

implement the administrative fines program, requires the Commission to “take[s] into account, the amount of the violation involved,” and concluded that, since 2 U.S.C. 434 required committees to report all receipts and disbursements, the “amount of the violation involved” was equal to the total receipts and disbursements. See Explanation and Justification for Final Rules on Administrative Fines, 65 FR 31792 (May 19, 2000). The commenter observed that the Commission’s regulations required committees to report non-Federal disbursements that are part of an allocable Federal/non-Federal activity and are paid for via non-Federal transfers to the Federal account. By excluding these amounts in the civil penalty calculation, the commenter argued that the Commission would effectively treat the disclosure of some types of receipts and disbursements as less important than others.

The Commission continues to believe that, in most cases, “total receipts and disbursements” is a fair basis on which to calculate a civil money penalty for violations of 2 U.S.C. 434(a). However, based on its experience with the administrative fines program, the Commission concludes that basing a civil money penalty on “total receipts and disbursements” may unfairly inflate the level of activity for unauthorized committees that allocate expenses between Federal and non-Federal accounts because a large portion of their receipts and disbursements may be attributable to non-Federal activity that must be reported through a Federal account. The Commission concludes that it is a permissible construction of 2 U.S.C. 437g(a)(4) to exclude from the definition of “level of activity” receipts and disbursements attributable to the payment of allocable non-Federal activity. Section 437g(a)(4) of FECA permits the Commission to establish and publish a schedule of penalties “which takes into account the amount of the violation involved . . . and other factors as the Commission deems appropriate.” (Emphasis added). It is both appropriate and fair to exclude from the civil money penalty calculation those receipts and disbursements solely attributable to payment of the non-Federal portion of allocated Federal/non-Federal activity. This approach ensures that the civil money penalty is proportionate to a committee’s level of participation in Federal elections.

Other disbursements that may be characterized as non-Federal but that are paid for with Federal funds, such as a disbursement by an authorized

committee to a State or local candidate, will not be excluded from the “level of activity” calculation. In these cases, a political committee chooses to use Federally-permissible receipts deposited in a Federal account for a non-Federal purpose. In contrast, where non-Federal funds are used to pay the non-Federal share of allocable activities, these funds flow through, and are reported by, the Federal account because Commission regulations so require.

Because only unauthorized committees are affected by the allocation rules, the definitions of “level of activity” and “estimated level of activity” have been amended only as applied to them. The definitions of these terms remain the same for late-filed or non-filed reports of all political committees before the effective date of these rules and for late-or non-filed reports of authorized committees due on or after the effective date of these rules. To make these distinctions clear, the definitions of “level of activity” and “estimated level of activity” have been moved in the final rules from 11 CFR 111.43(d) into revised section 111.43(a) and (b).

Specifically, the definitions of “level of activity” and “estimated level of activity” remain the same for late- and non-filed reports of all political committees that are due before the effective date of these rules as set forth in 11 CFR 111.43(a)(1)(i), 111.43(a)(1)(ii), 111.43(b)(1)(i) and 111.43(b)(1)(ii) and correspond to the schedule of penalties for reports due before the effective date of these final rules. The definitions of these terms also remain unchanged when applied to late- and non-filed reports of authorized committees that are due on or after the effective date of these rules as set forth in 11 CFR 111.43(a)(2)(i)(A), 111.43(a)(2)(ii)(A), 111.43(b)(2)(i) and 111.43(b)(2)(ii).

However, the final rules include revised definitions of “level of activity” and “estimated level of activity” as applied to late-filed and non-filed reports of unauthorized committees due on or after the effective date of these rules. Specifically, the final rule applicable to late-or non-filed non-election sensitive reports in 11 CFR 111.43(a)(2)(i)(B) provides that the definition of “level of activity” for these unauthorized committees means “total amount of receipts and disbursements” for the period covered by the late report minus the total of: (1) transfers received from non-Federal account(s) (from Schedule H3) as reported on Line 18(a) of FEC Form 3X, and (2) disbursements for the non-Federal share of operating expenditures attributable to allocated

Federal/non-Federal activity (from Schedule H4) as reported on Line 21(a)(ii) covered by the late report. The final rule applicable to late-filed or non-filed election-sensitive reports at new 11 CFR 111.43(b)(2)(i) refers back to that definition.

Similarly, the final rule applicable to late- and non-filed non-election sensitive reports of unauthorized committees due on or after the effective date contains a new definition of “estimated level of activity” expressed in a formula. New 11 CFR 111.43(a)(2)(ii)(B)(1) provides that “estimated level of activity” is calculated as follows: [(total receipts and disbursements reported in the current two-year election cycle) – (transfers received from non-Federal account(s) as reported on either Line 18(a) of FEC Form 3X or Line 18 of FEC Form 3X if before March 1, 2003 + disbursements for the non-Federal Share of operating expenditures attributable to allocated Federal/non-Federal activity as reported on Line 21(a)(ii) of Form 3X)] ÷ number of reports filed covering the activity in the current two-year election cycle. The final rule applicable to late-filed or non-filed election-sensitive reports of unauthorized committees at new 11 CFR 111.43(b)(2)(ii) refers back to that definition. Please note that the line number for transfers is different when referring to pre-BCRA reports.

Finally, new 11 CFR 111.43(a)(2)(ii)(B)(2) addresses the calculation of “estimated level of activity” when an unauthorized committee has not filed a non-election sensitive report covering activity in the current two-year election cycle. In that case, “estimated level of activity” is calculated as: [(total receipts and disbursements reported in the prior two-year election cycle) – (transfers received from non-Federal account(s) as reported on either Line 18(a) of FEC Form 3X or Line 18 of FEC Form 3X if before March 1, 2003 + disbursements for the non-Federal Share of operating expenditures attributable to allocated Federal/non-Federal activity as reported on Line 21(a)(ii) of Form 3X)] ÷ number of reports filed covering the activity in the prior two-year election cycle. New 11 CFR 111.43(b)(2)(ii) refers back to that definition for election-sensitive reports.

The Commission emphasizes that the exclusion of non-Federal receipts and disbursements attributable to allocable activity from the calculation of “level of activity” does not change an unauthorized committee’s obligation to fully disclose these amounts. Failure to do so is a violation of the Act and