

# Explanations and Justifications for Federal Election Commission Regulations

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Federal Election Commission  
March 2004



**EXPLANATIONS AND JUSTIFICATIONS  
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| <b>Explanation and Justification for Regulations on Travel on Behalf of Candidates and Political Committees</b><br><u>Federal Register</u> notice: 68 FR 69583<br>(December 15, 2003)    | 888                |
| <b>Explanation and Justification for Regulations on the Extension of Administrative Fines Program</b><br><u>Federal Register</u> notice: 69 FR 6525<br>(February 11, 2004)               | 900                |
| <b>Citation Index to Explanation and Justifications</b>  |                    |
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acceptable and unacceptable purpose descriptions to be reported by authorized committees. Paragraph (B) requires authorized committees, when itemizing certain disbursements for which reimbursements are required, to provide a brief explanation of the activity for which reimbursement is required. These provisions have been in Title 11 of the **Code of Federal Regulations** since 1980 and 1995, respectively, and were not affected by the recent statutory changes to the election cycle reporting requirements.

#### Need for Correction

As published, the final rules inadvertently omit two paragraphs describing information to be reported by authorized committees of Federal candidates.

All committees must report the purpose of itemized disbursements (i.e., those disbursements aggregating in excess of \$200). Omitted paragraph (A) contains examples of suitably specific purpose descriptions as well as examples of those descriptions that are unacceptably vague. This paragraph is inconsistent with the reporting of rules for unauthorized committees (committees other than candidate committees) in 11 CFR 104.3(b)(3).

Omitted paragraph (B) is used in administering the "personal use" rules in 11 CFR 113.1. Federal candidates are barred from using campaign funds for personal benefit. Paragraph (B) requires authorized committees of Federal candidates itemizing disbursements for which partial or total reimbursement is required under 11 CFR 113.1(g)(1)(iii)(C) or (D) to provide a brief explanation of the activity for which the reimbursement is made.

Section 801 of Title 5 of the United States Code requires Federal agencies to submit regulations to Congress. These regulations were submitted to the Speaker of the House of Representatives and the President of the Senate on November 26, 2001.

#### Certification of No Effect Pursuant to 5 U.S.C. § 605(b) [Regulatory Flexibility Act]

This correction will not have significant economic impact on a substantial number of small entities. The basis of this certification is that this correction only requires political committees to once again add information to the reports they are required to file. These regulations were in 11 CFR since 1980 and 1995, respectively, before being inadvertently omitted in 2000.

#### List of Subjects in 11 CFR Part 104

Campaign funds, Political committees and parties, Reporting and recordkeeping requirements.

Accordingly, 11 CFR part 104 is corrected by making the following correcting amendment:

#### PART 104—REPORTS BY POLITICAL COMMITTEES

1. The authority citation for part 104 continues to read as follows:

**Authority:** 2 U.S.C. 431(1), 431(8), 431(9), 432(i), 434, 438(a)(8), 438(b), 439a.

#### § 104.3 Contents of reports (2 U.S.C. 434(b), 439a).

\* \* \* \* \*

2. In § 104.3 add the following paragraphs (b)(4)(i)(A) and (B):

(b) \* \* \*

(4) \* \* \*

(i) \* \* \*

(A) As used in this paragraph, *purpose* means a brief statement or description of why the disbursement was made. Examples of statements or descriptions which meet the requirements of this paragraph include the following: dinner expenses, media, salary, polling, travel, party fees, phone banks, travel expenses, travel expense reimbursement, and catering costs. However, statements or descriptions such as *advance*, *election day expenses*, *other expenses*, *expenses*, *expense reimbursement*, *miscellaneous*, *outside services*, *get-out-the-vote* and *voter registration* would not meet the requirements of this paragraph for reporting the purpose of an expenditure.

(B) In addition to reporting the purpose described in paragraph (b)(4)(i)(A) of this section, whenever an authorized committee itemizes a disbursement that is partially or entirely a personal use for which reimbursement is required under 11 CFR 113.1(g)(1)(ii)(C) or (D), it shall provide a brief explanation of the activity for which reimbursement is required.

\* \* \* \* \*

Dated: November 26, 2001.

**Danny L. McDonald,**  
Chairman, Federal Election Commission.  
[FR Doc. 01-29679 Filed 11-29-01; 8:45 am]  
**BILLING CODE 6715-01-P**

#### FEDERAL ELECTION COMMISSION

#### 11 CFR Part 111

[Notice 2001-18]

#### Extension to Administrative Fines

**AGENCY:** Federal Election Commission.

**ACTION:** Final rule; revision of the sunset date.

**SUMMARY:** The Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the expiration date in which the Federal Election Commission (hereinafter "the Commission") may assess civil money penalties for violations of the reporting requirements of section 434(a) of the Federal Election Campaign Act (hereinafter "the Act" or "FECA").

**DATES:** Effective on December 31, 2001.

**FOR FURTHER INFORMATION CONTACT:** Ms. Rosemary C. Smith, Assistant General Counsel, or Ms. Mai T. Dinh, Attorney, 999 E Street, NW., Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

#### SUPPLEMENTARY INFORMATION:

#### Explanation and Justification

Section 640 of the Treasury and General Government Appropriations Act, 2000, Pub. L. No. 106-58, 106th Cong., 113 Stat. 430, 476-77 (1999), amended § 309(a)(4) of the FECA, 2 U.S.C. 437g(a)(4), to provide for a modified enforcement process for violations of reporting requirements. Under § 437g(a)(4)(C) of the FECA, the Commission may assess a civil money penalty for violations of the reporting requirements of 2 U.S.C. 434(a). This authority, however, was to sunset on December 31, 2001. Pub. L. No. 106-58, 106th Cong., § 640(c). Recently, § 642 of the Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the sunset date to include all reports that cover activity between January 1, 2000, to December 31, 2003.

The Commission published final rules on May 19, 2000, to implement the amendment contained in the Treasury and General Government Appropriations Act, 2000. Section 111.30 of the regulations reflects the sunset provision of Pub. L. No. 106-58, 106th Cong., § 640(c). Therefore, the Commission is issuing this final rule to amend section 111.30 to extend the application of the administrative fine regulations, 11 CFR part 111, subpart B, to include all violations relating to reports that cover the period between January 1, 2000, to December 31, 2003.

The Commission is promulgating this final rule without notice or opportunity for comment because it falls under the "good cause" exemption of the Administrative Procedures Act, 5 U.S.C. 553(b)(B). The exemption allows

29, 1983, (48 FR 39046); and "Licensee Event Report System," (10 CFR 50.73), July 26, 1983, (48 FR 33858). The former specifically addresses reporting requirements during the course of an event. The Commission also published a regulation (10 CFR 50.9, December 31, 1987 (523 FR 49372)), requiring that information provided to the Commission be complete and accurate in all material respects, and that licensees notify the Commission of information having significant implication for public health and safety or common defense and security. In addition, the Commission published similar regulations regarding reporting of nuclear material events (e.g., 10 CFR 30.50 and 10 CFR 30.9 and 10 CFR 72.74 and 10 CFR 72.11). Timely, accurate and complete information continues to be of great importance to the Commission. Rules have been promulgated which fulfill the objectives of the Policy Statement in ensuring timeliness, accuracy, and completeness of the reported information.

#### 6. Planning Basis For Emergency Responses to Nuclear Power Reactor Accidents

On October 23, 1979 (44 FR 61123), the NRC published a Policy Statement, "Planning Basis for Emergency Responses to Nuclear Power Plant Accidents," to endorse the guidance developed by a joint task force of the NRC and Environmental Protection Agency (EPA) on radiological emergency response plans to be developed by off-site agencies.

After reviewing public comments on the policy statement, information obtained from workshops held on the subject and reports from a Presidential Commission, the NRC published a final rule, "Emergency Planning," (10 CFR Parts 50 and 70) on August 19, 1980 (45 FR 55402). The final rule fulfilled the objectives of the Policy Statement by upgrading the NRC's emergency planning regulations to assure that adequate protective measures can and will be taken in the event of a radiological emergency.

Dated at Rockville, Maryland, this 6th day of January 1995.

For the Nuclear Regulatory Commission.

**James M. Taylor,**

*Executive Director for Operations.*

[FR Doc. 95-1475 Filed 1-19-95; 8:45 am]

**BILLING CODE 7590-01-P**

## FEDERAL ELECTION COMMISSION

### 11 CFR Part 1

[Notice 1995-4]

#### Privacy Act; Implementation

**AGENCY:** Federal Election Commission.

**ACTION:** Final rule.

**SUMMARY:** The Federal Election Commission ("Commission" or "FEC") is establishing a new system of records under the Privacy Act of 1974, "Inspector General Investigative Files (FEC 12)", consisting of the investigatory files of the Commission's Office of the Inspector General ("OIG"). The Commission is exempting this new system of records from certain provisions of the Privacy Act of 1974 ("Act").

**EFFECTIVE DATE:** February 21, 1995.

**FOR FURTHER INFORMATION CONTACT:**

Ms. Susan E. Propper, Assistant General Counsel, 999 E Street NW., Washington, DC 20463, (202) 219-3690 or (800) 424-9530.

**SUPPLEMENTARY INFORMATION:** Elsewhere in today's **Federal Register**, the Commission is publishing a Notice of Effective Date of the Notice of New and/or Revised Systems of Records under the Privacy Act, 5 U.S.C. 552a, as amended (published at 59 FR 53977, October 27, 1994). That Notice established a new system of records, FEC 12, "Office of Inspector General Investigative Files."

On October 27, 1994, the Commission published a Notice of Proposed Rulemaking seeking comments on a proposal to exempt this new system of records from certain provisions of the Act. 59 FR 53946. No comments were received in response to this Notice.

#### Statement of Basis and Purpose

*Section 1.14. Specific exemptions.* The Privacy Act and the implementing regulations require, among other things, that the Commission provide notice when collecting information, account for certain disclosures, permit individuals access to their records, and allow them to request that the records be amended. These provisions could interfere with the conduct of OIG investigations if applied to the OIG's maintenance of the new system of records.

Accordingly, the Commission is exempting FEC 12 from these requirements under sections (j)(2) and (k)(2) of the Act. Section (j)(2), 5 U.S.C. 552a(j)(2), exempts a system of records maintained by "agency or component thereof which performs as its principal

function any activity pertaining to enforcement of criminal laws \* \* \*." Section (k)(2), 5 U.S.C. 552a(k)(2), exempts a system of records consisting of "investigatory materials compiled for law enforcement purposes," where such materials are not within the scope of the (j)(2) exemption pertaining to criminal law enforcement.

FEC 12 consists of information covered by the (j)(2) and (k)(2) exemptions. The OIG investigatory files are maintained pursuant to official investigational and law enforcement functions of the Commission's Office of Inspector General under authority of the 1988 amendments to the Inspector General Act of 1978. See Pub. L. 100-504, amending Pub. L. 95-452, 5 U.S.C. app. The OIG is an office within the Commission that performs as one of its principal functions activities relating to the enforcement of criminal laws. In addition, the OIG is responsible for investigating a wide range of non-criminal law enforcement matters, including civil, administrative, or regulatory violations and similar wrongdoing. Access by subject individuals and others to this system of records could substantially compromise the effectiveness of OIG investigations, and thus impede the apprehension and successful prosecution or discipline of persons engaged in fraud or other illegal activity.

For these reasons, the Commission is exempting FEC 12 under exemptions (j)(2) and (k)(2) of the Privacy Act by adding a new paragraph (b) to 11 CFR 1.14, the section in which the Commission specifies its systems of records that are exempt under the Act. Where applicable, section (j)(2) may be invoked to exempt a system of records from any Privacy Act provision except: 5 U.S.C. 552a(b) (conditions of disclosure); (c) (1) and (2) (accounting of disclosures and retention of accounting, respectively); (e)(4) (A) through (F) (system notice requirements); (e) (6), (7), (8), (10) and (11) (certain agency requirements relating to system maintenance); and (f) (criminal penalties). Section (k)(2) may be invoked to exempt a system of records from: 5 U.S.C. 552a(c)(3) (making accounting of disclosures available to the subject individual); (d) (access to records); (e)(1) (maintaining only relevant and necessary information); (e)(4) (G), (H), and (I) (notice of certain procedures), and (f) (promulgation of certain Privacy Act rules). New paragraph (b) notes these specific exceptions and exemptions.

acceptable and unacceptable purpose descriptions to be reported by authorized committees. Paragraph (B) requires authorized committees, when itemizing certain disbursements for which reimbursements are required, to provide a brief explanation of the activity for which reimbursement is required. These provisions have been in Title 11 of the **Code of Federal Regulations** since 1980 and 1995, respectively, and were not affected by the recent statutory changes to the election cycle reporting requirements.

#### Need for Correction

As published, the final rules inadvertently omit two paragraphs describing information to be reported by authorized committees of Federal candidates.

All committees must report the purpose of itemized disbursements (i.e., those disbursements aggregating in excess of \$200). Omitted paragraph (A) contains examples of suitably specific purpose descriptions as well as examples of those descriptions that are unacceptably vague. This paragraph is inconsistent with the reporting of rules for unauthorized committees (committees other than candidate committees) in 11 CFR 104.3(b)(3).

Omitted paragraph (B) is used in administering the "personal use" rules in 11 CFR 113.1. Federal candidates are barred from using campaign funds for personal benefit. Paragraph (B) requires authorized committees of Federal candidates itemizing disbursements for which partial or total reimbursement is required under 11 CFR 113.1(g)(1)(iii)(C) or (D) to provide a brief explanation of the activity for which the reimbursement is made.

Section 801 of Title 5 of the United States Code requires Federal agencies to submit regulations to Congress. These regulations were submitted to the Speaker of the House of Representatives and the President of the Senate on November 26, 2001.

#### Certification of No Effect Pursuant to 5 U.S.C. § 605(b) [Regulatory Flexibility Act]

This correction will not have significant economic impact on a substantial number of small entities. The basis of this certification is that this correction only requires political committees to once again add information to the reports they are required to file. These regulations were in 11 CFR since 1980 and 1995, respectively, before being inadvertently omitted in 2000.

#### List of Subjects in 11 CFR Part 104

Campaign funds, Political committees and parties, Reporting and recordkeeping requirements.

Accordingly, 11 CFR part 104 is corrected by making the following correcting amendment:

#### PART 104—REPORTS BY POLITICAL COMMITTEES

1. The authority citation for part 104 continues to read as follows:

**Authority:** 2 U.S.C. 431(1), 431(8), 431(9), 432(i), 434, 438(a)(8), 438(b), 439a.

#### § 104.3 Contents of reports (2 U.S.C. 434(b), 439a).

\* \* \* \* \*

2. In § 104.3 add the following paragraphs (b)(4)(i)(A) and (B):

(b) \* \* \*  
(4) \* \* \*  
(i) \* \* \*

(A) As used in this paragraph, *purpose* means a brief statement or description of why the disbursement was made. Examples of statements or descriptions which meet the requirements of this paragraph include the following: dinner expenses, media, salary, polling, travel, party fees, phone banks, travel expenses, travel expense reimbursement, and catering costs. However, statements or descriptions such as *advance*, *election day expenses*, *other expenses*, *expenses*, *expense reimbursement*, *miscellaneous*, *outside services*, *get-out-the-vote* and *voter registration* would not meet the requirements of this paragraph for reporting the purpose of an expenditure.

(B) In addition to reporting the purpose described in paragraph (b)(4)(i)(A) of this section, whenever an authorized committee itemizes a disbursement that is partially or entirely a personal use for which reimbursement is required under 11 CFR 113.1(g)(1)(ii)(C) or (D), it shall provide a brief explanation of the activity for which reimbursement is required.

\* \* \* \* \*

Dated: November 26, 2001.

**Danny L. McDonald,**  
*Chairman, Federal Election Commission.*  
[FR Doc. 01-29679 Filed 11-29-01; 8:45 am]  
**BILLING CODE 6715-01-P**

#### FEDERAL ELECTION COMMISSION

#### 11 CFR Part 111

#### [Notice 2001-18]

#### Extension to Administrative Fines

**AGENCY:** Federal Election Commission.

**ACTION:** Final rule; revision of the sunset date.

**SUMMARY:** The Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the expiration date in which the Federal Election Commission (hereinafter "the Commission") may assess civil money penalties for violations of the reporting requirements of section 434(a) of the Federal Election Campaign Act (hereinafter "the Act" or "FECA").

**DATES:** Effective on December 31, 2001.

**FOR FURTHER INFORMATION CONTACT:** Ms. Rosemary C. Smith, Assistant General Counsel, or Ms. Mai T. Dinh, Attorney, 999 E Street, NW., Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

#### SUPPLEMENTARY INFORMATION:

#### Explanation and Justification

Section 640 of the Treasury and General Government Appropriations Act, 2000, Pub. L. No. 106-58, 106th Cong., 113 Stat. 430, 476-77 (1999), amended § 309(a)(4) of the FECA, 2 U.S.C. 437g(a)(4), to provide for a modified enforcement process for violations of reporting requirements. Under § 437g(a)(4)(C) of the FECA, the Commission may assess a civil money penalty for violations of the reporting requirements of 2 U.S.C. 434(a). This authority, however, was to sunset on December 31, 2001. Pub. L. No. 106-58, 106th Cong., § 640(c). Recently, § 642 of the Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the sunset date to include all reports that cover activity between January 1, 2000, to December 31, 2003.

The Commission published final rules on May 19, 2000, to implement the amendment contained in the Treasury and General Government Appropriations Act, 2000. Section 111.30 of the regulations reflects the sunset provision of Pub. L. No. 106-58, 106th Cong., § 640(c). Therefore, the Commission is issuing this final rule to amend section 111.30 to extend the application of the administrative fine regulations, 11 CFR part 111, subpart B, to include all violations relating to reports that cover the period between January 1, 2000, to December 31, 2003.

The Commission is promulgating this final rule without notice or opportunity for comment because it falls under the "good cause" exemption of the Administrative Procedures Act, 5 U.S.C. 553(b)(B). The exemption allows

**FEDERAL ELECTION COMMISSION**

[Notice 1995-5]

**11 CFR Parts 100, 104 and 113****Expenditures; Reports by Political Committees; Personal Use of Campaign Funds****AGENCY:** Federal Election Commission.**ACTION:** Final rules; transmittal of regulations to Congress.

**SUMMARY:** The Federal Election Commission has revised its regulations governing the personal use of campaign funds. These regulations implement portions of the Federal Election Campaign Act of 1971, as amended. The new rules insert a definition of personal use into the Commission's regulations. The rules also amend the definition of expenditure and the reporting requirements for authorized committees in the current regulations.

**EFFECTIVE DATES:** Further action, including the announcement of an effective date, will be taken after these regulations have been before Congress for 30 legislative days pursuant to 2 U.S.C. 438(d). A document announcing the effective date will be published in the **Federal Register**.

**FOR FURTHER INFORMATION CONTACT:** Ms. Susan E. Propper, Assistant General Counsel, 999 E Street, NW., Washington, DC 20463, (202) 219-3690 or (800) 424-9530.

**SUPPLEMENTARY INFORMATION:** The Commission is today publishing the final text of revisions to its regulations at 11 CFR parts 100, 104 and 113. These revisions implement section 439a of the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. § 431 *et seq.* ["FECA" or "the Act"]. Section 439a states that no amounts received by a candidate as contributions that are in excess of any amount necessary to defray his or her expenditures may be converted by any person to any personal use, other than to defray and ordinary and necessary expenses incurred in connection with his or her duties as a holder of Federal office. The new rules insert a definition of personal use into Part 113 of the current regulations. The rules also amend the reporting requirements for authorized committees at 11 CFR 104.3, and the definition of expenditure at 11 CFR 100.8.

The final rules published today are the result of an extended rulemaking process. In August of 1993, the Commission published a Notice of Proposed Rulemaking ["NPRM"] seeking comment on proposed rules governing the conversion of campaign

funds to personal use. 58 FR 45463 (August 30, 1993). The NPRM contained a proposed general definition of personal use, several enumerated examples, and other provisions for the administration of the personal use prohibition. The Commission subsequently granted a request for a 45 day extension of the comment period. 58 FR 52040 (Oct. 6, 1993). The Commission received 32 comments from 31 commenters in response to the NPRM. The Commission also held a public hearing on January 12, 1994, at which it heard testimony from five witnesses on the proposed rules.

After reviewing the comments received and the testimony given, Commission staff prepared draft final rules, which were considered at an open meeting held on May 19, 1994. The Commission also considered at that time several requests it had received for an additional opportunity to comment on the rules before they were finally promulgated. The Commission decided to seek additional comment on the rules, and published a Request for Additional Comments on August 17, 1994 ["RAC"]. 59 FR 42183 (August 17, 1994). The RAC contained a revised set of draft rules, including a revised definition of personal use that differed significantly from the general definition set out in the 1993 NPRM. The Commission received 31 comments from 34 commenters in response to the Request.

The comments received provided valuable information that serves as the basis for the final rules published today. Elements of both sets of draft rules have been incorporated into the final rules.

Section 438(d) of Title 2, United States Code requires that any rules or regulations prescribed by the Commission to carry out the provisions of Title 2 of the United States Code be transmitted to the Speaker of the House of Representatives and the President of the Senate 30 legislative days before they are finally promulgated. These regulations were transmitted to Congress on February 3, 1995.

**Explanation and Justification**

The 1979 amendments to the Federal Election Campaign Act, Pub. L. No. 96-187, 93 Stat. 1339, 1366-67, amended 2 U.S.C. § 439a to prohibit the use of campaign funds by any person for personal use, other than an individual serving as a Member of Congress on January 8, 1980. Under this provision, the Commission must determine whether a disbursement of campaign funds is a campaign expenditure, a permissible expense connected to the duties of a holder of Federal office, or

a conversion to personal use. The Commission undertook this rulemaking in an effort to provide additional guidance on these issues to the regulated community.

Some of the comments received contained general observations on the Commission's effort to promulgate personal use rules. Many commenters expressed general support for the Commission's efforts, but other commenters objected to Commission action in this area. One commenter expressed doubt that the Commission would be able to regulate personal use with these kinds of rules. A number of commenters argued that this entire area should be left to Congress. Two of these commenters objected to the rulemaking on the grounds that it is an expansion of Commission authority that is not mandated by Congressional action, one saying Congressional inaction does not confer jurisdiction on the Commission to take action.

However, this rulemaking is clearly within the Commission's jurisdiction and authority. Section 438(a)(8) of Title 2 states that "[t]he Commission shall prescribe rules, regulations and forms to carry out the provisions of [the Federal Election Campaign Act] \* \* \*." This rulemaking is an effort by the Commission to carry out the provisions of section 439a by more clearly defining personal use. Thus, it is precisely the kind of rulemaking contemplated by Congress when it enacted section 438(a)(8).

In addition, this rulemaking is prompted, in large part, by more recent Congressional action, specifically, the Ethics Reform Act of 1989, Pub. L. No. 101-194, 103 Stat. 1716. Section 504 of the Ethics Reform Act repealed a "grandfather" provision that Congress included in section 439a when it enacted the personal use prohibition in 1979. This grandfather provision exempted any person who was a "Senator or Representative in, or Delegate or Resident Commissioner to, the Congress" on January 8, 1980 from the personal use prohibition. By repealing the grandfather provision, Section 504 of the Ethics Reform Act limited conversions to personal use by grandfathered Members and former Members to the unobligated balance in their campaign accounts on November 30, 1989. It also completely prohibited conversions of campaign funds by anyone serving in the 103rd or any later Congress. Thus, any grandfathered Members who returned to Congress in January, 1993 gave up the right to convert funds to personal use.

Many of the enforcement actions and advisory opinions the Commission

addressed before the start of the 103rd Congress involved persons who, because they were Members of Congress on January 8, 1980, were eligible to convert campaign funds to personal use. Consequently, the question of whether a particular disbursement was a legitimate campaign expenditure or a conversion of campaign funds to personal use may not have been fully explored during that period. A few former Members of Congress may still be covered by the grandfather provision and so continue to be eligible to convert campaign funds to personal use. These former Members are not affected by the new rules published today.

However, the Commission expects that, in the future, most of the situations it will address will involve persons who are not eligible to convert funds to personal use. This increases the need for a clear distinction between permissible uses of campaign funds and impermissible conversions to personal use. In an effort to address this need, the Commission initiated this rulemaking. The Commission is hopeful that the promulgation of these rules will provide much needed guidance to the regulated community.

This Explanation and Justification departs from the Commission's usual practice of discussing the provisions of the final rules in numerical order. The amendments to Parts 100 and 104 are an outgrowth of the new rules inserted in part 113. Consequently, part 113 will be discussed first, in order to place the amendments to parts 100 and 104 in the proper context.

### **Part 113—Excess Campaign Funds and Funds Donated to Support Federal Officeholder Activities (2 U.S.C. 439a)**

#### *Section 113.1 Definitions (2 U.S.C. 439a)*

The final rules insert a definition of personal use into § 113.1, which contains the definitions that apply to Part 113. Part 113 lists the permissible uses of excess campaign funds and states that excess funds cannot be converted to personal use. Under § 113.1(e), candidates can determine that a portion of their campaign funds are excess campaign funds. The final rules treat the use of campaign funds for personal use as a determination by the candidate that the funds used are excess campaign funds. The personal use definition is inserted as section 113.1(g).

Section 113.1(g) contains a general definition of personal use. Section 113.1(g)(1) expands on this general definition. Paragraph (g)(1)(i) contains a list of expenses that are *per se* personal use. Paragraph (g)(1)(ii) explains how

the Commission will analyze situations not covered by the list of expenses in paragraph (g)(1)(i). The remaining provisions of § 113.1(g) set out specific exclusions from the definition of personal use, explain how the definition interacts with certain House and Senate rules, and describe the circumstances under which payments for personal use expenses by third parties will be considered contributions.

#### *Section 113.1(g) General Definition*

The general definition of personal use is set out in new paragraph 113.1(g). Personal use is any use of funds in a campaign account of a present or former candidate to fulfill a commitment, obligation or expense of any person that would exist irrespective of the candidate's campaign or responsibilities as a Federal officeholder.

Under this definition, expenses that would be incurred even if the candidate was not a candidate or officeholder are treated as personal rather than campaign or officeholder related. This approach is based on Advisory Opinions 1980–138 and 1981–2, in which the Commission said that “expenses which would exist regardless of an individual's election to Federal office are not ‘incidental’ and may not be paid from campaign funds.” Advisory Opinion 1981–2. Since not all cases that raise personal use questions can be specifically addressed in a rule, this standard provides a guideline for the Commission and the regulated community to use in determining whether a particular expense is permissible or prohibited.

The final rules supersede Advisory Opinion 1976–17, in which the Commission said that “any disbursements made and reported by the campaign as expenditures will be deemed to be for the purpose of influencing the candidate's election.” A disbursement for campaign funds will not be deemed to be for the purpose of influencing an election if the disbursement is for an expense that is considered a personal use under these rules.

The rules supersede Advisory Opinion 1980–49, in which the Commission indicated that section 439a allows a campaign to pay the “personal living expenses” of the candidate. The use of campaign funds to pay the personal living expenses of the candidate is a prohibited personal use under these rules. Similarly, the rules supersede Advisory Opinions 1982–64 and 1976–53, to the extent that they allowed the use of campaign funds for living expenses incurred during the campaign. However, the rules do not prohibit the use of campaign funds for

campaign or officeholder related meal expenses or subsistence expenses incurred during campaign or officeholder related travel. Generally, these uses are permissible under §§ 113.1(g)(1)(ii) (B) and (C). These sections will be discussed in detail below.

In approving the irrespective definition for inclusion in the final rules, the Commission returned to the definition set out in the 1993 NPRM. The Commission had proposed an alternative definition in the August 1994 Request for Additional Comments. Under the alternative definition, personal use would have been any use of funds that confers a benefit on a present or former candidate or a member of the candidate's family that is not primarily related to the candidate's campaign or the ordinary and necessary duties of a holder of Federal office. The Commission received numerous comments on both of these definitions.

Many commenters expressed strong support for the irrespective definition contained in the final rules. These commenters said the alternative definition is vague and would force the Commission to engage in piecemeal decisionmaking. Thus, the commenters said, the alternative definition would be difficult to enforce, and would not curtail any of the abuses taking place under current law. Consequently, the alternative version would not be an improvement over the current situation.

In contrast, the commenters who preferred the alternative version argued that it uses more established and well understood principles, and thus would reduce the likelihood of conflicts with other laws. They also said it more closely tracks the statute and more closely serves the purposes of the Ethics Reform Act of 1989, Pub. L. No. 101–194, 103 Stat. 1716 (1989). Two commenters criticized the irrespective definition, saying it does not provide enough guidance and leaves too much room for regulatory interpretation. These commenters said the alternative version would be flexible enough to accommodate a wide range of political and campaign activity, and would preserve the discretion recognized in the Commission's previous advisory opinions.

The irrespective definition is preferable to the alternative version because determining whether an expense would exist irrespective of candidacy can be done more objectively than determining whether an expense is primarily related to the candidacy. If campaign funds are used for a financial obligation that is caused by campaign activity or the activities of an

officeholder, that use is not personal use. However, if the obligation would exist even in the absence of the candidacy or even if the officeholder were not in office, then the use of funds for that obligation generally would be personal use.

In contrast, determining whether an expense is primarily related to a campaign or the duties of an officeholder, or instead is primarily related to some other activity, would force the Commission to draw conclusions as to which relationship is more direct or significant. The Commission has been reluctant to make these kinds of subjective determinations in the past. Moreover, any rule that requires these kinds of determinations can result in more *ad hoc* decisionmaking. The Commission initiated this rulemaking in order to reduce piecemeal resolution of personal use issues, and to provide more prospective guidance to the regulated community as to the kinds of uses that will be considered personal use. The Commission has concluded that the irrespective definition will more successfully achieve these goals.

The general definition of personal use originally proposed by the Commission in the 1993 NPRM applied to any use of campaign funds, regardless of whether the use benefited the candidate, a family member, a campaign employee or an unrelated party. However, under the revised draft rules set out in the RAC, the general definition would have been more limited. This definition would have covered only those uses of campaign funds that benefit the candidate or members of the candidate's family.

The final rules return to the original approach because this approach is more consistent with the FECA. Section 439a states that no campaign funds "may be converted by any person to any personal use." Thus, under the final rules, any use of campaign funds that would exist irrespective of the campaign or the duties of a Federal officeholder is personal use, regardless of whether the beneficiary is the candidate, a family member of the candidate, or some other person.

#### Paragraph (g)(1)(i)

Paragraph (g)(1)(i) of the final rules contains a list of expenses that are considered personal use. The list includes household food items, funeral expenses, clothing, tuition payments, mortgage, rent and utility payments, entertainment expenses, club dues, and salary payments to family members. The rule assumes that, in the indicated circumstances, these expenses would

exist irrespective of the candidate's campaign or duties as a Federal officerholder. Therefore, the rule treats the use of campaign funds for these expenses as *per se* personal use.

In adopting a *per se* list, the Commission rejected the alternative approach set out in the RAC. Under the alternative approach, the expenses on the list were not presumed to fall within the general definition of personal use. Instead, they were merely examples of expenses to which the "primarily related" standard would then be applied on a case by case basis.

Most of the commenters that addressed this issue preferred the list of *per se* personal uses that has been incorporated into the final rules. These commenters characterized the alternative version as a return to case by case review that would not provide any useful guidance to the regulated community and would not make it any easier to enforce the personal use prohibition. These commenters urged the Commission to use the *per se* approach and write whatever exceptions are necessary into the specific provisions of the list. The Commission used this approach in drafting the final rules.

However, two commenters went a step further. They urged the Commission to limit the rule to a list of specific uses that would be personal use, and eliminate the general definition of personal use that would apply to other situations. However, the Commission decided not to adopt this approach. It is doubtful that the agency could draft a complete list of the kinds of uses that raise personal use issues under section 439a. In addition, the Commission has identified some situations that warrant allocation between permissible and personal expenses. See section 5 of the discussion of paragraph (g)(1)(ii), below. Therefore, the rules would be incomplete without a general definition that could be applied to other situations.

One commenter argued that the *per se* list will reduce candidate flexibility in determining how to use campaign resources, and urged the Commission to adopt the alternative proposal because it strikes what the commenter believes is the appropriate balance.

However, a list of *per se* personal uses is preferable to a list of examples to which a "primarily related" test would be applied. By listing those uses that will be considered personal use and setting out the exceptions that apply, the *per se* list draws a clearer line and reduces the need or case by case review. A committee or a candidate can examine the rules and be much more

certain about what constitutes personal use.

In contrast, the alternative approach undercuts the Commission's efforts to provide clearer guidance. Under the alternative approach, the Commission would have to examine the facts and circumstances of each situation in order to determine whether a particular use is personal use. Thus, the alternative approach would require more Commission involvement in the resolution of personal use issues.

**1. Household Food Items and Supplies.** Under paragraph (g)(1)(i)(A) of the final rules, the use of campaign funds for household food items and supplies is personal use. This provision covers any food purchased for day to day consumption in the home, and any supplies purchased for use in maintaining the household. The need for these items would exist irrespective of the candidate's campaign or duties as a Federal officeholder. Therefore, the Commission regards them as inherently personal and subject to the personal use ban.

However, this provision would not prohibit the purchase of food or supplies for use in fundraising activities, even if the fundraising activities take place in the candidate's home. Items obtained for fundraising activities are not household items within the meaning of this provision. Similarly, refreshments for a campaign meeting would not be covered by this paragraph.

In addition, this provision does not apply to the use of campaign funds for meal expenses incurred outside the home. The use of campaign funds for these expenses is governed by section 113.1(g)(1)(ii)(B), which will be discussed further below. Similarly, this provision does not apply to the use of campaign funds for subsistence expenses, that is, food and shelter, incurred during travel. Section 113.1(g)(1)(ii)(C) specifically addressed this situation, and will be discussed in greater detail below.

**2. Funeral, Cremation and Burial Expenses.** Paragraph (g)(1)(i)(B) of the final rules indicates that the use of campaign funds to pay funeral, cremation or burial expenses is personal use. Campaign funds have been used for these expenses in the past by the estates of former Members of Congress who were covered by the grandfather provision and therefore could convert campaign funds to personal use. The Commission believes that these expenses are inherently personal in nature, and, under the current state of the law, should be covered by the personal use ban. The Commission



received no comments on this provision.

Section 113.1(g)(4) of the final rules contains an exception to the personal use definition that is relevant here. Section 113.1(g)(4), which will be discussed further below, states that gifts and donations of nominal value made on special occasions are not personal use, unless they are made to a member of the candidate's family. Under this provision, campaign funds can be used to send flowers to a constituent's funeral as an expression of sympathy without violating section 439a. However, if campaign funds are used to pay for costs of the funeral, that use is personal use under paragraph (g)(1)(i)(B).

3. *Clothing.* Under paragraph (g)(1)(i)(C) of the final rules, the use of campaign funds to purchase clothing is generally personal use. However, the rule contains an exception for clothing items of *de minimis* value that are used in the campaign. Thus, if a campaign committee uses campaign funds to purchase campaign T-shirts and caps with campaign slogans, the purchase is not personal use. One commenter expressed support for this provision.

This rule supersedes Advisory Opinion 1985-22 to the extent that opinion can be read to allow the use of campaign funds for these purposes. In that opinion, the requester sought to use campaign funds to purchase "specialized attire" to wear at "politically related functions which [were] both social and official business." The Commission concluded that the requester's committee could use the funds for these purposes because the requester was grandfathered. However, the language of the opinion suggests that the use of campaign funds for these purposes would also have been permissible if the clothing was to be used in connection with the campaign. Under paragraph (g)(1)(i)(C), the use of campaign funds for these purposes is personal use.

4. *Tuition Payments.* Under paragraph (g)(1)(i)(D) of the final rules, the use of campaign funds for tuition payments is personal use. However, this provision contains an exception that allows a committee to pay the costs of training campaign staff members, including candidates and officeholders, to perform the tasks involved in conducting a campaign. The Commission received no comments on this provision.

The Commission has concluded that only those tuition payments that fall within the narrow exception set out in the rule are campaign related and should be payable with campaign funds. Other tuition costs, whether for members of the campaign staff or other

persons, are subject to the personal use prohibition.

5. *Mortgage, Rent and Utility Payments.* Paragraph (g)(1)(i)(E) of the final rules addresses the use of campaign funds for mortgage, rent or utility payments on real or personal property owned by the candidate or a member of the candidate's family. In the past, the Commission has generally allowed campaigns to rent property owned by the candidate or a family member for use in the campaign, so long as the campaign did not pay rent in excess of the usual and normal charge for the kind of property being rented. See Advisory Opinions 1993-1, 1988-13, 1985-42, 1983-1, 1978-80, 1977-12, and 1976-53.

The new rule changes the Commission's policy with regard to rental of all or part of a candidate or family member's personal residence. Under paragraph (g)(1)(i)(E)(1), the use of campaign funds for mortgage, rent or utility payments on any part of a personal residence of the candidate or a member of the candidate's family is personal use, even if part of the personal residence is being used in the campaign. This paragraph supersedes Advisory Opinions 1988-13, 1985-42, 1983-1 and 1976-53, since they allow the use of campaign funds for these purposes.

In contrast, paragraph (g)(1)(i)(E)(2) continues the Commission's current policy in situations where the property being rented is not part of a personal residence of the candidate or a member of the candidate's family. Thus, a campaign committee can continue to rent part of an office building owned by the candidate for use in the campaign, so long as the committee pays no more than fair market value for the property usage.

Paragraph (g)(1)(i)(E)(2) is consistent with Advisory Opinions 1977-12 and 1978-80. It is also consistent with the result reached in Advisory Opinion 1993-1, in which the Commission allowed a candidate to rent a storage shed that was not part of his or her personal residence for use in the campaign. However, Advisory Opinion 1993-1 cites Advisory Opinions 1988-13, 1985-42, and 1983-1 as authority for this conclusion. As indicated above, these opinions are superseded by paragraph (1). Consequently, they should no longer be regarded as authority for the result reached in AO 1993-1.

The use of campaign funds to make mortgage, rent or utility payments on real or personal property that is not used in the campaign would be reviewed under the general definition of personal use. These expenses

presumably would exist irrespective of the candidacy, so the use of campaign funds to pay these expenses would be personal use.

The Commission received a number of comments on its proposed rules in this area. Four commenters urged the Commission to prohibit all transactions between the campaign committee and the candidate, saying that the rules should require the committee to enter into arms length transactions with unrelated third parties. Two of these commenters said the prohibition should be extended to transactions with any member of the candidate's family unit. In contrast, four other commenters urged the Commission to continue to allow these transactions so long as they involve *bona fide* rentals at fair market value.

The Commission has adopted what is essentially a middle ground. The rule prohibits payments for use of a personal residence because the expenses of maintaining a personal residence would exist irrespective of the candidacy or the Federal officeholder's duties. Thus, the rule draws a clear line, and avoids the need to allocate expenses associated with the residence between campaign and personal use.

At the same time, the Commission believes it is unnecessary to change its current policy regarding payments for the use of other property. These arrangements more closely resemble arms length transactions in that the property in question is available on the open market. Also, these arrangements generally do not raise the same kinds of allocation issues. Consequently, so long as the campaign pays fair market value, these payments will not be considered personal use.

It is important to note that paragraph (g)(1)(i)(E)(1) does not prohibit the campaign from using a portion of the candidate's personal residence for campaign purposes. It merely limits the committee's ability to pay rent for such a use. The candidate retains the option of using his or her personal residence in the campaign, so long as it is done at no cost to the committee. The Commission specifically allowed such an arrangement in Advisory Opinion 1986-28. That opinion is not affected by the new rules.

Nor should this rule be read to prohibit a campaign committee from paying the cost of long distance telephone calls associated with the campaign, even if those calls are made on a telephone located in a personal residence of the candidate or a member of the candidate's family. Since these calls are separately itemized on the residential telephone bill, they can

easily be attributed to the campaign without raising allocation issues.

6. *Entertainment.* Paragraph (g)(1)(i)(F) states that the use of campaign funds to pay for admission to a sporting event, concert, theater or other form of entertainment is personal use, unless the admission is part of a specific campaign or officeholder activity.

Several commenters urged the Commission to impose limits on the use of campaign funds for admission to these kinds of events. One suggested that these uses be prohibited unless they are part of a *bona fide* fundraising event, and said the Commission should require explicit solicitation of contributions in order to ensure that fundraising takes place. Another commenter recommended that the rule only allow the use of campaign funds if guests are present, and then only for the guests' admissions. A third commenter would require the candidate to show that the event was overwhelmingly campaign related in order to eliminate borderline cases. A fourth argued that these uses should only be allowed when the event is integral to campaign activity, and not when it is merely an event at which those present occasionally discuss campaign related subjects.

Other commenters took a different view. One commenter argued that meeting and mingling with supporters is a legitimate campaign activity, and that the expenses associated with that activity are a legitimate campaign expense. This commenter urged the Commission to allow the use of campaign funds for these purposes so long as the event takes place within the candidate's district. Another commenter said that the rules should allow committees to buy tickets for these events and give them to campaign workers, volunteers, and constituents.

The final rules require that the purchase of tickets be part of a particular campaign event or officeholder activity and not a leisure outing at which the discussion occasionally focuses on the campaign or official functions. This is not intended to include traditional campaign activity, such as attendance at county picnics, organizational conventions, or other community or civic occasions. This approach recognizes that these activities can be campaign or officeholder related. Moreover, the rules do not require an explicit solicitation of contributions or make distinctions based on who participates in the activity, since this would be a significant intrusion into how candidates and officeholders conduct campaign business.

7. *Dues, Fees and Gratuities.* Paragraph (g)(1)(i)(G) of the final rules provides that using campaign funds to pay dues, fees or gratuities to a country club, health club, recreational facility or other nonpolitical organization is personal use. Under this rule, membership dues, greens fees, court fees or other payments for access to these clubs are personal use, as are payments to caddies or professionals who provide services at the club, regardless of whether they are club employees or independent contractors. However, this rule contains an exception that allows a candidate holding a fundraising event on club premises to use campaign funds to pay the cost of the event. In this situation, the payments would be expenditures rather than personal use.

The Commission received a mix of comments on this provision. One commenter supported the rule, but urged the Commission to make it stronger by narrowing the exception for fundraising events. Another commenter took a different view, saying that a candidate's greens fees for golf with supporters or potential supporters is a legitimate campaign expense and should be allowed.

Once again, the rule charts a middle course. Playing a round of golf or going to a health club is often a social outing where the benefits received are inherently personal. Consequently, the use of campaign funds to pay for these activities will generally be personal use.

However, the rule is not so broad as to limit legitimate campaign related or officeholder related activity. The costs of a fundraising event held on club premises are no different under the FECA than the costs of a fundraiser held at another location, so the rule contains and exception that indicates that payments for these costs are not personal use. However, this exception does not cover payments made to maintain unlimited access to such a facility, even if access is maintained to facilitate fundraising activity. The exception is limited to payments for the costs of a specific fundraising event.

The rule also allows a candidate or officeholder to use campaign funds to pay membership dues in an organization that may have political interests. This would include community or civic organizations that a candidate or officeholder joins in his or her district in order to maintain political contacts with constituents or the business community. Even though these organizations are not considered political organizations under 26 U.S.C. § 527, they will be considered to have

political aspects for the purposes of this rule.

8. *Salary Payments to the Candidate's Family Members.* The final rules also clarify the Commission's policy regarding the payment of a salary to members of the candidate's family. Under paragraph (g)(1)(i)(H), salary payments to a member of the candidate's family are personal use, unless the family member is providing *bona fide* services to the campaign. If a family member provides *bona fide* services to the campaign, any salary payment in excess of the fair market value of the services provided is personal use. This rule is consistent with the Commission's current policy, as set out in Advisory Opinion 1992-4.

Several commenters urged the Commission to take a stricter approach. Two suggested that the Commission prohibit salary payments for any member of the candidate's household unit, because the salary could be used to pay the living expenses of the candidate. Other commenters urged the Commission to prohibit salary payments unless the family member was hired to perform services that he or she previously provided in a professional capacity outside the campaign. Some commenters expressed concern that the fair market value standard could be abused.

In contrast, a number of commenters urged the Commission to allow these payments. Two commenters questioned why family members should be treated any differently from other employees who provide legitimate services to the campaign. One commenter said the test should be whether the family member is actually working for the campaign. If so, salary payments should be allowed.

The Commission agrees with those commenters that argue that family members should be treated the same as other members of the campaign staff. So long as the family member is providing *bona fide* services to the campaign, salary payments to that family member should not be considered personal use. However, the Commission believes these payments should be limited to the fair market value of the services provided. Consequently, the final rules treat salary payments in excess of that amount as personal use.

9. *Additional Issues.* Both the Notice of Proposed Rulemaking and the Request for Additional Comments proposed to treat the use of campaign funds to pay the candidate a salary as personal use. This rule would have the effect of prohibiting candidate salaries, and would resolve an issue raised in Advisory Opinion 1992-1. The

Commission received numerous comments on this provision.

Several commenters objected to this provision and urged the Commission to allow candidate salaries. Most said that a prohibition would aggravate existing inequities between incumbents and challengers and would create a wealth test or property qualification for running for office. These commenters urged the Commission to allow candidate salaries in order to level the playing field and open up the election process to candidates of modest means. One commenter strongly believes a candidate should be able to receive a reasonable salary based on his or her experience and the services he or she renders to the campaign. Many different proposals for determining the amount of a candidate's salary were suggested.

Several other commenters questioned why full disclosure of salary payments would not adequately prevent any unfairness to campaign contributors. Another commenter argued that candidates are essentially employees of the party by whom they are nominated, and, as such, the party should be permitted to pay the candidate a salary.

In contrast, two commenters strongly supported a prohibition on candidate salaries, saying such a prohibition is required under section 439a. They urged the Commission to adopt a blanket rule prohibiting the use of campaign funds for this purpose, because permitting salaries effectively allows the candidate to use campaign funds to pay his or her personal living expenses and does away with the personal use prohibition. These commenters acknowledged that the inequities that exist between incumbents and challengers is a problem that needs to be rectified.

Nevertheless, they said this inequity cannot be resolved in this rulemaking because nothing in section 439a requires a level playing field. They also argue that nothing in section 439a justifies distinguishing between incumbents and other candidates, and since Members of Congress would not be allowed to take a salary from their campaigns in addition to their Congressional salary, the statute requires a prohibition on salary payments to the candidate.

One of these two commenters also urged the Commission not to try to level the playing field by reversing what the commenter described as the Commission's policy of requiring corporate employees to take an unpaid leave of absence to campaign for office. This commenter also said that a means test for payment of candidate salaries would not work.

The Commission took up the candidate salary issue when it

considered the final rules, but could not reach a majority decision by the required four affirmative votes. See 2 U.S.C. § 437c(c). Consequently, this issue has not been addressed in the final rules.

#### *Paragraph (g)(1)(ii)*

Paragraph (g)(1)(ii) explains how the Commission will address other uses of campaign funds not covered by the *per se* list of examples. If an issue comes before the Commission as to whether a use not listed in paragraph (g)(1)(i) is personal use, the Commission will determine whether the use is for an expense that would exist irrespective of the candidate's campaign or duties as a Federal officeholder. If so, it will be personal use unless some other specific exception applies. These determinations will be made on a case by case basis. Committees should look to the general definition for guidance in determining whether uses not listed in paragraph (g)(1)(i) are personal use.

Two commenters expressed concerns with this approach. One said that case by case review will cause great difficulty, and urged the Commission to allow candidates to explain the campaign relationship of any use that may appear to be personal. This commenter also argued that if the use reasonably appears to have a campaign relationship, it should not be personal use. The other commenter said that this provision leaves the question of personal use unsettled, and urged the Commission to affirm that candidates have wide discretion over the use of campaign funds and treat uses outside the categories contained in the rule as presumptively permissible.

In contrast, a third commenter expressed support for this provision if it is implemented in conjunction with a general definition of personal use that uses the irrespective standard.

The Commission is aware of the problems of case by case decisionmaking. It has sought to minimize these problems by incorporating a list of examples that specifically addresses the most common personal use issues into the final rules.

However, the Commission cannot anticipate every type of expense that will raise personal issues. Thus, the Commission cannot create a list that addresses every situation. Furthermore, some expenses that do raise personal use issues cannot be characterized as either personal or campaign related in the majority of situations, so they cannot be addressed in a *per se* list. Consequently, it is necessary to have a plan for addressing situations not covered by the *per se* list. The

Commission is including paragraph (g)(1)(ii) in the rules to provide guidance to the regulated community as to how these situations will be handled. Should a personal use issue arise, the candidate and committee will have ample opportunity to present their views. The Commission, however, reaffirms its long-standing opinion that candidates have wide discretion over the use of campaign funds. If the candidate can reasonably show that the expenses at issue resulted from campaign or officeholder activities, the Commission will not consider the use to be personal use.

The Notice of Proposed Rulemaking sought comments on other uses of campaign funds that sometimes raise personal use issues. In particular, the Commission encouraged commenters to submit their views on when the use of campaign funds for legal expenses, meal expenses, travel expenses and vehicle expenses would be personal use.

