

opinions, audits, and enforcement matters have presented a number of issues concerning the rental, sale, exchange, disposition, and ownership of political committees' mailing lists.¹ Central to the analysis of these issues is whether the proceeds from these transactions are contributions to the political committees that are subject to the Federal Election Campaign Act of 1971, as amended ("FECA" or "the Act"), 2 U.S.C. 431, *et seq.* The Commission is beginning this rulemaking to adopt formally its historical approach to these issues, or to modify those approaches as appropriate, and to provide candidates and political committees with more comprehensive guidance on commercial transactions involving mailing lists.

I. Proposed Addition of 11 CFR 110.21 Committee Rental or Sale of Mailing Lists to Others

A. Background and Overview

The Act defines the term "contribution" to include "any gift, subscription, loan, advance, or deposit of money or *anything of value* made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. 431(8)(A)(i) (emphasis added); *see also* 11 CFR 100.52(a). The term "anything of value" is defined in the regulations as "the provision of any goods or services without charge or at a charge that is less than the usual and normal charge for such goods or services." 11 CFR 100.52(d)(1). The "usual and normal charge" for goods is defined in 11 CFR 100.52(d)(2) as "the price of those goods in the market from which they ordinarily would have been purchased at the time of the contribution." Under 11 CFR 100.52(d)(1), the provision of goods or services at less than the usual and normal charge is an in-kind contribution in the amount of the difference between the usual and normal charge and the amount charged the political committee. The regulations also provide, however, that the entire amount paid as the purchase price for a fundraising item sold by a political committee is a contribution. 11 CFR 100.53.

Proposed 11 CFR 110.21 would state when certain transactions involving the sale or rental of a mailing list by a political committee are contributions to that committee and when they are not. Proposed paragraph (a) would list the

conditions that would need to be satisfied for a mailing list rental payment to not be a contribution by the person leasing the mailing list. Proposed paragraph (b) would incorporate similar conditions for the sale of mailing lists. Proposed paragraph (c) would explain the ramifications of failing to comply with proposed paragraphs (a) or (b). Reporting would be addressed in proposed paragraph (d). Transactions between a candidate and his or her authorized committee would be covered in proposed paragraph (e).

B. 11 CFR 110.21(a)—Rental of Mailing List

Proposed 11 CFR 110.21(a) would affirmatively allow political committees to rent their mailing lists to other persons, including other political committees. Further, it states that the rental payments would not be treated as contributions if certain conditions pertaining to the rental charge and use of the mailing list are met. These conditions are explained in detail below.

1. Usual and Normal Charge

One of the key factors used by the Commission in determining whether a sale or rental of a mailing list results in a contribution is whether the amount paid is the usual and normal charge for the mailing list. *See* AO 2002-14. The usual and normal charge for a mailing list allows the Commission to determine whether the sale or rental of a political committee's mailing list is a transaction for equal value.

A mailing list that is frequently rented on the open market is likely to be listed and described in a catalogue such as the *SRDS Direct Marketing List Source*. For each of thousands of lists, the catalogue states the number of names on the list, the price per thousand names, the minimum number of names that must be ordered, fees for addressing services, the amount of the commission, and credit policies. If a political committee does not routinely rent out its mailing list, it might not be listed in such a catalogue. However, even if a mailing list does not appear in a catalogue, a reasonable rental price might be ascertainable so long as the valuator is aware of the significance of various factors in the market (*e.g.*, he or she knows how lists with comparable characteristics are valued, as well as the pricing ranges for comparable lists). The price may depend upon such factors as how recently the names were updated for accurate addresses, how responsive the individuals on the mailing list have been to other similar solicitations (particularly recent solicitations), the

income level of the individuals, and the classification according to list industry sector or other subject matter. The Commission seeks comments on the ways in which mailing list rentals by political committees are similar and/or different from mailing list rentals by non-political entities.

Proposed 11 CFR 110.21(a)(1) would make ascertaining the usual and normal charge of a mailing list in advance one of the conditions that must be satisfied for the rental proceeds not to be contributions. This proposed regulation would not, however, define the factors that a committee should use to determine the usual and normal charge. Without any further specificity, the definition of "usual and normal charge" at 11 CFR 100.52(d)(2) and 100.111(e)(2) would apply. The Commission seeks comment on whether the rule in new 11 CFR 110.21 should specify the appropriate means for determining the usual and normal charge of a mailing list, and if so, whether this should be done by adding additional factors or in some other fashion. If the *SRDS Direct Marketing List Source* is not dispositive on the fair market value of a mailing list, are there other appropriate methodologies that can be used to determine the fair market value of a political committee's list that takes into account the unique nature of political mailing lists?

The Commission also seeks comment on whether the political committee that wishes to rent its mailing list should have the burden of establishing what the usual and normal rental charge is and, if so, whether it should be required to do so prior to renting the list. In the alternative, the Commission seeks comment on a proposed rule that would not specify who has the burden of establishing what the usual and normal charge is or when that charge must be established, but that would still require political committees to rent their mailing lists at the usual and normal charge in order to avoid receiving contributions from the lessees.

Proposed paragraph (a)(1) would also address the other services (*e.g.*, labels) provided with the mailing list in the ordinary course of business because other services appear to be priced separately. The Commission seeks comment on whether it is necessary to enumerate such services in paragraph (a)(1), or whether to assume that the usual and normal rental charge includes such services. Comment is also sought on whether services other than labels should be specifically mentioned in considering the usual and normal charge.

¹ See Advisory Opinions ("AO") 2003-16, 2002-14, 1988-12, 1982-41, 1981-53, and 1081-46; Matters Under Review ("MURs") 4382 and 4401 (Dole for President, Inc.), MUR 3371 (Americans United Committee), and MUR 1602 (Republican National Independent Expenditure Committee).