

Proposed paragraph (b) would also include the condition contained in proposed paragraph (a)(2) that the sale agreement be a *bona fide* arm's length transaction on commercially reasonable terms, including terms that address the use of the list by the purchaser. The Commission again seeks comment on whether the presence of a "*bona fide* arm's length transaction" should be a separate requirement under the rule. Comment is also sought as to what factors are appropriate for determining the commercial reasonability of the sale of a mailing list. For the reasons discussed above, there would also be a rebuttable presumption that the exchange is not of equal value if the parties do not engage in a *bona fide* arm's length transaction.

The Commission also seeks comment on whether it is usual and customary in the commercial list marketplace for one entity to provide raw list data to another entity that updates and enhances the data and where both entities consequently have access to the list. If so, comment is sought as to whether such a transaction is a commercially reasonable exchange of equal value that would not be an in-kind contribution.

The Commission understands that outright sales of lists are not common and that the sale price of a usable list would be substantially greater than a rental price. This is particularly true for political committees because they depend upon their mailing lists for the solicitation of funds. In advisory opinions approving the sale (as opposed to rental) of mailing lists, the Commission considered one situation involving a terminating committee, and another situation involving a committee of a Federal officeholder that was selling assets to his gubernatorial campaign committee. AOs 1989-4 and 1981-53. In contrast to a terminating committee, an ongoing political committee's sale of a valuable list in an arm's length transaction, for which it would normally be paid a price much greater than the rental price, would be unusual. The Commission seeks comment on whether its understandings as to the frequency of sales and the differences between sales prices and rental charges are correct. More specifically, the Commission also seeks comment as to the likelihood of, and the circumstances surrounding, an ongoing political committee selling its mailing list (as opposed to updating its current lists).

Related to comments on actual ongoing practices with respect to mailing lists, the Commission seeks comment on whether proposed 11 CFR 110.21(b) should contain a condition that the political committee must be

preparing to terminate because the sale of a mailing list by an ongoing political committee is so unusual that it would be *per se* commercially unreasonable. Should the Commission prohibit the sale of mailing lists other than in certain limited circumstances on the basis that there is no readily ascertainable market value for such lists? If not, what sources should the Commission look to in order to determine an objective value for the sale of mailing lists? Furthermore, if the Commission decides to adopt a rule that would limit the sale of a political committee's mailing list to a specified period before it files a termination report, should the Commission adopt exceptions to this special rule? For example, does a purchaser of a political committee's mailing list make a contribution to that committee if the list has not been updated recently and is of substantially depreciated value?

D. 11 CFR 110.21(c)—Rental or Sale Proceeds

Under proposed 11 CFR 110.21(c)(1), a transaction that does not comply with the conditions set forth in proposed paragraphs (a) or (b) would be fundraising, and thus would be treated as an in-kind contribution to the political committee, subject to the applicable limits and source prohibitions of the Act. The contribution amount would be the entirety of the rental or sales proceeds (not just the difference between the usual and normal charge and an amount paid that exceeds that charge). Treatment of the entire payment for a mailing list as a contribution would be consistent with 11 CFR 100.53, which states that "the entire amount paid as the purchase price for a fundraising item sold by a political committee is a contribution." Nevertheless, the Commission seeks comment on including in proposed paragraph (c)(1) the opposite approach of setting the amount of the contribution as the amount paid that exceeds the usual and normal charge for the sale of the mailing list.

While proposed 11 CFR 110.21(c)(1) would address sale or rental of mailing lists at an amount that exceeds the usual and normal charge, proposed paragraph (c)(2) would retain the current rule at 11 CFR 100.52 for situations where a political committee donates or transfers its mailing list or rents or sells its mailing list at less than the usual or normal charge.

E. 11 CFR 110.21(d)—Rental or Sale to the Candidate

Proposed 11 CFR 110.21(d) would address situations where an authorized

committee sells or rents its mailing list to the candidate who formed the authorized committee. The proposed rule would treat the amount paid by the candidate for the mailing list as a contribution from the candidate to the authorized committee in that amount. This provision would recognize that a transaction between these two parties is not at arm's length.

F. 11 CFR 110.21(e)—Reporting of Proceeds

Proposed 11 CFR 110.21(e) would require that proceeds from the rental or sale of a mailing list that complies with the provisions of proposed section 110.21 be reported as "other receipts."

G. 11 CFR 110.21(f)—Recordkeeping

Proposed 11 CFR 110.21(f) would set forth the recordkeeping requirements associated with the sale or rental of a political committee's mailing list. Proposed paragraph (f)(1) would require that political committees maintain and make available the sales or rental agreements. These agreements must be signed and dated. Proposed paragraph (f)(2) would require documentation of the usual and normal charge for a political committee's mailing list. For a mailing list that is listed in the *SRDS Direct Marketing List Source*, the political committee would need to retain a copy of the price list for its mailing list in the *SRDS Direct Marketing List Source* under proposed paragraph (f)(2)(A). For a mailing list that is not listed in the *SRDS Direct Marketing List Source*, the political committee would need to obtain a written appraisal from an independent entity. The Commission seeks comment on whether a written appraisal from an independent entity is the appropriate documentation of the usual and normal charge when a mailing list is not in the *SRDS Direct Marketing List Source*. Are there other ways to document the usual and normal charge? Should the rules include more specific requirements regarding the independent entities, such as that they are in the business of appraising the fair market value of mailing lists? Do such entities exist?

H. Other Issues

1. Allocation of Rental Proceeds

The Commission notes that in some cases a political committee's mailing list may be developed with non-Federal, as well as Federal funds, and that, under the proposed rule, the entire amount received from the rental or sale of the list may be deposited in the Federal account without being subject to the amount limitations and source