Because the use of campaign funds for these expenses can raise serious personal use issues, the Commission attempted to draft specific provisions on these uses and incorporate them into section 113.1(g)(1)(i). However, the Commission's efforts to craft language that would distinguish permissible uses from those subject to the prohibition generated rules that could have proved very confusing for the regulated community. Consequently, the Commission opted for a simpler approach. The Commission will address any issues raised by the use of campaign funds for these expenses by applying the general definition on a case by case basis. Thus, the use of campaign funds for these expenses will be personal use if the expense would exist irrespective of the candidate's campaign or duties as a Federal officeholder.

Legal, meal, travel and vehicle expenses are listed under paragraph (g)(1)(ii) as examples of uses that will be reviewed on a case by case basis. The Commission has inserted this list in the final rules in order to make it clear how issues involving the use of campaign funds for these expenses will be handled. These provisions, and the comments received in response to the NPRM, are discussed in detail below.

*1. Legal expenses.* Paragraph (g)(1)(ii)(A) indicates that issues regarding the use of campaign funds for legal expenses will be addressed on a case by case basis using the general definition of personal use. One commenter argued that legal expenses should be *per se* personal use except when they are incurred in ensuring compliance with the election laws. This commenter also urged the Commission

to prohibit contributions to the legal defense funds of other candidates.

Treating legal expenses other than those incurred in ensuring compliance with the election laws as *per se* personal use is too narrow a rule. A committee or a candidate could incur other legal expenses that arise out of campaign or officeholder activities but are not related to compliance with the FECA or other election laws. For example, a committee could incur legal expenses in its capacity as the employer of the campaign staff, or in its capacity as a contracting party in its dealings with campaign vendors. Consequently, the Commission has decided that issues raised by the use of campaign funds for a candidate's or committee's legal expenses will have to be addressed on a case by case basis.

However, legal expenses will not be treated as though they are campaign or officeholder related merely because the underlying legal proceedings have some impact on the campaign or the officeholder's status. Thus, legal expenses associated with a divorce or charges of driving under the influence of alcohol will be treated as personal, rather than campaign or officeholder related.

**2. Meal Expenses.** Paragraph (g)(1)(ii)(B) indicates that issues regarding the use of campaign funds for meal expenses will be addressed on a case by case basis using the general definition of personal use. One commenter thought payments for meals should be strictly limited, and recommended that the Commission prohibit the use of campaign funds to pay for meals that are not directly related to the campaign. Another commenter suggested the Commission follow the Internal Revenue Service approach for business meals, and allow the use of campaign funds if guests are present. Under this approach, family members would not qualify as guests, so campaign funds could not be used to pay for their meals.

A third commenter expressed doubt that persons who use campaign funds for entertainment actually discuss campaign business while the event is going on. The commenter said that, although these situations often involve face to face fundraising and therefore are campaign related, the Commission should require candidates to show that the event is overwhelmingly campaign related in order to eliminate borderline cases. A fourth commenter would require that the meal involve an explicit solicitation of contributions in order to allow use of campaign funds.

In contrast, two commenters objected to limits on the use of campaign funds for these purposes.

The Commission is aware of the potential for abuse in the use of campaign funds to pay for meal expenses. However, the Commission sought to establish a rule that would effectively curb these abuses without making it difficult to conduct legitimate campaign or officeholder related business. Consequently, the Commission has decided to address these situations on a case by case basis using the general definition of personal use.

Under this approach, the use of campaign funds for meals involving face to face fundraising would be permissible. Presumably, the candidate would not incur the costs associated with this activity if he or she were not a candidate. In contrast, the use of campaign funds to take the candidate's family out to dinner in a restaurant would be personal use, because the family's meal expenses would exist even if no member of the family were a candidate or an officeholder.

It should be noted that this provision applies to meal expenses incurred outside the home. It does not apply to the use of campaign funds for household food items, which are covered by section 113.1(g)(1)(i)(A). Nor does it apply to subsistence expenses incurred during campaign or officeholder related travel. These expenses will be considered part of the travel expenses addressed by paragraph (g)(1)(ii)(C).

**3. Travel Expenses.** Paragraph (g)(1)(iii)(C) indicates that the use of campaign funds for travel expenses, including subsistence expenses incurred during travel, will be addressed on a case by case basis using the general definition of personal use.

One commenter said that the rules should prohibit the use of campaign funds for expenses that are collateral to travel, such as greens fees, ski lift tickets and court time. This commenter also said the rules should prohibit the use of the campaign funds for pleasure or vacation trips or extensions of campaign or officeholder related trips. Another commenter urged the Commission to adopt a two part test for travel expenses which would allow them only if the travel is predominantly for permissible purposes and the trip is necessary for the fulfillment of those purposes. This commenter also urged the Commission to prohibit the payment of per diems, since they allow campaigns to use campaign funds without disclosing how they are used.

As will be discussed further below (see section 5 on "mixed use"), the final rules do prohibit the use of campaign funds for personal expenses collateral to campaign or officeholder related travel by treating these uses as personal use unless the committee is reimbursed. However, the Commission has decided against adopting the two part test suggested, because it would require closer review of a candidate's or officeholder's travel to determine the predominant purpose or necessity of a particular trip. This approach has been rejected, and is a departure from the analysis under the irrespective standard.

The Commission has also decided against imposing limits on per diem payments, since the Commission has a long-standing policy of allowing these payments, see Advisory Opinion 1984-8, and because these limits would be impractical and would impose unreasonable burdens on candidates and committees. However, per diem payments must be used for expenses that meet the general standard. They cannot be converted to personal use.

**4. Vehicle Expenses.** Paragraph (g)(1)(ii)(D) indicates that issues regarding the use of campaign funds for vehicle expenses will be addressed on a case by case basis using the general definition of personal use. However, the rule contains an exception for vehicle expenses of a *de minimis* amount. Thus, vehicle expenses that would exist irrespective of the candidate's campaign or duties as a holder of Federal office will be personal use, unless they are a *de minimis* amount. If these expenses exceed a *de minimis* amount, the person(s) using the vehicle for personal purposes must reimburse the committee for the entire amount associated with the personal use. See section 5 on "mixed use," below.

One commenter urged the Commission to make the vehicle expense provision more specific by defining *de minimis* and setting a specific cents per mile reimbursement amount. This commenter also urged the Commission to include a limit on payments for the candidate's personal vehicle.

The Commission is sensitive to the difficulties that candidates and committees would face in completely eliminating all vehicle uses that confer a personal benefit. Consequently, the Commission has sought to carefully craft a rule that will provide a mechanism for addressing apparent abuses of campaign vehicles without imposing unrealistic burdens on candidates and committees. The Commission has decided not to impose the more specific requirements

suggested by the commenter. Instead, it will review the facts of a particular case in order to determine whether personal use has occurred. The Commission will make use of the *de minimis* concept by assessing whether the amount of expenses associated with personal activities is significant in relation to the overall vehicle use.

While the comments focused on the use of campaign funds to pay for expenses associated with the candidate's personal vehicle, the rule applies to the use of campaign funds for expenses associated with any vehicle, regardless of whether it is owned or leased by the committee or the candidate. Because the expenses associated with a personal vehicle usually exist irrespective of the candidacy or the officeholder's duties, the use of campaign funds for these expenses will generally be considered personal use.

5. *Mixed Use.* Paragraphs (g)(1)(ii) (C) and (D) also explain the Commission's policy regarding the use of campaign funds for travel and vehicle expenses associated with a mixture of personal and campaign or officeholder related activities.

Under paragraph (c), if a campaign committee uses campaign funds to pay expenses associated with travel that involves both personal activities and campaign or officeholder related activities, the incremental expenses that result from the personal activities are personal use, unless the person(s) benefiting from this use reimburse(s) the campaign within thirty days for the amount of the incremental expenses.

Paragraph (D) contains a similar rule regarding vehicle expenses. However, this rule does not apply to vehicle expenses that are a *de minimis* amount. If the vehicle expenses associated with personal activities exceed a *de minimis* amount, the person(s) using the vehicle for personal activities must reimburse(s) the campaign within thirty days for the entire amount associated with the personal activities. Otherwise, the use of campaign funds for the vehicle expenses is personal use. This approach is consistent with Advisory Opinions 1984-59 and 1992-12.

For example, under paragraph (C), if a Member of Congress travels to Florida to make a speech in his or her official capacity, and stays an extra week there to enjoy a vacation, the Member's campaign committee can pay the Member's transportation costs and the subsistence costs necessary for making the speech. However, if the committee pays the cost of the entire trip, including the expenses incurred during

the extra week of vacation, the Member is required to reimburse the committee for the expenses incurred during this extra week. This includes the hotel and meal expenses for the extra week along with any entertainment expenses incurred during this time that are included in the amount paid by the committee.

Of course, the reimbursement need only cover the incremental costs of the personal activities, that is the increase in the total cost of the trip that is attributable to the extra week of vacation. Thus, if the vacation and the speech take place in the same location, the Member is not required to reimburse the committee for any portion of the airfare, since that expense would have been incurred even if the trip had not been extended. See Advisory Opinion 1993-6.

On the other hand, if the Member travels to one location to make the speech, travels on to another location for the vacation, and then returns to his or her point of origin, the Member is required to reimburse the committee for the increase in transportation costs attributable to the vacation leg of the trip. The increased costs would be calculated by determining the cost of a fictional trip that includes only the campaign and officeholder related stops, that is, a trip that starts at the point of origin, goes to every campaign related or officeholder related stop, and returns to the point of origin. The difference between the transportation costs of this fictional, campaign related trip and the total transportation costs of the trip actually taken is the incremental cost attributable to the personal leg of the trip.

These rules apply to any Federal candidate or officeholder. Thus, challengers are also required to reimburse their committees for any personal travel expenses that are paid with campaign funds.

These principles also apply to vehicle expenses for a trip that involves both campaign or officeholder related activities and personal activities in excess of a *de minimis* amount. If the personal activities are more than a *de minimis* portion of the trip, the person using the vehicle is required to reimburse the committee for the difference between the total vehicle expenses incurred during the trip and the amount that would be incurred on a fictional trip that only includes the campaign or officeholder related stops. Section 106.3(b) of the Commission's regulations sets out a method for allocating campaign and non-campaign related vehicle expenses. Advisory Opinion 1992-34 contains an example

of how this allocation mechanism works.

The Commission notes that if the person benefiting from the use of campaign funds for personal travel or vehicle expenses makes a timely reimbursement under this section, that reimbursement is not a contribution under the Act. However, if a reimbursement required under this section is made by a person other than the person benefiting, it may be a contribution under § 113.1(g)(6). Section 113.1(g)(6) will be discussed further below.

#### *Section 113.1(g)(2) Charitable Donations*

Section 113.1(g)(2) indicates that donations of campaign funds to organizations described in section 170(c) of the Internal Revenue Code are not personal use, so long as the candidate does not receive compensation from the recipient organization before it has expended the entire amount donated for purposes unrelated to the candidate's personal benefit. Compensation does not include reimbursements for expenses ordinarily and necessarily incurred on behalf of such organization by the candidate. This provision is based on the approach taken by the Commission in Advisory Opinion 1983-27, and is consistent with subsequent Commission treatment of charitable donations made with campaign funds. See Advisory Opinions 1986-39 and 1993-22. The Commission received no comments on this provision.

#### *Section 113.1(g)(3) Transfers of Campaign Assets*

Under § 113.1(g)(3), the sale or other transfer of a campaign asset is not personal use so long as the transfer is for fair market value. This provision seeks to limit indirect conversions of campaign funds to personal use. An indirect conversion occurs when a committee sells an asset for less than the asset's actual value, thereby essentially giving part of the asset to the purchaser at no charge. Section 113.1(g)(3) limits these conversions by requiring these transactions be for fair market value.

Section 113.1(g)(3) also seeks to limit indirect conversions to personal use by ensuring that any depreciation in the value of an asset being transferred is properly allocated between the committee and the purchaser. Many assets such as vehicles and office equipment depreciate dramatically immediately after they are purchased. If a campaign committee purchases an asset, uses it during a campaign season, and then sells it to the candidate at its

depreciated fair market value, the candidate receives the asset at a substantially reduced cost but with significant time remaining in its useful life. Thus, the cost of the depreciation falls disproportionately upon the campaign committee. This would effectively be a conversion of campaign funds to personal use.

Section 113.1(g)(3) addresses this situation by requiring that any depreciation that takes place before the transfer be allocated between the committee and the purchaser based on the useful life of the asset. Thus, the committee should absorb only that portion of the depreciation that is attributable to the time period during which it uses the asset. This approach is consistent with Advisory Opinion 1992-12, in which the Commission required a Congressman who was assuming a lease of a van from his campaign committee to "accept a pro rata share of the financial obligations and charges attending the lease \* \* \*." The Commission also noted that "the lease may provide for a discount on the purchase price of the van at the conclusion of the agreement. In that event, a portion of the discount may belong to the committee." Advisory Opinion 1992-12, n.3.

Two commenters expressed views on this provision. One commenter argued that, even if the asset's depreciation is allocated between the committee and the purchaser, the purchaser is still getting a bargain. This commenter urged the Commission to require the committee to sell its assets to third parties and use the proceeds to pay campaign debts or to make contributions to charities.

The Commission has decided not to require committees to sell their assets only to third parties, because such a requirement would not serve the purposes of the personal use prohibition. Section 439a prohibits conversions of campaign funds to any person's personal use. Thus, a violation of section 439a occurs whenever an asset is transferred for less than fair market value. It makes no difference whether the purchaser is the candidate or an unrelated third party. Consequently, a rule that requires that all transfers of campaign assets be for fair market value will fully serve the purposes of section 439a.

#### *Section 113.1(g)(4) Gifts*

As indicated above, the final rules generally apply with equal force to uses of campaign funds that benefit third parties as they do to uses of campaign funds that benefit the candidate or a member of the candidate's immediate

family. However, the final rules also contain a provision that allows a committee to use campaign funds to benefit constituents or supporters on certain occasions without violating the personal use prohibition. Section 113.1(g)(4) indicates that gifts or donations of nominal value given on special occasions to persons other than family members of the candidate are not personal use. This will allow a committee to use campaign funds to send flowers to a constituent's funeral without violating the personal use prohibition.

The Commission recognizes that candidates and officeholders frequently send small gifts to constituents and supporters on special occasions as gestures of sympathy or goodwill, and that such an expense would not exist irrespective of the candidate's or officeholder's status. The Commission has included this provision in the rules to specifically indicate that the use of campaign funds for this purpose is permitted.

However, the exception does not cover gifts that are of more than nominal value. For example, using campaign funds for other expenses associated with special occasions, such as the funeral and burial expenses covered under section 113.1(g)(1)(i)(B), would be personal use. Nor does this exception allow the committee to use campaign funds to send gifts to members of the candidate's family. Presumably, the candidate would give such a gift irrespective of whether he or she were a candidate or Federal officeholder. Therefore, the use of campaign funds for such a gift would be personal use.

#### *Section 113.1(g)(5) Political or Officially Connected Expenses*

Section 113.1(g)(5) explains how the personal use rules interact with the rules of the U.S. House of Representatives and the United States Senate. Under House rules, a Member "shall convert no campaign funds to personal use \* \* \* and shall expend no funds from his campaign account not attributable to bona fide campaign or political purposes." House Rule 43, clause 6. Senate Rule 38 also prohibits personal use, but allows a Member to use campaign funds to defray "expenses incurred \* \* \* in connection with his official duties." Senate Rule 38, clause 1(a). Thus, these rules allow Members to use campaign funds for what are described as "political" and "officially connected" expenses. Several commenters have raised the question of how the personal use rules would apply to the use of campaign funds for these purposes.

Section 113.1(g)(5) indicates that the use of campaign funds for a political or officially connected expense is not personal use to the extent that it is an expenditure under 11 CFR 100.8 or an ordinary and necessary expense incurred in connection with the duties of a holder of Federal office. The rule also reiterates that any use of funds that would be personal use under § 113.1(g)(1) will not be considered an expenditure or an ordinary and necessary expense incurred in connection with the duties of a Federal officeholder.

One commenter urged the Commission to be consistent with House and Senate rules in this area, saying that, since House rules specifically allow Members to use campaign funds for political expenses, the Commission's rules should specifically exclude these uses from the definition of personal use. Two other commenters agreed, and urged the Commission not to introduce additional confusion into this area.

In contrast, two commenters rejected the suggestion that the Commission should defer to House and Senate rules in this area. They asserted that enforcement of the personal use ban is the Commission's responsibility, and that, since Congressional precedents are based on rules with different language than section 439a, the Commission should not look to those precedents for guidance.

Other commenters expressed their views on the specific language of the rule. One commenter urged the Commission to treat what the commenter referred to as campaign disbursements and political disbursements as synonymous, and to treat what the commenter referred to as political and officially connected expenses as permissible ordinary and necessary expenses under section 439a. Another commenter criticized the provision as tautological, and cited this as an area in which the Commission should reaffirm that candidates and officeholders have wide discretion.

Two commenters said the rule is an improvement over a previous draft that was read to have ceded authority for determining whether uses by incumbents are personal use to the House and Senate. However, one said that the rule still defers too much to Congress because it still says political and officially connected expenses are not personal use to the extent that they are expenditures or the ordinary and necessary expenses of a Federal officeholder. The other commenter said the rule is acceptable so long as the list of uses is truly a per se list.

The Commission recognizes that the existence of two sets of rules creates the potential for confusion. However, the Commission cannot create a blanket exclusion from personal use for all uses that qualify as a political or officially connected expense under Congressional rules. Congress has given the Commission the authority to interpret and enforce the personal use prohibition in section 439a. Creating an exclusion for all political or officially connected expenses would effectively be an abdication of that authority, particularly since section 439a uses different standards than House and Senate rules for determining whether a particular use of campaign funds is permissible.

Nevertheless, the Commission anticipates that, in most circumstances other than those specifically addressed in the rules, political and officially connected expenses will be considered ordinary and necessary expenses incurred in connection with the duties of a Federal officeholder, as that term is used under the FECA. As such, they will not be personal use under § 113.1(g)(1). In other circumstances, political and officially connected expenses may be expenditures under the Act, and therefore clearly permissible. In short, the Commission does not anticipate a significant number of conflicting results under these rules.

The Commission notes that the FY 1991 Legislative Branch Appropriations Act (Pub. L. 101-520) provides that "official expenses" may not be paid from excess campaign funds. Thus, even though 2 U.S.C. § 439a, House Rule 43, and Senate Rule 38 contemplate the use of campaign funds for "ordinary and necessary expenses," "political purposes," and expenses "in connection with" official duties, guidance regarding the scope of the Legislative Branch Appropriations Act provision referred to above should be sought by persons covered.

#### *Section 113.1(g)(6) Third Party Payments of Personal Use Expenses*

Section 113.1(g)(6) sets out Commission policy on payments for personal use expenses by persons other than the candidate or the candidate's committee. Generally, payments of expenses that would be personal use if made by the candidate or the candidate's committee will be considered contributions to the candidate if made by a third party. Consequently, the amount donated or expended will count towards the person's contribution limits. However, no contribution will result if the payment would have been made irrespective of the candidacy. The final

rule contains three examples of payments that will be considered to be irrespective of the candidacy.

Several commenters expressed views on this provision. Three commenters objected to it, arguing that it is inconsistent to say that the use of campaign funds for certain expenses is personal use when those expenses are not campaign related, while at the same time saying that payments for those same expenses by third parties are contributions because they are being made for the purpose of influencing an election. Two of these commenters recommended that the Commission reverse its existing policy and allow corporate employers to pay employee-candidates a salary during the campaign in order to level the playing field.

Another commenter objected to this provision, saying that third parties should be allowed to pay the personal living expenses of a candidate who loses his or her salary upon becoming a full time candidate, subject to three conditions: (1) The payments are disclosed and limited as in-kind contributions under the FECA; (2) the payments are for essential living expenses; and (3) the total payments and the candidate's salary during the campaign period do not exceed his or her average monthly salary over the previous year, or that of an incumbent Member of Congress.

In contrast, one commenter approved of this provision. Another commenter urged the Commission to flatly prohibit these payments rather than treating them as contributions, saying that third parties should not be able to label as contributions payments that could not be made by the committee itself.

The Commission has decided to treat payments by third parties for personal use expenses as contributions subject to the limits and prohibitions of the Act, unless the payment would have been made irrespective of the candidacy. If a third party pays for the candidate's personal expenses, but would not ordinarily have done so if that candidate were not running for office, the third party is effectively making the payment for the purpose of assisting that candidacy. As such, it is appropriate to treat such a payment as a contribution under the Act. This rule follows portions of Advisory Opinions 1982-64, 1978-40, 1976-70 and the Commission's response to Advisory Opinion Request 1976-84. The Commission understands the concerns about the inequities between incumbents and challengers expressed by the commenters in relation to this provision and other aspects of this rulemaking. However, the FECA is not

intended to level the playing field between incumbents and challengers. See *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976).

If the payment would have been made even in the absence of the candidacy, the payment should not be treated as a contribution. Section 113.1(g)(6) excludes payments that would have been made irrespective of the candidacy, and sets out three examples of such payments. These examples protect a wide range of payments of personal use expenses from being treated as contributions. Other situations will be examined on a case by case basis.

First, the final rule excludes payments to a legal expense trust fund established under House and Senate rules. House and Senate rules provide Members of Congress with a mechanism they can use to accept donations to pay for legal expenses. The final rule places donations to these funds outside the scope of the contribution definition of the FECA. Donations to other legal defense funds will be examined on a case by case basis.

Second, the final rule excludes payments made from the personal funds of the candidate, as defined in 11 CFR 110.10(b). Section 110.10 allows candidates for Federal office to make unlimited expenditures from personal funds, as defined in paragraph (b) of that section. Thus, if a payment by a third party is made with the candidate's personal funds, the payment will not be considered a contribution that is subject to the limits and prohibitions of the Act. Similarly excluded from contribution treatment under this provision are payments made from an account jointly held by the candidate and a member of the candidate's family.

Finally, the rule indicates that a third party's payment of a personal use expense will not be considered a contribution if payments for that expense were made by the third party before the candidate became a candidate. If the third party is continuing a series of payments that were made before the beginning of the candidacy, the Commission considers this convincing evidence that the payment would have been made irrespective of the candidacy, and therefore should not be considered a contribution. For example, if the parents of a candidate had been making college tuition payments for the candidate's children, the parents could continue to do so during the candidacy without making a contribution.

It should be noted, however, that the exclusion for payments made before the candidacy contains a caveat for



compensation payments. Compensation payments that were made before the candidacy and continue during the candidacy will be considered contributions to the candidate unless three conditions are met: the compensation results from *bona fide* employment that is genuinely independent of the candidacy, the compensation is exclusively in consideration of services provided by the candidate as part of the employment, and the compensation does not exceed the amount that would be paid to a similarly qualified person for the same work over the same period of time. The Commission assumes that, when these three conditions exist, the compensation payment would have been made irrespective of the candidacy and should not be treated as a contribution. This rule is based on Advisory Opinion 1979-74, and is consistent with Advisory Opinions 1977-45, 1977-68, 1978-6 and 1980-115.

#### *Section 113.1(g)(7) Members of the Candidate's Family*

Section 113.1(g)(7) lists the persons who are members of the candidate's family for the purposes of §§ 113.1(g) and 100.8(b)(22). This list is significant for several provisions of the rules. Under § 113.1(g)(7), the candidate's family includes those persons traditionally considered part of an immediate family, regardless of whether they are of whole or half blood. Consistent with the laws of most states, the rules make no distinction between biological relationships and relationships that result from adoption or marriage. The grandparents of the candidate are also considered part of the candidate's family. Finally, the candidate's family also includes a person who has a committed relationship with the candidate, such as sharing a household and mutual responsibility for each other's welfare or living expenses. These persons will be treated as the equivalent of the candidate's spouse for the purposes of these rules.

#### *Section 113.2 Use of Funds (2 U.S.C. 439a)*

The final rules also contain an amendment to the list of permissible uses of excess campaign funds contained in 11 CFR 113.2. The amendment specifically indicates that certain travel costs and certain office operating expenditures will be considered ordinary and necessary expenses incurred in connection with the duties of a Federal officeholder.

The costs of travel for a Federal officeholder and an accompanying spouse who are participating in a function that is directly connected to *bona fide* official responsibilities will be considered ordinary and necessary expenses. 11 CFR 113.2(a)(1). The rule cites fact-finding meetings and events at which the officeholder makes an appearance in an official capacity as examples of functions covered by the rule. Note that spouse travel for campaign purposes continues to be a permissible expense.

In addition, the costs of winding down the office of a former Federal officeholder for six months after he or she leaves office will be considered ordinary and necessary expenses. 11 CFR 113.2(a)(2). Consequently, the use of excess campaign funds to pay for these expenses is permissible.

The Commission notes that the FY 1991 Legislative Branch Appropriations Act (Pub. L. 101-520) provides that "official expenses" may not be paid from excess campaign funds. Thus, even though 2 U.S.C. § 439a, House Rule 43, and Senate Rule 38 contemplate the use of campaign funds for "ordinary and necessary expenses," "political purposes," and expenses "in connection with" official duties, guidance regarding the scope of the Legislative Branch Appropriations Act provision referred to above should be sought by persons covered.

*1. Travel Costs.* Several commenters criticized the travel cost provision. One commenter thought Members of Congress received a stipend for these expenses, and argued that campaign funds should not be used for this purpose. Another commenter urged the Commission to only allow the use of campaign funds for travel between Washington, D.C. and the Member's district. A third commenter argued that the provision allowing travel expenses for a Member's spouse should be deleted because it creates confusion, and opens a loophole because it does not require the Member to demonstrate that the spouse participated in the official function.

One commenter urged the Commission to allow the use of campaign funds to defray expenses connected to officeholder duties, including travel, as permitted under House rules.

The Commission has concluded that the expenses of both the officeholder and the officeholder's spouse should be permitted. If an officeholder incurs expenses in traveling to a function that is directly connected to his or her *bona fide* official responsibilities, those expenses clearly would not exist

irrespective of his or her duties as a Federal officeholder. As such, the use of campaign funds for those expenses would not be personal use under section 113.1(g)(1).

The Commission also recognizes that an officeholder's spouse is often expected to attend these functions with the officeholder. See Advisory Opinion 1981-25. In this context, the spouse's attendance alone amounts to a form of participation in the function, even if the spouse has no direct role in the activities that take place during the event. Consequently, the Commission has decided that the rule should specifically indicate that the expenses of an accompanying spouse can be paid with campaign funds when an officeholder travels to attend an official function.

This provision also helps to clarify the relationship between the personal use rules and the rules of the House and Senate on the use of campaign funds for travel. Although Members receive appropriated funds for certain travel expenses, House and Senate rules also allow them to pay for certain other expenses with campaign funds. The amendments to § 113.2 make it clear that, so long as the travel is for participation in a function connected to the Member's official responsibilities, the permissibility of this use is not affected by the personal use rules.

Advisory Opinion 1980-113 indicated that campaign funds could be used to defray expenses incurred in carrying out the duties of a state officeholder. That opinion also suggested that campaign funds could be used to defray the travel expenses of the spouse of such an officeholder if the spouse's expenses are incident to the duties of the state officeholder. However, in Advisory Opinion 1993-6, the Commission explicitly superseded Advisory Opinion 1980-113 to the extent that it allowed the use of campaign funds "for expenses related to that person's position as a holder of state office or any office which is not a Federal office as defined in the Act." Advisory Opinion 1993-6, n.3. The amendments to § 113.2 are consistent with Advisory Opinion 1993-6. As revised, § 113.2(a)(1) does not permit the use of campaign funds for travel expenses associated with official responsibilities other than those of a Federal officeholder.

Finally, the Commission has not limited this rule to expenses associated with travel between a Member's district and Washington, D.C. The Commission recognizes that travel to other locations may be directly connected to a Member's *bona fide* official responsibilities. So long as the travel is



so connected, the use of campaign funds to pay the expenses of that travel will also be permissible.

2. *Winding Down Costs.* Six commenters expressed views on the provision regarding winding down costs. 11 CFR 113.2(a)(2). One commenter disagreed with the proposed rule, and argued that former officeholders should not be allowed to use campaign funds for this purpose. Another commenter agreed that a candidate should not be allowed to retain and use campaign funds beyond a certain reasonable period after the campaign to pay debts and operating expenses. This commenter suggested that any funds that remain unused after that time period should be returned to donors or taxed at one hundred percent.

A third commenter urged the Commission to allow these uses only for incumbents who lose their seat, and recommended against allowing Members of Congress to build up a large treasury and then use that treasury after voluntarily leaving Federal office.

Three commenters agreed these uses should be allowed, but urged the Commission to approve a rule that limits the time period to sixty days.

The Commission believes the costs of winding down the office of a former Federal officeholder are ordinary and necessary expenses within the meaning of section 439a. See Advisory Opinion 1993-6. Therefore, the use of campaign funds to pay these costs is permissible under the FECA. Furthermore, there is no basis in the Act for distinguishing between winding down costs incurred by officeholders who lose their seats and those incurred by officeholders who leave office for other reasons. The costs incurred by either kind of former officeholder are equally permissible.

The Commission initially proposed a sixty day time period. Since this process often takes longer than anticipated, the Commission is inclined to provide former officeholders with some leeway in the use of funds for these purposes. Consequently, the Commission has extended the period to six months to ensure that former officeholders have ample time to close down their offices. It should also be noted that, as written, this provision acts as a safe harbor. It does not preclude a former officeholder who can demonstrate that he or she has incurred ordinary and necessary winding down expenses more than six months after leaving office from using campaign funds to pay those expenses.

## Part 100—Scope and Definitions

### Section 100.8 Expenditure (2 U.S.C. 431(9))

Current § 100.8(b) of the Commission's regulations excludes certain disbursements from the definition of expenditure. Paragraph (b)(22) of that section specifically excludes payments by a candidate from his or her personal funds, as defined in 11 CFR 110.10(b), for routine living expenses which would have been incurred without candidacy. Thus, a candidate can pay his or her routine living expenses from personal funds without making an expenditure that must be reported under the Act.

New language has been added to § 100.8(b)(22) that indicates that payments for routine living expenses by a member of the candidate's family are not expenditures if made from an account held jointly with the candidate, or if the expenses were paid by the family member before the candidate became a candidate. The revised rule treats payments from an account jointly held by the candidate and a family member the same as payments made from the candidate's personal funds, and excludes them from the expenditure definition. Similarly, the rule assumes that payments by a family member that are a continuation of payments made before the candidacy are not in connection with the candidacy, and should not be treated as expenditures.

Under this section, payments from an account that contains only the candidate's personal funds will be exempt from the definition of expenditure even if the payment is made by another person such as a housekeeper or an accountant who has access to the account in order to pay the candidate's routine living expenses. These payments will also be exempt if the housekeeper makes the payment from an account jointly held by the candidate and a member of the candidate's family. The ability of a person who is not a family member to make payments from the account will not change otherwise exempt payments from the account into contributions.

However, if the account is jointly held by the candidate and someone who is not a member of the candidate's family, or contains the funds of such a person, the exemption in § 100.8(b)(22) does not apply, and payments from that account for the candidate's personal living expenses will be expenditures that have reporting consequences under the Act. These payments will also be in-kind contributions under section 113.1(g)(6), and will count towards the joint account

holder's contribution limits. See 11 CFR 110.1.

This section has been revised to parallel new § 113.1(g)(6). One commenter expressed general support for this provision.

## Part 104—Reports by Political Committees

### Section 104.3 Contents of Reports (2 U.S.C. 434(b))

The Notice of Proposed Rulemaking invited commenters to submit their views on any other issues raised by this rulemaking. Several commenters suggested that the Commission amend its reporting requirements in order to administer the personal use prohibition. These commenters urged the Commission to require more detailed reporting of expenditures that would force committees to bear the burden of establishing a clear connection between each expenditure and a campaign event. One commenter cited meals as an example, saying that the Commission should require the candidate to explain how the meal was related to the campaign and why it was not personal use. Two of these commenters recommended that the Commission initiate a separate rulemaking to implement more detailed reporting requirements.

The Commission agreed that additional reporting may be useful in administering the personal use rules, and solicited comments in the RAC on how new reporting requirements could be crafted to be both useful and not overly burdensome. One commenter responded, recommending that the Commission require committees to provide a detailed description of the relationship between a use of campaign funds and the candidate's campaign or officeholder duties.

The Commission has concluded that any significant changes to the reporting requirements should be taken up as part of a comprehensive review of the recordkeeping and reporting regulations. Such a review is currently under way as a separate rulemaking.

Nevertheless, the Commission has identified one limited change that can be made now and will be useful in administering the personal use rules. Section 104.3 contains a new reporting requirement for authorized committees that itemize certain disbursements implicating the personal use prohibition. The new reporting requirement is set out in section 104.3(b)(4)(i)(B).

Revised section 104.3(b)(4)(i)(B) requires an authorized committee that itemizes a disbursement for which

partial or total reimbursement is expected under new § 113.1(g)(1)(ii) (C) or (D) to briefly explain the activity for which reimbursement will be made. For example, when itemizing a disbursement of funds for travel expenses associated with a trip that was partially campaign related and partially a personal trip for the candidate, the committee is required to indicate that the trip includes the cost of the candidate's personal trip, for which the committee is anticipating reimbursement. This information would be included on schedule B of Form 3. Committees receiving reimbursements will report them as "other receipts" on the Detailed Summary Page of Form 3.

If an individual benefiting from the use of campaign funds for personal travel or vehicle expenses makes a reimbursement under this section, the reimbursement is not a contribution under the Act, and the individual is not required to report the reimbursement. However, if the reimbursement is made by a person other than the person benefiting from the use of the funds, it may be a contribution by the person making the reimbursement under § 113.1(g)(6). If so, it must be reported as a contribution.

**Certification of No Effect Pursuant to 5 U.S.C. § 605(b) (Regulatory Flexibility Act)**

The attached final rules, if promulgated, will not have a significant economic impact on a substantial number of small entities. The basis of this certification is that the final rules are directed at individuals rather than small entities within the meaning of the Regulatory Flexibility Act. Therefore, no small entities will be significantly impacted.

**List of Subjects**

11 CFR Part 100

Elections.

11 CFR Part 104

Campaign funds, Political committees and parties, Political candidates.

11 CFR Part 113

Campaign funds, Political candidates, Elections.

For the reasons set out in the preamble, subchapter A, chapter I of title 11 of the Code of Federal Regulations is amended as follows:

**PART 100—SCOPE AND DEFINITIONS (2 U.S.C. 431)**

1. The authority citation for part 100 continues to read as follows:

Authority: 2 U.S.C. 431, 438(a)(8).

2. Section 100.8 is amended by revising paragraph (b)(22) to read as follows:

**§ 100.8 Expenditure (2 U.S.C. 431(9)).**

\* \* \* \* \*

(b) \* \* \*

(22) Payments by a candidate from his or her personal funds, as defined at 11 CFR 110.10(b), for the candidate's routine living expenses which would have been incurred without candidacy, including the cost of food and residence, are not expenditures. Payments for such expenses by a member of the candidate's family as defined in 11 CFR 113.1(g)(7), are not expenditures if the payments are made from an account jointly held with the candidate, or if the expenses were paid by the family member before the candidate became a candidate.

\* \* \* \* \*

**PART 104—REPORTS BY POLITICAL COMMITTEES (2 U.S.C. 434)**

3. The authority citation for part 104 is revised to read as follows:

Authority: 2 U.S.C. 431(1), 431(8), 431(9), 432(i), 434, 438(a)(8), 438(b), 439a.

4. Section 104.3 is amended by revising the section heading and adding paragraph (b)(4)(i) (B) as follows:

**§ 104.3 Contents of reports (2 U.S.C. 434(b), 439a).**

\* \* \* \* \*

(b) \* \* \*

(4) \* \* \*

(i) \* \* \*

(A) \* \* \*

(B) In addition to reporting the purpose described in 11 CFR 104.3(b)(4)(i)(A), whenever an authorized committee itemizes a disbursement that is partially or entirely a personal use for which reimbursement is required under 11 CFR 113.1(g)(1)(ii) (C) or (D), it shall provide a brief explanation of the activity for which reimbursement is required.

\* \* \* \* \*

**PART 113—EXCESS CAMPAIGN FUNDS AND FUNDS DONATED TO SUPPORT FEDERAL OFFICEHOLDER ACTIVITIES (2 U.S.C. 439a)**

5. The authority citation for part 113 continues to read as follows:

Authority: 2 U.S.C. 432(h), 438(a)(8), 439a, 441a.

6. Section 113.1 is amended by adding paragraph (g) as follows:

**§ 113.1 Definitions (2 U.S.C. 439a).**

\* \* \* \* \*

(g) *Personal use.* *Personal use* means any use of funds in a campaign account

of a present or former candidate to fulfill a commitment, obligation or expense of any person that would exist irrespective of the candidate's campaign or duties as a Federal officeholder.

(1)(i) *Personal use* includes but is not limited to the use of funds in a campaign account for:

(A) Household food items or supplies;

(B) Funeral, cremation or burial expenses;

(C) Clothing, other than items of *de minimis* value that are used in the campaign, such as campaign "T-shirts" or caps with campaign slogans;

(D) Tuition payments, other than those associated with training campaign staff;

(E) Mortgage, rent or utility payments—

(1) For any part of any personal residence of the candidate or a member of the candidate's family; or

(2) For real or personal property that is owned by the candidate or a member of the candidate's family and used for campaign purposes, to the extent the payments exceed the fair market value of the property usage;

(F) Admission to a sporting event, concert, theater or other form of entertainment, unless part of a specific campaign or officeholder activity;

(G) Dues, fees or gratuities at a country club, health club, recreational facility or other nonpolitical organization, unless they are part of the costs of a specific fundraising event that takes place on the organization's premises; and

(H) Salary payments to a member of the candidate's family, unless the family member is providing *bona fide* services to the campaign. If a family member provides *bona fide* services to the campaign, any salary payment in excess of the fair market value of the services provided is personal use.

(ii) The Commission will determine, on a case by case basis, whether other uses of funds in a campaign account fulfill a commitment, obligation or expense that would exist irrespective of the candidate's campaign or duties as a Federal officeholder, and therefore are personal use. Examples of such other uses include:

(A) Legal expenses;

(B) Meal expenses;

(C) Travel expenses, including subsistence expenses incurred during travel. If a committee uses campaign funds to pay expenses associated with travel that involves both personal activities and campaign or officeholder related activities, the incremental expenses that result from the personal activities are personal use, unless the person(s) benefiting from this use

acceptable and unacceptable purpose descriptions to be reported by authorized committees. Paragraph (B) requires authorized committees, when itemizing certain disbursements for which reimbursements are required, to provide a brief explanation of the activity for which reimbursement is required. These provisions have been in Title 11 of the **Code of Federal Regulations** since 1980 and 1995, respectively, and were not affected by the recent statutory changes to the election cycle reporting requirements.

#### Need for Correction

As published, the final rules inadvertently omit two paragraphs describing information to be reported by authorized committees of Federal candidates.

All committees must report the purpose of itemized disbursements (i.e., those disbursements aggregating in excess of \$200). Omitted paragraph (A) contains examples of suitably specific purpose descriptions as well as examples of those descriptions that are unacceptably vague. This paragraph is inconsistent with the reporting of rules for unauthorized committees (committees other than candidate committees) in 11 CFR 104.3(b)(3).

Omitted paragraph (B) is used in administering the "personal use" rules in 11 CFR 113.1. Federal candidates are barred from using campaign funds for personal benefit. Paragraph (B) requires authorized committees of Federal candidates itemizing disbursements for which partial or total reimbursement is required under 11 CFR 113.1(g)(1)(iii)(C) or (D) to provide a brief explanation of the activity for which the reimbursement is made.

Section 801 of Title 5 of the United States Code requires Federal agencies to submit regulations to Congress. These regulations were submitted to the Speaker of the House of Representatives and the President of the Senate on November 26, 2001.

#### Certification of No Effect Pursuant to 5 U.S.C. § 605(b) [Regulatory Flexibility Act]

This correction will not have significant economic impact on a substantial number of small entities. The basis of this certification is that this correction only requires political committees to once again add information to the reports they are required to file. These regulations were in 11 CFR since 1980 and 1995, respectively, before being inadvertently omitted in 2000.

#### List of Subjects in 11 CFR Part 104

Campaign funds, Political committees and parties, Reporting and recordkeeping requirements.

Accordingly, 11 CFR part 104 is corrected by making the following correcting amendment:

#### PART 104—REPORTS BY POLITICAL COMMITTEES

1. The authority citation for part 104 continues to read as follows:

**Authority:** 2 U.S.C. 431(1), 431(8), 431(9), 432(i), 434, 438(a)(8), 438(b), 439a.

#### § 104.3 Contents of reports (2 U.S.C. 434(b), 439a).

\* \* \* \* \*

2. In § 104.3 add the following paragraphs (b)(4)(i)(A) and (B):

(b) \* \* \*

(4) \* \* \*

(i) \* \* \*

(A) As used in this paragraph, *purpose* means a brief statement or description of why the disbursement was made. Examples of statements or descriptions which meet the requirements of this paragraph include the following: dinner expenses, media, salary, polling, travel, party fees, phone banks, travel expenses, travel expense reimbursement, and catering costs. However, statements or descriptions such as *advance*, *election day expenses*, *other expenses*, *expenses*, *expense reimbursement*, *miscellaneous*, *outside services*, *get-out-the-vote* and *voter registration* would not meet the requirements of this paragraph for reporting the purpose of an expenditure.

(B) In addition to reporting the purpose described in paragraph (b)(4)(i)(A) of this section, whenever an authorized committee itemizes a disbursement that is partially or entirely a personal use for which reimbursement is required under 11 CFR 113.1(g)(1)(ii)(C) or (D), it shall provide a brief explanation of the activity for which reimbursement is required.

\* \* \* \* \*

Dated: November 26, 2001.

**Danny L. McDonald,**  
Chairman, Federal Election Commission.  
[FR Doc. 01-29679 Filed 11-29-01; 8:45 am]  
**BILLING CODE 6715-01-P**

#### FEDERAL ELECTION COMMISSION

#### 11 CFR Part 111

#### [Notice 2001-18]

#### Extension to Administrative Fines

**AGENCY:** Federal Election Commission.

**ACTION:** Final rule; revision of the sunset date.

**SUMMARY:** The Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the expiration date in which the Federal Election Commission (hereinafter "the Commission") may assess civil money penalties for violations of the reporting requirements of section 434(a) of the Federal Election Campaign Act (hereinafter "the Act" or "FECA").

**DATES:** Effective on December 31, 2001.

**FOR FURTHER INFORMATION CONTACT:** Ms. Rosemary C. Smith, Assistant General Counsel, or Ms. Mai T. Dinh, Attorney, 999 E Street, NW., Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

#### SUPPLEMENTARY INFORMATION:

#### Explanation and Justification

Section 640 of the Treasury and General Government Appropriations Act, 2000, Pub. L. No. 106-58, 106th Cong., 113 Stat. 430, 476-77 (1999), amended § 309(a)(4) of the FECA, 2 U.S.C. 437g(a)(4), to provide for a modified enforcement process for violations of reporting requirements. Under § 437g(a)(4)(C) of the FECA, the Commission may assess a civil money penalty for violations of the reporting requirements of 2 U.S.C. 434(a). This authority, however, was to sunset on December 31, 2001. Pub. L. No. 106-58, 106th Cong., § 640(c). Recently, § 642 of the Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the sunset date to include all reports that cover activity between January 1, 2000, to December 31, 2003.

The Commission published final rules on May 19, 2000, to implement the amendment contained in the Treasury and General Government Appropriations Act, 2000. Section 111.30 of the regulations reflects the sunset provision of Pub. L. No. 106-58, 106th Cong., § 640(c). Therefore, the Commission is issuing this final rule to amend section 111.30 to extend the application of the administrative fine regulations, 11 CFR part 111, subpart B, to include all violations relating to reports that cover the period between January 1, 2000, to December 31, 2003.

The Commission is promulgating this final rule without notice or opportunity for comment because it falls under the "good cause" exemption of the Administrative Procedures Act, 5 U.S.C. 553(b)(B). The exemption allows

**FEDERAL ELECTION COMMISSION**

[Notice 1995-9]

**11 CFR Parts 106, 9002, 9003, 9004, 9006, 9007, 9008, 9032, 9033, 9034, 9036, 9037, 9038, and 9039****Public Financing of Presidential Primary and General Election Candidates****AGENCY:** Federal Election Commission.**ACTION:** Final rule and transmittal of regulations to Congress.

**SUMMARY:** The Commission has revised its regulations governing public financing of presidential primary and general election candidates. These regulations implement provisions of the Presidential Election Campaign Fund Act ["Fund Act"] and the Presidential Primary Matching Payment Account Act ["Matching Payment Act"]. The revised rules reflect the Commission's experience in administering these programs during the 1992 election cycle, and are intended to anticipate questions that may arise during the 1996 presidential election cycle.

**DATES:** Further action, including the publication of a document in the **Federal Register** announcing the effective date, will be taken after these regulations have been before Congress for 30 legislative days pursuant to 2 U.S.C. 438(d) and 26 U.S.C. 9009(c) and 9039(c).

**FOR FURTHER INFORMATION CONTACT:** Ms. Susan E. Propper, Assistant General Counsel, 999 E Street NW., Washington, DC 20463, (202) 219-3690 or (800) 424-9530.

**SUPPLEMENTARY INFORMATION:** The Commission is publishing today the final text of revisions to its regulations at 11 CFR Parts 106, 9002, 9003, 9004, 9006, 9007, 9008, 9032, 9033, 9034, 9036, 9037, 9038 and 9039 governing public financing of presidential campaigns. On October 6, 1994, the Commission issued a Notice of Proposed Rulemaking ["NPRM"] in which it sought comments on proposed revisions to the public financing regulations. 59 FR 51006 (October 6, 1994). Subsequently, the Commission extended the comment period to provide the regulated community with additional time to comment on the proposed rules. 59 FR 64351 (December 14, 1994). The Commission received written comments from Hervey W. Herron, Common Cause, the Center for Responsive Politics, Public Citizen, the White House Counsel's office, the Republican National Committee, Huckaby and Associates, the Democratic

National Committee and Lyn Utrecht of Oldaker, Ryan & Leonard in response to the Notice. The Commission held a public hearing on February 15, 1995, at which four witnesses presented testimony on the issues raised in the NPRM.

The Commission also received two Petitions for Rulemaking that addressed related issues. See Notice of Availability on Petition for Rulemaking filed by the Center for Responsive Politics ["CRP"], 59 FR 14795 (March 30, 1994); Notice of Availability on Petition for Rulemaking filed by Anthony F. Essaye and William Josephson, 59 FR 63274 (December 8, 1994). In addition to the comments noted above, the Commission received comments from the Internal Revenue Service, Public Citizen, Common Cause and a joint comment from the Republican National Committee and the Democratic National Committee in response to the CRP Rulemaking Petition. The Commission received comments from the Internal Revenue Service and the Republican National Committee in response to the Essaye/Josephson Petition.

The CRP Petition for Rulemaking sought the abolishment of the general election legal and accounting compliance fund ["GELAC"] and is discussed in connection with 11 CFR 9003.3, below. The Essaye/Josephson petition asked the Commission whether expenses incurred in connection with the meeting of the Electoral College are covered by the Fund Act or the Federal Election Campaign Act ["FECA"], 2 U.S.C. 431 *et seq.* This is a complex question that the Commission believes deserves further consideration. Therefore, the issue has been dropped from this rulemaking and will be addressed in a separate rulemaking document.

Sections 9009(c) and 9039(c) of Title 26, United States Code, and 2 U.S.C. 438(d) require that any rules or regulations prescribed by the Commission to carry out the provisions of Title 26 of the United States Code be transmitted to the Speaker of the House of Representatives and the President of the Senate 30 legislative days before they are finally promulgated. These regulations were transmitted to Congress on June 12, 1995.

**Explanation and Justification**

The Commission has revised several aspects of its regulations governing publicly-financed presidential primary and general election candidates. A detailed, section by section analysis of these changes appears below. The document then discusses some additional proposals that were

considered in the course of this rulemaking that were not ultimately incorporated into the final rules.

**Part 106—Allocations of Candidate and Committee Activities***Section 106.2 State Allocation of Expenditures Incurred by Authorized Committees of Presidential Primary Candidates Receiving Matching Funds*

The Commission is adding a sentence to paragraph (a)(1) of this section to reflect the new attribution of certain expenditures between the primary and the general election limits. See discussion of 11 CFR 9034.4(e), below. The new sentence states that expenditures required to be allocated to the primary election under these new requirements shall also be allocated to particular states in accordance with 11 CFR 106.2.

**Part 9002—Definitions***Section 9002.11 Qualified Campaign Expense*

The Commission is adding a conforming amendment to paragraph (c) of this section to reflect the new attribution of certain expenditures between the primary and the general election limits. The amendment notes that certain expenditures formerly covered by this paragraph will now be attributed under these new guidelines. See discussion of 11 CFR 9034.4(e), below.

**Part 9003—Eligibility for Payments***Section 9003.1 Candidate and Committee Agreements*

The new rules contain a number of changes in section 9003.1. In the interests of clarity, the Commission is adding a comma in the last sentence of paragraph (b)(4), which relates to candidate and committee agreements to furnish certain documentation to the Commission. The rules also slightly reword paragraph (b)(9) to more clearly indicate that candidates must agree to pay any civil penalties arising from violations of the FECA, whether provided for in a conciliation agreement or imposed in a judicial proceeding.

