

prohibitions of the Act. The Commission seeks comment on whether proposed 11 CFR 110.21 should specify that only some allocable portion of the rental proceeds, rather than all of the rental proceeds, may be deposited and retained in the committee's Federal account, and that the remainder should be deposited in the non-Federal account, provided that the political committee is permitted to have a non-Federal account under 11 CFR 106.6, 106.7 or part 300.

One possible allocation rule is that the Federal account may only accept and use the portion of the proceeds that reflects the Federal portion of the committee's cost in developing the list. Another possibility is that the Federal account may only accept and use the amounts corresponding to the Federal share of administrative expenses applicable to the political committee under 11 CFR 106.6(c) or 106.7(d)(2). This approach recognizes that the list's development may have been paid for as allocable administrative expenses. If such splitting of the deposit of the rent proceeds is required, comment is also sought on whether national party committees would be allowed to retain the entire amount of proceeds from the rental of lists developed with mixed funds prior to the effective date of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. 107-155 (Mar. 27, 2002), in view of the fact that under BCRA they only have accounts with Federal funds.

2. Scope of Proposed Mailing List Rules

The proposed new rules in 11 CFR 110.21 would apply in the same manner to both authorized and unauthorized committees, *i.e.*, party committees, multicandidate committees, and other kinds of political committees. Nevertheless, the Commission seeks comments as to whether there are material distinctions between different types of political committees that should be reflected in the new mailing list provisions.

II. Proposed 11 CFR 110.22 Committee Exchange of Mailing Lists

A. Background

The Commission has, in its advisory opinions, addressed list exchanges by political committees with other organizations and has concluded that where the exchange is for equal value, a contribution is not made to the political committee. AOs 1982-41 and 1981-46; *see also* AOs 2003-16 and 2002-14. Such exchanges allow each organization or political committee to seek new potential donors, and often

allow each organization to add the names of individuals from the other mailing list to its own list where those individuals responded to that organization's solicitation. AO 1981-46 noted variations of equal exchange that went beyond "a direct exchange of the same number of names." In some cases, one organization may use fewer names more times, or the exchange may involve different numbers of names where the names on one mailing list may have a different market value than the names on the other list, or other variations dependent upon the frequency of use or the value of the names.

B. 11 CFR 110.22(a)—Exchanges of Equal Value

Proposed 11 CFR 110.22 would describe the conditions under which a political committee may exchange its mailing list with another organization without receiving a contribution, donation, or other reportable receipt. Proposed paragraph (a) would follow, in some respects, the proposed rules on mailing list rental and sale regarding the period of time and number of uses of the mailing list. It would treat the exchange as neither a contribution nor a reportable receipt if: (1) The usual and normal charge for the mailing list and the services ordinarily provided in the list exchange is ascertained in advance; (2) the mailing lists involved in the exchange are of equal value, as discussed below; and (3) the actual exchange is a *bona fide* arm's length transaction with commercially reasonable terms. 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. "Equal value" would be defined in proposed paragraph (a)(3)(i) in terms of the usual and normal rental value of each organization's or political committee's mailing list, or list portion being exchanged, as well as the agreed upon use by the organization, and the services provided. Proposed paragraph (a)(3)(ii) would also address the timing of the use of the exchanged lists, including delayed use if provided for in the agreement.

The Commission seeks comment on whether, and under what circumstances, multiple uses of a mailing list would be commercially reasonable; when delayed use would be reasonable; and whether the rule should address delayed use. Comment is also sought on how to determine the usual and normal charge, and whether the proposed rule should affirmatively

mandate that the mailing lists be used in a manner consistent with the list exchange agreement. The Commission also seeks comment on whether the proposed rule should require that each party to the exchange establish the fair market value of its own list in advance in order to avoid treating the transaction as entailing an in-kind contribution. The Commission also seeks comment on whether the presence of a "*bona fide* arm's length transaction" should be required, particularly if it has been otherwise established that the exchange of the mailing lists is an exchange of equal value. Moreover, can the requirement of a "*bona fide* arm's length transaction" be satisfied even if campaign 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 a leadership PAC?

The Commission also seeks comment on whether the political committee's ability to use the names on the other organization's mailing list to solicit contributions to the Federal account is affected by whether funds from the committee's non-Federal account were used to develop the committee list. (*See* the discussion above on allocation in proposed 11 CFR 110.21.)

Another issue raised previously with respect to the sale of mailing lists may more appropriately relate to the exchange of lists. Specifically, the Commission 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 treated as an in-kind contribution.

C. 11 CFR 110.22(b)—Exchanges of Unequal Value

Proposed 11 CFR 110.22(b) would address an exchange of mailing lists that does not comply with proposed paragraph (a). Where the value of the mailing list provided by the other person exceeds the value of the political committee's mailing list, only the excess amount is a contribution. This is in contrast to proposed 11 CFR 110.21(c), where the entire amount is a contribution. Also, while proposed 11 CFR 110.21 would treat a sale or rental of a mailing list at a charge that is greater than the usual or normal charge as a fundraising activity that is subject