 U.S.C. 636(a), authorizes SBA to guarantee loans made by Lenders to eligible small businesses. Currently, there are over 5,000 Lenders authorized to make such SBA guaranteed loans. SBA conducts off-site reviews/monitoring and on-site exams/reviews of these Lenders to ensure they are processing loans in accordance with prescribed standards, and to minimize losses. Section 5(b)(14) of the Small Business Act (15 U.S.C. 634(b)(14)), authorizes SBA to require these Lenders to pay fees to cover "the costs of [the] examinations, reviews, and other Lender oversight activities." Congress granted SBA this new fee authority under section 131 of Division K of Public Law 108-447, enacted December 8, 2004.

Examination and review costs primarily consist of contractor charges

for assistance with (i) on-site examinations; (ii) on-site reviews; and (iii) off-site reviews/monitoring activities. SBA's contractors for on-site exams and reviews bill SBA separately for each examination/review as it is conducted. The contractor supporting off-site reviews/monitoring generally bills SBA on a quarterly basis to cover its contract price.

A discussion of the proposal and a section-by-section analysis follows.

## **II. Proposal**

### **A. Review and Examination**

SBA conducts the following examinations and reviews of Lenders: (i) Off-site reviews/monitoring; (ii) on-site examinations; and (iii) on-site reviews. Under the proposed rule, the fee that SBA would charge a Lender would generally depend on the reviews/examinations that SBA conducts for that Lender.

### **B. All Lenders**

All Lenders receive a quarterly off-site review. The off-site review is conducted using SBA's Loan and Lender Monitoring System (L/LMS). This L/LMS review is the primary method of monitoring all of SBA's approximately 5,200 Lenders. For lower volume Lenders, it also may be SBA's sole method of reviewing them. L/LMS is also used in conjunction with SBA's on-site exams/reviews, for purposes of planning and prioritization of exams/reviews. Under the proposed rule, SBA's cost of off-site review/monitoring (primarily the L/LMS contract cost) would be recovered through fees charged to all Lenders. The cost would be allocated according to each Lender's respective outstanding SBA guarantees (guaranteed dollars) relative to the total guaranteed dollars SBA has outstanding in its 7(a) loan portfolio. Both Lenders' outstanding SBA guarantees and the total guaranteed SBA dollars would be calculated using September 30 portfolio figures. Guaranteed dollars outstanding includes guarantees of both loans held by the Lender and loans sold into the secondary market, securitized, or for which a Lender has sold a participation interest. It also includes loans that have been purchased by SBA but have not yet been charged off.

The annual cost of the L/LMS reviews under SBA's current contract is about \$82 per \$1 million in outstanding guarantees. SBA proposes to use this ratio in calculating the Lender's fee for off-site monitoring/reviews. Should SBA's costs under the contract change, the ratio would change accordingly. SBA does not plan at this time to