Paragraph (b)(10) has been added to require that, as a precondition of their receiving public funds, presidential candidates agree that they will prepare all of their television commercials with closed captioning or so that they are otherwise capable of being viewed by deaf and hearing impaired individuals. Congress added this requirement to 26 U.S.C. § 9003(e) when it enacted section 354 of the Legislative Branch

Appropriations Act of 1992, Pub. L. No. 102-393, 106 Stat. 1764 (1992).

One commenter requested that committees be allowed to pay the costs of closed captioning with funds from their general election legal and accounting compliance fund. However, the Commission views this not as a compliance cost, but rather as a means for committees to get their message out to those who otherwise would not hear it. Thus it is a qualified campaign expense.

### Section 9003.3 Allowable Contributions

On March 1, 1994, the Commission received a Petition for Rulemaking from the Center for Responsive Politics requesting that the Commission repeal its rules providing for the use of privately-financed general election legal and accounting compliance funds in presidential campaigns. Specifically, the petitioner sought repeal of 11 CFR 100.8(b)(15) (last two sentences), 106.2(b)(2)(iii)(last sentence), 9002.11(b)(5), 9003.3(a), and 9035.1(c)(1).

The Commission published a Notice of Availability on March 30, 1994, seeking statements in support of or in opposition to the Petition. 59 FR 14794 (March 30, 1994). The Commission received four comments in response to the Petition. Two comments were supportive, while one opposed the reversal of the Commission's longstanding policies regarding legal and accounting costs. The Commission subsequently incorporated the Petition into this rulemaking, and sought further comment on a number of options. The Commission received seven additional comments on the issues raised in the Petition.

The petitioner argued that the Commission's rules allowing private contributions of up to \$1,000 for the GELAC undermine the ability of the public financing laws to achieve the objective of eliminating the corrupting influence of large contributions in presidential elections. The Commission's reasons for establishing the GELAC are explained below and in the 1980 Explanation and Justification, 45 FR 43371 (June 27, 1980). The decision to allow the GELAC to accept contributions up to \$1,000 is based on the structure of the FECA. As the Supreme Court recognized in *Buckley v. Valeo*, 424 U.S. 1, 58 (1976), Congress created contribution limits to combat the reality or appearance of improper influence. Nevertheless, through the NPRM, the Commission sought evidence either supporting or refuting the petitioner's claim that the privately-

funded GELAC undermines the public financing regime by allowing the actuality and the appearance of improper influence in presidential elections. No evidence was presented.

As explained more fully below, the Commission has decided not to eliminate the GELAC. The Commission agrees with the commenters who felt that the separate fund for compliance has worked well since the GELAC rules were promulgated in 1980. To repeal them would force presidential campaigns to devote some of their public funds for compliance expenses, instead of using public monies for campaign expenses. One commenter noted that in the absence of a GELAC, committees would face extraordinary pressure to minimize the amount spent on compliance so as to devote as much money as possible to campaigning. Reducing compliance funds may very well reduce committees' abilities to keep good records, thereby increasing the difficulty and duration of post-election audits. Section 431(9)(B)(vii) of the FECA recognizes an exception for the cost of certain legal and accounting compliance services that is not recognized for other types of costs. The elimination of monetary contributions of \$1,000 or less for compliance purposes could force some committees to turn to much larger in-kind donations of legal and accounting services to ensure that their compliance obligations are satisfied. See 2 U.S.C. § 431(8)(B)(ix) and (9)(B)(vii). The GELAC is also used to make repayments, which would still need to be funded from private sources if the campaign had no public funds remaining to pay those amounts.

The Petition for Rulemaking also charged that these regulations permit evasion of the prohibition on accepting contributions to defray qualified campaign expenses established by the Fund Act. 26 U.S.C. § 9003(b). Furthermore, the Petition claims that the Commission's regulations violate the spending limits established by the FECA. 2 U.S.C. § 441a.

The Commission is not persuaded that the creation and operation of the GELAC is beyond its statutory authority or inconsistent with the public funding regime established by the Fund Act and the FECA. The regulations first establishing a separate GELAC were duly promulgated pursuant to 2 U.S.C. § 437d(a)(8) and 26 U.S.C. § 9009(b) for the practical reasons explained above. They were transmitted to Congress on June 13, 1980, together with the Explanation and Justification, for the required legislative review period. They became effective on September 5, 1980,

after neither House of Congress disapproved them under 26 U.S.C. § 9009(c)(2). This is, as the Supreme Court has noted, an "indication that Congress does not look unfavorably" upon the Commission's construction of the Act. *FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 34 (1981). See also, e.g., *Sibbach v. Wilson*, 312 U.S. 1, 16 (1941) ("That no adverse action was taken by Congress indicates, at least, that no transgression of legislative policy was found"). Subsequently, in legislative recommendations to Congress, the Commission has identified funding for compliance activities as an area Congress may wish to clarify, but Congress has not done so to date.

Consequently, the revised rules follow the previous provisions by retaining sections 100.8(b)(15) (last two sentences), 106.2(b)(2)(iii) (last sentence), 9002.11(b)(5), 9003.3, and 9035.1(c)(1). For the reasons set forth, the Petition for Rulemaking filed by the Center for Responsive Politics is denied.

Comments were also requested on several alternative revisions to the GELAC. For example, the NPRM raised the possibility of limiting the amount raised and spent for compliance to a fixed percentage of the general election spending limit. Although one commenter supported limiting the GELAC to 10% of the general election spending limit, or less, several others believed a limit would be artificial, unworkable and unfair, particularly since several factors make compliance costs unpredictable. Hence, to some extent, these costs cannot be controlled by the committee or known in advance. Other commenters opposed limiting the GELAC because they believed limits would not overcome fundamental defects in the current GELAC rules, and that the rules should be repealed.

The Commission agrees that compliance costs can be unpredictable, and therefore concludes that limiting the amount or percentage of the GELAC is not advisable.

The NPRM also expressed concern that fundraising activities for the GELAC could be used to generate electoral support for the candidate's campaign. Accordingly, the NPRM sought comments on whether to continue to permit the GELAC to pay the entire amount of these costs, or whether a fixed percentage of GELAC fundraising costs should be paid by the general election campaign committee.

In response, the petitioner and two commenters questioned the appropriateness of allowing fundraising costs for the GELAC to be paid for by the GELAC on the grounds these

expenses are campaign expenses that should be paid by the general election campaign and subject to the spending limits. On the other hand, several witnesses and commenters pointed out that effective fundraising necessarily involves setting forth what the candidate stands for. Some felt it is not appropriate to use public funds to raise private contributions that are used solely for legal and accounting compliance purposes.

The Commission has concluded that the rules regarding fundraising for the GELAC should remain largely unchanged. The Commission's audit and enforcement processes provide the appropriate mechanisms for ensuring that GELAC fundraising activities (or any other type of expenses paid from GELAC funds) do not involve campaigning for the candidate's election.

However, changes are being made regarding the information to be disclosed in solicitations to prospective contributors. Former section 9003.3(a)(1)(i)(A) required solicitations to clearly state that the contributions are solicited for the GELAC. The NPRM proposed adding language to let contributors know that their money would be used solely for legal and accounting costs. Those supporting the Petition for Rulemaking did not believe the proposed change would resolve the problems they perceived. Others noted that if the required language is lengthy enough, nobody will read it. Hence, the final rules have been modified to require committees to tell contributors that federal law prohibits the use of private contributions to pay a publicly-funded general election candidate's campaign expenses. This new language more clearly conveys to contributors that their contributions to the GELAC will only be used to ensure compliance with the law. The GELAC solicitation must also indicate how contributors should make out their checks, so as to avoid potential confusion regarding the contributor's intent.

Please note that the provisions regarding redesignations and transfers of primary funds to the GELAC in paragraphs (a)(1)(ii)-(iv) have been reorganized for clarity. In addition, new language has been added to resolve questions regarding depositing designated and undesignated contributions in the GELAC. Paragraph (a)(1)(i)(C) states that contributions must be designated in writing for the GELAC to be deposited directly into the GELAC. All contributions not designated in writing for the GELAC must be deposited initially in a primary election account and reported as such. An

explanation of the term "designated in writing" for the GELAC is being added as new paragraph (a)(1)(vi). Please note that 11 CFR 110.1(b)(4) covers designations for a presidential primary election. Contributions made out to the candidate's name or the primary committee, unless properly designated in writing for the compliance fund, cannot be deposited in it, and can be transferred to it only if they are properly redesignated by the contributor for the GELAC. Undesignated contributions cannot be deposited in the GELAC, regardless of when they are made or received, and can be transferred to it only if the committee receives a proper GELAC redesignation from the contributor. An exception to the redesignation requirement exists for leftover primary contributions made during the matching payment period; they may be transferred to the GELAC without securing redesignations if they exceed the amount needed to pay remaining net outstanding campaign obligations for the primary and any repayments. In addition, the revised rules permit contributions made after the date of nomination, but not designated in writing for the GELAC, to be redesignated for the GELAC only if they are not needed to pay remaining net outstanding campaign obligations from the primary campaign. The rules also specify that contributions designated in writing or redesignated for the GELAC cannot be matched.

Current paragraphs (a)(2)(i) (A) through (H) of section 9003.3 set forth the permissible uses of GELAC funds. The Petition for Rulemaking, and several commenters, urged the Commission to delete current paragraph (H) allowing GELAC funds to be used to pay unreimbursed costs of providing transportation for the Secret Service and national security staff. Other commenters and one witness urged the Commission to retain this provision, given the alternative of requiring campaigns to pay these costs from their limited campaign funds, even though transporting Secret Service and National Security staff does little to further the campaign.

This provision has been retained in the final rules because the limits on the amounts that can be reimbursed for transporting the Secret Service and National Security staff may be less than the actual cost to the campaign, and because the campaign must transport security personnel who do not provide a campaign-related benefit. However, GELAC funds may not be used to pay transition costs (costs incurred by the President-elect in preparation for the assumption of his or her official duties

which are not provided for under the Presidential Transition Act of 1963) (cf. AO 1980-97); legal defense fund expenses (expenses incurred in a judicial, civil, criminal, administrative, state, federal, or Congressional investigation, inquiry or proceeding not related to the Presidential campaign) (cf. AO 1979-37); or legal expenses not related to ensuring compliance with the FECA and the Fund Act, such as contract litigation.

In addition, the Commission has reduced from 70% to 50% the standard amount that the GELAC may pay for computer-related costs, and the corresponding exclusion from the spending limits. See 11 CFR 9003.3(a)(2)(ii)(A), (b)(6) and (c)(6). Some expressed concern that this allocation demonstrated the impossibility of separating compliance expenses from campaign expenses, thereby necessitating repeal of the GELAC rules. One commenter argued that the allowance should be reduced to 10%. On the other hand, others urged the Commission to increase the allowance to 80% or 90% to more accurately reflect the burden of compliance.

The Commission believes that a reduction from 70% to 50% accurately reflects the increased usage of computers for non-compliance campaign-related activities such as scheduling of campaign-related events, electronic communications, word processing, office automation, maintaining political databases, etc. Moreover, campaign committees must incur computer costs to perform basic accounting purposes irrespective of the need to comply with the campaign financing laws. Please note, however, that committees may still deduct a higher amount if they can show that their computer-related compliance costs are higher.

Section 9003.3(a)(2)(iv) has been modified slightly to clarify that funds remaining in the GELAC may only be used to pay debts remaining from the primary or for other lawful purposes pursuant to 2 U.S.C. § 439a if all GELAC expenses have been paid. Two commenters argued that this allows wealthy donors to evade the primary contribution limits and results in corruption of the public financing system. As explained above, the Commission believes that this provision is in keeping with the purpose and structure of the public funding statutes and notes that Congress did not disapprove of the Commission's regulations on transfers of surplus GELAC funds.

Finally, two citations contained in 11 CFR 9003.3(a)(2)(iii) are being revised. The first sentence of this paragraph referred to paragraphs 9003.3(a)(2)(i) (A) through (E). This is being updated to read, "11 CFR 9003.3(a)(2)(i) (A) through (F) and (H)." Also, the previous citation to paragraph 9003.3(a)(2)(i)(F) in the second sentence has been changed to refer to paragraph 9003.3(a)(2)(i)(G). Portions of paragraphs (b) and (c) of section 9003.3 have been replaced with language indicating that certain provisions in paragraph (a) apply to minor party candidates and situations where major party candidates do not receive full public funding.

Finally, the Commission is deleting the reference to final repayment determinations contained in former paragraph (a)(2)(ii)(B), now paragraph (a)(2)(ii)(G), as that term does not appear in the revised repayment process. See discussion of 11 CFR 9007.2, below.

#### *Section 9003.4 Expenses Incurred Prior to the Beginning of the Expenditure Report Period or Prior to Receipt of Federal Funds*

Former paragraph (a) of this section stated that certain expenditures for polling could be considered qualified campaign expenses for the general election, regardless of when the results of the polling were received. However, the Commission has now decided that polling expenditures should be attributed to the primary or the general election limits based on when the results are received. See discussion of 11 CFR 9034.4(e)(2), above.

The reference to polling in this paragraph has therefore been deleted. The Commission is adding new language referring readers to the new provisions at 11 CFR 9034.4(e)(2), to better alert them to this change.

#### *Section 9003.5 Documentation of Disbursements*

Section 9003.5(b)(1)(i) sets forth the documentation required for disbursements in excess of \$200. Under the previous rules, a canceled check, negotiated by the payee, was required in most situations, but not when the committee presented a receipted bill from the payee stating the purpose of the disbursement. The revised rules in this section require committees to provide canceled checks negotiated by the payees for all disbursements over \$200. One witness opposed these changes, and urged more flexibility in the requirements for documentation. However, this change will assist the Commission's audit staff in verifying that public funds are spent on qualified

campaign expenses. Committees should already have canceled checks in their possession, so production would not be burdensome. New paragraph (b)(1)(iv) indicates that the purpose of the disbursement must be noted on the check if it is not included in the accompanying documentation. Please note that, as in the past, the revised rules require that documentation in addition to the committee's check be provided for disbursements exceeding \$200.

Paragraph (b)(3) of this section has also been changed to include individuals who are advanced \$1000 or less for travel and subsistence in the definition of payee. The \$500 limit in the previous rules was raised to reflect current prices.

#### **Part 9004—Entitlement of Eligible Candidates to Payments; Use of Payments**

##### *Section 9004.4 Use of Payments*

##### *Winding Down Costs; Gifts and Bonuses*

New paragraph (a)(5) of section 9004.4 addresses the use of public funds to pay for gifts and bonuses for campaign staff and consultants. It generally follows new language in section 9034.4, which is discussed below. New language is being added to section 9004.4(a) to allow the GELAC to pay 100% of salary and overhead expenses incurred after the end of the expenditure report period. These expenses are presumed to be solely to ensure compliance with the FECA and the Fund Act.

One commenter questioned why computer expenses were not included in the proposed language when they were included in the corresponding primary regulations. The rules have been revised to recognize that the GELAC may pay 100% of computer expenses incurred after the end of the expenditure report period.

##### *Responsibility for Lost or Damaged Equipment*

Accounting procedures employed by the Commission make allowance for reasonable loss and normal damage of equipment leased or purchased by a campaign. However, the Commission has at times encountered incidents involving lost or damaged equipment that do not fall into these categories. The Notice of Proposed Rulemaking therefore sought to clarify how such situations should be handled in the audit process.

The Commission first sought comment on whether, as a precondition for the receipt of public funds, the candidate should agree to meet certain

standards in handling public monies as well as in overseeing the use of and accounting for public funds. Such standards would have been specified at 11 CFR 9003.1(b). However, the Commission now believes the question of liability for lost or damaged equipment is best handled by amending 11 CFR 9004.4(b) to clarify that the cost of lost or misplaced items may be considered a nonqualified campaign expense for purposes of these rules.

The Commission recognizes that there are varying degrees of responsibility in this area. The new rules therefore state that certain factors should be considered prior to any determination that a repayment is required. In particular, whether the committee demonstrates that it made careful efforts to safeguard the missing equipment would be of primary importance in this regard. Whether the committee sought or obtained insurance, the type of equipment involved and the number and value of items that were lost will also be among the factors considered in making this determination. However, the Commission has dropped as a stated factor the value of the lost equipment as a percentage of the total value of the equipment leased or owned by the committee, as the loss of even a small percentage of a committee's equipment can involve a sizeable amount of public funding.

One commenter argued that the phrase "used for any purpose other than \* \* \* to defray [ ] qualified campaign expenses" in 26 U.S.C. §§ 9007(b)(4) and 9038(b)(2), stating the reasons for which the Commission can require a repayment, connotes intentional conduct, so the Commission is barred from ever requiring a repayment for lost or misplaced items. While the word "purpose" can connote "intent," the Commission does not believe the two are synonymous in this context.

The Commission routinely determines that funds have been "used for the purpose" of nonqualified campaign expenses, regardless of the specific intent behind particular disbursements. Barring the Commission from inquiring into such situations would run counter to its long-standing practice in this area, and would also be inconsistent with the responsibility to ensure that public funds are properly used.

One commenter proposed a number of safeguards a committee could adopt to help ensure that losses are kept to a minimum. These include (1) maintaining a written inventory of equipment, (2) establishing and disseminating written procedures for handling of equipment by the staff, (3) maintaining and implementing security



procedures that limit access to the premises on which equipment is used and ensuring that equipment cannot be removed from the premises without appropriate written authorizations, (4) limiting use of vehicles to designated individuals, (5) maintaining a check-out system for portable equipment such as cellular telephones, and making individuals personally liable for return of the equipment, (6) obtaining insurance where economically prudent in accordance with the standards of the insurance industry, (7) establishing a procedure for reconciling inventory of equipment, in accordance with recognized accounting standards, when offices are closed, and (8) establishing procedures for handling of funds, including the handling of cash and writing of checks, that generally conform to recognized standards for internal controls established by the American Institute of Certified Public Accountants.

These are sound business practices that, if followed, should greatly reduce the possibility of loss. The Commission plans to recommend in the Financial Control and Compliance Manuals prepared in connection with the 1996 Presidential election that committees implement these or comparable standards.

This commenter further argued that, if a committee could demonstrate "substantial compliance" with these guidelines, the Commission should avoid an "item by item" examination of lost or misplaced items. While committees that follow these standards should have little problem with loss, the fact that they have done so should not preclude the Commission from ever challenging a loss, especially where costly items are involved.

The Notice sought comment on another approach, that of limiting the dollar amount of lost property that could be considered a qualified campaign expense. If a committee lost goods worth more than the specified amount, any amount over that figure would be a nonqualified campaign expense. This would have the advantage of focusing the Commission's resources on only the more serious instances, while recognizing that some loss is inevitable in large, lengthy campaigns.

The Commission believes this approach has merit, but feels it is inappropriate to include an actual dollar figure in the text of the rules. Rather, the Commission may address this matter in the context of the confidential materiality thresholds established in connection with each audit cycle.

#### *Conforming Amendment*

The Commission is moving paragraph (c) of 11 CFR 9004.4 to new 11 CFR 9007.2(a)(4). This paragraph, which deals with permissible sources of repayments, is more properly located in the section dealing with repayments.

#### *Section 9004.5 Investment of Public Funds*

Section 9004.5 of the existing regulations allows a committee to invest public funds or use them in other ways to generate income, provided that an amount equal to the net income derived from those investments, minus any taxes paid, is paid to the Treasury. Section 9007.2(b)(4) also lists the receipt of any income as a result of investment or other use of payments from the Fund pursuant to 11 CFR 9004.5 as one of the bases for requiring committees to make payments to the Treasury.

The final rules revise section 9004.5 to clarify that the payment requirement applies to any use of public funds that results in income to the committee, regardless of whether the committee engaged in that use with the intention of generating income. The final rules also contain a conforming amendment to the introductory language of section 9007.2(b)(4), clarifying that the receipt of income from any use of payments from the Fund is a basis for requiring payment to the Treasury. The Commission received no comments on these provisions.

These revisions ensure that any income received through the use of public funds benefits the public financing system. If a committee loses an item that is insured, and the insurance proceeds exceed the cost of replacing the item, such excess will be considered income under sections 9004.5 and 9007.2(b)(4). However, these rules are not meant to require payment of income that qualifies as exempt function income under section 527(c)(3) of the Internal Revenue Code, 26 U.S.C. 527(c)(3), such as receipts from fundraising activities permitted under 11 CFR 9003.3.

#### *Section 9004.6 Expenditures for Transportation Made Available to Media Personnel; Reimbursements*

Section 9004.6 of the existing rules has been reorganized for clarification purposes with only minor substantive changes. The revised version operates largely the same as the existing rule. Generally, expenditures for transportation and other services provided to media representatives, Secret Service personnel, and national security staff will be qualified campaign expenses and, with the exception of

costs related to Secret Service and national security personnel, will count toward the overall expenditure limits in section 9003.2. However, committees may seek reimbursement for these expenses, and may deduct reimbursements received from media representatives from the amount subject to the spending limit, in accordance with paragraph (c) of the revised rule.

Paragraph (b) limits the amount of reimbursement a committee can seek from a media representative to 110% of that representative's pro rata share of the actual costs of the transportation and services made available. Any reimbursement received in excess of that amount must be returned to the media representative under paragraph (d)(1). Paragraph (b)(2) sets out the formula for determining a media representative's pro rata share of the costs of transportation and services made available.

Paragraph (c) states that the committee may deduct the reimbursements received from media representatives from the amount of expenditures subject to the overall limitation. The rule limits the amount of this deduction to the actual cost of the transportation and services provided to media representatives. However, the rule also allows the committee to deduct an additional amount of the reimbursements received from media representatives, representing the administrative costs of providing these services and seeking reimbursement for them. Generally, this deduction is limited to 3% of the actual cost of the transportation and services provided to the media representatives. However, the committee may deduct an amount in excess of 3% if it can document the total amount of administrative costs actually incurred.

Paragraph (c)(2) clarifies that "administrative costs" includes all costs incurred by the committee in providing these services and seeking reimbursement for them. Thus, any costs that are not part of the actual cost of the transportation and services made available are administrative costs, regardless of whether they are incurred directly by the committee or by an independent contractor hired to make travel arrangements and/or seek reimbursements. If the committee uses a contractor, and the contractor charges the committee a fee for providing these services, the fee charged is part of administrative costs. The contractor's expenses and fees are not part of the actual costs for which the committee may seek reimbursement under paragraph (b)(1). Likewise, if the committee accepts credit card payments



from media representatives, any credit card fee, commission or discount is an administrative cost.

Paragraph (d) requires the committee to return any reimbursement received in excess of 110% of the actual pro rata cost of the transportation and services made available to the media representative providing the reimbursement. In addition, any amount in excess of the amount deductible under paragraph (c) that has not been returned to a media representative must be paid to the Treasury. For example, if a representative's pro rata cost is \$1,000, the committee can bill the representative for \$1,100. Assuming the committee claims the standard 3% to cover its administrative costs, it can deduct up to \$1,030 from the amount of expenditures subject to the limit. Any reimbursement received in excess of \$1,100 must be returned to the media representative. Any portion of the remaining amount that exceeds the \$1,030 that can be deducted from the spending limit must be paid to the Treasury.

Paragraph (e) requires the committee to report disbursements made in providing these services as expenditures under 11 CFR 104.3(b)(2), and to report any reimbursements received as offsets to operating expenditures under 11 CFR 104.3(a)(3)(ix).

The final rule contains two changes to the existing rule that reflect current practice. Generally, a media representative's pro rata share of the actual cost of transportation and services made available is determined by dividing the total costs of the services provided by the total number of persons to whom the services are made available. However, the new rule contains a special formula for determining the pro rata cost of transportation on a government conveyance to a city not served by regularly scheduled commercial airline service. See 11 CFR 9004.7(b)(5)(i)(C). Committees should not include national security staff in the total number of persons to whom the services were made available when determining pro rata cost in this situation. This formula places incumbent candidates on an equal footing with challengers, who are not required to transport national security personnel. See discussion of section 9004.7, below.

The new rule also clarifies that the administrative costs incurred by the committee in providing these services and seeking reimbursement for them must be included in the amount reported as an expenditure under paragraph (e).

Two commenters expressed general support for the Commission's efforts to reorganize this section. However, they also urged the Commission to treat billed out unreimbursed media transportation expenses the same as unreimbursed expenses associated with transporting Secret Service and national security personnel, by excluding these expenses from the spending limit and allowing the use of GELAC funds to reimburse the committee for these expenses.

The Commission has not adopted these recommendations because committees are now better able to recover the full cost of providing these services to media representatives than they were in the past. Committees can require media representatives to provide advance payment through the use of a credit card. If a representative fails to pay, the committee may, if it chooses, deny the representative access to the services being provided.

A review of one 1992 general election committee, and its associated primary committee, clearly demonstrates that this policy does not impose a financial burden. The two committees sought reimbursement from media representatives for a combined total of about \$7 million in transportation expenses. Both committees collected more than 99% of the amount they billed. Since the rules allow the committees to bill the representatives for 110% of actual cost, they received about \$7.5 million in reimbursements. Each committee received more than 109% of the cost of the services they provided. Thus, notwithstanding the failure of some representatives to provide reimbursement, the committees received payments substantially in excess of the costs they incurred.

In contrast, the amount of reimbursement received from Secret Service and national security personnel is limited by the rules of other federal agencies, not the FEC, and in some cases is not enough to cover the costs of transporting these persons. Allowing committees to use GELAC funds to cover the unreimbursed amounts ensures that transporting these persons does not deplete the public fund.

Consequently, the Commission has decided to continue its current policy of including unreimbursed media transportation expenses in the amount subject to the spending limit. It has also decided not to allow committees to pay these unreimbursed expenses with GELAC funds.

#### *Section 9004.7 Allocation of Travel Expenditures*

The NPRM sought comments on modifying 11 CFR 9004.7 to address several issues regarding the cost of campaign-related travel using government airplanes, helicopters and other vehicles. Please note that these rules apply to travel on federal government conveyances, and state or other government conveyances. The rules contemplate that for plane flights between cities served by a regularly scheduled commercial airline service, the campaign must reimburse the appropriate governmental entity for the first class airfare, and that this amount is treated as a qualified campaign expense. New language in section 9004.7(b)(5)(i) specifies that, for travel by airplane, the amount of the lowest unrestricted non-discounted first class commercial airfare available for the time traveled is to be used. Discounted fares that are subject to restrictions on the dates and times of travel, or restrictions on changing flights, are not comparable to the service provided when the campaign uses a government conveyance. Several commenters and witnesses supported this new language.

Under section 9004.7(b)(5)(v), campaign committees are responsible for determining the first class fare at the time of the flight to ensure that the right amount is paid to the appropriate government entity, and to ensure that they maintain documentation supporting these amounts. The lowest unrestricted non-discounted first class airfare is available from several sources including travel agents, and on-line services. Unfortunately, it is not possible to specify a single source for this information.

Questions also arose regarding cities that are served by regular air service, but first class flights are not available. In this case, the revised rules specify that committees should use the lowest unrestricted non-discounted coach fare available for the time traveled. This approach is consistent with the valuation method established by the Select Committee on Ethics of the United States Senate for the use of private aircraft. See Interpretive Ruling No. 412, Select Committee on Ethics, United States Senate, 101st Cong., 1st Sess., S. Prt. 101-18 at 251-52 (1989). It is also consistent with the valuation methods used by the House of Representatives' Committee on Standards of Official Conduct with respect to gifts of private transportation not associated with official travel. See, Valuation of Gifts of Transportation on Private Aircraft, Committee on

Standards of Official Conduct, Letter dated June 11, 1987. Several witnesses and commenters supported this approach.

For cities not served by regularly scheduled commercial service, the rules continue to specify that the amount to be reimbursed is the charter rate. The NPRM had proposed using the charter rate for a comparable airplane of similar make, model and size. Although that would be consistent with the approaches used by the Congressional Ethics Committees, several commenters and witnesses noted that there are no aircraft comparable to Air Force I and Air Force II, which are specially designed in terms of communications equipment and security. It was also pointed out that the Commission's proposals diverged from the approach taken in AO 1984-48 and the rules in 11 CFR 106.3(e).

It is not feasible to follow precisely the same approach as 11 CFR 106.3(e) because that rule governs non-presidential candidates who are not accompanied by the Secret Service. Accordingly, the final rules have been revised to indicate that the charter rate may be used for an aircraft sufficient in size to accommodate the campaign-related travelers, including the candidate, plus the news media and the Secret Service. Under this approach, campaigns having the use of government aircraft will incur approximately the same cost as campaigns that must charter a plane sufficient to hold campaign staff, media and Secret Service personnel.

The revised regulations address several questions that have arisen regarding the costs of "positioning" flights needed to bring the government aircraft from one stop where it dropped off the candidate and campaign staff to another stop where it will pick them up to continue the trip or return to the point of origin. New language in section 9004.7(b)(5)(ii) incorporates the Commission's previous practice regarding positioning flights. Thus, committees must pay the appropriate government entity for the greater of the amount billed by the government entity or the applicable fare for one passenger. This approach recognizes that positioning flights are campaign-related, and therefore these costs are properly treated as qualified campaign expenses. Several commenters and witnesses argued there should be no charge for positioning flights because commercial airlines do not charge to bring their planes to the city of departure. However, this argument fails to reflect the fact that charter services do build these costs into their price structures.

Several commenters also noted that the Commission has not previously required committees to pay the costs of fuel and crew time for positioning flight. The proposed language regarding the payment for fuel and crew costs has been deleted from the final rules because it would be burdensome for committees to absorb these costs.

Paragraph (b)(5)(iii) in section 9004.7 contains provisions regarding travel on federal or state government conveyances other than airplanes. For travel by helicopter or ground conveyance, the commercial rental rate should be paid for a conveyance sufficient in size to hold those traveling on behalf of the campaign, plus media representatives plus Secret Service personnel. This paragraph has been modified from the language previously included in the NPRM because there is no conveyance comparable in terms of security and communications to those used by the President and Vice President. Additional guidance on this area can be found in Advisory Opinion 1992-34. Please note that in the case of a presidential candidate who is also a state official, the equivalent rental conveyance does not need to be able to hold state police or other state security officers.

Section 9004.7(b)(5)(iv) continues to require payment for the use of accommodations paid for by a government entity. Under 11 CFR 100.7(a)(1)(iii)(B), the committee should use the usual and normal charge in the market from which it ordinarily would have purchased the accommodations. The term "accommodations" includes both lodging and meeting rooms.

New paragraph (b)(8) of section 9004.7 explicitly reflects Commission policy that travel on corporate conveyances is governed by 11 CFR 114.9(e). One witness suggested changing section 114.9(e) to include the lowest unrestricted nondiscounted coach fare for travel on corporate aircraft between cities where there is no first class service. Such a change is beyond the scope of this rulemaking.

Finally, new language in paragraph (b)(2) provides additional guidance as to when a stop will be considered campaign-related. It follows the Commission's previous decisions in AOs 1994-15 and 1992-6 that campaign activity includes soliciting, making or accepting contributions, and expressly advocating the nomination, election or defeat of the candidate. See, e.g., AOs 1994-15, 1992-6, and opinions cited therein. In these opinions, the Commission also indicated that the absence of solicitations for contributions or express advocacy regarding

candidates will not preclude a determination that an activity is campaign related. Hence, the revised rules include other factors the Commission has considered in determining whether a stop is campaign-related. Please note that this section continues to provide that incidental campaign-related contacts during an otherwise noncampaign-related stop do not cause the stop to be considered campaign-related.

While several witnesses and commenters favored inclusion of express advocacy and contribution solicitations as tests of whether a stop is campaign-related, some felt that the additional factors were subjective, workable, failed to provide sufficient guidance, and exceeded the Commission's authority given the language in *Buckley*, 424 U.S. at 79-80, equating "expenditure" with express advocacy, not mere issue advocacy. Several suggested creating a rebuttable presumption that a stop is not campaign-related in the absence of express advocacy or the solicitation, making or acceptance of contributions. The difficulty with this type of narrow interpretation of *Buckley* is that if a stop is not campaign-related because there is no express advocacy of the candidate's selection or defeat, then the costs of the stop cannot be considered qualified campaign expenses, and cannot be paid for from public funds.

Please note that paragraphs (b)(2) and (b)(3) of this section have been revised to indicate what should be shown on the itinerary, and to indicate what the official manifest created by the government or charter company must be made available for Commission inspection.

#### *Section 9004.9 Net Outstanding Qualified Campaign Expenses*

The NPRM sought comments on a proposal to require primary committees to include a categorical breakdown of their estimated winding down costs when submitting a NOCO statement. The Commission proposed this change in order to obtain more useful information about the committee's remaining obligations.

The Commission has decided to require this breakdown, and has incorporated it into paragraph 9034.5(b) of the primary regulations, which are discussed in detail below. In addition, the Commission has decided to require general election candidates to submit this information with the statements of net outstanding qualified campaign expenses ["NOQCE"] they submit after the general election. Under paragraph 9004.9(a) of the final rules, a general

election committee must include a breakdown of the estimated winding down costs listed on the NOQCE statement by category and time period. The committee must provide estimates of quarterly or monthly expenses from the date of the NOQCE statement until the expected termination of the committee's political activity. These estimates must be broken down into amounts for office space rental, staff salaries, legal expenses, accounting expenses, office supplies, equipment rental, telephone expenses, postage and other mailing costs, printing, and storage.

Requiring this breakdown will assist the Commission in ensuring that public funds are used only for qualified campaign expenses. It will also ensure that candidates who are eligible for post-election funding receive the amount to which they are entitled.

The Commission is also amending paragraph (d)(1) of this section to provide for a straight 40% depreciation of capital assets that committees include on their post-election statements of net outstanding qualified campaign expenses. Previously, committees could claim a higher depreciation under certain circumstances. This amendment conforms to the Commission's policy of adopting "bright line" rules where feasible throughout the public funding process. The changes to this section generally follow those to 11 CFR 9034.5(c)(1), discussed below.

#### **Part 9006—Reports and Recordkeeping**

##### *Section 9006.3 Alphabetized Schedules*

The final rules include new section 9006.3, which requires that presidential campaign committee reports containing schedules generated from computerized files list in alphabetical order the sources of the receipts, the payees and creditors. For individuals, including contributors, the list must be in alphabetical order by surname. However, presidential campaign committees are not required to computerize their records if they do not wish to do so. The new provision is intended to remedy situations in which, for example, committees maintain computerized records of contributors in alphabetical order, but file schedules with the order of the names scrambled. That practice makes it very difficult, if not impossible, to locate particular names on the committee's reports if the schedules are voluminous, thereby thwarting the public disclosure purposes of the FECA and making it more difficult to monitor compliance. Alphabetization of lists of contributors

is required for contributions to minor and new party candidates. Lists of contributors to the GELAC must also be alphabetized. In the event of a deficiency in the Presidential Election Campaign Fund, where private contributions may be accepted by major party candidates, alphabetical lists of contributors are also required. Unless there is a deficiency in the Fund, major party candidate who accept public funding for the general election may not accept private contributions.

There was no consensus among the witnesses and commenters on this proposal. While some supported it because it furthers full public disclosure, others opposed it on the grounds that it could increase computer costs and increase reliance on computer-driven accounting systems. The Commission notes that committees able to demonstrate such increased computer costs may claim a higher exemption for compliance expenses. One witness stated that accounting software does not currently alphabetize disbursements, debts or obligations, and suggested that committees indicate on their reports whether disbursements are listed by date of invoice, check number or date of payment. However, Commission inquiries indicate that commercial spreadsheet packages sort data in many different ways, including alphabetically. Given that most presidential campaigns use a variation of commercially available software, it should not be difficult for them to use standard database management software to alphabetize the information included on disclosure reports.

#### **Part 9007—Examinations and Audits; Repayments**

##### *Section 9007.1 Audits*

###### *Further Streamlining the Audit Process*

As noted in the NPRM, the Commission took several actions in the 1990-91 review of the public funding rules that have substantially shortened the audit process. These included easing compliance with the state-by-state allocation rules set forth at 11 CFR 106.2, and clarifying the use of subpoenas in presidential audits. See 56 FR 35899-900, 35903-04 (July 29, 1991).

The NPRM sought comments on other changes that might further streamline this process. These included publicly releasing the Interim Audit Report ("IAR"), moving up the committee's oral presentation to some earlier point in the process, and compressing or eliminating some stages of the process.

Most of the commenters who addressed this issue opposed further

changes to the audit process at this time. They noted that, in part because of changes in the last cycle, the Commission was able to approve all Final Audit Reports for the 1992 presidential elections substantially faster than in earlier cycles. They also noted that issues tend to fall away as the process continues, and argued that the size of the audits and the number of issues involved justify the length of the current process.

Nevertheless, the Commission believes that it is appropriate to further condense the audit process. This will result in more timely audits and a more efficient use of Commission and committee resources.

Accordingly, the Commission is compressing the audit process by eliminating the current IAR. Briefly, the revised process entails an expanded exit conference, including a written Exit Conference Memorandum ("ECM") prepared by Commission staff and presented to the committee at the exit conference; an opportunity for the committee to respond to the ECM; an audit report that contains the Commission's repayment determination; the opportunity for an administrative review of that determination, including the opportunity to request an oral hearing; and a post-review repayment determination and accompanying statement of reasons. These stages are discussed in greater detail below.

Former 11 CFR 9007.1(b)(2)(iii) provided for an exit conference at which Commission staff discussed preliminary findings and recommendations with committee representatives. The revised paragraph states that Commission staff will in addition prepare a written ECM that discusses these findings and recommendations, and provide a copy of the ECM to committee representatives at the exit conference. The listing of potential subjects to be addressed at the exit conference includes those formerly listed with regard to the IAR, but deletes references to Commission findings and enforcement actions, as the Commission will not have made any findings or instituted any enforcement actions at this point of the process.

Revised paragraph (c) gives the candidate and his or her authorized committee 60 calendar days following the exit conference to submit in writing legal and factual materials disputing or commenting on the findings presented in the ECM. The candidate should also provide any additional documentation requested by Commission staff during this period. The language in former 11 CFR 9007.1(c) regarding preparation of an IAR has been deleted, as the IAR is not longer part of the audit process.

Revised paragraph (d) contains many of the procedural provisions formerly found in 11 CFR 9007.1(c), which discussed preparation of the IAR. This paragraph has been renamed "Preparation of audit report," and refers to the report prepared following consideration of written materials submitted in response to the ECM. Revised paragraph (d)(1) notes that this report may address issues other than those discussed at the exit conference. This report also contains the repayment determination made by the Commission pursuant to 11 CFR 9007.2(c)(1).

In addition, former 11 CFR 9007.1(e)(2) has been moved to new paragraph (d)(2). The language has been revised to conform with the Commission's practice of issuing audit reports in their entirety, including all matters noted in the audit process. Former 11 CFR 9007.1(e)(4) has been moved to new paragraph (d)(3), and the language revised to clarify that addenda to the audit report may include additional repayment determination(s).

Revised paragraph (e), which discusses the public release of the audit report, corresponds to former 11 CFR 9007.1(e) (1) and (3), and has been slightly reworded to conform to the new procedures.

#### Sampling

The Commission is also adding new paragraph (f) to 11 CFR 9007.1 to incorporate sampling and disgorgement procedures that were adopted for use during the 1992 presidential election cycle.

The Commission has a statutory obligation to complete the audits of publicly-funded committees in a thorough and timely manner. In the past, the resources required to conduct reviews of the contributions received by presidential committees contributed to the Commission's difficulty in fulfilling that obligation.

Beginning with the 1992 election cycle, the Commission began to make more extensive use of statistical sampling for audits of contributions received by publicly-financed presidential primary election committees, and to use the sample results to quantify, in whole or in part, the dollar value of any related audit findings. While the Commission continues to conduct a limited non-sample review of contributions received by these committees, most audit testing of contributions and supporting documentation is now done on a sample basis.

The Commission notes that this approach will apply in a general election only to contributions that need

to be raised due to a deficiency in the Presidential Election Campaign Fund, to the GELAC, or to contributions raised by new or minor party candidates. See 26 U.S.C. §§ 9003(c)(2), 9006(c); 11 CFR 9003.2 (a)(2) and (b)(2), 9003.3 (b) and (c).

Some commenters argued that the Commission does not have the statutory authority to use statistical sampling in conducting its audits. However, the Commission has been given broad authority to audit publicly-funded presidential and vice presidential campaigns, see 26 U.S.C. § 9007(a), which authority includes the right to utilize generally accepted auditing standards in conducting these audits.

The use of statistical sampling is legally acceptable for projecting certain components of a large universe, such as excessive and prohibited contributions. See, e.g. *Chavez County Home Health Service v. Sullivan*, 931 F.2d 904 (D.C. Cir. 1991) (sampling audit used to recoup Medicaid overpayments to health care providers); *Michigan Dep't of Education v. U.S. Dep't of Education*, 875 F.2d 1196 (6th Cir. 1989) (sampling of 259 out of 66,368 total payment authorizations upheld as proper basis for determining amount of misexpended federal funds in vocational-rehabilitative program); *Georgia v. Califano*, 446 F. Supp. 404 (N.D. Ga. 1977) (Medicaid overpayments).

Most of these cases require the agency to demonstrate that it is infeasible to conduct a 100% review. See, e.g., *Chavez*, 931 F.2d at 916. While the Commission was able to conduct a more extensive review in the past, the increasing volume of records to be checked has now made this impossible. An accountant who testified at the Commission's public hearing stated that the Commission had no option but to use sampling, because of the large number of records involved in presidential campaign audits—a recent campaign with which he had been worked had involved over 200,000 contributions and tens of thousands of disbursements. These figures are not unusual in presidential campaign audits.

One commenter argued that these cases, which involve recoupment of government overpaid funds, should not be used to justify the use of sampling to determine excessive and illegal contributions which come from private sources. However, for statistical purposes there is no distinction between these two situations.

Some commenters also questioned the validity of the statistical sampling technique currently employed in this process. However, the fact that the

technique may be used in dissimilar programs, or programs seeking other types of information, does not mean that it is not appropriate for use in this context.

There is substantial judicial precedent to the effect that, when considering a challenge to individual accounting rules, the reviewing court must defer to agency expertise. In *A.T.&T. Co. v. United States*, 299 U.S. 232 (1936), the Supreme Court stated that before it would overrule an agency's decision to use a certain accounting system, that system "must appear to be so entirely at odds with fundamental principles of correct accounting as to be the expression of whim rather than an exercise of judgment." *Id.* at 236-37. See also *Transcontinental Gas Pipe Line Corp. v. Federal Power Commission*, 518 F.2d 459, 465 (D.C. Cir. 1975).

The statistical sampling method used for the Commission's matching fund submission process was designed and recommended by Ernst and Whinney (now Ernst and Young), one of the world's largest accounting firms. The Commission believes that this method works equally well in evaluating excessive and illegal contributions. In addition, in 1979 the Commission's Audit Division wrote to Arthur Andersen & Company, asking whether it would be appropriate to use statistical sampling to determine both matching fund eligibility and nonqualified campaign expenses. They responded that this would be appropriate in both situations. The Commission soon afterwards began to use statistical sampling in making matching fund determinations, but has not yet done so to determine nonqualified campaign expenses. However, if statistical sampling can be used to extrapolate the amount of nonqualified campaign expenses, it would seem equally capable of extrapolating the number of excessive and illegal contributions.

One commenter who supported this approach requested that the Commission advise committees in advance what records will be reviewed on a full 100% basis. The Commission believes it is inappropriate to divulge this kind of information in advance. Also, this can vary from committee to committee.

In its letter endorsing the use of statistical sampling to determine the amount of nonqualified campaign expenses, Arthur Andersen & Company recommended "that the resulting repayment determination [the repayment determination based on the sample] not be deemed as final until the committee being audited has been provided with the opportunity to

furnish additional support that might indicate that a modification of the sample results would be appropriate." The Commission follows this recommendation in projecting excessive and illegal contributions.

The Commission's projection of the total amount of excessive or prohibited contributions based on apparent excessive or prohibited contributions identified in a sample of a committee's contributions is only a preliminary finding. The Commission informs the committee which items served as the basis for the sample projection, and the committee responds to the specific sample items used to make the projection. If the committee shows that any errors found among the sample items were not excessive or prohibited contributions; were timely refunded, reattributed or redesignated; or for some other reason were not errors, a new projection is made, based on the reduced number of errors in the sample. A witness at the Commission's hearing on these rules endorsed the use of sampling in this context in part because of this opportunity to work with Commission auditors and obtain a lower projection if the committee provides additional information to reduce the number of errors found in the sample.

#### Disgorgement

The Commission is further clarifying at new paragraph 9007.1(f)(3) that the amount of any excessive or prohibited contributions that are not refunded, reattributed or redesignated in a timely manner shall be paid to the United States Treasury. Committees have 30 days from the date of receipt in which to refund prohibited contributions, and 60 days in which to obtain the reattribution, redesignation or refund of excessive contributions. 11 CFR 103.3(b)(1), (2) and (3). A committee's failure to take action on these contributions is a failure to cure contributions that are in violation of the FECA. The same is true of attempts to cure them outside of the specified time periods.

Courts have upheld the use of disgorgement in cases involving securities violations "as a method of forcing a defendant to give up the amount by which he was unjustly enriched." *SEC v. Tome*, 833 F.2d 1086, 1096 (2d Cir. 1987), citing *SEC v. Commonwealth Chemical Securities, Inc.*, 574 F.2d 90, 102 (2nd Cir. 1978). Requiring repayment to the Treasury for contributions that have been accepted in violation of 2 U.S.C. §§ 441a and 441b is consistent with this reasoning.

Disgorgement eliminates the need for the Commission to monitor a committee's refunds of excessive or

prohibited contributions. In addition, it is easier for a committee to make one payment to the Treasury, as opposed to refunding multiple contributions. Finally, although the Commission has used disgorgement in instances where a 100% review is conducted, this is a practical approach in those situations where it is difficult to discern the original contributors, e.g., where a 100% review is not done.

Some commenters questioned the Commission's authority to require repayment to the Treasury because this is not specifically provided for in the public funding Acts. However, the equitable doctrine of disgorgement supports the payment to the Treasury under these circumstances. The purpose of statistical sampling would be defeated if a 100% review of contributions was required to determine which particular contributions must be refunded, reattributed or redesignated. On the other hand, allowing committees to refund only those excessive or illegal contributions uncovered in the sample could result in a committee's retention of substantial funds to which it was not legally entitled.

Disgorgement is also consistent with past Commission practice. See Matter Under Review ("MUR") 1704, where, based upon preliminary estimates, Commission directed respondents to pay \$350,000 to the United States Treasury for contributions that would have exceeded section 441a limits; Plaintiff's Motion to Effectuate Judgment, *FEC v. Populist Party*, No. 92-0674(HHG) (D.D.C. filed May 4, 1993).

Moreover, this proposed payment is analogous to, and consistent with, the requirement at 11 CFR 9038.6 that stale-dated checks (those to creditors or contributors that remain outstanding after the campaign is over) be paid to the Treasury. This issue arose after the 1984 election cycle, and the rule was promulgated as a means to codify the Commission practice of requiring disgorgement, which was implemented during that cycle. See 52 FR 20864, 20874 (June 3, 1987).

One commenter argued that the stale-dated check situation should be distinguished from that involving excessive and illegal contributions, because the former involves the return of public funds to the Treasury, while the latter involves private contributions. Once again, however, the same accounting principles apply to both situations.

#### Section 9007.2 Repayments

##### Further Streamlining the Audit Process

Section 9007.2 has been revised to reflect amendments made to section 9007.1. Revised paragraph (a)(2) states that the audit report provided to the candidate under 11 CFR 9007.1(d), which contains the Commission's repayment determination, will constitute notification for purposes of the three-year notification requirement of 26 U.S.C. 9007(c). This approach is consistent with two recent decisions by the United States Court of Appeals for the District of Columbia Circuit, *Dukakis v. Federal Election Commission*, No. 93-1219 (D.C. Cir. May 5, 1995) and *Simon v. Federal Election Commission*, No. 93-1252 (D.C. Cir. May 5, 1995).

Paragraph (a)(2) has also been revised to conform to the statutory requirement that the 26 U.S.C. 9007(c) notification period ends 3 years after the day of the presidential election.

Paragraph (a)(3) has been reworded to state that once the candidate receives notice of the Commission's repayment determination contained in the audit report, the candidate should give preference to the repayment over all other outstanding obligations of the committee, except for any federal taxes owed by the committee.

The Commission is moving former 11 CFR 9004.4(c) to new paragraph (a)(4). This paragraph, which deals with permissible sources of repayments, is more properly located in the section dealing with repayments.

New repayment determination procedures are set forth in revised paragraph (c). Revised paragraph (c)(1) largely follows the former language, but refers to the audit report as the source of the repayment determination. The last sentence of that paragraph has also been revised to clarify that the candidate shall repay to the United States Treasury the amount which the Commission has determined to be repayable, using procedures set forth in 11 CFR 9007.2(d).

Revised paragraph (c)(2) sets forth the procedures necessary for a committee to obtain an administrative review of the repayment determination. Please note that this review is limited to repayment issues. It does not cover other issues, such as disgorgement, that will if necessary be handled through the enforcement process.

