

2. Rental at the Usual and Normal Charge With Commercially Reasonable Contractual Terms

Proposed paragraph (a)(2) of 11 CFR 110.21 would require that the mailing list (or list portion) be rented at the usual and normal charge for the contracted use of the list in a *bona fide* arm's length transaction with commercially reasonable contractual terms. Proposed paragraph (a)(2) would also indicate that if there is not a *bona fide* arm's length transaction, a rebuttable presumption would be raised that the exchange is not of equal value.

The Commission has relied on several signposts for ensuring that an arrangement between a political committee and another person constitutes a *bona fide* transaction, rather than serving as a vehicle for making a contribution to the committee. One of the most important of these signposts is whether the transaction represented a bargained-for exchange negotiated at arm's length. For example, the list rentals at issue in AO 2002-14 were approved on the condition that the lists be "leased at the usual and normal charge in a *bona fide*, arm's length transaction." The very concept of "fair market value," which is virtually identical to the concept of "usual and normal charge" as defined in the Commission's regulations, is defined by Black's Law Dictionary as "[t]he price that a seller is willing to accept and a buyer is willing to pay on the open market and in an arm's length transaction." Black's Law Dictionary 1549 (7th ed. 1999). The Commission seeks comment on whether a lack of arm's length bargaining should result in a rebuttable presumption that the exchange is not for fair market value. *Cf. Rybak v. Commissioner*, 91 T.C. 524, 536-37 (U.S. Tax Court 1988) (in tax law, where transactions are frequently examined for whether they should be disregarded for lack of economic substance, "[t]he absence of arm's length negotiations is a key indicator that a transaction lacks economic substance.")

To provide guidance on what constitutes commercially reasonable terms, proposed paragraph (a)(2) of new 11 CFR 110.21 would list three factors, although other factors could be considered as well. These factors are intended to ensure that the rental agreement provides that the lessee uses the mailing list in a manner comparable to the use in normal commercial transactions, thereby preventing transactions where the lessee attempts to make a contribution in the guise of a rental payment.

Two factors, in proposed paragraphs (a)(2)(i) and (ii), would examine whether the rental agreement permits use within a specified time only and, if so, whether this specified time is a reasonable period of time. The inclusion of factors in proposed paragraphs (a)(2)(i), (ii) and (iv) is intended to ensure that actual use would occur and that delayed use would be based on reasonable business considerations, such as to avoid competing with a political committee solicitation to the same group of persons. The Commission seeks comment on whether it should define what is a "reasonable" period of time and, if so, how it should do so.

The other factor, at proposed paragraph (a)(2)(iii), would focus on the number and types of uses by the person leasing the mailing list to ensure that the rental agreement represents a *bona fide* commercial transaction consistent with industry norms and not a transaction used to provide something of value to the political committee. The use of the phrases "usual and normal practice of the [list] industry" and "established procedures and past practice" are consistent with the Commission's regulations on extensions of credit in the ordinary course of business. *See* 11 CFR 116.3(c). As to the number of uses under proposed paragraph (a)(2)(iii), the Commission seeks comments as to whether providing for more than one-time use would be commercially reasonable under industry practice. Should the rules establish a rebuttable presumption that multiple uses are not commercially reasonable?

The Commission seeks comment on the appropriateness of these factors and what other factors, if any, should be included. The Commission also seeks comment on whether the presence of a "*bona fide* arm's length transaction" should be required under the proposed rule, particularly if mailing lists are rented out at the usual and normal charge pursuant to commercially reasonable terms. If the Commission does require the presence of a "*bona fide* arm's length transaction," should the Commission conclude that this requirement cannot be satisfied if committees of the same candidate, or party committees of the same political party, rent mailing lists from each other, or if a candidate's authorized committee rents a mailing list from an unauthorized committee such as that candidate's leadership PAC?

In addition, should proposed 11 CFR 110.21(a)(2) include a factor that considers whether a mailing list is developed over time by the political committee primarily for the political committee's own use? Conversely,

should the proposed rules state that revenue generated from a mailing list that is owned by the political committee, but not developed over time by it for its own use, is not a form of fundraising, and therefore not a contribution? In AO 1991-34, the Commission stated that generally the use of a political committee's asset to generate income through ongoing business or commercial ventures is fundraising in another form. Consequently the proceeds from such ventures would be contributions. However, this advisory opinion also reiterated the Commission's statement in AO 1988-12 that if an asset such as a mailing list was developed by the political committee primarily for its own use and not as a fundraising activity, then income generated from that asset would not be contributions.

Lastly, while proposed paragraph (a)(4) would focus on the rental agreement, the proposed rule does not include provisions that would examine the conduct of the person leasing the mailing list once the rental has occurred, to verify that the person leasing the mailing list in fact uses the mailing list in accordance with the agreement. The Commission seeks comment on whether the proposed rules should include such a provision.

C. 11 CFR 110.21(b)—Committee Sale of the Mailing List

Proposed 11 CFR 110.21(b) would set forth the conditions under which the proceeds from the sale of a political committee's mailing list would not be a contribution by the purchaser to the political committee. Like proposed paragraph (a)(1), proposed paragraph (b)(1) would require that the political committee ascertain in advance the usual and normal charge for the sale of the mailing list. The political committee would also be required to sell the mailing list at that price under proposed paragraph (b). As in the case of charges for a list rental, the Commission seeks comment on whether the political committee that wishes to sell its mailing list should have the burden of establishing what the sale price is and, if so, whether it should be required to do so prior to selling 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 sales price must be established, but that would still require political committees to sell their mailing lists at the usual and normal charge in order to avoid receiving contributions from the purchasers.