Paragraph (c)(2)(i) corresponds to former 11 CFR 9007.2(c)(2) and addresses the submission of written materials as part of this process. Paragraph (c)(2)(ii) corresponds to former 11 CFR 9007.2(c)(3), discussing

the oral hearing. The language in these paragraphs for the most part follows the former rules, with the following additions. The deadline for filing written materials seeking an administrative review of the repayment determination has been lengthened from 30 to 60 days. Also, the candidate's failure to timely raise an issue in the written materials presented pursuant to paragraph (c)(2)(i) will be deemed a waiver of the candidate's right to raise the issue at any future stage of the proceedings. See *Robertson v. FEC*, 45 F.3d 486 (D.C. Cir. 1995). Further, under paragraph (c)(2)(ii), a candidate who desires an oral hearing must, at the same time he or she presents written materials pursuant to paragraph (c)(2)(i), request such a hearing in writing, and identify in that request the repayment issues the candidate wishes to address at the oral hearing.

Revised paragraph (c)(3) corresponds to former 11 CFR 9007.2(c)(4), and now deals with repayment determinations made after an administrative review.

Please note that the statement regarding the Commission's possible consideration of new or additional information from other sources does not provide a means for the candidate or anyone acting on the candidate's behalf to make untimely submissions. Former 11 CFR 9007.2(c)(4) has been repealed.

Paragraphs (d), (f), (g) and (i) have been revised to conform with the new terminology used elsewhere in this section.

#### *Gains On the Use of Public Funds*

As indicated in the discussion of section 9004.5, above, the final rules contain a conforming amendment to the introductory language of section 9007.2(b)(4). This amendment clarifies that receiving income from investment or any other use of payments from the Fund is a basis for requiring payment to the Treasury. The Commission will require the committee to pay any such income received, less taxes paid, to the Treasury. The revisions to sections 9004.5 and 9007.2 ensure that any income received through the use of public funds benefits the public financing system. However, as indicated above, this provision does not apply to income that is exempt function income under 26 U.S.C. § 527(c)(3), such as amounts received from fundraising activities.

#### *Interest*

The Commission sought comment in the NPRM on whether interest should be assessed in certain situations. Although some commenters opposed this idea, the Commission believes it is

appropriate to assess interest on late repayments, and is therefore amending 11 CFR 9007.2(d) to provide that interest will be assessed on repayments made after the initial 90-day repayment period established at 11 CFR 9007.2(d)(1) or after the 30-day repayment period established at 11 CFR 9007.2(d)(2).

In the absence of interest charges for late repayments, debtors have little or no incentive to make timely repayments. Without this requirement, debtors may be more likely to pay their private sector debts first, as these generally accrue interest, and their government debts last.

While the presidential fund Acts contain no language on interest assessment, federal common law holds that interest may be assessed on debts owed the government, even without a statutory provision granting that power. *Robinson v. Watts Detective Agency*, 685 F.2d 729, 741 (1st Cir. 1982), cert. denied, 459 U.S. 1204 (1983). In particular, a statute is not necessary to compel payment of interest where equitable principles allow this. *Young v. Godbe*, 82 U.S. 562, 565 (1872).

The Commission has already established the precedent that it may assess interest when a presidential committee seeks a stay of a repayment determination pending appeal. 11 CFR 9007.5(c)(4), 9038.5(c)(4). One reason cited by the Commission for taking this action was to protect the Treasury "by helping to ensure that the repayment challenge is a serious one and not a dilatory tactic." Agenda Document 86-118, Proposed Revision of Title 26 Regulations (Nov. 26, 1986). Another was that, if the candidate is earning interest on the disputed repayment amount, the Treasury and not the candidate should receive the benefit if the Commission's repayment determination is upheld. *Id.* Both reasons are equally applicable in this situation.

By agreeing to certain conditions, including an audit and appropriate repayment, the presidential committees have established a contractual relationship with the Commission under which interest assessment becomes appropriate. See *West Virginia v. United States*, 479 U.S. 305, 310 (1987). Also, if a debtor-creditor relationship is established, "interest is allowed as a means of compensating a creditor for loss of use of his money." *United States v. United Drill and Tool Corporation*, 183 F.2d 998, 999 (D.C. Cir. 1950). Such a relationship exists in this context in that, prior to the receipt of public funds, the candidate must agree to repay unexpended funds, money determined

to be spent in an unqualified manner, and amounts received in excess of entitlement. 11 CFR 9003.1(b)(6), 9033.1(b)(7).

The interest currently assessed under 11 CFR 9007.5(c)(4) and 9038.5(c)(4) is the greater of that calculated using the formula set forth at 28 U.S.C. § 1961 (a) and (b) for computing interest on money judgments in federal civil cases, or the amount actually earned on the funds set aside under those sections. The Commission believes it is appropriate to utilize a similar approach in this situation. The Commission is therefore adding new paragraph 9007.2(d)(3) to provide that a comparable formula shall be used in assessing interest on late repayments under section 9007.2.

#### *Section 9007.3 Extensions of Time*

The Commission is amending paragraph (c) to include in that paragraph the policy that, whenever 11 CFR Part 9007 establishes a 60-day response period, the Commission may grant no more than one extension of time, which extension shall not exceed 15 days. The rules formerly provided for a 30 day response period. Materials provided to the committees prior to the audit process explained that extensions of time were limited to a single, 45 day extension. The rules thus continue the former 75-day total response period, and the initial 60-day response period may result in fewer extension of time requests.

#### *Section 9007.5 Petitions for Rehearings; Stays of Repayment Determinations*

The Commission is making conforming amendments to paragraphs (a), (b), (c)(1)(ii) and (c)(4), to reflect changes in terminology for the audit and repayment process. See discussion of 11 CFR 9007.1 and 9007.2, above.

#### *Section 9007.7 Administrative Record*

New section 9007.7 explains which documents constitute the administrative record for purposes of judicial review of final determinations regarding candidate certification and eligibility, and repayment determinations. The NPRM had included a lengthy list of documents that usually form the basis of the administrative record. It also indicated that certain items are not part of the Commission's decisionmaking process, and thus not part of the record on review.

One commenter expressed concern that the Commission was trying to impermissibly restrict documents to be included in the administrative record. The comment noted that judicial review is based on the whole record before the

agency. Similarly, another commenter stated that the administrative record should include all materials that form the basis of the Commission's decisions. Two comments suggested including workpapers on which the auditors relied in making their calculations and recommendations. During the course of the audit and repayment processes, it has been the Commission's practice to provide committees with the audit work papers they need to formulate their responses.

The Commission agrees that the administrative record includes all materials it considered in making its decision, and the final rules have been modified to reflect this. Thus, it will generally include all documents circulated to the Commission (including attachments) and materials referenced in those documents. However, documents in the files of individual Commissioners, or documents in FEC employees' files which do not constitute a basis for the Commission's decisions, are not included in the record. The administrative record also does not include transcripts or tapes of Commission discussions of audit or repayment matters. See, *Common Cause v. Federal Election Commission*, 676 F. Supp. 286, 289 and n.3 (D.D.C. 1986). Although these materials may sometimes be made available under the Freedom of Information and Government in the Sunshine Acts, they do not provide an adequate explanation of the reasons for the Commission's decisions because they represent pre-decisional discussions. Documents properly subject to privileges such as an attorney-client privilege, or items constituting attorney work product, are also excluded from the administrative record.

The new rules indicate that documents and materials timely submitted by publicly-funded committees for Commission consideration are a part of the administrative record. Materials will also be considered timely submitted if they are received within an extension of time granted by the Commission. It is important that committees avail themselves of the opportunity to submit documents and other materials in a timely fashion, as they will be deemed to have admitted all specific findings and conclusions contained in an audit report or a repayment determination unless they specifically contest those findings and conclusions and provide supporting evidence and legal arguments at the appropriate time. When submitting evidentiary materials, committees should keep in mind that statements of counsel that are not

supported by personal knowledge do not constitute evidence. Committees may include in their submissions the audit work papers with which they have been provided. They need not include transcripts or tapes of their oral presentation to the Commission regarding repayment determinations, as those materials are already a part of the record.

#### *Section 9008.12 Repayments*

A conforming amendment has been added to paragraph (a)(2), to state that the audit report provided to the convention committee that contains the Commission's repayment determination will constitute notification for purposes of the three-year notification requirement of 26 U.S.C. 9008(h).

The Commission's rules governing public financing of national nominating conventions provide at 11 CFR 9008.11 that audits of convention committees follow the procedures for audits of presidential campaign committees set forth at 11 CFR 9007.1 and 9038.1. The former language contained a reference to the IAR, which is no longer a part of these procedures.

#### **Part 9032—Definitions**

##### *Section 9032.9 Qualified Campaign Expenses*

The Commission is adding a conforming amendment to paragraph (c) of this section to reflect the new attribution of certain expenditures between the primary and the general election limits. The amendment notes that certain expenditures formerly covered by this paragraph will not be attributed under these new guidelines. See discussion of 11 CFR 9034.4(e), below.

#### **Part 9033—Eligibility for Payments**

##### *Section 9033.1 Candidate and Committee Agreements*

In the interests of clarity, the Commission is adding a comma in the second sentence of 11 CFR 9033.1(b)(5). Paragraph (b)(5) concerns candidate and committee agreements to furnish certain documentation to the Commission.

A conforming amendment has been added to paragraph 9033.1(b)(7), clarifying that the same candidate and committee responsibilities that attach to an audit and examination made pursuant to 11 CFR part 9038 also attach to part 9039 investigations, under appropriate circumstances. See discussion of part 9039, below.

The final rules slightly reword paragraph (b)(11) of this section to more clearly indicate that candidates must agree to pay any civil penalties arising

from violations of the FECA, whether provided for in a conciliation agreement or imposed in a judicial proceeding.

New paragraph 9033.1(b)(12) has been added to require presidential primary candidates to include closed captioning in the preparation of their television commercials, as a precondition of their receiving public funds. This amendment corresponds to new paragraph 9003.1(b)(10), discussed above. The Legislative Branch Appropriations Act of 1992 does not specifically amend 26 U.S.C. § 9033, which sets out the eligibility requirements for presidential primary candidates. However, the Appropriations Act does state that the closed captioning requirement inserted in 26 U.S.C. § 9003(e) applies both to general election candidates and to candidates who are eligible for funding "under chapter 96" of Title 26 of the United States Code, that is, the Matching Payment Act. The Commission is therefore amending 11 CFR 9033.1(b) to reflect this new requirement.

##### *Section 9033.4 Matching Payment Eligibility Threshold Requirements*

Former 11 CFR 9033.4(b) stated that, in evaluating a candidate's matching fund submission, the Commission could consider other relevant information in its possession, including but not limited to past actions of the candidate in an earlier campaign. This provision was held to exceed the Commission's statutory authority in *LaRouche v. FEC*, 996 F.2d 1263 (D.C. Cir. 1993), cert. denied 114 S. Ct. 550. The Commission is therefore deleting this paragraph from the rule.

##### *Section 9033.11 Documentation of Disbursements*

Revised section 9033.11 follows revised section 9003.5.

#### **Part 9034—Entitlements**

##### *Section 9034.4 Use of Contributions and Matching Payments*

###### *Winding Down Costs*

The regulations at 11 CFR 9034.4(a)(3)(i) permit candidates to receive contributions and matching funds, and make disbursements, for the purpose of defraying winding down costs over an extended period after the candidate's date of ineligibility ("DOI"). These amounts are treated as qualified campaign expenses, and can result in additional audit fieldwork and preparation of addenda to audit reports to focus on these receipts and disbursements.

As part of an effort to streamline and shorten the audit process, the



Commission sought comment on ways to reduce the winding down time for campaigns. The NPRM suggested limiting the amount that a candidate may receive for winding down costs to no more than a specified dollar amount, or a fixed percentage of the candidate's total expenditures during the campaign, or a fixed percentage of total matching funds certified for the candidate. The NPRM questioned whether campaigns that receive a pre-established dollar amount, but do not use the entire amount for winding down costs, should be permitted to retain the unspent amount. Alternatively, comments were sought on establishing a cutoff date after which winding down expenses would no longer be considered qualified campaign expenses.

Several commenters and witnesses opposed limiting wind down costs. They felt that basic fairness requires campaigns to have the resources necessary to respond during the audit process and to defend themselves against enforcement proceedings. It was also pointed out that during this period, campaigns need to be able to verify the proper payment of remaining bills, and that it would be a waste of federal funds if they were hampered in identifying incorrect bills.

The Commission agrees that it would be quite difficult to select an amount or time frame sufficient to meet reasonable expenses incurred in winding down the campaign. A limit on the amount of public funds available for winding down would provide the same difficulties as a restriction on the total funds to be used for wind down. Consequently, the final rules contain no new restrictions on the amount spent on winding down or the time taken. Thus, the Commission will continue to review the committee's wind down costs on a case by case basis.

#### *Post-DOI Expenses as Exempt Compliance Expenses*

New language in section 9034.4(a) incorporates the current practice of permitting publicly-funded primary committees to treat 100% of salary, overhead and computer expenses incurred after the candidate's DOI as exempt compliance expenses, beginning with the first full reporting period after DOI. See, *Financial Control and Compliance Manual for Presidential Primary Candidates Receiving Public Financing*, p. 25 (January 1992). Two witnesses and one commenter urged adoption of this provision. Please note that this regulation does not apply to expenses incurred during the period between DOI and the date on which a

candidate either re-establishes eligibility or ceases to continue to campaign.

#### *Gifts and Bonuses*

New language in section 9034.4(a) and section 9004.4(a) permits campaign committees to use federal funds to defray the costs of gifts for committee staff, volunteers and consultants, as long as the gifts do not exceed \$150 per individual and as long as all gifts do not exceed \$20,000. This approach received a favorable response from one witness and one commenter. It is somewhat similar to a provision included in the public funding rules for convention committees at 11 CFR 9008.7(a)(4)(xii). See 59 FR 33618 (June 29, 1994).

With regard to bonus arrangements provided for in advance in a written contract, the NPRM sought comments on whether the amount of these bonuses should be restricted to a fixed percentage of the compensation paid as provided by the contract, or whether these bonuses should be subject to the overall \$20,000 limit. A number of commenters and witnesses opposed these suggestions on the grounds that bonus decisions should remain within the discretion of the committees; primary campaigns may not know at the outset how much will be available for bonuses; and campaigns may choose not to enter into written employment contracts. Some felt these proposals were more feasible for general election committees than for primary campaigns because the party nominees know at the outset what their funding level will be for the general election. It was also suggested that all bonuses be paid within ten days of a committee's date of ineligibility.

The final rules have been revised to require that for general election campaigns, bonus arrangements must be provided for prior to the date of the general election in a written contract, and must be paid during the expenditure report period, which ends thirty days after the general election. Similarly, primary campaigns must make bonus arrangements in advance and must pay bonuses no later than thirty days after the candidate's DOI. These time frames allow ample time for campaigns to make decisions regarding bonuses.

#### *Lost or Damaged Equipment*

The Commission is adding new paragraph (b)(8) to section 9034.4 to clarify that the cost of lost or damaged items may be considered a nonqualified expense for purposes of these rules. This change parallels new paragraph 9004.4(b)(8), and is discussed in more

detail in connection with section 9004.4, above.

#### *Funding General Election Expenses With Primary Funds*

The Presidential Election Campaign Fund Act, the Presidential Primary Matching Payment Account Act, and Commission regulations require that publicly funded presidential candidates use primary election funds only for expenses incurred in connection with primary elections, and that they use general election funds only for general election expenses. 26 U.S.C. 9002(11), 9032(9); 11 CFR 9002.11, 9032.9. These requirements are tied to the overall primary and general election expenditure limits set forth at 2 U.S.C. 441a (b) and (c), and at 26 U.S.C. 9035(a). See also 11 CFR 110.8(a), 9035.1(a)(1).

Questions have arisen in recent election cycles as to whether certain expenses charged to primary committees were in fact used to benefit the general election. Once a candidate has secured enough delegates to win the nomination, the focus of the campaign may turn in large part to the general election. However, it can be difficult to distinguish between primary campaign activity, such as that designed to lock up delegates or otherwise related to the outcome of the primary campaign, and convention preparation, from activity that is geared towards winning the general election.

The NPRM sought general suggestions on how best to address this situation. For example, it suggested that certain expenditures within a set time frame before the date of the candidate's nomination might be subject to higher scrutiny. In addition, the Notice contained specific proposals on how to treat capital assets, certain goods and services, and supplies and materials in this context; and sought comments on how other expenditures, such as those for campaign related travel and media expenses, should be attributed.

Most of the commenters who addressed this issue favored a "bright line" cut-off date between primary and general election expenses, which would give committees clear guidance as to which expenses will be attributed to the primary election and which to the general election. Some suggested that this date be set as the candidate's date of ineligibility. Moreover, most comments opposed any guidelines or presumptions that would require a "case-by-case" determination of how certain expenditures should be characterized.

The Commission recognizes that it can be difficult to select a single "bright



line" date appropriate for all campaigns under all circumstances. Also, the adoption of "bright line" rules could in certain instances result in the primary committee's subsidizing the general election committee, or vice versa. Nevertheless, the Commission believes this approach is appropriate with regard to certain specific types of expenditures that may benefit both the primary and the general election. These include expenditures for polling; state or national offices; campaign materials; media production costs; campaign communications; and campaign-related travel costs (see also 11 CFR 9034.5, depreciation of capital assets, discussed below).

The Commission recognizes that there could be situations in which this approach does not accurately reflect the relative impact of particular expenditures. However, these differences should balance themselves out over the course of a lengthy campaign. In addition, a major factor in the Commission's decision is the desire to complete the audits more quickly and using fewer agency resources. It can be extremely time- and labor-intensive for both the Commission and the committees to examine thousands of individual expenditures, especially where, as here, both the timing and the purpose of each expenditure is at issue. Accordingly, the Commission is adding a new paragraph (e) to this section partially deal with this situation.

The introductory language to this paragraph notes that these rules apply only to campaigns of candidates who receive public funding in both the primary and the general election. Paragraph (e)(1) states the general rule that any expenditure for goods or services that are used exclusively for either the primary or the general election campaign shall be attributed to the limits applicable to that election.

Please note that primary expenditures are also attributable to the state allocation limits set forth in 11 CFR 106.2. Also, any expenditures that are attributed to the general election limits shall be paid for with general election funds.

Paragraph (e)(2) states that polling expenses shall be attributed according to when the results of the poll are received. If the results are received on or before the date of the candidate's nomination, the expenses will be considered primary election expenses. If partial results are received both before and after the date of the candidate's nomination, the costs shall be allocated between the primary and the general election limits based on the percentage

of results received during each such period.

A conforming amendment is also being made to 11 CFR 9003.4(a) (see discussion above). That paragraph formerly stated that certain polling expenses could count against the general election limit regardless of when the results of the polling were received.

Paragraph (e)(3) addresses overhead expenditures and payroll costs incurred in connection with state or national campaign offices, and attributes these according to when usage of the office occurs. For usage on or before the date of the candidate's nomination, these expenses are attributed to the primary election, except for periods when the office is used only by persons working exclusively on general election campaign preparations. The definition of "overhead expenditures" set forth in 11 CFR 106.2(b)(2)(iii)(D) is incorporated by reference into this paragraph.

Paragraph (e)(4) addresses campaign materials, including bumper stickers, campaign brochures, buttons, pens and similar items, that are purchased by the primary campaign and later transferred to the general election campaign. Any such materials that are used in the general election shall be attributed to the general election limits. Materials transferred to the general election committee but not used in the general election shall be attributed to the primary election limits.

Paragraph (e)(5) states that 50% of production costs for media communications that are broadcast or published both before and after the date of the candidate's nomination shall be attributed to the primary election limits, and 50% to the general election limits. Please note that distribution costs, including such costs as air time and advertising space in newspapers, must be paid for 100% by the primary or general election campaign depending on when the communication is broadcast or distributed.

The Commission notes that the pre- and post-nomination communications need not be identical for this attribution ratio to apply. Obvious changes include such matters as stating that the communication was "paid for by" the candidate's general rather than primary election campaign committee; and references to the candidate as the party's actual, rather than potential, nominee. However, there are also situations where a communication is substantially unchanged, except for a portion targeted to, for example, specific constituent groups or different parts of the country. The Commission also intends to apply

the 50/50 attribution ratio to these communications.

Paragraph (e)(6) addresses campaign communications, including solicitations, that are not used in both the primary and the general election. In the past questions have arisen as to whether a per-DOI communication was intended to influence the general election, or vice versa (e.g., thank you letters for primary contributions sent after the date of the candidate's nomination).

Paragraph (e)(6)(i) states that the costs of a solicitation shall be attributed to the primary election or to the General Election Legal and Accounting Compliance Fund, depending on for which purpose the solicitation is made.

While candidates may not accept private contributions to cover expenses incurred to benefit the general election campaign, they may solicit contributions for the GELAC. The rule states that, if a candidate solicits funds for both the primary election and for the GELAC in a single communication, 50% of the cost of the solicitation shall be attributed to the primary election, and 50% to the GELAC. Consequently, the primary committee must pay 50% of the solicitation costs, and the GELAC must pay 50%.

Occasionally a committee will solicit contributions to retire a primary election debt, and receive more money in response to the solicitation than is needed to pay off the debt. Under 11 CFR 9003.3(a)(1)(iv)(C), the committee may transfer such excess contributions to the GELAC if proper redesignations are obtained. If a committee chooses to seek redesignations, the cost of the solicitation shall be attributed to the primary limits, while any redesignation costs shall be paid by the GELAC.

Paragraph (e)(6)(ii) states that the costs of a communication that does not include a solicitation shall be attributed to the primary or general election limits based on the date on which the communication is broadcast, published or mailed.

Paragraph (e)(7) states that expenditures for campaign-related transportation, food and lodging by any individual, including a candidate, shall be attributed according to when the travel occurs. If the travel occurs on or before the date of the candidate's nomination, the cost is a primary election expense, except that the costs of travel by a person who is working exclusively on general election campaign preparations shall be considered a general election expense even if the travel occurs before the candidate's nomination. Travel both to

and from the convention shall be a primary expense.

#### *Sources of Repayment*

The rule set out in current paragraph 9034.4(c) has been moved to new paragraph 9038.2(a)(4). Paragraph 9034.4(c) has been removed and reserved for future use. This change generally follows the conforming amendment discussed in connection with section 9004.4, above.

#### *Section 9034.5 Net Outstanding Campaign Obligations*

##### *NOCO Statements*

The final rules make a number of changes in the requirements for submission of NOCO statements set out in section 9034.5. Paragraph (b) is amended to require committees submitting NOCO statements to include a breakdown of the estimated winding down costs listed on the statement by category and time period. The committee must provide estimates of quarterly or monthly expenses from the date of the NOCO statement until the expected termination of the committee's political activity. These estimates must be broken down into amounts for office space rental, staff salaries, legal expenses, accounting expenses, office supplies, equipment rental, telephone expenses, postage and other mailing costs, printing, and storage.

One commenter noted that it can be difficult to estimate winding down costs until well into the audit process, because the committee continues to receive bills, and also because it is not clear what issues will arise until the audit is underway.

The Commission recognizes that the winding down figures on a committee's NOCO statements are, by necessity, estimates of anticipated expenses. However the Commission has decided to require a breakdown of these expenses in order to obtain more meaningful information than is obtained under the existing rule. Currently, many NOCO statements list the candidate's estimated necessary winding down costs as a single lump sum. Requiring the breakdown will help the Commission determine whether the candidate is entitled to receive the entire estimated amount.

The final rules also revise the schedule for submission of revised NOCO statements. Under the current rules, candidates are required to submit a revised NOCO statement with each matching payment request submitted after DOI. The proposed rules would have required candidates to submit an additional revised NOCO statement just

before the date when matching fund payments will be certified, on a date to be published by the Commission. The additional statement would be used to ensure that the amount of matching funds certified accurately reflects the committee's financial situation at the time of certification. One commenter thought this additional requirement would be burdensome and will not solve the problem identified in the NPRM.

The Commission believes that requiring two revised NOCO statements for each matching payment submission is unnecessary. Consequently, the final rules change the Commission's current policy of requiring candidates to submit a revised NOCO statement at the time of each post-DOI matching payment submission. Instead, the final rules require the candidate to submit a certification that his or her remaining net outstanding campaign obligations equal to or exceed the amount submitted for matching. If the candidate so certifies, the Commission will process the matching payment submission.

The candidate must then submit a revised NOCO statement just before the next regularly scheduled payment date, on a date to be determined and published by the Commission in the **Federal Register**. The statement must reflect the financial status of the campaign as of the close of business three business days before the due date, and must also contain a brief explanation of each change in the committee's assets and obligations from the most recent NOCO statement. This will allow the Commission to adjust the committee's certification to reflect any change in the committee's financial position that occurs after submission of the initial matching payment request. Thus, the amount certified will be closer to the committee's actual entitlement, reducing the need to seek subsequent repayment.

This revised schedule is set out in paragraphs 9034.5(f) (1) and (2) of the final rules. Paragraph 9034.5(f)(2) of the former rules has been renumbered as paragraph (f)(3), without revision.

The Commission notes that, while the additional information required should increase the accuracy of the matching fund certifications, as under the current practice, the Commission will not approve NOCO statements when they are submitted. Thus, although the new rules will often reduce the size of a committee's repayment, the Commission will continue to seek repayment under appropriate circumstances.

#### *Capital Assets*

The Commission is amending paragraph (c)(1) of this section to provide for a standard 40% depreciation of capital assets that are received by a primary campaign committee prior to the candidate's DOI and subsequently sold to the general campaign committee or to another entity.

The former rule set forth the 40% depreciation allowance, but allowed a higher depreciation for particular item if the committee demonstrated through documentation that the asset's fair market value was lower. However, there was no corresponding provision for the Commission to document a higher fair market value. The NPRM proposed that the 40% figure be subject to both increase and decrease, under appropriate circumstances. Most of those who commented on this issue opposed this change, which the Commission had proposed to more accurately reflect its experience in dealing with this situation.

Consistent with its approach to other expenditures that can be attributed to both the primary and the general election limits (see discussion of 11 CFR 9034.4(e), above), the Commission is adopting a "bright line" 40% depreciation figure for capital assets that are used in both the primary and the general election campaigns. While the Commission recognizes that there may be instances in which the 40% figure is too low, there are also situations in which that figure may be too high. The Commission believes that in many instances there differences will balance themselves out over the course of a lengthy campaign. Also, given the number of capital assets involved in a typical campaign, it can be time- and labor-intensive for both the Commission and the committee to handle these on a case-by-case basis.

Please note that the term "capital asset" includes components of a system used as a whole and purchased at the same time at a cost exceeding \$2000, even if individual system components cost less than \$2000.

#### *Section 9034.6 Expenditures for Transportation and Services Made Available to Media Personnel; Reimbursements*

Section 9034.6 has been reorganized with minor substantive changes. These revisions are the same as those made to section 9004.6, the parallel provision for general election committees. See the discussion of section 9004.6, above.

### *Section 9034.7 Allocation of Travel Expenditures*

The changes in section 9034.7 follow the changes to section 9004.7.

### **Part 9036—Review of Submission and Certification of Payments by Commission**

#### *Section 9036.2 Additional Submissions for Matching Fund Payments*

##### *Complete Contributor Identification*

Treasurers of political committees, including authorized committees of presidential candidates, are required by 2 U.S.C. §§ 432(i) and 434(b) to use their best efforts to obtain, maintain and report the name, address, occupation and employer of all contributors who give over \$200 per calendar year. The Commission recently issued revised rules regarding this reporting obligation. See 58 FR 57725 (Oct. 27, 1993). During that rulemaking, two commenters suggested revising 11 CFR 9036.2 so that presidential primary candidates would only receive matching funds for contributions exceeding \$200 that also contain complete contributor information. While full contributor identifications are required for such contributions in threshold submissions under 11 CFR 9036.1(b), they have not been required under 11 CFR 9036.2(b)(1)(v) for additional submissions for matching funds. Accordingly, the Commission sought comment on whether to delete section 9036.2(b)(1)(v), thereby requiring complete contributor information for all matchable contributions exceeding \$200. In the alternative, comments were sought on only matching these contributions if committees can provide evidence demonstrating they made their best efforts to obtain the information.

There was no consensus among the commenters and witnesses who addressed this issue. Some felt that the public has a right to complete disclosure of this information when its money is given to presidential candidates, and that there is no rational basis for the distinction between threshold submissions and subsequent requests for matching funds. They cited figures from the 1992 election cycle to argue that some candidates did not take the disclosure statutes seriously. Others pointed out that the new best efforts rules are intended to resolve this issue, and that it would be onerous for committees to show during the matching submission process that they have satisfied the new best efforts rules. Some felt that contributors should not be forced to forego their privacy rights

in order to have their contributions matched. Hence, they argued that vigorous enforcement of the new best efforts rules is the appropriate course of action.

For several reasons, the Commission has decided not to change the current requirements regarding matchability of contributions from individuals. First, the Commission has seen a significant increase in the reporting of occupation and employer since the best efforts regulations were revised. For example, a comparison of authorized committee reports for April–September 1992 with reports for April–September 1994, shows the number of itemizable contributions from individuals which lacked information on the contributor's principal place of business decreased from 17% to 10%. Thus, it is premature to conclude that further measures are needed to enhance disclosure. Secondly, it is not an efficient use of Commission resources to verify this information during the matching fund submission process. Doing so would slow down an already time-constrained process. Moreover, the reasons for requiring occupation and employer in threshold submissions do not apply to additional submissions. Occupation and employer information are necessary for threshold submissions to ensure that candidates have met the eligibility requirements by having received matchable contributions of at least \$5000 from contributors in at least 20 states.

##### *Use of Digital Imaging for Matching Fund Submissions*

Several questions were also raised regarding the possibility that committees may wish to submit contributions for matching through the use of digital imaging technology such as computer CD ROMs, instead of submitting paper photocopies of checks and deposit slips. One witness urged the Commission to allow committees to have this option. Accordingly, new language has been added to paragraph (a)(1)(vi) of section 9036.2 to let committees provide digital images of contributions, but not to require that they do so. If they choose this option, the Commission may require committees to supply the Commission with the equipment needed to read the digital data at no cost to the Commission. One witness stated that this was a reasonable condition. Given the variety of sources providing this technology, it is not feasible for the Commission to purchase all the equipment that different committees might wish to use. The new language also specifies that the digital

information committees provide must include an image of each contribution received and imaged during the period covered by the matching fund submission, not just matchable contributions. As a practical matter, it may be simpler for committees to include all contributions on CD ROMs rather than separating out the nonmatchable ones. This approach will have the additional benefit of enabling the Commission's audit staff to begin examining contributions at an earlier point, which should speed up the audit process. The Commission may seek verification from the committee's bank or from contributors pursuant to 11 CFR 9039 if the Commission is unable to resolve questions regarding the digital images submitted.

While the Commission is approving the submission of contribution information using computerized digital imaging technology, it is not changing the requirements regarding the submission of disbursements documentation. Previously, the Commission has concluded that the retention of microfilm records satisfies the documentation requirements of 2 U.S.C. § 432(c), and that for electronic transfers, committees may keep records in the form of computerized magnetic media. AOs 1994–40 and 1993–4. However, these advisory opinions addressed fairly limited record retention issues, and did not address or resolve issues regarding the use of digital imaging technology to satisfy the requirements of 11 CFR 9003.5 or 9033.11.

##### *Section 9036.5 Determination of Ineligibility Date*

A conforming amendment has been added to paragraph 9036.5(a), clarifying that the procedures of section 9036.5 apply to matching fund resubmissions made pursuant to 11 CFR part 9036 and those prompted by an inquiry under 11 CFR part 9039, under appropriate circumstances. See discussion below.

### **Part 9037—Payments and Reporting**

#### *Section 9037.4 Alphabetized Schedules*

The final rules include new section 9037.4, which follows new section 9006.3.

### **Part 9038—Examination and Audits**

#### *Section 9038.1 Audit*

The amendments to this section follow those made to section 9007.1, above.

### *Section 9038.2 Repayments Repayment Ratio*

Section 9038.2(b)(2) of the current rules requires candidates to repay amounts received from the matching payment account that are used for non-qualified campaign expenses. The amount of the repayment is determined by multiplying the total amount of non-qualified campaign expenses by the candidate's repayment ratio. The repayment ratio is the ratio of matching funds received by a candidate to the candidate's total deposits. Under the current rules, the repayment ratio is determined as of the candidate's date of ineligibility.

The new rule changes the date for determining a candidate's repayment ratio from the date of ineligibility to 90 days after the date of ineligibility. Under the new rule, the Commission will multiply the amount of non-qualified campaign expenses by the ratio of matching funds to total deposits received as of 90 days after the candidate's date of ineligibility, in order to determine the amount the candidate must repay for using matching funds for non-qualified campaign expenses.

The new rule generates a repayment ratio that more accurately reflects the mix of public funds and private contributions received during the campaign, particularly for a candidate who receives significant amounts of private contributions after his or her date of ineligibility. By taking private contributions received within 90 days of DOI into account when determining a candidate's repayment ratio, the new rule will likely reduce the ratio, thereby reducing the amount of the candidate's repayment.

This approach is also more consistent with the statute when applied to a candidate who does not receive matching payments until after his or her date of ineligibility. Section 9038(b)(2) of the Matching Payment Act requires a candidate who uses public funds for non-qualified campaign expenses to repay a portion of the public funds he or she received to the Treasury. However, when section 8038.2(b)(2) of the current regulations is applied to a candidate who does not receive matching payments until after his or her DOI, it arguably generates a repayment ratio of zero. Thus, it does not require the candidate to make a repayment, even if the candidate incurred numerous non-qualified campaign expenses.

The new rule takes these post-DOI matching payments into account, thereby generating a ratio that is greater than zero and more accurately reflects

the mix is greater than zero and more accurately reflects the mix of matching payments and private contributions actually received. As a result, publicly-funded candidates that incur non-qualified campaign expenses will be required to make a repayment, even if they do not receive any public funds until after their date of ineligibility.

In approving this approach for the final rules, the Commission rejected an alternative approach set out in the NPRM. The alternative approach would treat all matching funds certified in response to matching payment submissions received before the candidate's DOI as if they were certified before the candidate's DOI. This would result in a repayment ratio of greater than zero that could be used to determine a repayment amount under section 9038(b)(2) of the statute. However, this approach would only address the zero repayment situation outlined above. Since determining the repayment ratio 90 days after DOI addresses both situations, the Commission has incorporated this approach into the final rules.

In an effort to improve clarity, the final rules break the last three sentences of this section into two separate paragraphs. The Commission received no comments on this provision.

### *Income Derived From the Use of Surplus Public Funds*

Paragraph 9038.2(b)(4) has been revised to indicate that the Commission may determine that income resulting from any use of surplus public funds after the candidate's DOI, less taxes, paid, shall be paid to the Treasury. This change parallels the changes made to sections 9004.5 and 9007.2(b)(4), discussed above.

### *Further Streamlining the Audit Process*

The amendments to the audit process contained in this section follow those made to section 9007.2(d), above.

### *Conforming Amendments*

A conforming amendment has been added to paragraph 9038.2(c)(1), to clarify that the repayment procedures followed by the Commission in connection with an 11 CFR part 9038 examination or audit also apply to an 11 CFR part 9039 examination or audit. See discussion of Part 9039, below.

The amendments to paragraph (d) of this section are identical to those made to 11 CFR 9007.2, discussed above.

### *Section 9038.4 Extensions of Time*

The amendment to this section follows that made to section 9007.3, above.

### *Section 9038.5 Petitions for Rehearing; Stays of Repayment Determinations*

The amendments to this section follow those made to section 9007.5, above.

### *Section 9038.7 Administrative Record*

This section generally follows new section 9007.7.

## **Part 9039—Review and Investigation Authority**

### *Section 9039.3 Examinations and Audits; Investigations*

The Commission's review and investigatory authority for administering the matching fund program is set forth at 26 U.S.C. § 9039(b). In carrying out these responsibilities, the Commission must perform a continuing review of candidate and committee reports and submissions, and other relevant information. Regulations implementing these requirements are found at 11 CFR part 9039.

For the most part the Commission's review is routine, carried out in accordance with the eligibility, audit and repayment procedures contained elsewhere in the regulations. Section 9039(b) and its implementing regulations provide authority to conduct audits and investigations in situations other than those addressed by 26 U.S.C. § 9038, 11 CFR part 9038, 2 U.S.C. § 437g and 11 CFR part 111. To date, most of these situations have involved issues relating to a candidate's continuing eligibility or the amount of his or her entitlement during the course of the campaign, although they can also involve a post-election inquiry.

Section 9039.3 of the regulations describes how examinations, audits and investments are conducted in these inquiries. However, the prior section did not address the actions that may be taken at the conclusion of any such action. The Commission is therefore adopting new paragraph 9039.3(b)(4) for that purpose.

This new paragraph states that, if the Commission decides to take no further action in a part 9039 case, the candidate(s) and committee(s) involved will be so notified. If the Commission decides to take further action, such action will follow as closely as possible the procedures already in place for comparable situations. Specifically, if the inquiry results in an adjustments to the amount of certified matching funds, the procedures set forth at 11 CFR 9036.5 shall be followed. If the inquiry coincides with an audit undertaken pursuant to 11 CFR 9038.1, the information obtained in the inquiry will be utilized as part of the repayment

determination. If the inquiry results in an initial or additional repayment determination, whether or not this coincides with a Commission audit, the procedures set forth at 11 CFR 9038.2, 9038.4 and 9038.5 shall be followed.

The new rules also include conforming amendments to 11 CFR 9033.1(b)(7), 9036.5(a), and 9038.2(c)(1).

#### *Additional Issues*

The Commission considered other proposals in the course of this rulemaking that it did not ultimately incorporate into the final rules. A summary of these proposals follows.

#### *Convention Expenses of Ineligible Candidates*

The Commission also sought comments in the NPRM on whether expenses incurred by losing primary election candidates in attending their party's national nominating convention should be considered a qualified campaign expense under 11 CFR 9032.9. Such attendance can provide a defeated candidate the opportunity to continue to fundraise and to maintain contact with his or her pledged convention delegates.

The Commission has decided for several reasons not to take this action. Qualified campaign expenses are defined in the Matching Payment Act at 26 U.S.C. § 9032(9)(A) as those "incurred by a candidate, or by his authorized committee, in connection with his campaign for nomination for election." This definition seemingly does not apply to those no longer seeking the presidential nomination.

Also, the purpose of the 10% rule set forth at 11 CFR 9033.5(b), under which a candidate becomes ineligible for additional funding on the 30th day following the date of the second consecutive primary election in which he or she receives less than 10% of the popular vote, is to discontinue funding of candidates who have not received substantial support following their initial establishment of eligibility. Allowing them to obtain additional funding at a later point in the process would undercut this purpose.

Under 11 CFR 9034.1(b), candidates can already count fundraising expenses incurred following their DOI, including those incurred at a national nominating convention, as qualified campaign expenses as part of their winding down costs. The Commission notes, however, that only those expenses directly related to fundraising qualify as qualified campaign expenses under this section. Creating an additional window of eligibility during the wind down period could substantially lengthen and complicate the audit process.

#### *Treating Matching Payments as an Entitlement*

One commenter urged the Commission to treat the matching payment program as more of an entitlement program. This commenter argued that the entitlement of a candidate who remains eligible for matching payments until the nominating convention should not be limited by the candidate's net outstanding campaign obligations. Instead, such a candidate should be entitled to receive matching funds for all matchable contributions received, up to fifty percent of the expenditure limitation. See 26 U.S.C. § 9034(b), 11 CFR 9034.1(d). The commenter said that the Commission should match all qualifying contributions submitted by such a candidate for matching, up to fifty percent of the limitation, and then seek a ratio surplus repayment once all campaign obligations have been satisfied.

However, this approach is inconsistent with the Matching Payment Act. Although the Act limits a candidate's overall entitlement to fifty percent of the expenditure limitation, the Act also further limits entitlement for candidates who become ineligible. Ineligible candidates are limited to matching payments for their net outstanding campaign obligations. 26 U.S.C. § 9033(c)(2). See 11 CFR 9034.1(b). All candidates for the nomination become ineligible when the party makes its nomination, because they can no longer be "seeking" a nomination that has already been awarded. See 26 U.S.C. § 9033(b)(2). Thus, a candidate's post-convention entitlement is limited to his or her NOCO, even if the candidate was eligible at the time the convention began.

If the commenter's suggestion were adopted, a candidate who was still eligible at the time of the convention could submit a large matching payment request after the nomination was awarded and have that request fully matched, even if the campaign had no debts outstanding at the time the funds were certified. The funds received would be treated as surplus funds rather than funds received in excess of entitlement. Thus, the committee would only be required to repay a portion of the funds under the surplus repayment rules. Such a result would frustrate the purposes of the Matching Payment Act, which requires a full repayment of any funds received by a candidate who has no further entitlement on the date of certification. 26 U.S.C. § 9038(b)(1). See 11 CFR 9038.2(b)(1).

The Commission also notes that this issue is the subject of ongoing litigation.

#### **Certification of No Effect Pursuant to 5 U.S.C. § 605(b) (Regulatory Flexibility Act)**

The attached final rules, if promulgated, will not have a significant economic impact on a substantial number of small entities. The basis for this certification is that few, if any, small entities will be affected by these final rules. Further, any small entities affected are already required to comply with the requirements of the Presidential Election Campaign Fund Act and the Presidential Primary Matching Payment Account Act in these areas.

#### **List of Subjects**

##### *11 CFR Part 106*

Campaign funds, Political candidate, Political committee and parties, Reporting and recordkeeping requirements.

##### *11 CFR Parts 9002–9004*

Campaign funds, Elections, Political candidates.

##### *11 CFR Parts 9006–9007*

Administrative practice and procedure, Campaign funds, Elections, Political candidates, Reporting requirements.

##### *11 CFR Part 9008*

Campaign funds, Political committees and parties, Reporting and recordkeeping requirements.

##### *11 CFR Parts 9032–9034*

Campaign funds, Elections, Political candidate.

##### *11 CFR Parts 9036–9039*

Administrative practice and procedure, Campaign funds, Political candidates.

For the reasons set out in the preamble, subchapters A, E and F of chapter I of title 11 of the Code of Federal Regulations are amended as follows:

#### **PART 106—ALLOCATIONS OF CANDIDATE AND COMMITTEE ACTIVITIES**

1. The authority citation for part 106 continues to read as follows:

**Authority:** 2 U.S.C. 438(a)(8), 441a(b), 441a(g).

2. Section 106.2 is amended by adding a sentence to the end of paragraph (a)(1), to read as follows:

**Animal and Plant Health Inspection Service****9 CFR Part 92**

[Docket No. 95-064-2]

**Specifically Approved States Authorized To Receive Mares and Stallions Imported From CEM-Affected Countries**

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Direct final rule; confirmation of effective date.

**SUMMARY:** On September 27, 1995, the Animal and Plant Health Inspection Service published a direct final rule. (See 60 FR 49751-49752, Docket No. 95-044-1). The direct final rule notified the public of our intention to amend the animal importation regulations by adding Texas to the list of States approved to receive certain mares and stallions imported into the United States from countries affected with contagious equine metritis (CEM). We did not receive any written adverse comments or written notice of intent to submit adverse comments in response to the direct final rule.

**EFFECTIVE DATE:** The effective date of the direct final rule is confirmed as: November 27, 1995.

**FOR FURTHER INFORMATION CONTACT:** Dr. David Vogt, Senior Staff Veterinarian, Import/Export Animals, National Center for Import and Export, VS, APHIS, Suite 3B05, 4700 River Road Unit 39, Riverdale, MD 20737-1231, (301) 734-8423.

**Authority:** 7 U.S.C. 1622; 19 U.S.C. 1306; 21 U.S.C. 102-105, 111, 114a, 134a, 134b, 134c, 134d, 134f, 135, 136, and 136a; 31 U.S.C. 9701; 7 CFR 2.17, 2.51, and 371.2(d).

Done in Washington, DC, this 7th day of November 1995.

Terry L. Medley,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 95-28272 Filed 11-15-95; 8:45 am]

BILLING CODE 3410-34-P

**FEDERAL ELECTION COMMISSION****11 CFR Parts 106, 9002, 9003, 9004, 9006, 9007, 9008, 9032, 9033, 9034, 9036, 9037, 9038 and 9039**

[Notice 1995-20]

**Public Financing of Presidential Primary and General Election Candidates; Correction**

AGENCY: Federal Election Commission.

ACTION: Technical Corrections to final rules.

**SUMMARY:** This document contains technical corrections to final rules published June 16, 1995 (60 FR 31854) regarding public financing of presidential primary and general election candidates.

EFFECTIVE DATE: August 16, 1995.

**FOR FURTHER INFORMATION CONTACT:** Ms. Susan E. Propper, Assistant General Counsel, 999 E Street, NW., Washington, DC 20463, (202) 219-3690 or (800) 424-9530.

**SUPPLEMENTARY INFORMATION:** On June 16, 1995, the Commission published final rules revising its regulations governing public financing of presidential primary and general election candidates. 60 FR 31854 (June 16, 1995). These regulations implement provisions of the Presidential Election Campaign Fund Act and the Presidential Primary Matching Payment Account Act.

Unfortunately, the June 16 final rule document contained a number of errors that could make the rules misleading and could cause problems when the rules are codified in the Code of Federal Regulations. Some of the errors reflect mistakes contained in the document submitted by the Commission to the Federal Register. Other errors occurred when the Federal Register typeset the document for publication.

Most of the errors are technical in nature. The Commission is publishing this document to correct these technical errors. These corrections are set out below. However, the June 16 final rule document also contains two errors of a more substantive nature that must be corrected. The Commission is publishing another document in today's edition of the **Federal Register** that corrects these errors. Readers interested in the Commission's public financing regulations should carefully review both notices.

**Correction of Publication**

Accordingly, the publication of final regulations on June 16, 1995 (60 FR 31854), which were the subject to FR Doc. 95-14667, is corrected as follows:

**Explanation and Justification (Preamble) [Corrected]**

1. On page 31860, in the third column, in the 19th line, "workable" should read "unworkable".

2. On page 31860, in the third column, in the 34th line, "selection" should read "election".

3. On page 31861, in the third column, in the last line, "not" should read "no".

4. On page 31869, in the second column, in the first paragraph after the italicized heading, in the 12th line, "(a)(1)(vi)" should read "(b)(1)(vi)".

5. On page 31870, in the first column, in the third paragraph after the headings, in the 12th line, "radio" should read "ratio".

6. On page 31870, in the second column, in the first and second lines, "is greater than zero and more accurately reflects the mix" should be removed.

**§ 9003.3 Allowable contributions. [Corrected]**

7. On page 31874, in the first column, in § 9003.3(b)(5), in the 11th line, "expendute" should read "expenditure".

**§ 9003.4 Expenses incurred prior to the beginning of the expenditure report period or prior to receipt of Federal funds. [Corrected]**

8. On page 31874, in the third column, the amendatory language in instruction 8 should read "Section 9003.4 is amended by revising the last sentence of paragraph (a)(1), and adding a new sentence to the end of paragraph (a)(1), to read as follows:".

**PART 9006—REPORTS AND RECORDKEEPING [CORRECTED]**

9. On page 31877, in the third column, the authority citation following instruction 16 should read:

**Authority:** 2 U.S.C. 434 and 26 U.S.C. 9009(b).

**PART 9008—FEDERAL FINANCING OF PRESIDENTIAL NOMINATING CONVENTIONS [CORRECTED]**

10. On page 31880, in the third column, the authority citation following instruction 24 should read:

**Authority:** 2 U.S.C. 437, 438(a)(8), 26 U.S.C. 9008, 9009(b).

**PART 9034—ENTITLEMENTS****§ 9034.4 Use of contributions and matching payments. [Corrected]**

11. On page 31882, in the first column, in § 9034.4(a)(3)(i), in the eighth line, insert a comma after "office supplies".

12. On page 31882, in the first column, in § 9034.4(a)(3)(iii), in the second line, insert a comma after "9035.1".

**§ 9034.6 Expenditures for transportation and services made available to media personnel; reimbursements. [Corrected]**

13. On page 31884, in the first column, in § 9034.6, in the heading of paragraph (c), "limitations" should read "limitation".

acceptable and unacceptable purpose descriptions to be reported by authorized committees. Paragraph (B) requires authorized committees, when itemizing certain disbursements for which reimbursements are required, to provide a brief explanation of the activity for which reimbursement is required. These provisions have been in Title 11 of the **Code of Federal Regulations** since 1980 and 1995, respectively, and were not affected by the recent statutory changes to the election cycle reporting requirements.

#### Need for Correction

As published, the final rules inadvertently omit two paragraphs describing information to be reported by authorized committees of Federal candidates.

All committees must report the purpose of itemized disbursements (i.e., those disbursements aggregating in excess of \$200). Omitted paragraph (A) contains examples of suitably specific purpose descriptions as well as examples of those descriptions that are unacceptably vague. This paragraph is inconsistent with the reporting of rules for unauthorized committees (committees other than candidate committees) in 11 CFR 104.3(b)(3).

Omitted paragraph (B) is used in administering the "personal use" rules in 11 CFR 113.1. Federal candidates are barred from using campaign funds for personal benefit. Paragraph (B) requires authorized committees of Federal candidates itemizing disbursements for which partial or total reimbursement is required under 11 CFR 113.1(g)(1)(iii)(C) or (D) to provide a brief explanation of the activity for which the reimbursement is made.

Section 801 of Title 5 of the United States Code requires Federal agencies to submit regulations to Congress. These regulations were submitted to the Speaker of the House of Representatives and the President of the Senate on November 26, 2001.

#### Certification of No Effect Pursuant to 5 U.S.C. § 605(b) [Regulatory Flexibility Act]

This correction will not have significant economic impact on a substantial number of small entities. The basis of this certification is that this correction only requires political committees to once again add information to the reports they are required to file. These regulations were in 11 CFR since 1980 and 1995, respectively, before being inadvertently omitted in 2000.

#### List of Subjects in 11 CFR Part 104

Campaign funds, Political committees and parties, Reporting and recordkeeping requirements.

Accordingly, 11 CFR part 104 is corrected by making the following correcting amendment:

#### PART 104—REPORTS BY POLITICAL COMMITTEES

1. The authority citation for part 104 continues to read as follows:

**Authority:** 2 U.S.C. 431(1), 431(8), 431(9), 432(i), 434, 438(a)(8), 438(b), 439a.

#### § 104.3 Contents of reports (2 U.S.C. 434(b), 439a).

\* \* \* \* \*

2. In § 104.3 add the following paragraphs (b)(4)(i)(A) and (B):

(b) \* \* \*

(4) \* \* \*

(i) \* \* \*

(A) As used in this paragraph, *purpose* means a brief statement or description of why the disbursement was made. Examples of statements or descriptions which meet the requirements of this paragraph include the following: dinner expenses, media, salary, polling, travel, party fees, phone banks, travel expenses, travel expense reimbursement, and catering costs. However, statements or descriptions such as *advance*, *election day expenses*, *other expenses*, *expenses*, *expense reimbursement*, *miscellaneous*, *outside services*, *get-out-the-vote* and *voter registration* would not meet the requirements of this paragraph for reporting the purpose of an expenditure.

(B) In addition to reporting the purpose described in paragraph (b)(4)(i)(A) of this section, whenever an authorized committee itemizes a disbursement that is partially or entirely a personal use for which reimbursement is required under 11 CFR 113.1(g)(1)(ii)(C) or (D), it shall provide a brief explanation of the activity for which reimbursement is required.

\* \* \* \* \*

Dated: November 26, 2001.

**Danny L. McDonald,**  
Chairman, Federal Election Commission.  
[FR Doc. 01-29679 Filed 11-29-01; 8:45 am]  
**BILLING CODE 6715-01-P**

#### FEDERAL ELECTION COMMISSION

#### 11 CFR Part 111

#### [Notice 2001-18]

#### Extension to Administrative Fines

**AGENCY:** Federal Election Commission.

**ACTION:** Final rule; revision of the sunset date.

**SUMMARY:** The Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the expiration date in which the Federal Election Commission (hereinafter "the Commission") may assess civil money penalties for violations of the reporting requirements of section 434(a) of the Federal Election Campaign Act (hereinafter "the Act" or "FECA").

**DATES:** Effective on December 31, 2001.

**FOR FURTHER INFORMATION CONTACT:** Ms. Rosemary C. Smith, Assistant General Counsel, or Ms. Mai T. Dinh, Attorney, 999 E Street, NW., Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

#### SUPPLEMENTARY INFORMATION:

#### Explanation and Justification

Section 640 of the Treasury and General Government Appropriations Act, 2000, Pub. L. No. 106-58, 106th Cong., 113 Stat. 430, 476-77 (1999), amended § 309(a)(4) of the FECA, 2 U.S.C. 437g(a)(4), to provide for a modified enforcement process for violations of reporting requirements. Under § 437g(a)(4)(C) of the FECA, the Commission may assess a civil money penalty for violations of the reporting requirements of 2 U.S.C. 434(a). This authority, however, was to sunset on December 31, 2001. Pub. L. No. 106-58, 106th Cong., § 640(c). Recently, § 642 of the Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the sunset date to include all reports that cover activity between January 1, 2000, to December 31, 2003.

The Commission published final rules on May 19, 2000, to implement the amendment contained in the Treasury and General Government Appropriations Act, 2000. Section 111.30 of the regulations reflects the sunset provision of Pub. L. No. 106-58, 106th Cong., § 640(c). Therefore, the Commission is issuing this final rule to amend section 111.30 to extend the application of the administrative fine regulations, 11 CFR part 111, subpart B, to include all violations relating to reports that cover the period between January 1, 2000, to December 31, 2003.

The Commission is promulgating this final rule without notice or opportunity for comment because it falls under the "good cause" exemption of the Administrative Procedures Act, 5 U.S.C. 553(b)(B). The exemption allows



**FEDERAL ELECTION COMMISSION****11 CFR Parts 100, 106, 109, and 114**

[Notice 1995-10]

**Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures****AGENCY:** Federal Election Commission.**ACTION:** Final rule; Transmittal of regulations to Congress.

**SUMMARY:** The Commission is issuing revised regulations that define the term "express advocacy" and describe certain nonprofit corporations that are exempt from the prohibition on independent expenditures. The new rules implement portions of several decisions issued by the Federal courts in recent years. These rules were originally part of a larger rulemaking on the scope of permissible and prohibited corporate and labor organization expenditures. The Commission expects to complete the remaining portions of the original rulemaking by issuing additional revisions to the regulations at a later date.

**DATES:** Further action, including the announcement of an effective date, will be taken after these regulations have been before Congress for 30 legislative days pursuant to 2 U.S.C. 438(d).

**FOR FURTHER INFORMATION CONTACT:** Ms. Susan E. Propper, Assistant General Counsel, 999 E Street, N.W., Washington, D.C. 20463, (202) 219-3690 or (800) 424-9530.

**SUPPLEMENTARY INFORMATION:** The Commission is today publishing the final text of revisions to its regulations at 11 CFR 100.17, 106.1(d) and 109.1(b) and the text of new regulations at 11 CFR 100.22 and 114.10. Generally, these regulations implement sections 431(17), 431(18) and 441b of the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. 431 *et seq.* ["FECA" or "the Act"]. These regulations have been revised in accordance with a number of Federal court decisions involving section 441b.

Section 441b prohibits corporations and labor organizations from using general treasury monies to make contributions or expenditures in connection with Federal elections. The new regulations provide further guidance on what constitutes an expenditure, and describe certain corporations that are exempt from the independent expenditure prohibition. However, these new rules do not apply to contributions, whether monetary or in-kind.

In *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479

U.S. 238 (1986) ["*MCFL*"], the Supreme Court held that expenditures must constitute express advocacy to be subject to the prohibition of section 441b. *MCFL* at 249. In addition, the Court concluded that the prohibition on independent expenditures in section 441b cannot constitutionally be applied to nonprofit corporations having certain essential features. The Court said that corporations that (1) are formed for the express purpose of promoting political ideas and cannot engage in business activities; (2) have no shareholders or other persons affiliated so as to have a claim on the corporation's assets or earnings; and (3) are not established by a business corporation or labor organization and have a policy against accepting donations from such entities, cannot be subject to the independent expenditure prohibition.

Based on this decision, the National Right to Work Committee filed a Petition for Rulemaking urging the Commission to revise 11 CFR 114.3 and 114.4 to conform to the statement in the *MCFL* opinion that "express advocacy" is the appropriate standard for determining when independent communications by corporations and labor organizations are prohibited under section 441b. See Notice of Availability of Petition for Rulemaking, National Right to Work Committee, 52 FR 16275 (May 4, 1987). Thus, the Petition took the position that the Commission's partisan/nonpartisan standards governing corporate and labor organization communications to the entity's restricted class and the general public are unconstitutional under *MCFL*.

The Commission subsequently sought public input on whether to initiate a rulemaking to determine the extent to which the *MCFL* decision necessitated changes in the Part 114 rules governing independent expenditures by corporations possessing the three essential features, changes in the scope of the "independent expenditure" provisions at 11 CFR Part 109, or the implementation of an "express advocacy" test for all corporations and labor organizations covered by 11 CFR Part 114. Advance Notice of Proposed Rulemaking, 53 FR 416 (January 7, 1988) ["Advance Notice" or "ANPRM"].

The Commission received over 17,000 comments in response to the Advance Notice. Nearly all of the commenters submitted virtually identical letters urging the Commission to act favorably on NRWC's rulemaking petition, and to limit application of its regulations to communications expressly advocating the election or defeat of candidates so as to avoid impinging upon First

Amendment rights. The Commission also received detailed comments from seven sources, and held a public hearing on November 16, 1988 at which two commenters testified as to how the Commission should implement the *MCFL* opinion. The detailed comments and testimony reflect a wide range of views as to how the Commission should proceed in response to the *MCFL* decision.

In subsequent litigation, two lower courts relied upon an express advocacy standard to evaluate corporate communications under section 441b of the FECA. In *Faucher v. Federal Election Commission*, 743 F. Supp. 64 (D. Me. 1990), the court invalidated the Commission's voter guide regulations at 11 CFR 114.4(b)(5)(i). The Court concluded that the Commission's voter guide rule is not authorized by the FECA "as interpreted by the Supreme Court in [*MCFL*], to the extent that the regulation makes the permissibility of voter guides \* \* \* hinge upon on whether such guides are 'nonpartisan' in a broad sense that includes issue advocacy rather than the narrower test of 'express advocacy.'" *Id.* at 72. Similarly, in *Federal Election Commission v. National Organization of Women*, 713 F. Supp. 428 (D.D.C. 1989) ["*NOW*"], another district court applied an express advocacy test to determine whether section 441b permitted an incorporated membership organization to use general treasury funds for membership recruitment letters directed to the general public. The court concluded that the letters in question did not go beyond issue discussion to express electoral advocacy. The Commission appealed both of these lower court decisions.

Shortly after the *MCFL* opinion, a court of appeals decision held that speech need not include any of the specific words listed in *Buckley v. Valeo*, 424 U.S. 1, 44 n.52 (1976) to constitute express advocacy. *Federal Election Commission v. Furgatch*, 807 F.2d 857, 862-63 (9th Cir.), *cert. denied*, 484 U.S. 850 (1987). Instead, the appropriate inquiry is whether the communication, when read as a whole and with limited reference to external events, is susceptible to no other reasonable interpretation but as an exhortation to vote for or against a specific candidate. *Id.* at 864.

In addition, the Supreme Court provided further guidance on the exception from the independent expenditure prohibition for nonprofit corporations in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990). In *Austin*, the Court interpreted a Michigan statute very similar to



section 441b of the FECA. The *Austin* decision prompted the Commission to issue a second notice seeking further comments on what changes to its regulations were warranted. Request for Further Comment, 55 FR 40397 (Oct. 3, 1990), comment period extended 55 FR 45809 (Oct. 31, 1990). This notice also welcomed comments on the express advocacy questions raised by the *Faucher* and *NOW* decisions.

Eight commenters responded to the second notice, including some who reiterated their earlier positions. Most, but not all, of the commenters urged the Commission to adopt an express advocacy test for expenditures under section 441b. One comment favored the development of definitions which precisely set out what activity will be deemed within the scope of the FECA under such a standard, while another comment supported the use of a case by case approach. There was also some support for revising the regulations to reflect the approach to express advocacy taken into the *Furgatch* opinion. The Commission also received specific suggestions for delineating the class of nonprofit corporations falling within *MCFL*'s exception from the independent expenditure prohibition. Two comments advocated a broad scope for the exemption, while a third comment emphasized the narrowness of the group of organizations possessing the three essential features delineated in *MCFL* and *Austin*.

Subsequently, the Court of Appeals for the First Circuit upheld the district court's decision in *Faucher*. *Faucher v. Federal Election Commission*, 928 F.2d 468 (1st Cir. 1991). *cert. denied sub nom. Federal Election Commission v. Keefer et al.*, 502 U.S. 820 (1991). The Commission sought certiorari in *Faucher*, arguing that the express advocacy standard should not be made applicable to the 441b prohibition on corporate expenditures. On October 7, 1991, the Supreme Court denied the petition for certiorari, and thus declined to consider narrowing or otherwise modifying the statements it made in *MCFL* regarding the scope of section 441b. Accordingly, the Commission moved for the dismissal of its appeal in *NOW* and resumed consideration of several substantial changes to its regulations necessitated by the *MCFL* decision.

The Commission published a Notice of Proposed Rulemaking on July 29, 1992 seeking public comment on draft rules codifying the reduced scope of the prohibition on corporate expenditures. 57 FR 33548 (July 29, 1992). The proposed language set forth the general rule that corporations and labor

organizations are prohibited from making expenditures for communications to the general public expressly advocating the election or defeat of a clearly identified candidate. The draft regulations also sought to establish criteria for determining whether nonprofit corporations qualify for the exemption from section 441b's prohibition on independent expenditures.

The Commission received 35 separate comments on the NPRM from 32 commenters between July 29, 1992 and November 22, 1993. The Commission also received 149 form comments during that period. The Commission held a public hearing on October 15 and 16, 1992, at which 15 of these commenters testified on the issues presented in the *MCFL* decision and the proposed rules. The comments and testimony are discussed in more detail below.

As indicated above, this rulemaking process has involved a broader range of issues regarding the scope of permissible and prohibited corporate and labor organization expenditures than is reflected in the final rules being promulgated today. The rulemaking with regard to the other issues is continuing, and the Commission expects to issue additional new rules revising 11 CFR Parts 110 and 114 at a later date. These subsequent changes will replace the partisan/nonpartisan standards in sections 110.13, 114.1, 114.2, 114.3, 114.4 and 114.12(b) with language prohibiting corporations and labor organizations from making expenditures for communications to the general public expressly advocating the election or defeat of clearly identified candidates. Specifically, these provisions govern candidate debates, candidate appearances, distributing registration and voting information, voter guides, voting records, conducting voter registration and get-out-the-vote drives and use of meeting rooms. At the same time, the Commission intends to address issues which have arisen regarding activities undertaken by incorporated colleges and universities, the use of logos, trademarks and letterheads, endorsements of candidates, activities which facilitate the making of contributions, and coordination between candidates and corporations or labor organizations which results in in-kind contributions. These issues, not previously addressed in the rules, involve activities that are also impacted by the express advocacy standard and the case law in this area.

Section 438(d) of Title 2, United States Code requires that any rules or regulations prescribed by the

Commission to carry out the provisions of Title 2 of the United States Code be transmitted to the Speaker of the House of Representatives and the President of the Senate 30 legislative days before they are finally promulgated. These regulations were transmitted to Congress on June 30, 1995.

### Explanation and Justification

Generally, the new and amended rules contain the following changes. First, the definitions of "express advocacy" and "clearly identified" at 11 CFR 109.1 (b)(2) and (b)(3) have been moved to new 11 CFR 100.22 and revised 11 CFR 100.17, respectively. They have been reworded to provide further guidance on what types of communications constitute express advocacy of clearly identified candidates, in accordance with the judicial interpretations found in *Buckley*, *MCFL*, *Furgatch*, *NOW* and *Faucher*.

Second, new section 114.10 has been added to implement the *MCFL* Court's conclusion that nonprofit corporations possessing certain essential features may not be bound by the restrictions on independent expenditures contained in section 441b. This new section expressly permits certain corporations to use general treasury funds for independent expenditures, and sets out the reporting obligations for these corporations.

Part 100—Scope and Definitions (2 U.S.C. 431)

*Section 100.17 Clearly Identified* (2 U.S.C. 431(18))

The definitions of "clearly identified" in 11 CFR 106.1(d) and "clearly identified candidate" in 11 CFR 109.1(b)(3) have been removed and replaced by a revised definition in section 100.17. It is not necessary for this definition to appear in multiple locations throughout these regulations.

The NPRM sought comments on two alternative approaches regarding the requirement that the candidates be "clearly identified." Alternative A-1 indicated that this would include candidates of a clearly identified political party and a clearly identified group of candidates, such as the "pro-life" candidates in the *MCFL* case. Alternative A-2 did not specifically mention clearly identified groups of candidates or candidates of clearly identified political parties.

Several commenters and witnesses argued that under Alternative A-1, it could be too difficult to determine the candidates in the group. Examples cited were buttons that read "Elect Women

for a Change” or “Vote Pro-Choice,” without more. The language was intended to apply to a situation, for example, where one insert in a mailing lists voting records or positions on specific issues and clearly indicates which of the named candidates shares the speaker’s views. If another insert urges the reader to vote in favor of candidates who share its views, this is considered to be advocating the election of those clearly identified candidates. Similarly, the *MCFL* case involved a flyer which urged voters to vote for “pro-life” candidates, and included a list of “pro-life candidates.” Thus, in this example, several “pro-life” candidates were clearly identified to the reader.

In light of comments, the wording of new section 100.22(a) has been reworked to refer to “one or more clearly identified candidate(s)” to more clearly state what was intended. In addition, section 100.17 has been modified to provide some additional examples of when candidates are considered to be “clearly identified.”

#### *Section 100.22 Expressly Advocating*

The definition of express advocacy previously located in 11 CFR 109.1(b)(2) has been replaced with a revised definition in new section 100.22. The placement of the definition of express advocacy in Part 100—Scope and Definitions is intended to ensure that the reader will be able to locate it more easily. Also, while express advocacy is an important component of any independent expenditure, it is also the legal standard used in determining whether other types of activities are expenditures by corporations or labor organizations under 11 CFR Part 114. Please note that the terms “communication containing express advocacy” and “communication expressly advocating the election or defeat of one or more clearly identified candidates” have the same meaning.

The NPRM presented the possibility of creating a separate definition of “express advocacy” for inclusion in Part 114 that would apply only to corporations and labor organizations governed by that Part. The NPRM indicated that the purpose of promulgating a separate definition would be to focus more specifically on implementing the *MCFL* Court’s dictate that “express advocacy” is the standard when determining what is an expenditure under 2 U.S.C. § 441b. The Notice suggested that a separate definition could center on whether a communication urged action with respect to a federal election rather than on whether the communication also

related to a clearly identified candidate. Thus, this approach would have taken a different view of “express advocacy” for organizations subject to the prohibitions of section 441b.

There was little support for separate definitions from the comments and testimony. The difficulty the commenters and witnesses had in trying to determine what the courts meant by “express advocacy,” and what they thought the Commission had in mind, amply demonstrate that it would be extremely confusing to work with separate definitions for corporations and labor organizations on one hand, and candidates, committees and individuals on the other. Consequently, separate definitions of express advocacy have not been included in the final rules.

#### *1. Alternative Definitions Presented in the NPRM*

The NPRM sought comments on two alternative sets of revisions to the definition of express advocacy. Alternatives A–1 and A–2 were similar in several respects. They both continued to list the specific phrases set forth in the *Buckley* opinion as examples of express advocacy. Both alternatives recognized that all statements and expressions included in a communication must be evaluated in terms of pertinent external factors such as the context and timing of the communication. In addition, both proposed definitions clearly indicated that communications consisting of several pieces of paper will be read together.

The alternative definitions in the NPRM differed in several respects. Under Alternative A–1, express advocacy included suggestions to take actions to affect the result of an election, such as to contribute or to participate in campaign activity. In contrast, Alternative A–2 indicated that express advocacy constitutes an exhortation to support or oppose a clearly identified candidate, and that there must be no other reasonable interpretation of the exhortation other than encouraging the candidate’s election or defeat, rather than another type of action on a specific issue. Nevertheless, Alternative A–2 also specifically stated that “with respect to an election” includes references such as “Smith ’92” or “Jones is the One.”

There was no consensus among the commenters and witnesses regarding either alternative definition of express advocacy. While there was more support for Alternative A–2 than A–1, specific portions of both alternatives troubled a number of commenters and witnesses. Some objected that

Alternative A–1 was too narrow in that it did not cover all express, implied, or reasonably understood references to an upcoming election. Others argued Alternative A–1 was too broad, and preferred Alternative A–2. However, there was also considerable sentiment expressed that Alternative A–2 was also too broad, and should be further limited to avoid running afoul of the First Amendment considerations that are involved.

To illustrate the difficulty involved in applying an “express advocacy” standard, the Commission included Agenda Document #92–86–A in the rulemaking record. This document contained seven hypothetical advertisements, each of which is assumed to be published within two weeks of an election. Several written comments and witnesses mentioned these examples in analyzing the proposals contained in this Notice, but there was no consensus as to which examples, if any, contained express advocacy.

In commenting on the proposed rules, the Internal Revenue Service indicated that 26 U.S.C. § 501(c)(3) prohibits certain nonprofit organizations from participating or intervening in political campaigns on behalf of or in opposition to candidates for elective public office. The IRS stated that prohibited political activity under the Internal Revenue Code is much broader in scope than the express advocacy standard under the FECA. The Commission expresses no opinion as to any tax ramifications of activities conducted by nonprofit corporations, since these questions are outside its jurisdiction.

The definition of express advocacy included in new section 100.22 includes elements from each definition, as well as the language in the *Buckley*, *MCFL* and *Furgatch* opinions emphasizing the necessity for communications to be susceptible to no other reasonable interpretation but as encouraging actions to elect or defeat a specific candidate. Please note that exhortations to contribute time or money to a candidate would also fall within the revised definition of express advocacy. The expressions enumerated in *Buckley* included “support,” a term that encompasses a variety of activities beyond voting.

#### *2. Examples of Phrases That Expressly Advocate*

The previous definition of express advocacy in 11 CFR 109.1(b)(2) included a list of expressions set forth in *Buckley*. Both alternatives in the NPRM would have largely retained this list of phrases that constitute express

advocacy. The revised definition in 11 CFR 100.22(a) includes a somewhat fuller list of examples. The expressions enumerated in *Buckley*, such as “vote for,” “Smith for Congress,” and “defeat” have no other reasonable meaning than to urge the election or defeat of clearly identified candidates.

### 3. Communications Lacking Such Phrases

The NPRM also addressed communications that contain no specific call to take action on any issue or to vote for a candidate, but which do discuss a candidate's character, qualifications, or accomplishments, and which are made in close proximity to an election. An example is a newspaper or television advertisement which simply states that the candidate has been caring, fighting and winning for his or her constituents. Another example is a case in which a candidate is criticized for missing many votes, or for specific acts of misfeasance or malfeasance while in office.

Under Alternative A-2, these types of communications would have constituted exhortations if made within a specified number of days before an election, and if they did not encourage any type of action on any specific issue, such as, for example, supporting pro-life or pro-choice legislation. Comments were requested as to what an appropriate time frame should be—as short as 14 days, or as long as six months, prior to an election, or some other time period considered reasonable.

Some commenters opposed treating these communications as express advocacy on the grounds that there is not a clear call to action. Others argued that such communications, particularly when made by a candidate's campaign committee, were clearly intended to persuade the listener or reader to vote for the candidate.

Communications discussing or commenting on a candidate's character, qualifications, or accomplishments are considered express advocacy under new section 100.22(b) if, in context, they have no other reasonable meaning than to encourage actions to elect or defeat the candidate in question. The revised rules do not establish a time frame in which these communications are treated as express advocacy. Thus, the timing of the communication would be considered on a case-by-case basis.

### 4. Communications Containing Both Issue Advocacy and Electoral Advocacy

The final rules, like the proposed rules, treat communications that include express electoral advocacy as express

advocacy, despite the fact that the communications happen to include issue advocacy, as well. Several comments pointed out that the legislative process continues during election periods, and argued that if a legislative issue becomes a campaign issue, the imposition of unduly burdensome requirements on those groups seeking to continue their legislative efforts and communicate with their supporters is unconstitutional. These concerns are misplaced, however, because the revised rules in section 100.22(b) do not affect pure issue advocacy, such as attempts to create support for specific legislation, or purely educational messages. As noted in *Buckley*, the FECA applies only to candidate elections. See, e.g., 424 U.S. at 42-44, 80. For example, the rules do not preclude a message made in close proximity to a Presidential election that only asked the audience to call the President and urge him to veto a particular bill that has just been passed, if the message did not refer to the upcoming election or encourage election-related actions. In contrast, under these rules, it is express advocacy if the communication described above urged the audience to vote against the President if the President does not veto the bill in question.

Nevertheless, to alleviate the commenters' concerns, the definition of express advocacy in new section 100.22(b) has been revised to incorporate more of the *Furgatch* interpretation by emphasizing that the electoral portion of the communication must be unmistakable, unambiguous and suggestive of only one meaning, and reasonable minds could not differ as to whether it encourages election or defeat of candidates or some other type of non-election action.

Both alternative definitions of express advocacy included consideration of the context and timing of the communication, and indicated that communications consisting of several pieces of paper will be read together. Several commenters and witnesses were troubled by the perceived vagueness and uncertainty inherent in the use of the phrases “taken as a whole,” “in light of the circumstances under which they were made,” and “with limited reference to external events.” They argued that they would not be able to ascertain in advance which facts and circumstances would be considered by the Commission. Some of the commenters and witnesses acknowledged the difficulty of crafting a clear and precise standard in the First Amendment context.

The final rules in section 100.22 retain the requirement that the communication be read “as a whole and with limited reference to external events” because *MCFL* makes clear that isolated portions of a communication are not to be read separately in determining whether a communication constituted express advocacy. See 479 U.S. at 249-50. Further, the *Furgatch* opinion evaluated the contents of the communication in question “as a whole, and with limited reference to external events.” 807 F.2d at 864. The external events of significance in *Furgatch* included the existence of an upcoming presidential election and the timing of the advertisement a week before the general election. However, please note that the subjective intent of the speaker is not a relevant consideration because *Furgatch* focuses the inquiry on the audience's reasonable interpretation of the message. *Furgatch*, 807 F.2d at 864-65.

### 5. “Vote Democratic” or “Vote Republican”

In the NPRM, Alternative A-2 treated as express advocacy messages such as “Vote Republican” or “Vote Democratic” if made within a specified period prior to a special or general election or an open primary. Again, comments were sought on time periods ranging from 14 days to 6 months prior to an election, or any other time period considered reasonable. Alternatively, the period between the primary and general elections was suggested as the time when such messages refer to clearly identified candidates. In contrast, Alternative A-1 treated these phrases as express advocacy if made at any time after specific individuals have become Republican or Democratic candidates within the meaning of the FECA in the geographic area in which the communication is made. The NPRM also sought comments on when a message such as “Vote Democratic” or “Vote Republican” refers to one or more clearly identified candidates, rather than being just a message of support for a party.

The views of the commenters and witnesses reflected little consensus regarding these messages. Several were supportive of Alternative A-2, and suggested that a 90 day time frame would be appropriate. Others felt that such messages are always express advocacy because they aim at influencing the outcome of elections. Conversely, some commenters argued that these messages cannot be express advocacy if there are no declared candidates yet running for the party's

nomination or if the nominee of the party has not yet been selected.

Section 100.22 of the final rules does not specify a time frame or triggering event that will cause these messages to be considered express advocacy. Instead, messages such as "Vote Democratic" or "Vote Republican" will be evaluated on a case-by-case basis to determine whether they constitute express advocacy under the criteria set out in 11 CFR 100.22(b).

#### Part 106—Allocations of Candidate and Committee Activities

##### *Section 106.1 Allocation of expenses between candidates*

A conforming amendment has been made to paragraph (d) of section 106.1. Previously, this paragraph restated the definition of "clearly identified." It has been revised to refer the reader to the definition located in 11 CFR 100.17.

#### Part 109—Independent Expenditures (2 U.S.C. 431(17), 434(c))

##### *Section 109.1 Definitions (2 U.S.C. 431(17))*

The revised rules incorporate a technical amendment to the definition of "person" in the independent expenditure provisions in section 109.1(b)(1). The revision clarifies that "person" includes qualified nonprofit corporations, which are discussed more fully below. This change reflects that in *MCFL*, the Court upheld the right of qualified nonprofit corporations to make independent expenditures, but this decision did not extend to other corporations.

Conforming amendments have also been made to paragraphs (b)(2) and (b)(3) of section 109.1. These sections had contained definitions of "expressly advocating" and "clearly identified candidate." As explained above, they have been revised to refer the reader to the definitions located in sections 100.22 and 100.17, respectively.

#### Part 114—Corporate and Labor Organization Activity

##### *Section 114.2 Prohibitions on Contributions and Expenditures*

Paragraph (b) of section 114.2 has been revised to reflect the exception recognized in the *MCFL* decision, which allows certain nonprofit corporations to use their general treasury funds to make independent expenditures. The Commission anticipates making further changes to this provision when it completes the remaining portions of this rulemaking.

##### *Section 114.10 Qualified Nonprofit Corporations*

In *MCFL*, the Supreme Court reviewed the application of the independent expenditure prohibition in section 441b to *MCFL*, a small, nonprofit corporation organized to promote specific ideological beliefs. The Court concluded that, because *MCFL* did not have the potential to exert an undesirable influence on the electoral process, it did not implicate the concerns that legitimately prompted regulation by Congress. Consequently, the Court found section 441b unconstitutional as applied to *MCFL*.

The Court cited "three features essential to [its] holding that [*MCFL*] may not constitutionally be bound by § 441b's restriction on independent spending." 479 U.S. at 264. First, *MCFL* was formed for the express purpose of promoting political ideas and cannot engage in business activities. Second, it has no shareholders or other persons affiliated so as to have either a claim on the corporation's assets or earnings, or any other economic disincentives to disassociate with the corporation. Third, it was not established by a business corporation or a labor union, and it has a policy of not accepting contributions from such entities. *MCFL* at 264. The Court said that section 441b's prohibition on independent expenditures is unconstitutional as applied to nonprofit corporations with these three characteristics.

Section 114.10 of the final rules is based on this part of the *MCFL* decision, and on the Court's subsequent decision in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990). Section 114.10 lists the features of those corporations that are exempt from section 441b's prohibition on independent expenditures. It also sets out the reporting requirements for these corporations. A detailed explanation of section 114.10 is set out below.

##### *1. General Issues Raised by the NPRM and the Commenters*

*a. The name given to exempt corporations.* One preliminary question is the name to be used for corporations that are exempt from the independent expenditure prohibition. The Commission specifically sought comments on this issue in the Notice of Proposed Rulemaking. The NPRM referred to them as "exempt corporations." However, the Commission and some of the commenters expressed concern that this name might cause confusion, because the term "exempt" is so closely

associated with the Internal Revenue Code.

The NPRM contained an alternative version of proposed section 114.10 that used the phrase "qualified corporation" as the name for these organizations. The Commission believes this phrase is easy to use, and clearly distinct from terms used in other areas of the law. However, the Commission has also added the word "nonprofit" to make this phrase more descriptive. Thus, the name "qualified nonprofit corporation" or "QNC" will be used to refer to organizations that are exempt from the independent expenditure prohibition.

*b. General concerns expressed by commenters.* Some of the comments received contained general observations on the Commission's efforts to promulgate rules regarding the exemption recognized in *MCFL*. One commenter objected to any Commission effort to issue rules in this area, arguing that Commission action will inevitably narrow the standards that were clearly stated in *MCFL* and *Austin*, and would make the Commission an arbiter of First Amendment rights. The commenter alleges that this is a role for which the Commission has no constitutional or Congressionally conferred authority.

However, the Commission disagrees, and has decided to issue regulations in this area. Although the *MCFL* opinion may be quite specific by judicial standards, it leaves many administrative questions unanswered. Without new rules, the Commission would have to apply the *MCFL* decision on an *ad hoc* basis, which could result in inconsistency and would provide no guidance to the regulated community. In addition, the Commission's regulations are more readily available to the regulated community than the text of court decisions, and serve as the primary reference for Commission policy. Consequently, the rules should reflect court decisions that significantly affect the application of the FECA.

Many of the commenters felt that the proposed rules were too restrictive. One commenter said that the essence of the decision is that organizations more like voluntary political associations than business firms cannot be subjected to section 441b. This commenter argued that the three stated features should provide organizations with a safe harbor but should not be absolutely required.

As will be discussed further below, several provisions specifically criticized as too restrictive by the commenters have been eliminated from the final rules. However, it is important that the three features enunciated by the Supreme Court be included in the final rules as a threshold requirement for an

exemption from the independent expenditure prohibition. The *MCFL* Court described these three features as "essential to [its] holding that [MCFL] may not constitutionally be bound by § 441b's restriction on independent spending." 479 U.S. at 263-64. The clear implication is that a corporation that does not have all three of these features can be subject to this restriction.

The U.S. Court of Appeals decision in *Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994), does not affect this conclusion. In that case, the Eighth Circuit decided that a Minnesota statute that closely tracked the Supreme Court's three essential features was unconstitutional as applied to a Minnesota nonprofit corporation. The Commission believes the Eighth Circuit's decision, which is controlling law in only one circuit, is contrary to the plain language used by the Supreme Court in *MCFL*, and therefore is of limited authority.

The Notice sought comments on two versions of section 114.10 that represent contrasting approaches for defining the *MCFL* exemption. The first version set out the essential features listed in the *MCFL* opinion as threshold requirements for an exemption from the independent expenditure prohibition. By following the long-standing presumption that all incorporated entities are subject to the independent expenditure prohibition in section 441b, and requiring corporations that claim to be exempt from that prohibition to demonstrate that they are entitled to an exemption, this version sought to fit the *MCFL* decision into the existing statutory framework.

The second version took the opposite approach. It presumed a broad class of corporations would be exempt from section 441b's independent expenditure prohibition, unless they have a characteristic that would bring them within the Commission's jurisdiction.

The Commission has decided to follow the first approach and incorporate the rules into the existing framework for section 441b. The Supreme Court did not conclude that all of section 441b is unconstitutional on its face. Rather, it held that one portion of section 441b, the prohibition on independent expenditures, is unconstitutional as applied to a narrow class of incorporated issue advocacy organizations. The Court explicitly reaffirmed the validity of section 441b's prohibition on corporate contributions. 479 U.S. at 259-60. Thus, the broad prohibition on the use of corporate treasury funds contained in section 441b still exists, and the Commission's

responsibility for enforcing that provision remains in place.

The Commission is aware that most of the comments were in accord with the second version. These commenters argued that all organizations are entitled to unlimited First Amendment rights regardless of whether they are incorporated, and that any Commission action that has the effect of limiting those rights is unconstitutional. They felt that the first version would define the category of exempt corporations too narrowly, and would burden the speech activity of corporations that are entitled to an exemption.

However, there is a long history of regulating the political activity of corporations, and the Supreme Court has recognized the compelling governmental interest in regulating this activity on numerous occasions. "The overriding concern behind the enactment of the [statutory predecessor to section 441b] was the problem of corruption of elected representatives through the creation of political debts.

\* \* \* The importance of the governmental interest in preventing this occurrence has never been doubted." *First National Bank of Boston v. Belotti*, 435 U.S. 765, 788, n.26 (1978). "This careful legislative adjustment of the federal electoral laws . . . to account for the particular legal and economic attributes of corporations and labor organizations warrants considerable deference. . . . [I]t also reflects a permissible assessment of the dangers posed by those entities to the electoral process." *FEC v. National Right to Work Committee*, 459 U.S. 197, 209 (1982).

The *MCFL* decision reaffirms, rather than casts doubt upon, the validity of Congressional regulation of corporate political activity. In its opinion, the *MCFL* Court said "[w]e acknowledge the legitimacy of Congress' concern that organizations that amass great wealth in the economic marketplace not gain unfair advantage in the political marketplace." *MCFL*, 479 U.S. at 263. The Court found the application of section 441b to *MCFL* unconstitutional not because this governmental interest was not compelling in general, but because *MCFL* was different from the majority of entities addressed by section 441b. Consequently, this governmental interest was not implicated by *MCFL*'s activity. *Id.* The Court also acknowledged that *MCFL*-type corporations are the exception rather than the rule, saying that "[i]t may be that the class of organizations affected by our holding today will be small." *Id.* at 264. Thus, the Commission's task is to incorporate this narrow exception to the independent expenditure

prohibition into the regulations so that they protect the interests of organizations that are like *MCFL* without undermining the FECA's legitimate legislative purposes. The Commission has concluded that the first approach is better suited to this task.

## 2. Scope and Definitions

Paragraph (a) is a scope provision that explains, in general terms, the purposes of section 114.10. Paragraph (b) defines four terms for the purposes of this section.

*a. The promotion of political ideas.* The first term is the phrase "the promotion of political ideas." The *MCFL* Court said one of *MCFL*'s essential features was that "it was formed for the express purpose of promoting political ideas, and cannot engage in business activities." 479 U.S. at 264. Paragraph (b)(1) clarifies what this phrase means for the purposes of section 114.10. Under paragraph (b)(1), the promotion of political ideas includes issue advocacy, election influencing activity, and research, training or educational activity that is expressly tied to the organization's political goals.

The Commission added the last phrase, which is based on language in the *Austin* decision, in response to several commenters who felt that the proposed definition was too narrow. These commenters said that many organizations engage in certain activities that are not pure advocacy but are directly related to their advocacy activities. They argued that organizations should be allowed to conduct these activities without losing their exemption from the independent expenditure prohibition. The Commission agrees, and has added the last phrase to the final rules to serve this purpose.

*b. Express purpose.* Paragraph (b)(2) defines the term "express purpose," as that term is used in section 114.10. As indicated above, the Supreme Court said that *MCFL* was formed for the express purpose of promoting political ideas and cannot engage in business activities. *Id.* Paragraph (b)(2) states that a qualified nonprofit corporation's express purpose is evidenced by the purpose stated in the corporation's charter, articles of incorporation, or bylaws. It also may be evidenced by any purpose publicly stated by the corporation or its agents, and any activities in which the corporation actually engages.

Generally, if an organization's organic documents set out a purpose that cannot be characterized as issue advocacy, election influencing activity, or research, training or educational activity

expressly tied to political goals, the organization will not be a qualified nonprofit corporation. However, paragraph (b)(2)(i) contains an exception to this rule. If a corporation's organic documents indicate that the corporation was formed for the promotion of political ideas and "any lawful purpose" or "any lawful activity," the latter statement will not preclude a finding under paragraph (c)(1) that the corporation's only express purpose is the promotion of political ideas. The Commission recognizes that it is common for corporations to use boilerplate purpose statements elicited from their state's incorporation statute when they prepare their articles of incorporation. These statements will not prevent such an organization from being a qualified nonprofit corporation.

One commenter objected to including those purposes evidenced by the activities in which the corporation actually engages. The commenter argued that this rule would allow the Commission to analyze the motives behind the corporation's activities.

The Commission has decided to include this provision in the final rules. Generally, corporations engage in activities that further the goals of the corporation. Thus, the corporation's activities tend to provide a more objective and complete indication of the corporation's reasons for existing. In contrast, if the Commission could look only to a corporation's organic documents for the corporation's purpose, a corporation with an appropriate purpose statement in its organic documents would be exempt from the independent expenditure prohibition, regardless of whether the activities in which it actually engages were consistent with its stated purpose or with the exemption recognized in the *MCFL* opinion.

The Commission does not intend to engage in extensive speculation about the motivations of qualified nonprofit corporations. However, it is necessary for the Commission to consider the activities in which a corporation actually engages in order to completely assess the corporation's purpose.

*c. Business activities.* Paragraph (b)(3) defines the term "business activities" for the purposes of these rules. Under paragraph (b)(3), "business activities" generally includes any provision of goods and services that results in income to the corporation. It also includes any advertising or promotional activity that results in income to the corporation, other than in the form of membership dues or donations. Thus, a corporation that publishes a newsletter or magazine and sells advertising space

in that publication will be engaging in business activities, and will not be a qualified nonprofit corporation.

However, the definition specifically excludes fundraising activities that are expressly described as requests for donations that may be used for political purposes, such as supporting or opposing candidates. Fundraising activities conducted under these circumstances will not be considered business activities under these rules.

This definition reflects a critical distinction made by the Supreme Court in *MCFL*. The definition includes those activities that closely resemble the commercial activities of a business corporation because these activities generate financial resources that, like those of a business corporation, "are not an indication of popular support for the corporation's political ideas \* \* \* [but] reflect instead the economically motivated decisions of investors and customers." 479 U.S. at 258. Thus, these "resources amassed in the economic marketplace" can create "an unfair advantage in the political marketplace." *Id.* at 257.

In contrast, the definition specifically excludes activities that generate resources that reflect "popular support for the corporation's political ideas." *Id.* at 257. Fundraising activities that are described to potential donors as requests for donations that will be used for political purposes will generate donations that reflect popular support for the corporation's political ideas. Consequently, they do not pose the risk of giving the corporation an unfair advantage in the political marketplace.

In some cases, the fundraising activities of a qualified nonprofit corporation closely resemble business activities in that they involve a provision of goods that results in income to the corporation. For example, a qualified nonprofit corporation may sell T-shirts or calendars in order to generate funds to support its political activity. *MCFL* itself held garage sales, bake sales and raffles to raise funds for these purposes. However, if the corporation discloses that the activities are an effort to raise funds for its political activities, such as supporting or opposing candidates, the activities will not be considered business activities for the purposes of these rules, notwithstanding their close resemblance to ordinary business transactions. "This ensures that political resources reflect political support." *NCFL* at 264.

The Commission notes that this exclusion is limited to direct fundraising by the corporation. If a corporation sells items through a third party, such as a retail store or catalog

mail order outlet, this will generally be considered a business activity, even if the item is accompanied by a notification that a portion of the proceeds will be used to support the corporation's political activities. The sale of items by a third party that is not a qualified nonprofit corporation justifies the application of the independent expenditure prohibition.

*d. Shareholders.* Paragraph (b)(4) states the term "shareholder" has the same meaning as the term "stockholder," as defined in section 114.1(h) of the Commission's current rules.

#### 4. The Essential Features

The Supreme Court said "MCFL has three features essential to our holding that it may not constitutionally be bound by § 441b's restriction on independent spending." *MCFL* at 263-64. These features have been incorporated into paragraph 114.10(c) of the final rules. A qualified nonprofit corporation is a corporation that has all the characteristics set out in this paragraph. Corporations that do not have all of these characteristics are not qualified nonprofit corporations, and therefore are bound by the independent expenditure prohibition.

*a. Purpose.* Paragraph (c)(1) states that a qualified nonprofit corporation is one whose only express purpose is the promotion of political ideas. In other words, if a corporation's organic documents, authorized agents, and actual activities indicate that its purpose is issue advocacy, election influencing activity, or research, training or other activity expressly tied to the organization's political goals, the corporation may be a qualified nonprofit corporation. However, if the documents, agents or activities indicate any other purpose, the corporation will be subject to the independent expenditure prohibition.

As indicated above, the rules contain an exception for boilerplate purpose statements in a corporation's organic documents. If a corporation's organic documents indicate that the corporation was formed for the promotion of political ideas and "any lawful purpose" or "any lawful activity," the latter statement will not preclude a finding under paragraph (c)(1) that the corporation's only express purpose is the promotion of political ideas.

One commenter argued that requiring the promotion of political ideas to be an organization's only express purpose would exclude organizations that do educational and research work on political topics with which they are concerned. It would also exclude

organizations that train people in advocacy techniques, an important part of the activities of many nonprofit corporations. The Commission has addressed these concerns by broadening the definition of the phrase "the promotion of political ideas" in paragraph (b)(1) to include these activities. This definition is discussed in detail above.

*b. Business activities.* Under paragraph (c)(2), a corporation must be unable to engage in business activities in order to be a qualified nonprofit corporation. Paragraph (c)(2) tracks the language of the *MCFL* decision in that it limits the exemption to corporations that cannot engage in business activities. Thus, in order to be exempt, business activities must be proscribed by the corporation's organic documents or other internal rules.

However, as indicated above, fundraising activities that are expressly described as requests for donations to be used for political purposes are not business activities. Consequently, a qualified nonprofit corporation can engage in fundraising activities without losing its exemption, so long as it makes the appropriate disclosure.

Most of the commenters objected to a complete prohibition on business activities. One commenter argued that the presence of minimal business activities would not have changed the result in *MCFL*. This commenter said that, despite the Supreme Court's reliance on the absence of business activities, a prohibition should not be read into the opinion, since it would unreasonably limit the activities of these organizations.

However, the plain language of the *MCFL* opinion endorses a complete prohibition on business activities. The Court said "MCFL has three features essential to our holding that it cannot constitutionally be bound by § 441b's restriction on independent spending. First, it was formed for the express purpose of promoting political ideas, and cannot engage in business activities." *MCFL*, 479 U.S. at 264 (emphasis added). This statement clearly supports a total ban on business activities.

In addition, other parts of the opinion make it clear that the Court based its conclusion on the complete absence of any business activities, and strongly suggest that the presence of business activities would have changed the result. Earlier, the Court said that "the concerns underlying the regulation of corporate political activity are simply absent with regard to *MCFL*. It is not the case \* \* \* that *MCFL* merely poses less of a threat of the danger that has

prompted regulation. Rather, it does not pose such a threat at all." 479 U.S. at 263. In order to pose no such threat, a corporation must be free from resources obtained in the economic marketplace. Only those corporations that cannot engage in business activities are free from these kinds of resources.

This approach will not unreasonably limit the activities of a qualified nonprofit corporation. The corporation has at least two options for generating revenue under the final rules. First, the corporation can engage in unlimited fundraising activities, so long as it informs potential donors that it is seeking donations that will be used for political purposes, such as supporting or opposing candidates. Second, the corporation can establish a separate segregated fund and make its independent expenditures exclusively from that fund.

Several other commenters also felt that a limited amount of business activity should be allowed, and argued that the Commission should incorporate the tax law concepts of related and unrelated business activity into the final rules. Under this approach, income from activity that is related to the corporation's mission would not be considered business activity, and as such, would not affect its qualified nonprofit corporation status. In addition, qualified nonprofit corporations would be permitted to engage in some unrelated business activity, so long as it does not become the organization's primary purpose.

However, reliance on these tax law concepts would be inappropriate here because the tax code was drafted to serve different purposes. Section 501(c)(4) of the tax code grants tax exempt status to organizations that promote the social welfare. In exercising its administrative discretion, the Internal Revenue Service has concluded that it is appropriate to allow social welfare organizations to engage in some unrelated business activity so long as it does not become their primary purpose, apparently believing that a limited amount of business activity is not incompatible with the promotion of social welfare.

In contrast, section 441b seeks to prevent the use of resources amassed in the economic marketplace to gain an unfair advantage in the political marketplace. The *MCFL* Court concluded that a complete prohibition on the use of resources amassed in the economic marketplace is necessary to serve this purpose. Thus, the Commission has incorporated this prohibition into the final rules.

*c. Shareholders/disincentives to disassociate.* The second feature that distinguished *MCFL* from other corporations was that "it ha[d] no shareholders or other persons affiliated so as to have a claim on its assets or earnings." 479 U.S. at 264. The Supreme Court said this "ensures that persons connected with the organization will have no economic disincentive for disassociating with it if they disagree with its political activity." *Id.* Later, in *Austin*, the Court said that persons other than shareholders may also face disincentives to disassociate with the corporation. "Although the Chamber also lacks shareholders, many of its members may be similarly reluctant to withdraw as members even if they disagree with the Chamber's political expression, because they wish to benefit from the Chamber's nonpolitical programs. \* \* \* The Chamber's political agenda is sufficiently distinct from its educational and outreach programs that members who disagree with the former may continue to pay dues to participate in the latter." 494 U.S. at 663.

These characteristics have been incorporated into paragraph (c)(3) of the final rules. In the interests of clarity, the rules separate these two characteristics into separate subparagraphs. Only those corporations that have the characteristics set out in both subparagraphs are exempt from the independent expenditure prohibition.

*i. Shareholders.* Under paragraph (c)(3)(i), a qualified nonprofit corporation is one that has no shareholders or other persons affiliated in a way that could allow them to make a claim on the organization's assets or earnings. Thus, if any of the persons affiliated with a corporation have an equitable or ownership interest in the corporation, the corporation will not be a qualified nonprofit corporation.

One commenter said the limitation on persons with claims against the corporation is unnecessary, and also said it should be coupled with an explanation that this restriction will not deprive a corporation of the right to have dues-paying members.

The Commission believes this limitation is necessary to ensure that associational decisions are based entirely on political considerations. However, this limitation will not adversely affect corporations with dues-paying members. In most cases, dues payments are not investments made with an expectation of return or repayment. They do not give members any right to the corporation's assets or earnings. Consequently, the existence of



dues-paying members will not affect the corporation's exempt status.

Two commenters expressed concern that paragraph 114.10(c)(3)(i) could be read to deny exempt status to corporations with employees or creditors, because an employee of a qualified nonprofit corporation could have a claim against the corporation for wages, and a creditor could have a claim against the corporation on a debt.

The Commission has revised this provision in accordance with these comments. Claims held by employees and creditors with no ownership interest in the corporation arise out of arms-length employment or credit relationships, rather than an equitable interest in the corporation. Consequently, they will not be treated as claims on the corporation's assets or earnings that affect the corporation's exemption from the independent expenditure prohibition.

ii. Disincentives to disassociate.

Paragraph (c)(3)(ii) limits the exemption to corporations that do not offer benefits that are a disincentive for recipients to disassociate themselves with the corporation on the basis of its position on a political issue. Thus, if the corporation offers a benefit that recipients lose if they end their affiliation with the corporation, or cannot obtain unless they become affiliated, the corporation will not be a qualified nonprofit corporation. This provision ensures that the associational decisions of persons who affiliate themselves with the corporation are based exclusively on political, rather than economic, considerations.

The rule contains examples of benefits that will be considered disincentives to disassociate with the corporation. First, credit cards, insurance policies and savings plans will be considered disincentives to disassociate. Consequently, corporations that offer such things as affinity credit cards or life insurance will not be qualified nonprofit corporations.

Second, training, education and business information will be considered disincentives to disassociate from the corporation, unless the corporation provides these benefits to enable the persons who receive them to help promote the group's political ideas. This provision allows a qualified nonprofit corporation to provide its volunteers with the training and information they need to advocate its issues. However, if the corporation provides other kinds of training or information that is not needed for its issue advocacy work, the corporation will not be a qualified nonprofit corporation.

One commenter objected to paragraph (c)(3)(ii), saying that it would prevent most organizations from qualifying for the exemption. Other commenters urged the Commission to distinguish between benefits that are related to the corporation's issue advocacy work, or grow out of it, and those that are unrelated to that work, saying that only the latter should be regarded as disincentives to disassociate. These commenters also recommended that a substantiality test be used, so that benefits that are insubstantial or create an insignificant disincentive to disassociate would not disqualify the corporation.

The Commission has revised this section to address some of the concerns raised by the commenters. As indicated above, paragraph 114.10(c)(3)(ii) has been revised to say that, if a corporation provides training or education that is necessary to promote the organization's political ideas, the training will not be considered an incentive to associate or disincentive to disassociate.

However, the Commission has decided against including a substantiality test for benefits that ostensibly create a less significant disincentive to disassociate with the corporation. Any disincentive, no matter how small, can influence an individual's associational decisions, particularly where the "cost" to the individual of obtaining the benefit is only a small yearly donation to the corporation. For example, a corporation might offer donors access to affinity credit cards with no annual fee. Although the actual dollar value of such a benefit may be insignificant, it could easily offset the donor's annual donation to the corporation. Thus, membership levels would partially reflect the popularity of the benefit being offered, rather than exclusively reflecting the popularity of the group's political ideas.

Including a substantiality test would also force the Commission to determine which benefits are substantial enough to influence a particular individual's decision whether or not to continue associating with an organization. The Commission is reluctant to make these difficult subjective determinations if they can be avoided. Consequently, the final rule does not contain a substantiality threshold for disincentives to disassociate with the corporation.

*e. Relationship with business corporations and labor organizations.* The Supreme Court said that one of the reasons MCFL was exempt from the independent expenditure prohibition was that it "was not established by a

business corporation or labor union, and it is its policy not to accept contributions from such entities." *MCFL*, 479 U.S. at 264. This characteristic has been incorporated into paragraph (c)(4) of the final rules. The final rule has been broken down into three subparagraphs for purposes of clarity.

Paragraph (c)(4)(i) implements the first part of the Court's statement. Only corporations that were not established by a business corporation or labor organization can be eligible for an exemption from, the independent expenditure prohibition. Thus, corporations that are set up by business corporations or labor organizations cannot be qualified nonprofit corporations.

Paragraph (c)(4)(ii) limits the exemption to corporations that do not directly or indirectly accept donations of anything of value from business corporations or labor organizations. This includes donations received directly from these entities, and donations that pass through a third organization. Thus, if a corporation accepts donations from an organization that accepts donations from these entities, the corporation will not be a qualified nonprofit corporation.

The rule also limits the exemption to corporations that can provide some assurance that they do not accept donations from business corporations or labor organizations. Under paragraph (c)(4)(iii), if the corporation can demonstrate, through accounting records, that it has not accepted any donations from business corporations and labor organizations in the past from business corporations and labor organizations in the past, it will be eligible for the exemption. If it is unable, for good cause, to make this showing, it can provide adequate assurance by showing that it has a documented policy against accepting donations from these entities. In order to be documented, this policy must be embodied in the organic documents of the corporation, the minutes of a meeting of the governing board, or a directive from the person that controls the day-to-day operation of the corporation.

Most of the commenters objected to an absolute ban on the acceptance of business corporation and labor organization donations, arguing that a ban is not necessary and is not supported by the court decisions. Several commenters argued that *MCFL's* third requirement is met when an organization is free from the influence of business corporations. Others urged the Commission to focus not on the level of donations but on whether the



corporation is acting as a "conduit" for business corporation and labor organization funds. One commenter suggested that the Commission engage in factual analyses to determine whether an organization is under the influence of a business corporation or labor organization or is acting as a conduit for the funds of such an organization.

However, the language of the *MCFL* opinion supports a prohibition on business corporation and labor organization donations. The *MCFL* Court said that one of the features "essential to [its] holding that [MCFL] may not constitutionally be bound by § 441b's restriction on independent spending" was that "MCFL was not established by a business corporation or a labor union, and it is its policy not to accept contributions from such entities." 479 U.S. at 263-64 (emphasis added). The Court concluded that the existence of this policy "prevents [qualified nonprofit] corporations from serving as conduits for the type of direct spending that creates a threat to the political marketplace." *Id.* Thus, although the *MCFL* Court was concerned that business corporations and labor organizations could improperly influence qualified nonprofit corporations and use them as conduits to engage in political spending, the Court saw *MCFL*'s policy of not accepting business corporation or labor organization donations as the way to address these concerns.

The *Austin* decision explains why a complete prohibition on these donations is necessary to serve the purposes of section 411b. In concluding that the Michigan Chamber of Commerce was not an *MCFL*-type corporation, the Court recognized that the danger of "unfair deployment of wealth for political purposes" exists whenever a business corporation or labor organization is able to funnel donations through a qualified nonprofit corporation. "Because the Chamber accepts money from for-profit corporations, it could, absent application of [Michigan's version of section 441b], serve as a conduit for corporate political spending." *Austin*, 494 U.S. at 664. "Business corporations \* \* \* could circumvent the [independent expenditure] restriction by funneling money through the Chamber's general treasury." *Id.*

Therefore, the Commission has limited the exemption to corporations that do not accept donations from business corporation or labor organizations. The Commission believes it would be impractical to engage in factual analyses to determine whether an organization is actually influenced

by a business corporation or labor organization or is acting as a conduit for the funds of these entities. Furthermore, nothing in the Court's decisions suggests that the Commission must engage in such an inquiry. In fact, the Court has specifically said that, with regard to the application of section 441b, it will not "second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared." *FEC v. National Right to Work Committee*, 459 U.S. 197, 210 (1982) ("*NRWC*").

Two commenters said it is impossible to screen out all such donations, and asserted that incidental or inadvertent business corporation or labor organization receipts should be permitted. One commenter suggested a *de minimis* test for a qualified nonprofit corporation's overall level of corporate or labor support, and limits on the percentage that could be accepted from a single contributor. Another commenter said the Commission should allow qualified nonprofit corporations to accept a *de minimis* amount of corporate or labor organization donations, so long as the corporation segregates these donations in a separate account and allocates expenses so that the corporate funds are not used to make independent expenditures.

In applying this rule, the Commission will distinguish inadvertent acceptance of prohibited donations from knowing acceptance of a *de minimis* amount of prohibited donations. Inadvertently accepted prohibited donations will not affect a corporation's qualification for an exemption from the independent expenditure prohibition. However, knowingly accepted prohibited donations will void a corporation's exemption, even if the corporation accepts only a *de minimis* amount. The Commission notes that political committees are required to screen their receipts for prohibited contributions. Most committees do so successfully, even though many of them are small and have limited resources. Qualified nonprofit corporations will also be expected to adopt a mechanism for screening their receipts for prohibited contributions in order to remain exempt from the independent expenditure prohibition.

Finally, the Commission notes that, in most cases, the prohibition on indirect business corporation and labor organization donations in paragraph (c)(4)(ii), discussed above, will not affect qualified nonprofit corporations that receive grants from organizations that are tax exempt under section 501(c)(3). Some qualified nonprofit corporations, all of which are section 501(c)(4) tax

exempt organizations under the final rules, may receive grants from section 501(c)(3) organizations. Because section 501(c)(3) organizations can accept donations from business corporations and labor organizations, paragraph (c)(4)(ii) could be read to disqualify an otherwise qualified nonprofit corporation if it receives a grant from a section 501(c)(3) organization.

However, under IRS rules, section 501(c)(4) organizations that receive funds from a section 501(c)(3) organization are required to use those funds in a way that is consistent with the section 501(c)(3) organization's exempt purpose. Since political campaign intervention is never consistent with a section 501(c)(3) organization's exempt purpose, the recipient section 501(c)(4) organization is not supposed to use the grant for campaign activity. "[O]therwise, public funds might be spent on an activity that Congress chose not to subsidize." *Regan v. Taxation With Representation*, 461 U.S. 540, 544 (1982). So long as these safeguards exist, the Commission will not regard a grant from a section 501(c)(3) organization to a qualified nonprofit corporation as an indirect donation from a business corporation or labor organization. Consequently, the grant will not affect the organization's exemption from the independent expenditure prohibition.

*f. Section 501(c)(4) status.* Paragraph (c)(5) of the final rules limits the exemption from the independent expenditure prohibition to corporations that are described in 26 U.S.C. 501(c)(4). Section 501(c)(4) describes a class of organizations known as social welfare organizations that are exempt from certain tax obligations. Under section 501(c)(4), a social welfare organization is not organized for profit but is operated exclusively for the promotion of social welfare. A corporation must be a social welfare organization in order to be exempt from the prohibition on independent expenditures.

IRS regulations state that the promotion of social welfare does not include "direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate." 26 CFR 1.501(c)(4)-1(a)(2)(ii). However, the rules also state that an organization is operated exclusively for the promotion of social welfare if it is "primarily" engaged in promoting the common good and general welfare of the people of the community. 26 CFR 1.501(c)(4)-1(a)(2)(i). Thus, the rules allow social welfare organizations to engage in a limited amount of political activity.

The commenters expressed varying views on this provision and its relationship to the rest of the proposed rules. Two commenters argued that section 501(c)(4) organizations should be presumptively exempt, regardless of whether they have any of the other characteristics of a qualified nonprofit corporation. In contrast, two other commenters said that the additional characteristics should be included in the final rules. These two commenters noted that the Internal Revenue Code allows business corporations and labor organizations to make direct donations to section 501(c)(4) organizations. Thus, the additional characteristics must be included in order to limit the exemption from the independent expenditure prohibition to the kind of organizations described in the *MCFL* opinion.

The Commission has decided not to recognize a presumption that social welfare organizations are qualified nonprofit corporations solely because of their section 501(c)(4) status. Although the characteristics of a social welfare organization overlap to some extent with *MCFL*'s three essential features, they are not identical. This difference results from the fact that the tax code was written to serve different purposes than the FECA. Thus, it would be inappropriate to presume that all social welfare organizations are entitled to an exemption from the independent expenditure prohibition.

Furthermore, the Internal Revenue Service often uses general legal principles to enforce the provisions of the tax code. Thus, there will often be no clearly stated IRS rule or policy that the Commission can refer to in making its determinations. In addition, filing for formal recognition of tax exempt status under section 501(c)(4) is permissive, not required. As a result, the Commission will not be able to rely on the IRS for verification of an organization's tax exempt status.

Therefore, the Commission has decided to include the additional characteristics in the final rules, and limit the exemption from the independent expenditure prohibition to corporations with these characteristics.

##### 5. Other Requirements Not Included in the Final Rules

The Notice of Proposed Rulemaking contained a number of proposed requirements that are not included in the final rules. These proposals are summarized below.

*a. Affiliation with a separate segregated fund.* One proposal would have denied the exemption to corporations that have a separate segregated fund. This proposal would

have the effect of requiring corporations that have separate segregated funds to make independent expenditures solely from that fund, regardless of whether they have the characteristics of a qualified nonprofit corporation.

The commenters were universally opposed to this proposal. One commenter said such a rule would be impossible to apply, and would lead to a nonsensical result whereby small, unsuccessful groups would be able to make independent expenditures with general treasury funds, while larger, more successful groups would be required to use their separate segregated funds. Another commenter said that there is no governmental interest in denying the exemption to organizations with separate segregated funds, because the existence of such a fund does not create a danger that the organization will flood the electoral process with business profits. A third commenter objected to this criterion, arguing that the constitutional theory underlying the *MCFL* decision did not rely upon *MCFL*'s allegations of the difficulty faced by small nonprofits attempting to comply with FEC regulations.

Although a bright line rule such as this one would be very useful in implementing the Court decisions, the Commission has not included this proposal in the final rules. Consequently, corporations with these characteristics will be exempt from the independent expenditure prohibition regardless of whether they have a separate segregated fund.

*b. Eligibility to file IRS Form 990EZ.* The NPRM proposed to limit the exemption from the independent expenditure prohibition to corporations with limited financial resources by requiring them to be eligible to file their tax returns on Internal Revenue Service Form 990EZ. Form 990EZ is available to organizations that have gross receipts during the year of less than \$100,000 and total assets at the end of the year of less than \$250,000.

Most commenters objected to this proposal. Several commenters observed that an organization's size was not included in the list of essential features, and also said that it has no relationship to the justification given for the regulation of corporate political speech. One commenter argued that the filing eligibility levels are so low that most "substantial" organizations would not qualify for an exemption.

In contrast, one commenter supported the use of the Form 990EZ eligibility thresholds as a criterion for an exemption from the independent expenditure prohibition. This commenter thought it should be used to

prevent groups with extensive financial resources from exacting political debts from candidates by giving them significant support. He argued that there is a compelling state interest in preventing organizations from seeking a quid pro quo.

The Commission is concerned that this proposal may be difficult to administer, and so has decided not to include it in the final rules. The Internal Revenue Service submitted comments in which it noted that only those section 501(c)(4) organizations that are formally recognized as tax exempt can file Form 990 or 990EZ. Organizations that are not formally recognized must file as taxable organizations, usually on Form 1120. Consequently, there may not be an easy way to confirm an organization's eligibility to file Form 990EZ. In addition, organizations with less than \$25,000 in annual gross receipts have no real need to seek formal recognition, since they are not required to file tax returns at all. Thus, there will be no way to confirm the filing eligibility of these organizations.

The IRS also noted that the eligibility requirements for filing Form 990EZ may change from time to time. This would have the effect of changing the eligibility requirements for an exemption from the independent expenditure prohibition.

Consequently, the Commission has excluded this proposal from the final rules. Corporations with the characteristics in paragraph (c) will be exempt regardless of whether they are eligible to file Form 990EZ.

*c. Less sophisticated fundraising techniques.* The narrative portion of the NPRM indicated that the Commission was considering limiting the exemption to groups that use the less sophisticated fundraising techniques typically employed by grass roots organizations. One criterion considered would deny the exemption to organizations that utilize more formalized fundraising methods such as direct mail solicitation.

However, the Commission has decided not to include this in the final rules. Corporations with the characteristics set out in paragraph (c) will be exempt from the independent expenditure prohibition regardless of how they raise funds, so long as their fundraising activity is not business activity under paragraph (b)(3) of the final rules.

##### 6. Reconstituting as a Qualified Nonprofit Corporation

The Commission recognizes that some corporations that are not qualified nonprofit corporations may wish to reconstitute themselves so that they

qualify for an exemption from the independent expenditure prohibition. In order to become a qualified nonprofit corporation, a corporation must adopt the essential characteristics set out in paragraph (c) of the final rules. In addition, the corporation must purge its accounts of corporate and labor organization donations and implement a policy to ensure that it does not accept these donations in the future. Once it adopts the essential characteristics, purges its accounts, and implements such a policy, the corporation will become a qualified nonprofit corporation.

#### 7. Permitted Corporate Independent Expenditures

Paragraph (d) states that qualified nonprofit corporations can make independent expenditures, as defined in 11 CFR Part 109, without violating the prohibitions on corporate expenditures in 11 CFR Part 114. However, this paragraph also emphasizes that qualified nonprofit corporations remain subject to the other requirements and limitations in Part 114, in particular, the prohibition on corporate contributions, whether monetary or in-kind.

The Commission received no comments on this provision, and has retained it in the final rules.

#### 8. Reporting Requirements

Paragraph (e) requires a corporation that makes independent expenditures to certify that it is a qualified nonprofit corporation under this section and report its independent expenditures. The procedures for certifying exempt status are set out in paragraph (e)(1). The requirements for reporting independent expenditures are set out in paragraph (e)(2).

Under paragraph (e)(1), the corporation must certify that it is eligible for an exemption from the independent expenditure prohibition. This certification must be submitted no later than the date upon which the corporation's first independent expenditure report is due under paragraph (e)(2), which will be described in detail below. However, the corporation is not required to submit this certification prior to making independent expenditures. The certification can be made as part of FEC Form 5, which the Commission will be modifying for use in this situation. Or, the corporation can submit a letter that contains the name, address, signature and printed name of the individual filing the report, and certifies that the corporation has the characteristics set out in paragraph (c).

One of the alternatives set out in the NPRM would have required qualified nonprofit corporations to submit much more detailed information in order to qualify for exempt status. The Commission decided not to include these requirements in the final rules in order to minimize the reporting burdens on qualified nonprofit corporations. Instead, the Commission has decided to require only that corporations certify that they have the characteristics of a qualified nonprofit corporation when they make independent expenditures. This will ensure that corporations claiming to be exempt are aware of the characteristics required to qualify for an exemption.

Paragraph (e)(2) states that qualified nonprofit corporations must comply with the independent expenditure reporting persons who make independent expenditures in excess of \$250 in a calendar year to report those expenditures using FEC Form 5. This report must include the name and mailing address of the person to whom the expenditure was made, the amount of the expenditure, an indication as to whether the expenditure was in support of or in opposition to a candidate, and a certification as to whether the corporation made the expenditure in cooperation or consultation with the candidate. The names of persons who contributed more than \$200 towards the expenditure must also be reported.

Thus, the final rules treat qualified nonprofit corporations as individuals for the purposes of the reporting requirements. This is one of the least burdensome reporting schemes contained in the FECA. The *MCFL* Court specifically endorsed this approach when it said that the disclosure provisions of 2 U.S.C. 434(c) will "provide precisely the information necessary to monitor [the corporation's] independent spending activity and its receipt of contributions." *MCFL*, 479 U.S. at 262. None of the commenters discussed the proposed independent expenditure reporting requirements.

In another part of its opinion, the *MCFL* Court also said that "should *MCFL*'s independent spending become so extensive that the organization's major purpose may be regarded as campaign activity, the corporation would be classified as a political committee." *MCFL*, 479 U.S. at 262. The proposed rules set out a test for determining a corporation's major purpose, and also contained proposed reporting requirements related to that test. These reporting requirements were set out in paragraph (e) of the proposed rules.

As will be discussed further below, the Commission has decided not to address this part of the Court's opinion in the final rules being promulgated today, preferring to do so at a later date as part of a separate rulemaking. Consequently, the reporting requirements related to the major purpose test have been deleted from paragraph (e) of the final rules. However, these rules may eventually be amended to require reporting of information related to the major purpose concept. Any such changes will be made as part of the separate rulemaking.

#### 9. Solicitation Disclosure

Section 114.10(f) of the final rules states that when a qualified nonprofit corporation solicits donations, the solicitation must inform potential donors that their donations may be used for political purposes, such as supporting or opposing candidates. This rule, which has been modified slightly from the proposed rule, requires qualified nonprofit corporations to include a disclosure statement in their solicitations for donations.

One commenter called this an "unjustifiable roadblock" to the exercise of constitutional rights by small nonprofit corporations, and speculated that the people who run these organizations won't know about this requirement until after a complaint is filed against them.

However, this disclosure requirement directly serves the purposes of the *MCFL* exemption. In carving out this exemption, the Supreme Court said "[t]he rationale for regulation is not compelling with respect to independent expenditures by [*MCFL*]" because "[i]ndividuals who contribute to appellee are fully aware of its political purposes, and in fact contribute precisely because they support those purposes." *MCFL* at 260-61. "Given a contributor's awareness of the political activity of [*MCFL*], as well as the readily available remedy of refusing further donations, the interest [of] protecting contributors is simply insufficient to support § 441b's restriction on the independent spending of *MCFL*." *Id.* at 262 (emphasis added).

The *MCFL* Court went on to endorse the disclosure requirement as a way to ensure that persons who make donations are aware of how those donations may be used. The Court said the need to make donors aware that their donations may be used to "urge support for or opposition to political candidates" can be met by "simply requiring that contributors be informed that their money may be used for such a purpose." *MCFL*, 479 U.S. at 261.

Furthermore, the Commission does not regard anticipated ignorance of a regulation as a legitimate argument against the promulgation of that regulation, particularly when the regulation will implement the Commission's statutory mandate and the holding of a Supreme Court decision.

Therefore, the Commission has included this requirement in the final rules. The Commission does not expect this requirement to impose a significant burden on qualified nonprofit corporations. For example, corporations need not say anything more than "donations to xyz organization may be used for political purposes, such as supporting or opposing candidates," or similar language, in order to satisfy this requirement. This will ensure that donors are aware of the corporation's campaign activity.

#### 10. Non-authorization Notification

Paragraph (g) of the final rules requires qualified nonprofit corporations that make independent expenditures to comply with the disclaimer requirements in 11 CFR 110.11. Section 110.11 requires any person financing an express advocacy communication to include a statement in the communication identifying who paid for it. 11 CFR 110.11(a)(1). This statement must also identify the candidate or committee who authorized the communications, unless the communications was not authorized by any candidate or committee, in which case, it must so indicate. 11 CFR 110.11(a)(1)(iii). Thus, a qualified nonprofit corporation that finances an independent expenditure must include a disclaimer that states the name of the corporation and indicates that the communication was not authorized by any candidate or candidate's committee. The Commission received no comments on this provision.

#### 11. Major Purpose

In *MCFL*, the Court said that "should *MCFL*'s independent spending become so extensive that the organization's major purpose may be regarded as campaign activity, the corporation would be classified as a political committee. \* \* \* As such, it would automatically be subject to the obligations and restrictions applicable to those groups whose primary objective is to influence political campaigns." 479 U.S. at 262 (citation omitted).

The NPRM sought comments on a number of issues related to this part of the Court's opinion. For example, the notice set out two alternative versions of a test for determining whether a

qualified nonprofit corporation's major purpose is making independent expenditures. The notice also specifically sought comments on whether these tests should turn on whether independent expenditures are "a" major purpose or "the" major purpose of the corporation. As discussed above, the notice also contained proposed requirements for reporting the information that the Commission would need for these tests. Several commenters submitted views on these issues.

The Commission has decided not to address this part of *MCFL* in the final rules. In its administration of the Act, the Commission is applying a major purpose concept in other contexts that do not involve qualified nonprofit corporations. The Commission would prefer to promulgate a major purpose test that will govern in all of these situations. Such a rule is beyond the scope of this rulemaking.

Therefore, the Commission has decided to initiate a separate rulemaking to address this part of *MCFL* and other outstanding issues. Any further definition or refinement of the major purpose concept and the associated reporting requirements will be done in that rulemaking. The comments submitted on these issues in response to the NPRM will be considered as part of this separate rulemaking.

However, in the meantime, the Commission cautions, that, "should [a qualified nonprofit corporation's] independent spending become so extensive that [its] major purpose may be regarded as campaign activity," it will be treated as a political committee under the FECA and subject to the applicable regulations.

#### Certification of No Effect Pursuant to 5 U.S.C. § 605(b) [Regulatory Flexibility Act]

The attached final rules will not, if promulgated, have a significant economic impact on a substantial number of small entities. The basis for this certification is that the definition of express advocacy will not have a significant economic impact on a substantial number of small entities. In addition, as anticipated by the Supreme Court in *MCFL*, there may not be a substantial number of small entities affected by the final rules. The new disclosure rules for qualified nonprofit corporations, which are small entities, are the least burdensome requirements possible under the FECA.

#### List of Subjects

##### 11 CFR Part 100

Elections

##### 11 CFR Part 106

Campaign funds  
Political candidates  
Political committees and parties

##### 11 CFR Part 109

Campaign funds  
Elections  
Political candidates  
Political committees and parties  
Reporting requirements

##### 11 CFR Part 114

Business and industry  
Elections  
Labor

For the reasons set out in the preamble, Subchapter A, Chapter I of Title 11 of the *Code of Federal Regulations* is amended as follows:

#### PART 100—SCOPE AND DEFINITIONS (2 U.S.C. 431)

1. The authority citation for 11 CFR Part 100 continues to read as follows:

**Authority:** 2 U.S.C. 431, 438(a)(8).

2. 11 CFR Part 100 is amended by revising section 100.17 to read as follows:

##### § 100.17 Clearly identified (2 U.S.C. 431(18)).

The term *clearly identified* means the candidate's name, nickname, photograph, or drawing appears, or the identity of the candidate is otherwise apparent through an unambiguous reference such as "the President," "your Congressman," or "the incumbent," or through an unambiguous reference to his or her status as a candidate such as "the Democratic presidential nominee" or "the Republican candidate for Senate in the State of Georgia."

3. 11 CFR Part 100 is amended by adding section 100.22 to read as follows:

##### § 100.22 Expressly advocating (2 U.S.C. 431(17)).

*Expressly advocating* means any communication that—(a) Uses phrases such as "vote for the President," "re-elect your Congressman," "support the Democratic nominee," "cast your ballot for the Republican challenger for U.S. Senate in Georgia," "Smith for Congress," "Bill McKay in '94," "vote Pro-Life" or "vote Pro-Choice" accompanied by a listing of clearly identified candidates described as Pro-Life or Pro-Choice, "vote against Old Hickory," "defeat" accompanied by a picture of one or more candidate(s),

acceptable and unacceptable purpose descriptions to be reported by authorized committees. Paragraph (B) requires authorized committees, when itemizing certain disbursements for which reimbursements are required, to provide a brief explanation of the activity for which reimbursement is required. These provisions have been in Title 11 of the **Code of Federal Regulations** since 1980 and 1995, respectively, and were not affected by the recent statutory changes to the election cycle reporting requirements.

#### Need for Correction

As published, the final rules inadvertently omit two paragraphs describing information to be reported by authorized committees of Federal candidates.

All committees must report the purpose of itemized disbursements (i.e., those disbursements aggregating in excess of \$200). Omitted paragraph (A) contains examples of suitably specific purpose descriptions as well as examples of those descriptions that are unacceptably vague. This paragraph is inconsistent with the reporting of rules for unauthorized committees (committees other than candidate committees) in 11 CFR 104.3(b)(3).

Omitted paragraph (B) is used in administering the "personal use" rules in 11 CFR 113.1. Federal candidates are barred from using campaign funds for personal benefit. Paragraph (B) requires authorized committees of Federal candidates itemizing disbursements for which partial or total reimbursement is required under 11 CFR 113.1(g)(1)(iii)(C) or (D) to provide a brief explanation of the activity for which the reimbursement is made.

Section 801 of Title 5 of the United States Code requires Federal agencies to submit regulations to Congress. These regulations were submitted to the Speaker of the House of Representatives and the President of the Senate on November 26, 2001.

#### Certification of No Effect Pursuant to 5 U.S.C. § 605(b) [Regulatory Flexibility Act]

This correction will not have significant economic impact on a substantial number of small entities. The basis of this certification is that this correction only requires political committees to once again add information to the reports they are required to file. These regulations were in 11 CFR since 1980 and 1995, respectively, before being inadvertently omitted in 2000.

#### List of Subjects in 11 CFR Part 104

Campaign funds, Political committees and parties, Reporting and recordkeeping requirements.

Accordingly, 11 CFR part 104 is corrected by making the following correcting amendment:

#### PART 104—REPORTS BY POLITICAL COMMITTEES

1. The authority citation for part 104 continues to read as follows:

**Authority:** 2 U.S.C. 431(1), 431(8), 431(9), 432(i), 434, 438(a)(8), 438(b), 439a.

#### § 104.3 Contents of reports (2 U.S.C. 434(b), 439a).

\* \* \* \* \*

2. In § 104.3 add the following paragraphs (b)(4)(i)(A) and (B):

(b) \* \* \*

(4) \* \* \*

(i) \* \* \*

(A) As used in this paragraph, *purpose* means a brief statement or description of why the disbursement was made. Examples of statements or descriptions which meet the requirements of this paragraph include the following: dinner expenses, media, salary, polling, travel, party fees, phone banks, travel expenses, travel expense reimbursement, and catering costs. However, statements or descriptions such as *advance*, *election day expenses*, *other expenses*, *expenses*, *expense reimbursement*, *miscellaneous*, *outside services*, *get-out-the-vote* and *voter registration* would not meet the requirements of this paragraph for reporting the purpose of an expenditure.

(B) In addition to reporting the purpose described in paragraph (b)(4)(i)(A) of this section, whenever an authorized committee itemizes a disbursement that is partially or entirely a personal use for which reimbursement is required under 11 CFR 113.1(g)(1)(ii)(C) or (D), it shall provide a brief explanation of the activity for which reimbursement is required.

\* \* \* \* \*

Dated: November 26, 2001.

**Danny L. McDonald,**  
Chairman, Federal Election Commission.  
[FR Doc. 01-29679 Filed 11-29-01; 8:45 am]  
**BILLING CODE 6715-01-P**

#### FEDERAL ELECTION COMMISSION

#### 11 CFR Part 111

#### [Notice 2001-18]

#### Extension to Administrative Fines

**AGENCY:** Federal Election Commission.

**ACTION:** Final rule; revision of the sunset date.

**SUMMARY:** The Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the expiration date in which the Federal Election Commission (hereinafter "the Commission") may assess civil money penalties for violations of the reporting requirements of section 434(a) of the Federal Election Campaign Act (hereinafter "the Act" or "FECA").

**DATES:** Effective on December 31, 2001.

**FOR FURTHER INFORMATION CONTACT:** Ms. Rosemary C. Smith, Assistant General Counsel, or Ms. Mai T. Dinh, Attorney, 999 E Street, NW., Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

#### SUPPLEMENTARY INFORMATION:

#### Explanation and Justification

Section 640 of the Treasury and General Government Appropriations Act, 2000, Pub. L. No. 106-58, 106th Cong., 113 Stat. 430, 476-77 (1999), amended § 309(a)(4) of the FECA, 2 U.S.C. 437g(a)(4), to provide for a modified enforcement process for violations of reporting requirements. Under § 437g(a)(4)(C) of the FECA, the Commission may assess a civil money penalty for violations of the reporting requirements of 2 U.S.C. 434(a). This authority, however, was to sunset on December 31, 2001. Pub. L. No. 106-58, 106th Cong., § 640(c). Recently, § 642 of the Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the sunset date to include all reports that cover activity between January 1, 2000, to December 31, 2003.

The Commission published final rules on May 19, 2000, to implement the amendment contained in the Treasury and General Government Appropriations Act, 2000. Section 111.30 of the regulations reflects the sunset provision of Pub. L. No. 106-58, 106th Cong., § 640(c). Therefore, the Commission is issuing this final rule to amend section 111.30 to extend the application of the administrative fine regulations, 11 CFR part 111, subpart B, to include all violations relating to reports that cover the period between January 1, 2000, to December 31, 2003.

The Commission is promulgating this final rule without notice or opportunity for comment because it falls under the "good cause" exemption of the Administrative Procedures Act, 5 U.S.C. 553(b)(B). The exemption allows

| Scientific name | Common name | Over-wintering requirements to be excluded |
|-----------------|-------------|--|
|                 |             |  |

Insured's Signature \_\_\_\_\_

Date \_\_\_\_\_

Insurance Company Representative's Signature and Code Number \_\_\_\_\_

Date \_\_\_\_\_

Done in Washington, DC, on June 9, 1995.

**Kenneth D. Ackerman,**  
*Manager, Federal Crop Insurance Corporation.*

[FR Doc. 95-14710 Filed 6-14-95; 8:45 am]

BILLING CODE 3410-08-P

**FEDERAL ELECTION COMMISSION**

**11 CFR Parts 104, 110, and 114**

[Notice 1995-8]

**Repeal of Obsolete Rules**

**AGENCY:** Federal Election Commission.

**ACTION:** Final rule with request for comments.

**SUMMARY:** The Commission is repealing three obsolete provisions of its regulations. The repealed provisions involve contributions to retire pre-1975 debts; certain 1976 payroll deductions for separate segregated funds; and an alternative reporting option for candidates in presidential elections held prior to January 1, 1981.

**DATES:** Comments must be received on or before July 17, 1995. If no adverse comments are received, the rules will be sent to Congress for a 30 legislative day review period pursuant to 2 U.S.C. 438(d) at the close of this comment period. Further action, including the announcement of an effective date, will be taken at the close of the legislative review period. A document announcing the effective date will be published in the **Federal Register**.

**ADDRESSES:** Comments must be in writing and addressed to: Ms. Susan E. Propper, Assistant General Counsel, 999 E Street NW., Washington, D.C. 20463.

**FOR FURTHER INFORMATION CONTACT:** Ms. Susan E. Propper, Assistant General Counsel, 999 E Street, N.W., Washington, D.C. 20463, (202) 219-3690 or (800) 424-9530.

**SUPPLEMENTARY INFORMATION:** The Commission is repealing three obsolete

provisions in its rules. All regulate activity that has now been concluded and that cannot recur.

The Commission is issuing these rules as final rules subject to a 30 day public comment period. If no adverse comments are received, the rules will be sent to Congress at the close of this comment period, for a 30 legislative day review period pursuant to 2 U.S.C. 438(d). Further action, including the announcement of an effective date, will take place following this 30 legislative day review period.

If adverse comments are received during the public comment period, the Commission will withdraw these final rules, and publish a Notice of Proposed Rulemaking addressing these issues.

**Explanation and Justification**

*Part 104—Reports by Political Committees*

Section 104.17 Content of Reports; Presidential and Vice Presidential Committees

The Commission is repealing 11 CFR 104.17, which established alternative filing procedures for authorized committees of candidates for President and Vice President for elections occurring prior to January 1, 1981. The last committees following these procedures were administratively terminated by the Commission on May 25, 1995. No such committees are currently operating under these provisions.

*Part 110—Contribution and Expenditure Limitations and Prohibitions*

Section 110.1 Contributions by Persons Other Than Multicandidate Political Committees

The Commission is repealing 11 CFR 110.1(g), *Contributions to retire pre-1975 debts*. This paragraph exempts contributions made to retire debts resulting from elections held prior to January 1, 1975, from the 11 CFR part 110 contribution limits as long as certain requirements are met. The last committee with pre-1975 debts has resolved these obligations. There are currently no committees registered with the Commission that are paying off pre-1975 election debts.

*Part 114—Corporate and Labor Organization Activity*

Section 114.12 Miscellaneous Provisions

The Commission is repealing 11 CFR 114.12(d). That paragraph allowed a corporation that offered all of its employees a payroll deduction plan prior to May 11, 1976, for contributions

made to the corporation's separate segregated fund to continue to make such deductions for those employees who were not executive or administrative personnel, or stockholders, until December 31, 1976.

**Certification of No Effect Pursuant to 5 U.S.C. 605(b) [Regulatory Flexibility Act]**

The attached final rules will not, if promulgated, have a significant economic impact on a substantial number of small entities. The basis for this certification is that these rules repeal obsolete provisions of the Commission's rules and thus have no impact on any current activity.

**List of Subjects**

*11 CFR Part 104*

Campaign funds, Political committees and parties, Reporting and recordkeeping requirements.

*11 CFR Part 110*

Campaign funds, Political committees and parties.

*11 CFR Part 114*

Business and industry, Elections, Labor.

For reasons set out in the preamble, chapter I of title 11 of the Code of Federal Regulations is amended to read as follows:

**PART 104—REPORTS BY POLITICAL COMMITTEES**

1. The authority citation for part 104 continues to read as follows:

**Authority:** 2 U.S.C. 431(1), 431(8), 431(9), 432(i), 434, 438(a)(8), 438(b).

**§ 104.17 [Removed]**

2. Section 104.17 is removed.

**PART 110—CONTRIBUTION AND EXPENDITURE LIMITATIONS AND PROHIBITIONS**

3. The authority citation for part 110 continues to read as follows:

**Authority:** 2 U.S.C. 431(8), 431(9), 432(c)(2), 437d(a)(8), 438(a)(8), 441a, 441b, 441d, 441e, 441f, 441g and 441h.

**§ 110.1 [Amended]**

4. Section 110.1 is amended by removing and reserving paragraph (g).

**PART 114—CORPORATE AND LABOR ORGANIZATION ACTIVITY**

5. The authority citation for part 114 continues to read as follows:

**Authority:** 2 U.S.C. 431(8)(B), 431(9)(B), 432, 437d(a)(8), 438(a)(8), and 441b.

acceptable and unacceptable purpose descriptions to be reported by authorized committees. Paragraph (B) requires authorized committees, when itemizing certain disbursements for which reimbursements are required, to provide a brief explanation of the activity for which reimbursement is required. These provisions have been in Title 11 of the **Code of Federal Regulations** since 1980 and 1995, respectively, and were not affected by the recent statutory changes to the election cycle reporting requirements.

#### Need for Correction

As published, the final rules inadvertently omit two paragraphs describing information to be reported by authorized committees of Federal candidates.

All committees must report the purpose of itemized disbursements (i.e., those disbursements aggregating in excess of \$200). Omitted paragraph (A) contains examples of suitably specific purpose descriptions as well as examples of those descriptions that are unacceptably vague. This paragraph is inconsistent with the reporting of rules for unauthorized committees (committees other than candidate committees) in 11 CFR 104.3(b)(3).

Omitted paragraph (B) is used in administering the "personal use" rules in 11 CFR 113.1. Federal candidates are barred from using campaign funds for personal benefit. Paragraph (B) requires authorized committees of Federal candidates itemizing disbursements for which partial or total reimbursement is required under 11 CFR 113.1(g)(1)(iii)(C) or (D) to provide a brief explanation of the activity for which the reimbursement is made.

Section 801 of Title 5 of the United States Code requires Federal agencies to submit regulations to Congress. These regulations were submitted to the Speaker of the House of Representatives and the President of the Senate on November 26, 2001.

#### Certification of No Effect Pursuant to 5 U.S.C. § 605(b) [Regulatory Flexibility Act]

This correction will not have significant economic impact on a substantial number of small entities. The basis of this certification is that this correction only requires political committees to once again add information to the reports they are required to file. These regulations were in 11 CFR since 1980 and 1995, respectively, before being inadvertently omitted in 2000.

#### List of Subjects in 11 CFR Part 104

Campaign funds, Political committees and parties, Reporting and recordkeeping requirements.

Accordingly, 11 CFR part 104 is corrected by making the following correcting amendment:

#### PART 104—REPORTS BY POLITICAL COMMITTEES

1. The authority citation for part 104 continues to read as follows:

**Authority:** 2 U.S.C. 431(1), 431(8), 431(9), 432(i), 434, 438(a)(8), 438(b), 439a.

#### § 104.3 Contents of reports (2 U.S.C. 434(b), 439a).

\* \* \* \* \*

2. In § 104.3 add the following paragraphs (b)(4)(i)(A) and (B):

(b) \* \* \*

(4) \* \* \*

(i) \* \* \*

(A) As used in this paragraph, *purpose* means a brief statement or description of why the disbursement was made. Examples of statements or descriptions which meet the requirements of this paragraph include the following: dinner expenses, media, salary, polling, travel, party fees, phone banks, travel expenses, travel expense reimbursement, and catering costs. However, statements or descriptions such as *advance*, *election day expenses*, *other expenses*, *expenses*, *expense reimbursement*, *miscellaneous*, *outside services*, *get-out-the-vote* and *voter registration* would not meet the requirements of this paragraph for reporting the purpose of an expenditure.

(B) In addition to reporting the purpose described in paragraph (b)(4)(i)(A) of this section, whenever an authorized committee itemizes a disbursement that is partially or entirely a personal use for which reimbursement is required under 11 CFR 113.1(g)(1)(ii)(C) or (D), it shall provide a brief explanation of the activity for which reimbursement is required.

\* \* \* \* \*

Dated: November 26, 2001.

**Danny L. McDonald,**  
Chairman, Federal Election Commission.  
[FR Doc. 01-29679 Filed 11-29-01; 8:45 am]  
**BILLING CODE 6715-01-P**

#### FEDERAL ELECTION COMMISSION

#### 11 CFR Part 111

#### [Notice 2001-18]

#### Extension to Administrative Fines

**AGENCY:** Federal Election Commission.

**ACTION:** Final rule; revision of the sunset date.

**SUMMARY:** The Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the expiration date in which the Federal Election Commission (hereinafter "the Commission") may assess civil money penalties for violations of the reporting requirements of section 434(a) of the Federal Election Campaign Act (hereinafter "the Act" or "FECA").

**DATES:** Effective on December 31, 2001.

**FOR FURTHER INFORMATION CONTACT:** Ms. Rosemary C. Smith, Assistant General Counsel, or Ms. Mai T. Dinh, Attorney, 999 E Street, NW., Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

#### SUPPLEMENTARY INFORMATION:

#### Explanation and Justification

Section 640 of the Treasury and General Government Appropriations Act, 2000, Pub. L. No. 106-58, 106th Cong., 113 Stat. 430, 476-77 (1999), amended § 309(a)(4) of the FECA, 2 U.S.C. 437g(a)(4), to provide for a modified enforcement process for violations of reporting requirements. Under § 437g(a)(4)(C) of the FECA, the Commission may assess a civil money penalty for violations of the reporting requirements of 2 U.S.C. 434(a). This authority, however, was to sunset on December 31, 2001. Pub. L. No. 106-58, 106th Cong., § 640(c). Recently, § 642 of the Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the sunset date to include all reports that cover activity between January 1, 2000, to December 31, 2003.

The Commission published final rules on May 19, 2000, to implement the amendment contained in the Treasury and General Government Appropriations Act, 2000. Section 111.30 of the regulations reflects the sunset provision of Pub. L. No. 106-58, 106th Cong., § 640(c). Therefore, the Commission is issuing this final rule to amend section 111.30 to extend the application of the administrative fine regulations, 11 CFR part 111, subpart B, to include all violations relating to reports that cover the period between January 1, 2000, to December 31, 2003.

The Commission is promulgating this final rule without notice or opportunity for comment because it falls under the "good cause" exemption of the Administrative Procedures Act, 5 U.S.C. 553(b)(B). The exemption allows



**FEDERAL ELECTION COMMISSION**

[Notice 1995-13]

**11 CFR Parts 100, 106, 109 and 114****Express Advocacy; Independent Expenditures; Corporation and Labor Organization Expenditures****AGENCY:** Federal Election Commission.**ACTION:** Final rules; Announcement of Effective Date.

**SUMMARY:** On July 6, 1995, the Commission published the text of revised regulations defining the term "express advocacy" and describing certain nonprofit corporations that are exempt from the prohibition on independent expenditures. 60 FR 35292. These regulations implement portions of the Federal Election Campaign Act of 1971, as amended. The Commission announces that the rules are effective as of October 5, 1995.

**EFFECTIVE DATE:** October 5, 1995.

**FOR FURTHER INFORMATION CONTACT:** Ms. Susan E. Propper, Assistant General Counsel, 999 E Street, N.W., Washington, D.C. 20463, (202) 219-3690 or (800) 424-9530.

**SUPPLEMENTARY INFORMATION:** Today, the Commission is announcing the effective date of new regulations defining the term "express advocacy" and describing certain nonprofit corporations that are exempt from the prohibition on independent expenditures. The new rules are being incorporated into parts 100, 106, 109 and 114 of the existing regulations.

Section 438(d) of Title 2, United States Code requires that any rules or regulations prescribed by the Commission to carry out the provisions of Title 2 of the United States Code be transmitted to the Speaker of the House of Representatives and the President of the Senate 30 legislative days before they are finally promulgated. These regulations were transmitted to Congress on June 30, 1995. Thirty legislative days expired in the House of Representatives on September 21, 1995. Thirty legislative days expired in the Senate on September 8, 1995.

Announcement of Effective Date: 11 CFR 100.17, 100.22, 106.1(d), 109.1(b)(1), (2) and (3), 114.2(b) and 114.10, as published at 60 FR 35292 (July 6, 1995), are effective as of October 5, 1995.

Dated: September 29, 1995.

**Danny L. McDonald,**  
*Chairman, Federal Election Commission.*  
[FR Doc. 95-24700 Filed 10-4-95; 8:45 am]

BILLING CODE 6715-01-M

**11 CFR Part 110**

[Notice 1995-14]

**Communications Disclaimer Requirements****AGENCY:** Federal Election Commission.**ACTION:** Final rule and transmittal of regulations to Congress.

**SUMMARY:** The Federal Election Commission has revised its regulations that govern disclaimers on campaign communications. The revisions clarify how these rules apply to coordinated party expenditures; broadly define "direct mail" in this context; require a statement of who paid for a covered communication, the cost of which is exempt from the Federal Election Campaign Act's contribution and expenditure limits; require a disclaimer on all communications included in a package of materials that are intended for separate distribution; and clarify the meaning of "clear and conspicuous" as that term is used in these rules.

**DATES:** Further action, including the publication of a document in the **Federal Register** announcing the effective date, will be taken after these regulations have been before Congress for 30 legislative days pursuant to 2 U.S.C. 438(d).

**FOR FURTHER INFORMATION CONTACT:** Ms. Susan E. Propper, Assistant General Counsel, 999 E Street, N.W., Washington, D.C. 20463, (202) 219-3690 or (800) 424-9530.

**SUPPLEMENTARY INFORMATION:** The Federal Election Campaign Act ["FECA" or "the Act"] at 2 U.S.C. 441d(a) requires a disclaimer on communications by any person that expressly advocate the election or defeat of a clearly identified federal candidate, or solicit contributions, through any form of general public political advertising. The Commission is revising the implementing regulations, which are found at 11 CFR 110.00, to address issues that have arisen since the rules were last amended, and to clarify their scope and applicability.

The Commission published a Notice of Proposed Rulemaking ["Notice" or "NPRM"] on proposed amendments to the disclaimer rules on October 5, 1994. 59 FR 50708. Comments in response to this Notice were received from Robert Alan Dahl; the Democratic National Committee; a joint comment from the Democratic Senatorial Campaign Committee and the Democratic Congressional Campaign Committee; the Internal Revenue Service; the National Association of Broadcasters; the Ohio Right to Life Political Action

Committee; United States Representative Carolyn B. Maloney; United States Representative Thomas E. Petri; and Wilson Communication Services. The Commission held a public hearing on March 8, 1995, at which five witnesses presented testimony on the issues addressed in the NPRM.

Section 438(d) of Title 2, United States Code, requires that any rules or regulations prescribed by the Commission to carry out the provisions of the FECA be transmitted to the Speaker of the House of Representatives and the President of the Senate for a 30 legislative day review period before they are finally promulgated. These regulations were transmitted to Congress on October 2, 1995.

**Explanation and Justification**

The FECA at 2 U.S.C. 441d(a) requires disclaimers on communications by any person that expressly advocate the election or defeat of a clearly identified federal candidate, or solicit contributions, through any form of general public political advertising. In most instances the disclaimer must state both who paid for the communication and whether it was authorized by any candidate or authorized committee.

A primary purpose of this rulemaking was to simplify the implementing regulations to this statutory requirement. A number of revisions have accordingly been made, to clarify their scope and applicability. However, after reviewing the comments and testimony presented at the hearing, the Commission has determined that its present regulation is in most instances the most reasonable alternative at this time. A detailed analysis of the new and revised provisions appears below.

Please note that these revisions are limited to 11 CFR 110.11(a). Paragraph 110.11(b), which deals with newspaper and magazine charges for campaign advertisements, has not been amended.

**Part 110—Contribution and Expenditure Limitations and Prohibitions***Section 110.11 Communications; Advertising***General Requirements**

The language of former paragraph (a)(1) has largely been retained. However, the last sentence of the former paragraph (a)(1), which deals with placement of the disclaimer, and former paragraph (a)(1)(iv)(B), solicitations by separate segregated funds ["SSF"], have been moved to new paragraphs (a)(5)(i) and (a)(7), respectively.

The NPRM sought comments on a number of different approaches,



including: A rebuttable presumption that communications by certain political committees that mention a clearly identified federal candidate contain express advocacy, and thus trigger the section 441d(a) disclaimer requirements; and reading the FECA so as to require disclaimers on all communications by all political committees, whether or not they contain express advocacy.

None of the commenters who addressed these issues supported the presumption or any of the other proposed changes, although one suggested the Commission could expand the "paid for by" requirements based on its authority to monitor campaign spending. The Commission has determined that adopting the presumption of express advocacy would likely not eliminate the need for case by case examination of challenged communications, and concerns also exist with regard to the other proposals. For this reason the Commission has decided to leave the general disclaimer requirements largely intact at this time. The Commission has submitted legislative recommendations suggesting that Congress might want to consider legislation to address this situation.

#### Phone Banks

The NPRM also sought comment on a proposal to insert phone banks in the listing of types of activities that constitute general public political advertising. This proposal would have had the effect of requiring oral disclaimers as part of phone bank campaign communications.

Two Members of Congress who commented on these rules supported this proposal. Another commenter asked the Commission to clarify what information a multicandidate committee should include in an oral authorization statement if some but not all of the candidates supported by that committee have authorized a communication.

The Commission considered including phone banks in the listing of types of activities that constitute general public political advertising when it prepared the final rules, but could not reach a majority decision by the required four affirmative votes. See 2 U.S.C. 437c(c). Consequently, this proposal has not been included in the final rules.

#### Coordinated Party Expenditures

The FECA at 2 U.S.C. 441a(d) permits political party committees to make expenditures on behalf of party candidates in excess of the generally applicable contribution limits set forth at 2 U.S.C. 441a(a). New paragraph (a)(2)

clarifies the disclaimer requirements for communications paid for as coordinated party expenditures.

If a state or national party committee chooses not to make the coordinated expenditures permitted by section 441a(d), it may assign its right to do so to a designated agent, such as the senatorial campaign committee of the party. *FEC v. Democratic Senatorial Campaign Committee*, 454 U.S.C. 27 (1981). Paragraph (a)(2)(i) clarifies that the disclaimer on a communication made as a coordinated party expenditure should identify the committee that made the actual expenditure as the person who paid for the communication, regardless of whether that committee was acting as a designated agent or in its own capacity.

Paragraph (a)(2)(ii) states that communications made pursuant to 2 U.S.C. 441a(d) prior to the date a party's candidate is nominated need state only who paid for the communication; i.e., no authorization statement is required. The commenters who addressed this issue favored this approach. Please note, however, that this does not change the Commission's long-standing conclusion that such communications count against the committee's coordinated party expenditure limits.

#### Definition of "Direct Mailing"

A definition for the term "direct mailing" has been added at new paragraph (a)(3). For purposes of these requirements, "direct mailing" is broadly defined to include any mailing that consists of more than 100 substantially similar pieces of mail. While the NPRM suggested 50 pieces as the number to trigger this requirement, the Commission believes limiting this to mailings of more than 100 pieces more accurately reflects the size and scope of current campaign operations.

One commenter and witness at the hearing asked that the Commission clarify what is meant by the term "substantially similar." Technological advances now permit what is basically the same communication to be personalized to include the recipient's name, occupation, geographic location, and similar variables. The Commission considers communications to be "substantially similar" if they would be the same but for such individualization.

#### Exempt Activity

New paragraph (a)(4) requires a statement of who paid for the communication on covered communications by a candidate or party committee whether or not they qualify as exempt activities under 11 CFR 100.8(b)(10), (16), (17), or (18). The

NPRM proposed requiring an authorization statement on such communications, as well.

Most of the comments that addressed this issue disagreed with the proposed approach. However, the intent of the FECA is that those activities by state and local party committees or candidates that qualify as "exempt" under 2 U.S.C. 431(8)(B)(v), (x), (xi), and (xii) not count towards the FECA's contribution and expenditure limits. Requiring a "paid for by" statement does not conflict with that intent.

Both the disclaimer rules and the exempt activity provisions contain definitions of general public political advertising and direct mail, although in the former case the list describes covered communications, while in the latter case the list describes communications that do not qualify for exemption. However, these definitions are broader under the disclaimer rules than under the exempt activity provisions. Thus, certain communications covered by the exempt activity provisions, such as phone banks and yard signs, are still general public political advertising for purposes of the disclaimer rules. The Commission notes, however, that some exempt activities will continue to fall under the small items exception, e.g., pins and bumper stickers, and therefore will not require a disclaimer.

#### The "Clear and Conspicuous" Requirement

New paragraph (a)(5) provides guidance on the meaning of the term "clear and conspicuous" as that phrase is used in this section. The NPRM proposed that, consistent with the Commission's 1993 rulemaking addressing what constitutes "best efforts" to obtain identifying information about certain campaign contributors (see 2 U.S.C. 432(i); 11 CFR 104.7; 58 FR 57725 (Oct. 27, 1993)), a disclaimer would not be considered "clear and conspicuous" if it was in small type in comparison to the remainder of the material, or if the printing was difficult to read or if the placement was easily overlooked.

Several commenters pointed out that the "comparable size" requirement, while appropriate for the solicitations addressed in the "best efforts" rules, may not be appropriate for communications that, for example, consist only of two lines of large type. The Commission has accordingly deleted this language from the final rule, while retaining the other guidelines. That is, a disclaimer is now stated not to be "clear and conspicuous" if the printing is difficult to read or if the

placement is easily overlooked. Technical requirements for televised communications are set forth in new paragraph (a)(5)(iii), discussed *infra*.

#### Placement of Disclaimer

New paragraph (a)(5)(i) states that the disclaimer need not appear on the front or cover page of a communication as long as it appears within the communication, except on communications such as billboards that contain only a front face. This provision formerly appeared in paragraph (a)(1) of this section.

#### Packaged Materials

New paragraph (a)(5)(ii) clarifies that all materials included in a package that would require a disclaimer if distributed separately must contain the required disclaimer, even if they are included in a package with solicitations or other materials that already have a disclaimer. Questions have arisen in the past as to whether a single disclaimer per package would satisfy the purposes of this requirement.

One commenter and witness at the hearing sought further clarification on how this will be interpreted. All items intended for separate distribution (e.g., a campaign poster included in a mailing of campaign literature) are covered by this requirement.

#### Televised Communications

New paragraph (a)(5)(iii) responds to a commenter's request that the Commission incorporate into the text of these rules the Federal Communication Commission's ["FCC"] disclaimer size requirements for televised political advertisements concerning candidates for public office. These requirements, which are set forth at 47 CFR 73.1212(a)(2)(ii), require in any such advertisement that the sponsor be identified with letters equal to or greater than four (4) percent of the vertical picture height that air for not less than four (4) seconds. The new rule states that disclaimers in a televised communication shall be considered clear and conspicuous if they meet these requirements.

In *Dalton Moore*, 7 FCC Rcd 3587 (1992), the FCC explained that twenty (20) scan lines meets the four (4) percent requirement. Also, FCC staff has advised the Commission that the four (4) percent/twenty (20) lines requirement applies to each line of type, and that if the type is upper and lower case, the requirement applies to the smaller (lower case) type.

One commenter, while correctly noting that the FCC and not the FEC has authority over these technical

requirements, nevertheless requested that the Commission modify them. However, it is impossible for one agency to amend another's rules. Also, the FCC conducted a lengthy rulemaking, in which the FEC participated, before deciding that the current standards were appropriate. 57 FR 8279 (Mar. 9, 1992).

#### Exceptions

New paragraph (a)(6) lists the exceptions to the general requirements. Former 11 CFR 110.11(a)(2) has been broken down into new paragraphs (a)(6)(i) and (a)(6)(ii), which address the "small item" and "impracticable item" exceptions, respectively. In addition, the "impracticable item" provision, which formerly included "skywriting, watertowers or other means of displaying an advertisement of such a nature that the inclusion of a disclaimer would be impracticable," has been amended to specifically include "wearing apparel," such as T-shirts or baseball caps, that contain a political message.

While no comments were received on this issue, the question continues to arise as to whether such items require a disclaimer. Since in many instances it is impracticable to include disclaimers on wearing apparel, the Commission believes this further exception is appropriate.

Consistent with the Notice, new paragraph (a)(6)(iii) clarifies that checks, receipts and similar items of minimal value that do not contain a political message and that are used for purely administrative purposes do not require a disclaimer.

#### Activities by Separate Segregated Funds or Their Connected Organizations

New paragraph (a)(7) corresponds to former 11 CFR 110.11(a)(1)(iv)(B). It exempts from the disclaimer requirements solicitations for contributions to an SSF from those persons the fund may solicit under the applicable provisions of 11 CFR part 114, or communications to such persons, because this does not constitute general public political advertising. This language encompasses mailings by a corporation or labor organization to the corporation's or labor organization's restricted class, as well as comparable activities conducted by membership organizations and trade associations pursuant to 11 CFR 114.7 and 114.8.

#### Other Issues

##### *Disclaimers on the Internet*

In AO 1995-9, the Commission determined that Internet

communications and solicitations that constitute general public political advertising require disclaimers as set forth in 2 U.S.C. 441d(a) and former 11 CFR 110.11(a)(1). These communications and others that are indistinguishable in all material aspects from those addressed in the advisory opinion will now be subject to the requirements of paragraph (a)(1) of this section.

##### *Disclaimers on "Push Polls"*

Two commenters and several witnesses at the hearing discussed the possibility that the Commission require disclaimers on "push polls." This term has generally been used to refer to phone bank activities or written surveys that provide false or misleading information about a candidate under the guise of conducting a legitimate poll. For example, if the person being polled states a preference for candidate X, the poll might ask whether X would still be the preferred choice if "you knew he or she had a drunken driving record," "a history of recreational drug use," "was soft on crime," or the like. Such slanted surveys can result in both skewed poll results (if a poll is in fact conducted) and damage to the candidate's reputation.

One of the commenters, Congresswoman Maloney, has introduced a bill, H.R. 324 in the 104th Congress, that would include phone banks in the listing of types of communications set forth in 2 U.S.C. 441d(a) that trigger the disclaimer requirements. As discussed above, the Commission proposed in the NPRM that phone banks be added to the comparable listing in the disclaimer rules, but during consideration of the final rules, the Commission did not reach a majority decision by the required four affirmative votes. Consequently, the final disclaimer rules do not apply to push polls conducted by using phone banks.

The question of requiring disclaimers during telephone push polling also involves significant legal and constitutional issues that have not been put out for notice and comment as required by the Administrative Procedure Act at 5 U.S.C. 553. As noted by some of the witnesses, it may require amendments to the FECA before the Commission can take further action. For example, it does not appear that all push polls contain "express advocacy" or contribution solicitations, a critical point under these rules.

Thus, the new regulations only require disclaimers for push polls that qualify as general public political advertising and that either contain a

solicitation or express advocacy of a clearly identified candidate.

**Certification of no Effect Pursuant to 5 U.S.C. 605(b) [Regulatory Flexibility Act]**

The attached final regulations will not have a significant economic impact on a substantial number of small entities. The basis for this certification is that any affected entities are already required to comply with the Act's requirements in this area.

**List of Subjects**

*11 CFR Part 110*

Campaign Funds, Political Candidates, Political Committees and Parties.

For reasons set out in the preamble, Subchapter A, chapter I of Title 11 of the Code of Federal Regulations is amended as follows:

**PART 110—CONTRIBUTION AND EXPENDITURE LIMITATIONS AND PROHIBITIONS**

1. The authority citation for 11 CFR Part 110 continues to read as follows:

**Authority:** 2 U.S.C. 431(8), 431(9), 432(c)(2), 437d(a)(8), 438(a)(8), 441a, 441b, 441d, 441e, 441f, 441g, and 441h.

2. Part 110 is amended by revising paragraph (a) of section 110.11 to read as follows:

**§ 110.11 Communications; advertising (2 U.S.C. 441d).**

(a)(1) *General rules.* Except as provided at paragraph (a)(6) of this section, whenever any person makes an expenditure for the purpose of financing a communication that expressly advocates the election or defeat of a clearly identified candidate, or that solicits any contribution, through any broadcasting station, newspaper, magazine, outdoor advertising facility, poster, yard sign, direct mailing or any other form of general public political advertising, a disclaimer meeting the requirements of paragraphs (a)(1) (i), (ii), (iii), (iv) or (a)(2) of this section shall appear and be presented in a clear and conspicuous manner to give the reader, observer or listener adequate notice of the identity of persons who paid for and, where required, who authorized the communication.

(i) Such communication, including any solicitation, if paid for and authorized by a candidate, an authorized committee of a candidate, or its agent, shall clearly state that the communication has been paid for by the authorized political committee; or

(ii) Such communication, including any solicitation, if authorized by a

candidate, an authorized committee of a candidate or an agent thereof, but paid for by any other person, shall clearly state that the communication is paid for by such other person and is authorized by such candidate, authorized committee or agent; or

(iii) Such communication, including any solicitation, if made on behalf of or in opposition to a candidate, but paid for by any other person and not authorized by a candidate, authorized committee of a candidate or its agent, shall clearly state that the communication has been paid for by such person and is not authorized by any candidate or candidate's committee.

(iv) For solicitations directed to the general public on behalf of a political committee which is not an authorized committee of a candidate, such solicitation shall clearly state the full name of the person who paid for the communication.

(2) *Coordinated Party Expenditures.*

(i) For a communication paid for by a party committee pursuant to 2 U.S.C. 441a(d), the disclaimer required by paragraph (a)(1) of this section shall identify the committee that makes the expenditure as the person who paid for the communication, regardless of whether the committee was acting in its own capacity or as the designated agent of another committee.

(ii) A communication made by a party committee pursuant to 2 U.S.C. 441a(d) prior to the date the party's candidate is nominated shall satisfy the requirements of this section if it clearly states who paid for the communication.

(3) *Definition of "direct mailing."* For purposes of paragraph (a)(1) of this section only, "direct mailing" includes any number of substantially similar pieces of mail but does not include a mailing of one hundred pieces or less by any person.

(4) *Exempt Activities.* For purposes of paragraph (a)(1) of this section only, the term "expenditure" includes a communication by a candidate or party committee that qualifies as an exempt activity under 11 CFR 100.8(b)(10), (16), (17), or (18). Such communications, unless excepted under paragraph (a)(6) of this section, shall clearly state who paid for the communication but do not have to include an authorization statement.

(5) *Placement of Disclaimer.* The disclaimers specified in paragraph (a)(1) of this section shall be presented in a clear and conspicuous manner, to give the reader, observer or listener adequate notice of the identity of the person or committee that paid for, and, where required, that authorized the communication. A disclaimer is not

clear and conspicuous if the printing is difficult to read or if the placement is easily overlooked.

(i) The disclaimer need not appear on the front or cover page of the communication as long as it appears within the communication, except on communications, such as billboards, that contain only a front face.

(ii) Each communication that would require a disclaimer if distributed separately, that is included in a package of materials, must contain the required disclaimer.

(iii) Disclaimers in a televised communication shall be considered clear and conspicuous if they appear in letters equal to or greater than four (4) percent of the vertical picture height that air for not less than four (4) seconds.

(6) *Exceptions.* The requirements of paragraph (a)(1) of this section do not apply to:

(i) bumper stickers, pins, buttons, pens and similar small items upon which the disclaimer cannot be conveniently printed;

(ii) skywriting, watertowers, wearing apparel or other means of displaying an advertisement of such a nature that the inclusion of a disclaimer would be impracticable; or

(iii) checks, receipts and similar items of minimal value which do not contain a political message and which are used for purely administrative purposes.

(7) *Activities by separate segregated fund or its connected organization.* For purposes of paragraph (a)(1) of this section, whenever a separate segregated fund or its connected organization solicits contributions to the fund from those persons it may solicit under the applicable provisions of 11 CFR part 114, or makes a communication to those persons, such communication shall not be considered a form of general public political advertising and need not contain the disclaimer set forth in paragraph (a)(1) of this section.

\* \* \* \* \*

Dated: October 2, 1995.

**Danny Lee McDonald,**  
*Chairman.*

[FR Doc. 95-24749 Filed 10-4-95; 8:45 am]

**BILLING CODE 6715-01-M**

**ACTION:** Final rule.

**SUMMARY:** This final rule adopts without change the provisions of the interim rule published in the **Federal Register** (60 FR 35834) on July 12, 1995, which added to the peanut price support regulations in 7 CFR part 1446, a reference to crop insurance requirements contained in 7 CFR part 400 which affect the eligibility of peanut producers for price support benefits. Under the provisions of part 400, producers generally must obtain crop insurance for all crops in which they have an interest in the county where the peanuts are produced. The crop insurance requirements of part 400, which implement provisions of the Federal Crop Insurance Reform Act of 1994 (1994 Act), are in addition to all existing eligibility requirements for price support for peanuts contained in part 1446 and elsewhere.

**EFFECTIVE DATE:** November 29, 1995.

**FOR FURTHER INFORMATION CONTACT:** Gary S. Fountain, Tobacco and Peanuts Division, Consolidated Farm Service Agency, U.S. Department of Agriculture, PO Box 2415, Washington, DC 20013-2415; telephone (202) 720-9106.

**SUPPLEMENTARY INFORMATION:**

#### **Executive Order 12866**

This final rule has been determined to be not significant for purposes of Executive Order 12866 and therefore has not been reviewed by the Office of Management and Budget (OMB).

#### **Federal Assistance Program**

The title and number of the Federal assistance program, as found in the Catalog of Federal Domestic Assistance, to which this final rule applies is: Commodity Loans and Purchases—10.051.

#### **Regulatory Flexibility Act**

It has been determined that the Regulatory Flexibility Act is not applicable to this final rule since neither the Commodity Credit Corporation nor the Consolidated Farm Service Agency (CFSA) is required by 5 U.S.C. 553 or any other provision of law to publish a notice of proposed rulemaking with respect to the subject matter of this rule.

#### **Executive Order 12372**

This program/activity is not subject to the provisions of Executive Order 12372 which require intergovernmental consultation with State and local officials. See the Notice related to 7 CFR part 3015, subpart V, published at 48 FR 29115, June 24, 1983.

#### **Paperwork Reduction Act**

This final rule does not change the CFSA information collection requirements that were previously approved by OMB and assigned control numbers 0560-0006 and 0560-0014. The catastrophic risk protection insurance coverage requirements are included in the information collection package that has been approved by OMB and assigned control number 0563-0003.

#### **Executive Order 12612**

It has been determined under section 6(a) of Executive Order 12612, Federalism, that this final rule does not have significant Federalism implications which warrant the preparation of a Federalism Assessment. The requirements and procedures contained in this rule will not have a substantial direct effect on States or their political subdivisions, or on the distribution of power and responsibilities among the various levels of government.

#### **Executive Order 12778**

This final rule has been reviewed in accordance with Executive Order 12778. The provisions of this rule are not retroactive and preempt State laws to the extent that such laws are inconsistent with the provisions of this rule. Before any judicial action may be brought regarding determinations made under provisions of 7 CFR part 1446, the administrative remedies in 7 CFR part 780 must be exhausted.

#### **Environmental Evaluation**

This action is not expected to have any significant impact on the quality of the human environment, health or safety. Therefore, neither an Environmental Assessment nor an Environmental Impact Statement is needed.

#### **Background**

The 1994 Act, enacted on October 13, 1994, requires that persons who seek price support benefits for peanuts, and certain other farm program benefits, must, if insurance is available, acquire at least the catastrophic level of protection for all insurable crops of "economic significance", in which they have an interest, that are grown in the same county as the crop for which price support or any other benefit is sought. A crop of "economic significance" is defined in the 1994 Act to be a crop that has contributed, or is expected to contribute, 10 percent or more of the total expected value of all crops grown by the person.

The provisions of the 1994 Act are administered by the Federal Crop Insurance Corporation (FCIC). FCIC has issued, by an interim rule published on January 6, 1995 (60 FR 1996), regulations which implement the 1994 Act. The FCIC rule is codified in 7 CFR part 400. Related rules are codified in 7 CFR part 402.

Price support for peanuts is made available under the Agricultural Act of 1949, 7 USC 1421 *et seq.* The peanut price support regulations are found at 7 CFR part 1446.

#### **List of Subjects in 7 CFR Part 1446**

Loan programs—Agriculture, Peanuts, Price support programs, Reporting and recordkeeping requirements, Warehouses.

Following publication of the interim rule, the public was afforded 30 days to submit written comments and data. No comments or data were received.

Accordingly, under the authority of 7 U.S.C. 1359a, 1375, 1421 *et seq.*; 15 U.S.C. 714b and 714c, the interim rule that added to the peanut price support regulations in 7 CFR part 1446, as published in the **Federal Register** on July 12, 1995, at 60 FR 35834, is hereby adopted without change as a final rule.

Signed at Washington, DC, on November 22, 1995.

**Bruce R. Weber,**

*Acting Executive Vice President, Commodity Credit Corporation.*

[FR Doc. 95-29169 Filed 11-28-95; 8:45 am]

**BILLING CODE 3410-05-P**

## **FEDERAL ELECTION COMMISSION**

### **11 CFR Part 110**

**[Notice 1995-21]**

#### **Communications Disclaimer Requirements**

**AGENCY:** Federal Election Commission.

**ACTION:** Final rule correction.

**SUMMARY:** The Federal Election Commission is publishing a correction to the final rules governing disclaimers on campaign communications that were published in the **Federal Register** on Oct. 5, 1995. 60 FR 52069. The correction deletes a reference to phone banks in the preamble to the rules, thereby removing the inference that the Commission determined phone banks to be considered general public political advertising for purposes of these rules.

**DATES:** Further action, including the publication of a document in the **Federal Register** announcing the effective date, will be taken after the

final disclaimer rules have been before Congress for 30 legislative days pursuant to 2 U.S.C. 438(d). The disclaimer rules were transmitted to Congress on Oct. 2, 1995.

**FOR FURTHER INFORMATION CONTACT:**

Ms. Susan E. Propper, Assistant General Counsel, 999 E Street NW., Washington, DC 20463, (202) 219-3690 or (800) 424-9530.

**SUPPLEMENTARY INFORMATION:** The Federal Election Campaign Act (the "Act") at 2 U.S.C. 441d(a) requires a disclaimer on communications by any person that expressly advocate the election or defeat of a clearly identified federal candidate, or solicit contributions, through any form of general public political advertising. On Oct. 5, 1995, the Commission published in the *Federal Register* revisions to the implementing regulations, which are found at 11 CFR 110.11. 60 FR 52069.

In the discussion before adopting these revisions, the Commission considered including phone banks in the list of communications that require a disclaimer, but could not reach a majority decision to do so by the required four affirmative votes. See 2 U.S.C. 437c(c). Consequently, this proposal was not included in the final rules.

Accordingly, the term "phone bank" does not appear anywhere in the text of the final rules. 60 FR 52072. Also, the Explanation and Justification ("E&J") that accompanied the final rules correctly explained the Commission's action both in its discussion of phone banks (60 FR 52070) and in the discussion of so-called "push poll" activity. 60 FR 52071-72. (The term "push poll" is generally used to refer to phone bank activities or written surveys that provide false or misleading information about a candidate under the guise of conducting a legitimate poll.)

However, the E&J's discussion of new disclaimer requirements for certain "exempt activities," that is, activities by a candidate or political party committee that are exempt from the Act's contribution and expenditure limits under 11 CFR 100.8(b)(10), (16), (17), or (18), inadvertently retained a statement from an earlier document to the effect that exempt phone banks would require a disclaimer. The Commission is deleting this language from the E&J to insure that no one is misled by this inconsistency.

**Correction of Publication**

Accordingly, the publication of final regulations on October 5, 1995 (60 FR 52069), which were the subject of FR Doc. 95-24749, is corrected as follows:

**Explanation and Justification (Preamble) (Corrected)**

On p. 52070, in the third column, in the second full paragraph, in lines 14 and 15, "phone banks and" should be removed.

**Danny Lee McDonald,**

*Chairman, Federal Election Commission.*

[FR Doc. 95-29141 Filed 11-28-95; 8:45 am]

**BILLING CODE 6715-01-M**

**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**15 CFR Part 902**

**50 CFR Part 641**

[Docket No. 950810206-5268-03; I.D. 071395A]

**RIN 0648-AG29**

**Reef Fish Fishery of the Gulf of Mexico; Amendment 8**

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Final rule.

**SUMMARY:** NMFS issues this final rule to implement certain provisions of Amendment 8 to the Fishery Management Plan for the Reef Fish Fishery of the Gulf of Mexico (FMP). Amendment 8 initiates a limited entry program for the commercial red snapper sector of the reef fish fishery in the Gulf of Mexico. Initial participants in the limited entry program will receive shares of the commercial quota of red snapper based on specified criteria. The percentage shares of the commercial quota equate to individual transferable quotas (ITQs). In addition, NMFS clarifies the regulations regarding commercial permit requirements, and informs the public of the approval by the Office of Management and Budget (OMB) of the collection-of-information requirements contained in this rule and publishes the OMB control numbers for those collections. The intended effect of this rule is to manage the commercial red snapper sector of the reef fish fishery to preserve its long-term economic viability.

**EFFECTIVE DATE:** April 1, 1996; except that the amendments to 15 CFR part 902 and 50 CFR 641.2, 641.7(s), 641.24(g), and the additions 50 CFR 641.7(ee) and 641.10 heading and paragraph (c), are effective November 24, 1995.

**ADDRESSES:** Requests for copies of the final regulatory flexibility analysis

(FRFA) should be sent to Robert Sadler, Southeast Regional Office, NMFS, 9721 Executive Center Drive N., St. Petersburg, FL 33702.

Comments regarding the collection-of-information requirements contained in this rule should be sent to Edward E. Burgess, Southeast Regional Office, NMFS, 9721 Executive Center Drive N., St. Petersburg, FL 33702, and to the Office of Information and Regulatory Affairs, OMB, Washington, DC 20503 (Attention: NOAA Desk Officer).

**FOR FURTHER INFORMATION CONTACT:**

Robert Sadler, 813-570-5305.

**SUPPLEMENTARY INFORMATION:** The reef fish fishery of the Gulf of Mexico is managed under the FMP. The FMP was prepared by the Gulf of Mexico Fishery Management Council (Council) and is implemented through regulations at 50 CFR part 641 under the authority of the Magnuson Fishery Conservation and Management Act (Magnuson Act).

Based on a preliminary evaluation of Amendment 8 at the beginning of formal agency review, NMFS disapproved three of its measures after determining that they were inconsistent with the provisions of the Magnuson Act and other applicable law. NMFS published a proposed rule to implement the remaining measures of Amendment 8 and to clarify existing regulations regarding commercial permit requirements (60 FR 44825, August 29, 1995). The rationale for the remaining measures of Amendment 8 and for the clarification of existing regulations, as well as the reasons for the disapproval of the three Amendment 8 measures at the beginning of formal agency review, are contained in the preamble of the proposed rule and are not repeated here. On October 13, 1995, NMFS approved the remaining measures of Amendment 8; this final rule implements those approved measures.

**Comments and Responses**

A minority report signed by three Council members was submitted with Amendment 8. In addition, written comments during the comment period were received from 34 entities, including individual representatives of four commercial seafood associations (fishing associations), two state government agencies, and 28 members of the public. Seventeen of the comments supported the proposed rule and/or Amendment 8, including 12 from persons holding red snapper endorsements on their reef fish vessel permits. Sixteen of the comments opposed the proposed rule and/or Amendment 8, including three from endorsement holders. Three of the

acceptable and unacceptable purpose descriptions to be reported by authorized committees. Paragraph (B) requires authorized committees, when itemizing certain disbursements for which reimbursements are required, to provide a brief explanation of the activity for which reimbursement is required. These provisions have been in Title 11 of the **Code of Federal Regulations** since 1980 and 1995, respectively, and were not affected by the recent statutory changes to the election cycle reporting requirements.

#### Need for Correction

As published, the final rules inadvertently omit two paragraphs describing information to be reported by authorized committees of Federal candidates.

All committees must report the purpose of itemized disbursements (i.e., those disbursements aggregating in excess of \$200). Omitted paragraph (A) contains examples of suitably specific purpose descriptions as well as examples of those descriptions that are unacceptably vague. This paragraph is inconsistent with the reporting of rules for unauthorized committees (committees other than candidate committees) in 11 CFR 104.3(b)(3).

Omitted paragraph (B) is used in administering the "personal use" rules in 11 CFR 113.1. Federal candidates are barred from using campaign funds for personal benefit. Paragraph (B) requires authorized committees of Federal candidates itemizing disbursements for which partial or total reimbursement is required under 11 CFR 113.1(g)(1)(iii)(C) or (D) to provide a brief explanation of the activity for which the reimbursement is made.

Section 801 of Title 5 of the United States Code requires Federal agencies to submit regulations to Congress. These regulations were submitted to the Speaker of the House of Representatives and the President of the Senate on November 26, 2001.

#### Certification of No Effect Pursuant to 5 U.S.C. § 605(b) [Regulatory Flexibility Act]

This correction will not have significant economic impact on a substantial number of small entities. The basis of this certification is that this correction only requires political committees to once again add information to the reports they are required to file. These regulations were in 11 CFR since 1980 and 1995, respectively, before being inadvertently omitted in 2000.

#### List of Subjects in 11 CFR Part 104

Campaign funds, Political committees and parties, Reporting and recordkeeping requirements.

Accordingly, 11 CFR part 104 is corrected by making the following correcting amendment:

#### PART 104—REPORTS BY POLITICAL COMMITTEES

1. The authority citation for part 104 continues to read as follows:

**Authority:** 2 U.S.C. 431(1), 431(8), 431(9), 432(i), 434, 438(a)(8), 438(b), 439a.

#### § 104.3 Contents of reports (2 U.S.C. 434(b), 439a).

\* \* \* \* \*

2. In § 104.3 add the following paragraphs (b)(4)(i)(A) and (B):

(b) \* \* \*  
(4) \* \* \*  
(i) \* \* \*

(A) As used in this paragraph, *purpose* means a brief statement or description of why the disbursement was made. Examples of statements or descriptions which meet the requirements of this paragraph include the following: dinner expenses, media, salary, polling, travel, party fees, phone banks, travel expenses, travel expense reimbursement, and catering costs. However, statements or descriptions such as *advance*, *election day expenses*, *other expenses*, *expenses*, *expense reimbursement*, *miscellaneous*, *outside services*, *get-out-the-vote* and *voter registration* would not meet the requirements of this paragraph for reporting the purpose of an expenditure.

(B) In addition to reporting the purpose described in paragraph (b)(4)(i)(A) of this section, whenever an authorized committee itemizes a disbursement that is partially or entirely a personal use for which reimbursement is required under 11 CFR 113.1(g)(1)(ii)(C) or (D), it shall provide a brief explanation of the activity for which reimbursement is required.

\* \* \* \* \*

Dated: November 26, 2001.

**Danny L. McDonald,**  
*Chairman, Federal Election Commission.*  
[FR Doc. 01-29679 Filed 11-29-01; 8:45 am]  
**BILLING CODE 6715-01-P**

#### FEDERAL ELECTION COMMISSION

#### 11 CFR Part 111

[Notice 2001-18]

#### Extension to Administrative Fines

**AGENCY:** Federal Election Commission.

**ACTION:** Final rule; revision of the sunset date.

**SUMMARY:** The Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the expiration date in which the Federal Election Commission (hereinafter "the Commission") may assess civil money penalties for violations of the reporting requirements of section 434(a) of the Federal Election Campaign Act (hereinafter "the Act" or "FECA").

**DATES:** Effective on December 31, 2001.

**FOR FURTHER INFORMATION CONTACT:** Ms. Rosemary C. Smith, Assistant General Counsel, or Ms. Mai T. Dinh, Attorney, 999 E Street, NW., Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

#### SUPPLEMENTARY INFORMATION:

#### Explanation and Justification

Section 640 of the Treasury and General Government Appropriations Act, 2000, Pub. L. No. 106-58, 106th Cong., 113 Stat. 430, 476-77 (1999), amended § 309(a)(4) of the FECA, 2 U.S.C. 437g(a)(4), to provide for a modified enforcement process for violations of reporting requirements. Under § 437g(a)(4)(C) of the FECA, the Commission may assess a civil money penalty for violations of the reporting requirements of 2 U.S.C. 434(a). This authority, however, was to sunset on December 31, 2001. Pub. L. No. 106-58, 106th Cong., § 640(c). Recently, § 642 of the Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the sunset date to include all reports that cover activity between January 1, 2000, to December 31, 2003.

The Commission published final rules on May 19, 2000, to implement the amendment contained in the Treasury and General Government Appropriations Act, 2000. Section 111.30 of the regulations reflects the sunset provision of Pub. L. No. 106-58, 106th Cong., § 640(c). Therefore, the Commission is issuing this final rule to amend section 111.30 to extend the application of the administrative fine regulations, 11 CFR part 111, subpart B, to include all violations relating to reports that cover the period between January 1, 2000, to December 31, 2003.

The Commission is promulgating this final rule without notice or opportunity for comment because it falls under the "good cause" exemption of the Administrative Procedures Act, 5 U.S.C. 553(b)(B). The exemption allows

**FEDERAL ELECTION COMMISSION****11 CFR Parts 100, 104, 105, 109, 110 and 114**

[Notice 1996-3]

**Document Filing****AGENCY:** Federal Election Commission.**ACTION:** Final rule; Technical amendments.

**SUMMARY:** On December 28, 1995, the President signed a bill that amended the Federal Election Campaign Act of 1971 ("FECA" or "Act") to improve the electoral process, *inter alia*, by requiring candidates, and the authorized committees of the candidates, to the United States House of Representatives ("House") to file campaign finance reports with the Federal Election Commission. The Commission today is publishing technical amendments to conform its regulations to the statute.

**EFFECTIVE DATE:** February 1, 1996.

**FOR FURTHER INFORMATION CONTACT:** Ms. Susan E. Propper, Assistant General Counsel, or Ms. Teresa A. Hennessy, Attorney, 999 E Street, N.W., Washington, D.C. 20463, (202) 219-3690 or (800) 424-9530.

**SUPPLEMENTARY INFORMATION:** The FECA governs, *inter alia*, the filing of campaign finance reports by candidates for Federal office. 2 U.S.C. 432(g). As amended in 1979, the FECA required that all designations, statements, and reports required to be filed under the Act by a candidate, authorized committee(s) of the candidate, or principal campaign committee of the candidate for the House be filed with the Clerk of the House as custodian for the Commission. The FECA specified that a House candidate includes a candidate for the Office of Representative in, or Delegate or Resident Commissioner to, the Congress. Federal Election Campaign Act Amendments of 1979, Public Law No. 96-187, section 102, 93 Stat. 1339, 1346, codified at 2 U.S.C. § 432(g)(1). At 11 CFR 105.1, the Commission implemented this requirement and provided that all other reports by committees that support only candidates to the House be filed with the Clerk of the House.

On December 28, 1995, Public Law No. 104-79, 109 Stat. 791 (1995) amended the FECA to require that these reports instead be filed with the Federal Election Commission. See Section 3. The new law made no changes to the filing requirements for candidates to the United States Senate. The law became effective with the first reports required

to be filed after December 31, 1995. However, since the law was enacted shortly before this date, under agreement with the Clerk, authorized committees of candidates for the House will file year-end reports for 1995 with the Clerk. The Clerk will date stamp and forward these reports to the Commission. Thereafter, the candidates and committees formerly filing with the Clerk will file all documents required to be filed under FECA with the Commission.

Therefore, the Commission is publishing this Notice to make necessary technical and conforming amendments to its regulations. The Notice amends 11 CFR 105.1 to conform to the statute and includes conforming amendments to several provisions that refer to the regulation: 11 CFR 100.5(e)(3)(i), 104.3(e)(5), 104.4(c)(3), 104.5(f), 104.14(c), 104.15(a), 105.4, 105.5, 109.2(a), 110.6(c)(1) (i) and (ii), and 114.6 (d)(3)(i) and (d)(5). Please note that the sale or use restriction on information in campaign finance reports, set forth at 11 CFR 104.15(a), still would apply to all reports, including those previously filed with the Clerk.

Because the amendments are merely technical, they are exempt from the notice and comment requirements of the Administrative Procedure Act. *See* 5 U.S.C.553(b)(B). They are also exempt from the legislative review provisions of the FECA. *See* 2 U.S.C. § 438(d). These exemptions allow the amendments to be made effective immediately upon publication in the **Federal Register**. As a result, these amendments are made effective on February 1, 1996.

**Certification of No Effect Pursuant to 5 U.S.C. 605(b) (Regulatory Flexibility Act)**

I certify that the attached final rule will not have a significant economic impact on a substantial number of small entities. The basis of this certification is that the rule is necessary to conform to the Act and that the rule changes only the location of filing reports. Therefore, no significant economic impact is caused by the final rule.

**List of Subjects**

11 CFR Part 100

Elections.

11 CFR Part 104

Campaign funds, Political committees and parties, Reporting and recordkeeping requirements.

11 CFR Part 105

Campaign funds, Political candidates, Political committees and parties,

Reporting and recordkeeping requirements.

11 CFR Part 109

Elections, Reporting and recordkeeping requirements.

11 CFR Part 110

Campaign funds, Political committees and parties.

11 CFR Part 114

Business and industry, Elections, Labor.

For the reasons set out in the preamble, subchapter A, chapter I, title 11 of the Code of Federal Regulations is amended as follows:

**PART 100—SCOPE AND DEFINITIONS (2 U.S.C. 431)**

1. The authority citation for Part 100 continues to read as follows:

**Authority:** 2 U.S.C. 431, 438(a)(8).**§ 100.5(e)(3)(i) [Amended]**

2. Section 100.5(e)(3)(i) is amended by removing “, Clerk of the House”.

**PART 104—REPORTS BY POLITICAL COMMITTEES (2 U.S.C. 434)**

3. The authority citation for Part 104 continues to read as follows:

**Authority:** 2 U.S.C. 431(1), 431(8), 431(9), 432(i), 434, 438(a)(8), 438(b).**§ 104.3(e)(5) [Amended]**

4. Section 104.3(e)(5) is amended by removing all references to “Clerk of the House of Representatives,” and by removing the comma after “Secretary of the Senate” in the first and third sentences.

**§ 104.4(c)(3) [Amended]**

5. Section 104.4(c)(3) is amended by revising all references to “Clerk of the House” to read “Federal Election Commission”.

**§ 104.5(f) [Amended]**

6. Section 104.5(f) is amended by removing “the Clerk of the House,”.

**§ 104.14(c) [Amended]**

7. Section 104.14(c) is amended by removing “, the Clerk of the House,”.

**§ 104.15(a) [Amended]**

8. Section 104.15(a) is amended by revising “with the Commission, Clerk of the House, Secretary of the Senate, or any Secretary of State or other equivalent State officer” to read “under the Act”.



acceptable and unacceptable purpose descriptions to be reported by authorized committees. Paragraph (B) requires authorized committees, when itemizing certain disbursements for which reimbursements are required, to provide a brief explanation of the activity for which reimbursement is required. These provisions have been in Title 11 of the **Code of Federal Regulations** since 1980 and 1995, respectively, and were not affected by the recent statutory changes to the election cycle reporting requirements.

#### Need for Correction

As published, the final rules inadvertently omit two paragraphs describing information to be reported by authorized committees of Federal candidates.

All committees must report the purpose of itemized disbursements (i.e., those disbursements aggregating in excess of \$200). Omitted paragraph (A) contains examples of suitably specific purpose descriptions as well as examples of those descriptions that are unacceptably vague. This paragraph is inconsistent with the reporting of rules for unauthorized committees (committees other than candidate committees) in 11 CFR 104.3(b)(3).

Omitted paragraph (B) is used in administering the "personal use" rules in 11 CFR 113.1. Federal candidates are barred from using campaign funds for personal benefit. Paragraph (B) requires authorized committees of Federal candidates itemizing disbursements for which partial or total reimbursement is required under 11 CFR 113.1(g)(1)(iii)(C) or (D) to provide a brief explanation of the activity for which the reimbursement is made.

Section 801 of Title 5 of the United States Code requires Federal agencies to submit regulations to Congress. These regulations were submitted to the Speaker of the House of Representatives and the President of the Senate on November 26, 2001.

#### Certification of No Effect Pursuant to 5 U.S.C. § 605(b) [Regulatory Flexibility Act]

This correction will not have significant economic impact on a substantial number of small entities. The basis of this certification is that this correction only requires political committees to once again add information to the reports they are required to file. These regulations were in 11 CFR since 1980 and 1995, respectively, before being inadvertently omitted in 2000.

#### List of Subjects in 11 CFR Part 104

Campaign funds, Political committees and parties, Reporting and recordkeeping requirements.

Accordingly, 11 CFR part 104 is corrected by making the following correcting amendment:

#### PART 104—REPORTS BY POLITICAL COMMITTEES

1. The authority citation for part 104 continues to read as follows:

**Authority:** 2 U.S.C. 431(1), 431(8), 431(9), 432(i), 434, 438(a)(8), 438(b), 439a.

#### § 104.3 Contents of reports (2 U.S.C. 434(b), 439a).

\* \* \* \* \*

2. In § 104.3 add the following paragraphs (b)(4)(i)(A) and (B):

(b) \* \* \*  
(4) \* \* \*  
(i) \* \* \*

(A) As used in this paragraph, *purpose* means a brief statement or description of why the disbursement was made. Examples of statements or descriptions which meet the requirements of this paragraph include the following: dinner expenses, media, salary, polling, travel, party fees, phone banks, travel expenses, travel expense reimbursement, and catering costs. However, statements or descriptions such as *advance*, *election day expenses*, *other expenses*, *expenses*, *expense reimbursement*, *miscellaneous*, *outside services*, *get-out-the-vote* and *voter registration* would not meet the requirements of this paragraph for reporting the purpose of an expenditure.

(B) In addition to reporting the purpose described in paragraph (b)(4)(i)(A) of this section, whenever an authorized committee itemizes a disbursement that is partially or entirely a personal use for which reimbursement is required under 11 CFR 113.1(g)(1)(ii)(C) or (D), it shall provide a brief explanation of the activity for which reimbursement is required.

\* \* \* \* \*

Dated: November 26, 2001.

**Danny L. McDonald,**  
*Chairman, Federal Election Commission.*  
[FR Doc. 01-29679 Filed 11-29-01; 8:45 am]  
**BILLING CODE 6715-01-P**

#### FEDERAL ELECTION COMMISSION

#### 11 CFR Part 111

#### [Notice 2001-18]

#### Extension to Administrative Fines

**AGENCY:** Federal Election Commission.

**ACTION:** Final rule; revision of the sunset date.

**SUMMARY:** The Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the expiration date in which the Federal Election Commission (hereinafter "the Commission") may assess civil money penalties for violations of the reporting requirements of section 434(a) of the Federal Election Campaign Act (hereinafter "the Act" or "FECA").

**DATES:** Effective on December 31, 2001.

**FOR FURTHER INFORMATION CONTACT:** Ms. Rosemary C. Smith, Assistant General Counsel, or Ms. Mai T. Dinh, Attorney, 999 E Street, NW., Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

#### SUPPLEMENTARY INFORMATION:

#### Explanation and Justification

Section 640 of the Treasury and General Government Appropriations Act, 2000, Pub. L. No. 106-58, 106th Cong., 113 Stat. 430, 476-77 (1999), amended § 309(a)(4) of the FECA, 2 U.S.C. 437g(a)(4), to provide for a modified enforcement process for violations of reporting requirements. Under § 437g(a)(4)(C) of the FECA, the Commission may assess a civil money penalty for violations of the reporting requirements of 2 U.S.C. 434(a). This authority, however, was to sunset on December 31, 2001. Pub. L. No. 106-58, 106th Cong., § 640(c). Recently, § 642 of the Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the sunset date to include all reports that cover activity between January 1, 2000, to December 31, 2003.

The Commission published final rules on May 19, 2000, to implement the amendment contained in the Treasury and General Government Appropriations Act, 2000. Section 111.30 of the regulations reflects the sunset provision of Pub. L. No. 106-58, 106th Cong., § 640(c). Therefore, the Commission is issuing this final rule to amend section 111.30 to extend the application of the administrative fine regulations, 11 CFR part 111, subpart B, to include all violations relating to reports that cover the period between January 1, 2000, to December 31, 2003.

The Commission is promulgating this final rule without notice or opportunity for comment because it falls under the "good cause" exemption of the Administrative Procedures Act, 5 U.S.C. 553(b)(B). The exemption allows



**§ 9038.2 Repayments [Corrected]**

14. On page 31886, in the second column, in instruction 44, "adding paragraphs (a)(4) and (i)" should read "adding paragraph (a)(4) and revising paragraph (h)".

15. On page 31886, in the second column, in § 9038.2(a)(3), in the fourth line, "given" should read "give".

16. On page 31887, in § 9038.2, in the third column, in the third line, the five asterisks following paragraph (g) should be removed, and in the fourth line, the paragraph designated as paragraph (i) should be designated as paragraph (h).

Dated: November 9, 1995.

**Lee Ann Elliott,**

*Vice Chairman, Federal Election Commission.*

[FR Doc. 95-28276 Filed 11-15-95; 8:45 am]

BILLING CODE 6715-01-M

**11 CFR Parts 9034 and 9038**

[Notice 1995-19]

**Public Financing of Presidential Primary and General Election Candidates**

**AGENCY:** Federal Election Commission.

**ACTION:** Final rule; correcting amendments.

**SUMMARY:** This document contains final rules correcting promulgation errors made in final rules published June 16, 1995 (60 FR 31854) regarding public financing of presidential primary and general election candidates.

**DATES:** The Commission will announce an effective date for these rules after they have been before Congress for 30 legislative days pursuant to 26 U.S.C. 9039(c). This announcement will be published in the **Federal Register**.

**FOR FURTHER INFORMATION CONTACT:** Ms. Susan E. Propper, Assistant General Counsel, 999 E Street, N.W., Washington, D.C. 20463, (202) 219-3690 or (800) 424-9530.

**SUPPLEMENTARY INFORMATION:** On June 16, 1995, the Commission published final rules revising its regulations governing public financing of presidential primary and general election candidates. 60 FR 31854 (June 16, 1995). These regulations implement provisions of the Presidential Election Campaign Fund Act and the Presidential Primary Matching Payment Account Act.

Unfortunately, there were a number of errors in the June 16 final rule document. The Commission is publishing two documents in today's edition of the **Federal Register** to correct these errors. Readers interested in the Commission's public financing

regulations should carefully review these two documents.

Most of the errors were of a technical nature. A Commission document published elsewhere in today's **Federal Register** corrects these technical errors.

However, two of the errors in the June 16 final rule document were not purely technical in that they reflect errors made in approval of the final rules.

Specifically, the June 16 final rules replaced § 9034.4(a)(3)(ii) with the version of that provision that was in effect before the public financing rules were last revised in 1991. 56 FR 35898 (July 29, 1991). This had the effect of eliminating language relating to candidates who continue to campaign after their dates of ineligibility. The June 16 final rules also removed the "continuing to campaign" reference from the heading in § 9034.4(a)(3).

In addition, the rules deleted language inserted in § 9038.2(b)(2)(iii). The deleted language reduces the amount of an ineligible candidate's repayment by shortening the time period during which the candidate's non-qualified campaign expenses would generate a repayment obligation.

The Commission never intended to make these revisions, as is evidenced by references to the deleted provisions that remain in other parts of the final rules. See, e.g., § 9034.4(a)(3)(iii).

Consequently, the Commission is publishing this document to restore the deleted provisions. The corrected versions of these rules are set out below. Because the regulated community had an opportunity to comment on these rules before they were promulgated in 1991, the Commission believes an additional comment period is unnecessary. Therefore, in accordance with 5 U.S.C. 553(b)(B), the Commission is approving these corrections as final rules without seeking further comment. The explanation and justification for these rules is set out at 56 FR 35898 (July 29, 1991).

Section 9039(c) of Title 26, United States Code requires that any rules or regulations prescribed by the Commission to carry out the provisions of Title 26 of the United States Code be transmitted to the Speaker of the House of Representatives and the President of the Senate 30 legislative days before they are finally promulgated. These regulations were transmitted to Congress on November 9, 1995.

**Certification of No Effect Pursuant to 5 U.S.C. 605(b) (Regulatory Flexibility Act)**

The attached final rules, if promulgated, will not have a significant impact on a substantial number of small

entities. The basis for this certification is that few, if any, small entities will be affected by these final rules.

Furthermore, any small entities affected are already required to comply with the requirements of the Presidential Primary Matching Payment Account Act in these areas.

**List of Subjects**

11 CFR 9034

Campaign funds.

11 CFR 9038

Campaign funds.

For the reasons set out in the preamble, subchapter F of chapter I of title 11 of the Code of Federal Regulations is amended as follows:

**PART 9034—ENTITLEMENTS**

1. The authority citation for part 9034 continues to read as follows:

**Authority:** 26 U.S.C. 9034 and 9039(b).

2. Section 9034.4 is amended by revising the heading in paragraph (a)(3), and by revising paragraph (a)(3)(ii), to read as follows:

**§ 9034.4 Use of contributions and matching payments.**

(a) \* \* \*

(3) Winding down costs and continuing to campaign. \* \* \*

(ii) If the candidate continues to campaign after becoming ineligible due to the operation of 11 CFR 9033.5(b), the candidate may only receive matching funds based on net outstanding campaign obligations as of the candidate's date of ineligibility. The statement of net outstanding campaign obligations shall only include costs incurred before the candidate's date of ineligibility for goods and services to be received before the date of ineligibility and for which written arrangement or commitment was made on or before the candidate's date of ineligibility, and shall not include winding down costs until the date on which the candidate qualifies to receive winding down costs under paragraph (a)(3)(i) of this section.

Contributions received after the candidate's date of ineligibility may be used to continue to campaign, and may be submitted for matching fund payments. The candidate shall be entitled to receive the same proportion of matching funds to defray net outstanding campaign obligations as the candidate received before his or her date of ineligibility. Payments from the matching payment account that are received after the candidate's date of ineligibility may be used to defray the candidate's net outstanding campaign

acceptable and unacceptable purpose descriptions to be reported by authorized committees. Paragraph (B) requires authorized committees, when itemizing certain disbursements for which reimbursements are required, to provide a brief explanation of the activity for which reimbursement is required. These provisions have been in Title 11 of the **Code of Federal Regulations** since 1980 and 1995, respectively, and were not affected by the recent statutory changes to the election cycle reporting requirements.

#### Need for Correction

As published, the final rules inadvertently omit two paragraphs describing information to be reported by authorized committees of Federal candidates.

All committees must report the purpose of itemized disbursements (i.e., those disbursements aggregating in excess of \$200). Omitted paragraph (A) contains examples of suitably specific purpose descriptions as well as examples of those descriptions that are unacceptably vague. This paragraph is inconsistent with the reporting of rules for unauthorized committees (committees other than candidate committees) in 11 CFR 104.3(b)(3).

Omitted paragraph (B) is used in administering the "personal use" rules in 11 CFR 113.1. Federal candidates are barred from using campaign funds for personal benefit. Paragraph (B) requires authorized committees of Federal candidates itemizing disbursements for which partial or total reimbursement is required under 11 CFR 113.1(g)(1)(iii)(C) or (D) to provide a brief explanation of the activity for which the reimbursement is made.

Section 801 of Title 5 of the United States Code requires Federal agencies to submit regulations to Congress. These regulations were submitted to the Speaker of the House of Representatives and the President of the Senate on November 26, 2001.

#### Certification of No Effect Pursuant to 5 U.S.C. § 605(b) [Regulatory Flexibility Act]

This correction will not have significant economic impact on a substantial number of small entities. The basis of this certification is that this correction only requires political committees to once again add information to the reports they are required to file. These regulations were in 11 CFR since 1980 and 1995, respectively, before being inadvertently omitted in 2000.

#### List of Subjects in 11 CFR Part 104

Campaign funds, Political committees and parties, Reporting and recordkeeping requirements.

Accordingly, 11 CFR part 104 is corrected by making the following correcting amendment:

#### PART 104—REPORTS BY POLITICAL COMMITTEES

1. The authority citation for part 104 continues to read as follows:

**Authority:** 2 U.S.C. 431(1), 431(8), 431(9), 432(i), 434, 438(a)(8), 438(b), 439a.

#### § 104.3 Contents of reports (2 U.S.C. 434(b), 439a).

\* \* \* \* \*

2. In § 104.3 add the following paragraphs (b)(4)(i)(A) and (B):

(b) \* \* \*

(4) \* \* \*

(i) \* \* \*

(A) As used in this paragraph, *purpose* means a brief statement or description of why the disbursement was made. Examples of statements or descriptions which meet the requirements of this paragraph include the following: dinner expenses, media, salary, polling, travel, party fees, phone banks, travel expenses, travel expense reimbursement, and catering costs. However, statements or descriptions such as *advance*, *election day expenses*, *other expenses*, *expenses*, *expense reimbursement*, *miscellaneous*, *outside services*, *get-out-the-vote* and *voter registration* would not meet the requirements of this paragraph for reporting the purpose of an expenditure.

(B) In addition to reporting the purpose described in paragraph (b)(4)(i)(A) of this section, whenever an authorized committee itemizes a disbursement that is partially or entirely a personal use for which reimbursement is required under 11 CFR 113.1(g)(1)(ii)(C) or (D), it shall provide a brief explanation of the activity for which reimbursement is required.

\* \* \* \* \*

Dated: November 26, 2001.

**Danny L. McDonald,**  
Chairman, Federal Election Commission.  
[FR Doc. 01-29679 Filed 11-29-01; 8:45 am]  
**BILLING CODE 6715-01-P**

#### FEDERAL ELECTION COMMISSION

#### 11 CFR Part 111

#### [Notice 2001-18]

#### Extension to Administrative Fines

**AGENCY:** Federal Election Commission.

**ACTION:** Final rule; revision of the sunset date.

**SUMMARY:** The Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the expiration date in which the Federal Election Commission (hereinafter "the Commission") may assess civil money penalties for violations of the reporting requirements of section 434(a) of the Federal Election Campaign Act (hereinafter "the Act" or "FECA").

**DATES:** Effective on December 31, 2001.

**FOR FURTHER INFORMATION CONTACT:** Ms. Rosemary C. Smith, Assistant General Counsel, or Ms. Mai T. Dinh, Attorney, 999 E Street, NW., Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

#### SUPPLEMENTARY INFORMATION:

#### Explanation and Justification

Section 640 of the Treasury and General Government Appropriations Act, 2000, Pub. L. No. 106-58, 106th Cong., 113 Stat. 430, 476-77 (1999), amended § 309(a)(4) of the FECA, 2 U.S.C. 437g(a)(4), to provide for a modified enforcement process for violations of reporting requirements. Under § 437g(a)(4)(C) of the FECA, the Commission may assess a civil money penalty for violations of the reporting requirements of 2 U.S.C. 434(a). This authority, however, was to sunset on December 31, 2001. Pub. L. No. 106-58, 106th Cong., § 640(c). Recently, § 642 of the Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the sunset date to include all reports that cover activity between January 1, 2000, to December 31, 2003.

The Commission published final rules on May 19, 2000, to implement the amendment contained in the Treasury and General Government Appropriations Act, 2000. Section 111.30 of the regulations reflects the sunset provision of Pub. L. No. 106-58, 106th Cong., § 640(c). Therefore, the Commission is issuing this final rule to amend section 111.30 to extend the application of the administrative fine regulations, 11 CFR part 111, subpart B, to include all violations relating to reports that cover the period between January 1, 2000, to December 31, 2003.

The Commission is promulgating this final rule without notice or opportunity for comment because it falls under the "good cause" exemption of the Administrative Procedures Act, 5 U.S.C. 553(b)(B). The exemption allows

# Rules and Regulations

Federal Register

Vol. 61, No. 33

Friday, February 16, 1996

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

## FEDERAL ELECTION COMMISSION

### 11 CFR Parts 100 and 108

[Notice 1996-6]

#### Document Filing

**AGENCY:** Federal Election Commission.  
**ACTION:** Final Rule; Technical Amendments.

**SUMMARY:** On February 1, 1996, several technical amendments were published in the **Federal Register** conforming the Commission's regulations to a recent amendment to the Federal Election Campaign Act of 1971, as amended ("FECA"). The Commission today is publishing technical amendments to conform two additional regulations to the recently amended statute.

**EFFECTIVE DATE:** February 16, 1996.

**FOR FURTHER INFORMATION CONTACT:** Ms. Susan E. Propper, Assistant General Counsel, or Ms. Teresa A. Hennessy, Attorney, 999 E Street, N.W., Washington, D.C. 20463, (202) 219-3690 or (800) 424-9530.

**SUPPLEMENTARY INFORMATION:** The FECA governs, *inter alia*, the filing of campaign finance reports by candidates, and the authorized committees of candidates, to the House of Representatives ("House"). 2 U.S.C. 432(g). On December 28, 1995, Public Law No. 104-79, 109 Stat. 791 (1995) amended the FECA to require that these reports be filed with the Federal Election Commission rather than the Clerk of the House. *See* Section 3. As noted above, the Commission has published in the **Federal Register** a technical amendment to 11 CFR 105.1 to conform to the amended statute and conforming amendments to several provisions that refer to the regulation. 61 FR 3549.

The Commission today is publishing additional technical amendments to conform the following regulations to the amended statute: 11 CFR 100.19(a) and

108.8. As noted in the original rulemaking, these technical requirements are exempt from the notice and comment requirements of the Administrative Procedure Act. *See* U.S.C. 553 (b)(B). They are also exempt from the legislative review provisions of the FECA. *See* 2 U.S.C. 438(d). Therefore, these technical amendments are effective on February 16, 1996.

### Certification of No Effect Pursuant to 5 U.S.C. 605(B) (Regulatory Flexibility Act)

I hereby certify that the attached technical amendments will not have a significant economic impact on a substantial number of small entities. The basis of this certification is that the technical amendments are necessary to conform to the FECA and that these change only the location of filing reports. Therefore, no significant economic impact is caused by the technical amendments.

#### List of Subjects

##### 11 CFR Part 100

Elections.

##### 11 CFR Part 108

Elections, Reporting and recordkeeping requirements.

For the reasons set out in the preamble, subchapter A, chapter I, title 11 of the Code of Federal Regulations is amended as follows:

### PART 100—SCOPE AND DEFINITIONS (2 U.S.C. 431)

1. The authority citation for Part 100 continues to read as follows:

**Authority:** 2 U.S.C. 431, 438(a)(8)

#### § 100.19(a) [Amended]

2. Section 100.19(a) is amended by adding "or" before "the Secretary" and by removing "; or the Clerk of the United States House of Representatives, House Records and Registration, 1036 Longworth House Office Building, Washington, DC 20515".

### PART 108—FILING COPIES OF REPORTS AND STATEMENTS WITH STATE OFFICERS (2 U.S.C. 439)

3. The authority citation for Part 108 continues to read as follows:

**Authority:** 2 U.S.C. 434(a)(2), 438(a)(8), 439, 453.

### § 108.8 [Amended]

4. Section 108.8 is amended by removing "Clerk," and by removing the comma after "Secretary".

Dated: February 13, 1996.

**Lee Ann Elliott,**

*Chairman, Federal Election Commission.*

[FR Doc. 96-3571 Filed 2-15-96; 8:45 am]

**BILLING CODE 6715-01-M**

## FEDERAL DEPOSIT INSURANCE CORPORATION

### 12 CFR Part 353

RIN 3064-AB63

#### Suspicious Activity Reports

**AGENCY:** Federal Deposit Insurance Corporation.

**ACTION:** Final rule.

**SUMMARY:** The Federal Deposit Insurance Corporation (FDIC) is amending its regulation on the reporting of known or suspected criminal and suspicious activities by insured state nonmember banks. This final rule streamlines reporting requirements by providing that a state nonmember bank file a new Suspicious Activity Report (SAR) with the FDIC and the appropriate federal law enforcement agencies by sending a single copy of the SAR to the Financial Crimes Enforcement Network of the Department of the Treasury (FinCEN) to report a known or suspected criminal offense or a transaction that it suspects involves money laundering or violates the Bank Secrecy Act.

**EFFECTIVE DATE:** April 1, 1996.

**FOR FURTHER INFORMATION CONTACT:**

Carol A. Mesheske, Chief, Special Activities Section, (202) 898-6750, or Gregory Gore, Counsel, (202) 898-7109.

#### SUPPLEMENTARY INFORMATION:

##### Background

The FDIC, FRB, OCC, and OTS have issued for public comment substantially similar proposals to revise their regulations on the reporting of known or suspected criminal conduct and suspicious activities. The Department of the Treasury, through FinCEN, has issued for public comment a substantially similar proposal to require the reporting of suspicious transactions relating to money laundering activities.

acceptable and unacceptable purpose descriptions to be reported by authorized committees. Paragraph (B) requires authorized committees, when itemizing certain disbursements for which reimbursements are required, to provide a brief explanation of the activity for which reimbursement is required. These provisions have been in Title 11 of the **Code of Federal Regulations** since 1980 and 1995, respectively, and were not affected by the recent statutory changes to the election cycle reporting requirements.

#### Need for Correction

As published, the final rules inadvertently omit two paragraphs describing information to be reported by authorized committees of Federal candidates.

All committees must report the purpose of itemized disbursements (i.e., those disbursements aggregating in excess of \$200). Omitted paragraph (A) contains examples of suitably specific purpose descriptions as well as examples of those descriptions that are unacceptably vague. This paragraph is inconsistent with the reporting of rules for unauthorized committees (committees other than candidate committees) in 11 CFR 104.3(b)(3).

Omitted paragraph (B) is used in administering the "personal use" rules in 11 CFR 113.1. Federal candidates are barred from using campaign funds for personal benefit. Paragraph (B) requires authorized committees of Federal candidates itemizing disbursements for which partial or total reimbursement is required under 11 CFR 113.1(g)(1)(iii)(C) or (D) to provide a brief explanation of the activity for which the reimbursement is made.

Section 801 of Title 5 of the United States Code requires Federal agencies to submit regulations to Congress. These regulations were submitted to the Speaker of the House of Representatives and the President of the Senate on November 26, 2001.

#### Certification of No Effect Pursuant to 5 U.S.C. § 605(b) [Regulatory Flexibility Act]

This correction will not have significant economic impact on a substantial number of small entities. The basis of this certification is that this correction only requires political committees to once again add information to the reports they are required to file. These regulations were in 11 CFR since 1980 and 1995, respectively, before being inadvertently omitted in 2000.

#### List of Subjects in 11 CFR Part 104

Campaign funds, Political committees and parties, Reporting and recordkeeping requirements.

Accordingly, 11 CFR part 104 is corrected by making the following correcting amendment:

#### PART 104—REPORTS BY POLITICAL COMMITTEES

1. The authority citation for part 104 continues to read as follows:

**Authority:** 2 U.S.C. 431(1), 431(8), 431(9), 432(i), 434, 438(a)(8), 438(b), 439a.

#### § 104.3 Contents of reports (2 U.S.C. 434(b), 439a).

\* \* \* \* \*

2. In § 104.3 add the following paragraphs (b)(4)(i)(A) and (B):

(b) \* \* \*

(4) \* \* \*

(i) \* \* \*

(A) As used in this paragraph, *purpose* means a brief statement or description of why the disbursement was made. Examples of statements or descriptions which meet the requirements of this paragraph include the following: dinner expenses, media, salary, polling, travel, party fees, phone banks, travel expenses, travel expense reimbursement, and catering costs. However, statements or descriptions such as *advance*, *election day expenses*, *other expenses*, *expenses*, *expense reimbursement*, *miscellaneous*, *outside services*, *get-out-the-vote* and *voter registration* would not meet the requirements of this paragraph for reporting the purpose of an expenditure.

(B) In addition to reporting the purpose described in paragraph (b)(4)(i)(A) of this section, whenever an authorized committee itemizes a disbursement that is partially or entirely a personal use for which reimbursement is required under 11 CFR 113.1(g)(1)(ii)(C) or (D), it shall provide a brief explanation of the activity for which reimbursement is required.

\* \* \* \* \*

Dated: November 26, 2001.

**Danny L. McDonald,**  
Chairman, Federal Election Commission.  
[FR Doc. 01-29679 Filed 11-29-01; 8:45 am]  
**BILLING CODE 6715-01-P**

#### FEDERAL ELECTION COMMISSION

#### 11 CFR Part 111

#### [Notice 2001-18]

#### Extension to Administrative Fines

**AGENCY:** Federal Election Commission.

**ACTION:** Final rule; revision of the sunset date.

**SUMMARY:** The Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the expiration date in which the Federal Election Commission (hereinafter "the Commission") may assess civil money penalties for violations of the reporting requirements of section 434(a) of the Federal Election Campaign Act (hereinafter "the Act" or "FECA").

**DATES:** Effective on December 31, 2001.

**FOR FURTHER INFORMATION CONTACT:** Ms. Rosemary C. Smith, Assistant General Counsel, or Ms. Mai T. Dinh, Attorney, 999 E Street, NW., Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

#### SUPPLEMENTARY INFORMATION:

#### Explanation and Justification

Section 640 of the Treasury and General Government Appropriations Act, 2000, Pub. L. No. 106-58, 106th Cong., 113 Stat. 430, 476-77 (1999), amended § 309(a)(4) of the FECA, 2 U.S.C. 437g(a)(4), to provide for a modified enforcement process for violations of reporting requirements. Under § 437g(a)(4)(C) of the FECA, the Commission may assess a civil money penalty for violations of the reporting requirements of 2 U.S.C. 434(a). This authority, however, was to sunset on December 31, 2001. Pub. L. No. 106-58, 106th Cong., § 640(c). Recently, § 642 of the Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the sunset date to include all reports that cover activity between January 1, 2000, to December 31, 2003.

The Commission published final rules on May 19, 2000, to implement the amendment contained in the Treasury and General Government Appropriations Act, 2000. Section 111.30 of the regulations reflects the sunset provision of Pub. L. No. 106-58, 106th Cong., § 640(c). Therefore, the Commission is issuing this final rule to amend section 111.30 to extend the application of the administrative fine regulations, 11 CFR part 111, subpart B, to include all violations relating to reports that cover the period between January 1, 2000, to December 31, 2003.

The Commission is promulgating this final rule without notice or opportunity for comment because it falls under the "good cause" exemption of the Administrative Procedures Act, 5 U.S.C. 553(b)(B). The exemption allows

**FEDERAL ELECTION COMMISSION****11 CFR Parts 100, 102, 109, 110, and 114**

[Notice 1995-23]

**Corporate and Labor Organization Activity; Express Advocacy and Coordination With Candidates****AGENCY:** Federal Election Commission.**ACTION:** Final rule and transmittal of regulations to Congress.

**SUMMARY:** The Commission is issuing revised regulations regarding expenditures by corporations and labor organizations. The new rules implement the Supreme Court's opinion in *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (*MCFL*), by substituting an express advocacy standard for the previous partisan/nonpartisan standard with respect to corporate and labor organization expenditures.

Consequently, in many respects, the revised rules permit corporations and labor organizations to engage in a broader range of activities than was permitted under the previous rules. New provisions are also being added to provide corporations and labor organizations with guidance regarding endorsements of candidates, activities which facilitate the making of contributions, and candidate appearances at colleges and universities.

**DATES:** Further action, including the publication of a document in the **Federal Register** announcing an effective date, will be taken after these regulations have been before Congress for 30 legislative days pursuant to 2 U.S.C. 438(d).

**FOR FURTHER INFORMATION CONTACT:** Ms. Susan E. Propper, Assistant General Counsel, or Ms. Rosemary C. Smith, Senior Attorney, 999 E Street NW., Washington, D.C. 20463, (202) 219-3690 or (800) 424-9530.

**SUPPLEMENTARY INFORMATION:** The Commission is publishing today the final text of revisions to its regulations at 11 CFR 109.1(b)(4), 110.12, 110.13, 114.1 (a) and (j), 114.2, 114.3, 114.4, 114.12(b) and 114.13. These provisions implement 2 U.S.C. 431(17) and 441b, provisions of the Federal Election Campaign Act of 1971, as amended (the Act or FECA), 2 U.S.C. 431 *et seq.* Also included are conforming amendments to 11 CFR 100.7(b)(21), 100.8 (b)(3) and (b)(23) and 102.4(c)(1). Section 438(d) of Title 2, United States Code, requires that any rule or regulations prescribed by the Commission to carry out the provisions of Title 2 of the United States Code be

transmitted to the Speaker of the House of Representatives and the President of the Senate 30 legislative days before they are finally promulgated. These regulations were transmitted to Congress on December 8, 1995.

**Explanation and Justification**

The new and revised rules reflect recent judicial and Commission interpretations of 2 U.S.C. 441b. This section of the FECA prohibits corporations and labor organizations from using general treasury monies to make contributions or expenditures in connection with federal elections. The new and amended rules contain the following changes:

1. The partisan/nonpartisan standards in previous 11 CFR part 114 have been replaced by new language at section 114.2, 114.3, and 114.4, prohibiting corporations and labor organizations from making expenditures for communications to the general public expressly advocating the election or defeat of federal candidates. This new language applies only to expenditures.

2. The provisions regarding candidate debates, candidate appearances, distributing registration and voting information, voter guides, voting records, and conducting voter registration and get-out-vote drives in sections 110.13, 114.3, 114.4 and 114.13 have been revised and updated.

3. New provisions have been added to sections 110.12, 114.1., 114.2, and 114.4 to define "restricted class," and to address candidate appearances at colleges and universities, endorsements of candidates, and activities which facilitate the making of contributions.

4. New language has been added to 11 CFR 114.2, 114.3 and 114.4 to address the question of when coordination between a candidate and a corporation or labor organization will cause an activity to become a prohibited contribution.

Please note that at an earlier stage of this rulemaking, the Commission revised the definition of express advocacy in accordance with the judicial interpretations found in *Buckley v. Valeo*, 424 U.S. 1, 44 n. 52 (1976) (*Buckley*, *MCFL* and *Federal Election Commission v. Furgatch*, 807 F.2d 857 (9th Cir.), *cert. denied*, 484 U.S. 850 (1987) (*Furgatch*) and moved it to 11 CFR 100.22. See Explanation and Justification for 11 CFR 100.17, 100.22, 106.1, 109.1 and 114.10, 60 FR 35292 (July 6, 1995). At that time, the definition of "clearly identified," in 11 CFR 100.17, was also updated. In addition, new section 114.10 was added to allow qualified nonprofit corporations possessing certain essential

features to use general treasury funds for independent expenditures, and to set out reporting obligations for qualified nonprofit corporations making independent expenditures. Section 114.10 implements the Supreme Court's decisions in *MCFL* and *Austin v. Michigan Chamber of Commerce*, 494 U.S.C. 652 (1990) (*Austin*).

The history of this rulemaking, including the Petition for Rulemaking and the comments and public testimony, are discussed in more detail in the previously published Explanation and Justification at 60 FR 35292 (July 6, 1995), and in the Notice of Proposed Rulemaking at 57 FR 33548 (July 29, 1992) (Notice or NPRM). The promulgation of these regulations, after the close of the thirty legislative day period, will complete the Commission's consideration of the National Right to Work Committee's Petition for Rulemaking.

**Section 100.7(b)(21) Contribution**

Paragraph (b)(21) of this section is being amended by removing the term "nonpartisan" in describing candidate debates because that term is no longer used in the debate rules at 11 CFR 110.13. In addition, the cite to section 114.4(e) is being changed to 114.4(f) to correspond to the renumbering of that section.

**Section 100.8 (b)(3) and (b)(23) Expenditure**

Paragraph (b)(3) of section 100.8 is being amended to delete the term "nonpartisan" in describing the type of voter drive activity which fall outside the definition of "expenditure." In order for this exception to apply, such activity must still be conducted without any effort to determine party or candidate preference. A reference to section 114.3(c)(4) has also been added for the convenience of readers concerned with corporate or labor organization voter drives aimed at the restricted class.

Paragraph (b)(23) of this section is being amended by removing the term "nonpartisan" in describing candidate debates because that term is no longer used in the debate rules at 11 CFR 110.13. In addition, the cite to section 114.4(e) is being changed to 114.4(f) to correspond to the renumbering of that section.

**Section 102.4(c)(1) Administrative Termination**

The citation to the rules governing debt settlement procedures is being changed from 11 CFR 114.10 to 11 CFR part 116. Section 114.10 now covers qualified nonprofit corporations, not debt settlement.

#### Section 109.1(b)(4) Coordination with Candidates

The Notice suggested revising 11 CFR 109.1(b)(4) to indicate that the limited types of communication with candidates and their campaign staff which are described in 11 CFR 114.2(c), 114.3 and 114.4 do not constitute coordination if they comply with the requirements of those sections. Upon further reflection, this proposal has been dropped because 11 CFR part 109 covers all persons, and the Commission's concerns regarding the coordination of corporate or labor organization activity is more appropriately addressed in 11 CFR 114.2 through 114.4, which are discussed below.

#### Section 110.12 Candidate Appearance on Public Educational Institution Premises

New section 110.12 of the regulations addresses candidate appearances on the premises of public educational institutions. This section generally follows new paragraph (c)(7) of section 114.4, which is discussed more fully below. It has been included in the regulations so that public colleges and universities may continue to invite candidates to appear and address either the academic community or the general public in the same manner as incorporated private colleges and universities. A number of commenters pointed out that private schools should be treated the same as public educational institutions. Please note, however, that these institutions are also governed by state law which may impose additional requirements in this area.

#### Section 110.13 Candidate Debates

The Commission has revised its regulations at 11 CFR 110.13 governing the staging of candidate debates in several respects. First, the previous requirement that debates be "nonpartisan" has been removed. However, the rules continue to specify that candidate debates may not be structured to promote or advance a particular candidate. Also, debates may not be coordinated with a candidate in a manner that would result in the making of an in-kind contribution.

In the NPRM, the Commission has proposed several additional requirements, such as a restriction on discussing campaign strategy and tactics with the candidate or agents of the candidate. The NPRM also included restrictions on giving one candidate more time during the debate or more advance information as to the questions to be asked. Several commenters were

critical of these proposals. While this language has been deleted from the final rules, these restrictions are subsumed within the requirement that the debate not be structured to promote or advance a particular candidate over the others.

The Commission also considered including language stating that staging organizations may not expressly advocate the election or defeat of any clearly identified candidate during the debates. That language does not need to be included in the final rule because the rules already state that the debates may not be structured to promote or advance one candidate over another. Please note that no portion of the entire event, including any pre-debate or post-debate commentary and analysis, may be structured to promote or advance a particular candidate. Nevertheless, a news organization that stages a candidate debate may produce a separate editorial containing express advocacy under the news story exception to the definitions of contribution and expenditure in 11 CFR 100.7(b)(2) and 100.8(b)(2).

#### 1. Definition of Staging Organization

Section 110.13(a) addresses several issues that have been raised regarding nonprofit groups and media organizations that wish to be staging organizations for candidate debates. First, this provision was rewritten to clarify that nonprofit organizations described in 26 U.S.C. 501 (c)(3) and (c)(4) may stage debates even if they have not received official confirmation from the Internal Revenue Service of their status as nonprofit organizations. In addition, the previous language may have been confusing because it described these entities as "exempt from Federal taxation", when they may be required to pay taxes on their nonexempt function income. Please note that under section 110.13, it is possible for a candidate debate to be sponsored by multiple staging organizations. The Internal Revenue Service commented that while the requirements in the FEC's rules are not identical to the factors the IRS considers, they do not conflict with the IRS's rules regarding political activity carried out by 501(c) organizations. Another commenter questioned the reason for disqualifying nonprofit organizations from staging debates if they endorsed candidates, as long as the debate is fair. The Commission is retaining this requirement because it is needed to ensure the integrity of candidate debates.

Section 110.13(a)(2) follows the previous provision by indicating that broadcasters and the print media may

stage candidate debates, but it does not indicate whether local cable stations or cable networks may stage debates. However, questions involving cable debates will be addressed in a separate NPRM. This area is currently subject to many changes, and the Commission intends to consult further with the Federal Communications Commission before addressing it.

Two comments questioned the use of the term "*bona fide*" to describe newspapers who may qualify as debate staging organizations, and the Commission's authority to determine what is a *bona fide* newspaper or magazine under the First Amendment guarantee of freedom of the press. *Bona fide* newspapers and magazines include publications of general circulation containing news, information, opinion, and entertainment, which appear at regular intervals and derive their revenues from subscriptions and advertising. This term is explained in more detail in the Explanation and Justification for the 1979 rules on funding and sponsorship of federal candidate debates. See 44 FR 76734 (December 27, 1979). These rules were transmitted to Congress on December 20, 1979, together with the Explanation and Justification. They became effective on April 1, 1980, after neither house of Congress disapproved them under 2 U.S.C. 438(d)(2). (An earlier version of the candidate debate rules was disapproved by Congress on September 18, 1979. See 44 FR 39348 (July 5, 1979).) This is, as the Supreme Court has noted, an "indication that Congress does not look favorably" upon the Commission's construction of the Act. *FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 34 (1981). See also, e.g., *Sibbach v. Wilson*, 312 U.S. 1, 16 (1941) ("That no adverse action was taken by Congress indicates, at least, that no transgression of legislative policy was found"). Accordingly, the revised rules follow the previous provisions by retaining the term "*bona fide*" to describe newspapers and magazines that may stage candidate debates.

Finally, please note that the purpose of section 110.13 and 114.4(f) is to provide a specific exception so that certain nonprofit organizations and the news media may stage debates, without being deemed to have made prohibited corporate contributions to the candidates taking part in debates. This exception is consistent with the traditional role these organizations have played in the political process. Individuals and unincorporated entities wishing to stage debates are not covered by the exception.

## 2. Debate Structure and Selection of Candidates

The rules in section 110.13(b)(1) continue the previous policy of permitting staging organizations to decide which candidates to include in a debate, so long as the debate includes at least two candidates. Please note that a face-to-face appearance or confrontation by the candidates is an inherent element of a debate. Hence, a debate does not consist of a series of candidates appearances at separate times over the course of a longer event. See AO 1986-37. Nevertheless, the requirement of including two candidates would be satisfied, for example, if two candidates were invited and accepted, but one was unable to reach the debate site due to bad weather conditions, and the staging organization held the debate with only the other candidate present. Other situations will be addressed on a case-by-case basis. The Commission does not intend to penalize staging organizations for going forward with debates when circumstances beyond their control result in only one candidate being present and it is not feasible to reschedule. Please note that in some situations, the rules in 11 CFR 114.4 regarding candidate appearance may also be applicable.

Many comments, and much public testimony, was received on whether the Commission should establish reasonable, objective, nondiscriminatory criteria to be used by staging organizations in determining who must be invited to participate in candidate debates. In the alternative, it was suggested that the Commission could allow staging organizations to use their own pre-established sets of reasonable, objective, nondiscriminatory criteria, provided the criteria are subject to Commission review and are announced to the candidates in advance.

In response to the comments and testimony, new paragraph (c) has been added to section 110.13 to require all staging organizations to use pre-established objective criteria to determine which candidates are allowed to participate in debates. Given that the rules permit corporate funding of candidate debates, it is appropriate that staging organizations use pre-established objective criteria to avoid the real or apparent potential for a *quid pro quo*, and to ensure the integrity and fairness of the process. The choice of which objective criteria to use is largely left to the discretion of the staging organization. The suggestion that the criteria be "reasonable" is not needed because reasonableness is implied.

Similarly, the revised rules are not intended to permit the use of discriminatory criteria such as race, creed, color, religion, sex or national origin.

Although the new rules do not require staging organizations to do so, those staging debates would be well advised to reduce their objective criteria to writing and to make the criteria available to all candidates before the debate. This will enable staging organizations to show how they decided which candidates to invite to the debate. Staging organizations must be able to show that their objective criteria were used to pick the participants, and that the criteria were not designed to result in the selection of certain pre-chosen participants. The objective criteria may be set to control the number of candidates participating in a debate if the staging organization believes there are too many candidates to conduct a meaningful debate.

Under the new rules, nomination by a particular political party, such as a major party, may not be the sole criterion used to bar a candidate from participating in a general election debate. But, in situations where, for example, candidates must satisfy three of five objective criteria, nomination by a major party may be one of the criteria. This is a change from the Explanation and Justification for the previous rules, which had expressly allowed staging organizations to restrict general election debates to major party candidates. See Explanation and Justification, 44 FR 76735 (December 27, 1979). In contrast, the new rules do not allow a staging organization to bar minor party candidates or independent candidates from participating simply because they have not been nominated by a major party.

The final rules which follow also continue the previous policy that sponsoring a primary debate for candidates of one political party does not require the staging organization to hold a debate for the candidates of any other party. See Explanation and Justification, 44 FR 76735 (December 27, 1979).

### Section 114.1 Definitions

#### 1. Contribution and Expenditure

The revised regulations in 11 CFR 114.1 (a)(1) and (a)(2) recognize that the *MCFL* decision necessitates certain distinctions between the terms "contribution" and "expenditure." The previous rules had treated these terms as coextensive. The distinction arises because the Court read an express advocacy standard into the 2 U.S.C.

441b definition of expenditure. However, payments which are coordinated with candidates constitute expenditures and in-kind contributions to those candidates even if the communications do not contain express advocacy. See AO 1988-22.

One commenter urged the Commission to continue to interpret the term "contribution or expenditure" to cover the same disbursements. The comment argued that the *MCFL* decision applies equally to contributions and expenditures. The Commission disagrees with this interpretation of *MCFL*, given that the case only involved the issue of whether corporate expenditures were made. In *MCFL*, the parties did not raise, and the Supreme Court did not resolve, the factual question of whether corporate contributions had been made by *MCFL, Inc.* However, the *MCFL* Court reaffirmed the First Amendment distinction between independent expenditures and contributions, which was recognized in the *Buckley* opinion. In *Buckley*, the Supreme Court generally struck down the Act's limitations on independent campaign expenditures by individuals and organizations (*Buckley*, 424 U.S. at 39-51), but upheld the constitutionality of the Act's restrictions on contributions to candidates. *Id.* at 23-38. Subsequently, the Court stated in *NCPAC* that "there was a fundamental constitutional difference between money spent to advertise one's views independently of the candidate's campaign and money contributed to the candidate to be spent on his campaign." *Federal Election Commission v. National Conservation PAC*, 470 U.S. 480, 497 (1985). Similarly, the Court indicated that "a corporation's expenditures to propagate its views on issues of general public interest are of a different constitutional stature than corporate contributions to candidates." *Id.*, at 495-96. In light of this judicially-recognized distinction, the final version of section 114.1(a)(1) and (a)(2) is being modified to recognize that the terms "contribution" and "expenditure" are not coextensive.

The attached rules also include two technical amendments to section 114.1(a)(1). First, the reference to the National (sic) Savings and Loan Insurance Corporation has been deleted, because that entity no longer exists. Paragraph (a)(2)(ii) of section 114.1 is also being amended to remove the reference to "nonpartisan" voter drives.

#### 2. Restricted Class

New paragraph (j) of section 114.1 contains a definition of "restricted class" for purposes of receiving



corporate or labor organization communications containing express advocacy. It has been included to avoid describing everyone in the restricted class in numerous places throughout the regulations where it would be more convenient to simply use the term "restricted class." The definition does not change who is considered to be within the restricted class. It also does not change who is an executive or administrative employee under section 114.1(c) or who is a member of a membership association under section 114.1(e).

For most corporations and labor organizations, the restricted class is the same as the solicitable class. However, for incorporated trade associations and certain cooperatives, there are differences in who can receive solicitations and who can receive express advocacy communications. For example, a trade association's restricted class includes member corporations who are not in its solicitable class, since corporations may not make contributions under section 441b of the FECA. Conversely, however, a trade association may solicit its member corporations' stockholders and executive and administrative personnel, even though these individuals are not in its restricted class, if the member corporations have approved the solicitations. *See, e.g.*, AO 1991-24 and 11 CFR 114.8.

### Section 114.2 Prohibitions on Contributions and Expenditures

#### 1. Express Advocacy

The final rules incorporate an express advocacy standard in several sections of 11 CFR part 114. First, new language in paragraphs (a) and (b) of section 114.2 prohibits corporations and labor organizations from making expenditures for communications to the general public that expressly advocate the election or defeat of one or more clearly identified candidates. Please note that some portions of the regulations refer to "communications containing express advocacy." This term has the same meaning as the references elsewhere to "communications expressly advocating the election or defeat of one or more clearly identified candidates."

For the reasons explained above, the express advocacy standard in the revised rules applies to independent expenditures, but not contributions. The prohibition against contributions made by corporations and labor organizations in connection with federal elections remains unaffected by *MCFL*. Most, but not all, commenters supported the adoption of an express advocacy

standard for evaluating independent expenditures under section 441b of the FECA.

The provision prohibiting expenditures for communications containing express advocacy applies to all corporations and labor organizations except for qualified nonprofit corporations meeting the criteria set out in new section 114.10. Thus, these qualified nonprofit corporations may use general treasury funds to make independent expenditure communications to the general public which contain express advocacy. These could include registration and voting communications, official registration and voting information, voting records and voter guides. *See also* 11 CFR 114.4(c)(1)(i) and (ii).

#### 2. Coordination With Candidates

A new paragraph (c) has been added to 11 CFR 114.2 to address the topic of coordination of corporate or labor organization activity with candidates or their authorized committees or agents, which results in the making of an in-kind contribution. Previous paragraphs (c) and (d) have been redesignated as paragraphs (d) and (e), respectively.

*a. Initial Proposals.* In *Buckley v. Valeo*, the Supreme Court made a distinction between independent expenditures and contributions. The Court observed, "[u]nlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." *Buckley*, 424 U.S. at 47. Thus, *Buckley* could be interpreted to prohibit all contacts with candidates. However, the NPRM recognized that it is justifiable to allow some forms of contact to preserve the previous range of permissible activity, such as sponsoring candidate appearances. The prohibition against corporate contributions was expressly reaffirmed in *MCFL*. 479 U.S. at 260. Therefore, the NPRM sought to draw a distinction between permissible contacts with candidates which are necessary to conduct these activities, and more extensive coordination that will result in in-kind contributions in some circumstances. The proposals in the NPRM would have defined coordination to include discussions of specific campaign strategy or tactics.

The proposed rules include new language in section 114.2(c) indicating

when corporate and labor organization disbursements will be treated as impermissible in-kind contributions to particular candidates. Prior to the *MCFL* decision, the Commission had not needed to examine the extent to which such payments by corporations and labor organizations could be treated as in-kind contributions, because they were simply treated as prohibited corporate or labor organization expenditures in connection with federal elections, unless permitted by a specific exemption.

#### *b. Comments and Testimony.*

Numerous commenters expressed a wide variety of views on this topic. Many were confused as to how such a standard would work in practice. Some pointed out that this was an area not addressed by the *MCFL* decision, and that it appeared as though the Commission was trying to find a way to impose new requirements that would be at least as restrictive as the former partisan/nonpartisan standard. They argued that section 441b(b)(2)(A) of the FECA excludes communications with the restricted class on any subject from the definition of contribution or expenditures. Others favored a more restrictive rule allowing no contacts except for arranging the logistics of candidate debates and appearances, or obtaining responses for voter guides.

*c. Revised Rules.* In response to these concerns, new section 114.2(c) has been rewritten to clarify what types of contacts with candidates are considered impermissible coordination, and what types are permissible. The comments received in response to these proposals illustrated the need to clarify and simplify the operation of these provisions. Under revised section 114.2, a corporation or labor organization that only makes communications to its restricted class does not run the risk of having its expenditures treated as in-kind contributions. On the other hand, a corporation or labor organization that engages in election-related activities directed at the general public must avoid most forms of coordination with candidates, as this will generally result in prohibited in-kind contributions, and will compromise the independence of future communications to the general public. For example, a prohibited in-kind contribution would result if a voter guide is prepared and distributed after consulting with the candidate regarding his or her plans, projects or needs regarding the campaign. Please note that, in the case of a communication just to the restricted class, coordination will not cause that activity or future communications to the restricted class to be considered in-kind contributions.



However, such coordination may compromise the ability of a corporation's or labor organization's separate segregated fund to make independent expenditures to those outside the restricted class in the future.

Additional changes to the rules covering candidate debates, candidate appearances, colleges and universities, voting records, voting guides, voter registration and get-out-the-vote drives, endorsements, trademarks and letterhead, and facilitation are described below.

### 3. Facilitating the Making of Contributions

As part of the revisions to 11 CFR Part 114, the Commission has reassessed the prohibition against corporations and labor organizations facilitating the making of contributions, and is adding a new provision which modifies its prior interpretation. Previously, in AOs 1987-29, 1986-4 and 1982-2, MUR 3540 and in the 1989 and 1977 Explanation and Justifications of sections 110.6 and 114.3, the Commission has stated that corporations and labor organizations may not facilitate the making of contributions to particular candidates or political committees other than their own separate segregated funds. *Explanation and Justification of Regulations*, H. Doc. No. 95-44, 95th Cong., 1st Sess. at 104-105 (1977); 54 F.R. 34106 (Aug. 17, 1989).

The NPRM contemplated adding new language to 11 CFR 114.3(d) to set forth the current policies regarding facilitating the making of contributions. Please note that the new facilitation rules have been relocated to 11 CFR 114.2(f), since section 114.3 covers activities involving only the restricted class, and facilitation can involve activities that are directed to the restricted class or that go beyond the restricted class.

The comments addressing this topic reflected a diversity of opinion. Some felt it was helpful to include the Commission's policies on facilitation in the regulations. Others felt the proposals would restrict the ability of corporations to engage in activities that were permissible, and would drive political fundraising underground, and thwart public disclosure. Another concern was that the rules would discourage corporations and labor organization from supporting the political activities of their employees in situations where the corporation or labor organizations does not take a position on the election. The Internal Revenue Service found no conflict with its requirements covering nonprofit corporations.

The revised facilitation provisions attempt to address a variety of concerns. First, section 114.2(f)(1) sets out the general prohibition, and explains that facilitation means using corporate resources or facilities to engage in fundraising for candidates. However, this is not intended to negate the range of permissible activities found in other portions of the rules. For example, individual volunteer activity using corporate or labor organization facilities is still permissible under 11 CFR 100.7, 1008, and 114.9 (a), (b), and (c), provided it meets the conditions set forth in those rules. Similarly, there are no changes to the regulations governing the rental or use of corporate or labor organization facilities or aircraft by other persons. 11 CFR 114.9 (d) and (e).

The new rules at 11 CFR 114.2(f)(1) also explain that commercial vendors, such as hotels or caterers, would not facilitate the making of corporate contributions if in the ordinary course of their business they provide meeting rooms or food for a candidate's fundraiser and receive the usual and normal charge. The term "commercial vendor" is defined in 11 CFR 116.1(c).

In the past, the Commission has also addressed situations where a candidate owns or operates a corporation. *E.g.* AOs 1995-8, 1994-8 and 1992-24. Nothing in the new facilitation rules would modify the conclusions of these opinions that these corporations may serve as a commercial vendor or lessor to the candidate's committee as long as the transactions are consistent with the corporation's ordinary course of business.

New paragraph (f)(2) of section 114.2 gives several examples of facilitation. Some of these include activities that do not fall within the "safe harbors" provided by other regulations. For example, facilitation would occur if a corporation or labor organization makes its meeting room available for a candidate's fundraiser, but has not made the room available for community or civic groups. *Compare* 11 CFR 114.2(f)(2)(i)(D) with 11 CFR 114.13. The permissibility of using such room when the corporation or labor organization receives payment would be governed by 11 CFR 114.9(a), (b) or (d). Similarly, facilitation would result if other facilities, such as telephones and copiers, are used by campaign committee staff for a fundraiser, and the corporation is not reimbursed within a commercially reasonable time for the normal and usual rental charge. *Compare* 11 CFR 114.2(f)(2)(i)(B) with 11 CFR 114.9(d).

Other examples of facilitation include directing corporate or union employees

to work on a fundraiser for a candidate; using a mailing, telephone or computer list of customers, vendors, or others outside the restricted class to distribute invitations and solicit contributions; and providing in-house or external catering and food services for the fundraiser. 11 CFR 114.2(f)(2)(i) (A), (C), and (E). However, in these three situations, the new rules allow either the candidate, or the organization's separate segregated fund, or the official directing the activity to pay the corporation or labor organization in advance for the fair market value of the services or the list. Such payment by a separate segregated fund or official would constitute an in-kind contribution subject to the individual's or the separate segregated fund's contribution limits, and is not treated as facilitation. The candidate's authorized committee must report receiving these in-kind contributions.

A more limited advance payment method was approved by the Commission with regard to employee services in AO 1984-37. The new rules go beyond this advisory opinion with regard to the source of the advance payment and the types of services for which advance payment may be made. "In advance" means prior to when the list is provided, or the catering or food services are obtained, or the employees perform the work. Fair market value consists of the price that would normally be paid in the marketplace where the corporation or labor organization would normally obtain these goods or services, if reasonably ascertainable. However, in no case is the fair market value less than the corporation's or labor organization's actual cost, which includes total compensation earned by all employees directed or ordered to engage in fundraising, plus benefits and overhead.

These new rules modify, to some extent, the interpretation applied in prior enforcement matters, including MUR 3540. The conciliation agreement for MUR 3540 stated that, "[t]he 'individual volunteer activity' exemption does not, however, extend to collective enterprises where the top executives of a corporation direct their subordinates in fundraising projects, use the resources of the corporation, such as lists of vendors and customers, or solicit whole classes of corporate executives and employees. See MURs 1690 and 2668. The individual volunteer activity exemption also does not apply when an employee uses the facilities of a corporation in connection with a Federal election and the corporation is reimbursed by a political committee or

a candidate's committee [emphasis added]. See MUR 2185."

However, the new facilitation regulations now provide another exemption where an individual or a candidate's committee or other political committee pays in advance for the use of corporate personnel who are directed to organize or conduct a fundraiser for the candidate as part of their job, and hence are not volunteers. Although employees may be asked to undertake such activity, under new language in paragraph (f)(2)(iv) of this section, it is not permissible to use coercion, threats, force or reprisal to urge any individual to contribute to a candidate or engage in fundraising activities. Thus, employees who are unwilling to perform these services as part of their job have a right to refuse to do so.

Under new paragraphs (f)(2)(iii) and (f)(4)(iii), facilitation includes corporate or labor organization solicitation of earmarked contributions that will be collected and forwarded by the organization's separate segregated fund (whether or not deposited in the separate segregated fund's account), unless the earmarked contributions are treated as contributions both by and to that separate segregated fund. The corporation or labor organization may name in the solicitation the candidate(s) for whom an earmarked contribution is sought. Space may be left on the contribution response card for contributors to designate candidates of their choice, but no candidates are suggested in the accompanying solicitation materials. The latter situation was presented in AO 1995-15. In both cases, under new paragraphs (f)(2)(iii) and (f)(4)(iii), the contributions must be counted against the separate segregated fund's limits to avoid facilitation, which is impermissible. Hence these new provisions supersede those portions of AOs 1991-29, 1981-57 and 1981-21 which indicate that a conduit separate segregated fund's contribution limits under 2 U.S.C. 441a are only affected if it exercises direction or control over the choice of the recipient candidate. Please note that 11 CFR 110.6(b)(2)(ii) has not been changed, and therefore continues to prohibit corporations or labor organizations, themselves, from acting as conduits for contributions earmarked to candidates. See AO 1986-4. However, in AO 1983-18, the Commission recognized that a trade association political action committee may collect and forward contributions to other trade association political action committees where directed by member corporation executives. A corporation or union employee may still utilize the volunteer

exemption found at 11 CFR 100.7(b)(3) to collect earmarked contributions on their own time and forward such contributions to a specific candidate or committee. Such earmarked contributions would not be considered as contributions by the separate segregated fund.

Paragraph (f)(3) lists two examples of separate segregated fund activity that do not constitute corporate or labor organization facilitation. First, separate segregated funds may continue to solicit or make contributions in accordance with the requirements of 11 CFR 110.1, 110.2, and 114.5 through 114.8. Secondly, separate segregated funds may continue to solicit, collect and forward earmarked contributions to candidates under 11 CFR 110.6. The money expended by the separate segregated fund to solicit earmarked contributions must come from permissible funds received under the FECA, and will count against the separate segregated fund's contribution limit for the candidate(s) involved. These examples contrast with new paragraphs (f)(2)(iii) and (f)(4)(iii), under which a solicitation by the corporation or labor organization would either constitute facilitation or result in the contribution being counted against the separate segregated fund's contribution limits.

In addition to the latter example discussed above, paragraph (f)(4) lists two other examples of corporate or labor organization activity which do not result in facilitation. The first preserves the practice of enrolling the restricted class in a payroll deduction plan or check-off system, or an employee participation plan. No changes are being made in the operation of employee participation plans under 11 CFR 114.11 or payroll deduction plans. The second example permits solicitations of the restricted class for contributions that contributors will send directly to candidates, without being bundled or forwarded through the separate segregated fund. This situation was presented in AO 1989-29, and falls within the corporation's or labor organization's right to communicate with its restricted class on any subject under 2 U.S.C. 441b(b)(2)(A).

*Section 114.3 Disbursements for Communications to the Restricted Class in Connection With a Federal Election*

1. Express Advocacy, Coordination, and Reporting Internal Communications

The revised rules preserve several distinctions between communications and other activities directed solely to the restricted class (set forth at 11 CFR

114.3) and those directed to the general public or other individuals outside the restricted class (set forth at 11 CFR 114.4). Section 114.3 continues to recognize that the FECA permits corporations and labor organizations to communicate with their restricted classes on any subject. 2 U.S.C. 441b(b)(2)(A). However, in light of the *MCFE* decision, the references to "partisan" activities have been replaced with narrower provisions that only apply to communications containing express advocacy. For example, in paragraph (c) of section 114.3, revised language makes clear that communications directed solely to the restricted class may contain express advocacy. In addition, amended section 114.3(b) now states more explicitly that only communications expressly advocating the election or defeat of a clearly identified candidate are subject to the reporting requirements of 11 CFR 100.8(b)(4) and 104.6. Similarly, the revisions delete the more restrictive language in previous section 114.3(a)(1) that had prohibited corporate and labor organization expenditures for "partisan" communications to the general public because revised section 114.4 establishes that such communications are only prohibited if they contain express advocacy or are impermissibly coordinated with candidates or political committees.

In contrast, under revised section 114.3(a)(1), communications directed solely to the restricted class may be coordinated with candidates and political committees. For example, they may involve discussions with campaign staff regarding a candidate's plans, projects, or needs. Such coordination will not transform that restricted class communication into an in-kind contribution. Nor will it affect subsequent activities directed only to the restricted class. However, communications to the restricted class that are based on a candidate's plans, projects and needs may jeopardize the independence of subsequent communications or activities, including those financed from the separate segregated fund, which extend to anyone outside the restricted class.

One witness at the hearing objected to labor organizations' use of general treasury funds which could come from compulsory union dues to subsidize new forms of election-related activity, or even the activities set out in sections 114.3 and 114.4. This is an area over which the Department of Labor has jurisdiction, and recently it issued final rules removing 29 CFR part 470, in response to Executive Order 12836 revoking Executive Order 12800. 58 FR

15402 (March 22, 1993). The Commission does not have jurisdiction over whether dues and assessments are paid as a condition of employment or whether they are voluntary.

## 2. Candidate Appearances

Paragraph (c)(2) of 11 CFR 114.3 governs corporate and labor organization funding of candidate appearances before the restricted class. The NPRM sought to resolve several issues not addressed in the previous rules and to clarify language on which the Commission has received a number of questions. For example, the Notice proposed that instead of allowing "limited invited guests and observers" to attend candidate appearances, the rule should refer to guests who are being honored or speaking or participating in the event. This is intended to cover individuals who are part of the program.

One commenter was concerned that this language would interfere with its ability to allow its members to attend a candidate appearance. Under these provisions, which have been retained in the final rules, all those who qualify as members, and are therefore in an organization's restricted class, may attend. As noted above, nothing in the attached revisions to the rules affects the definition of who is a member.

In addition, these amendments do not adversely affect the ability of corporations or labor organizations to invite their restricted class, other employees or the general public to attend a speech given by an officeholder or other prominent individual who is also a federal candidate, if the speech is not campaign-related and the individual is not appearing in his or her capacity as a candidate for Federal office. *See, e.g.,* AOs 1980-22 and 1992-6.

Two issues which generated considerable debate in this area were the solicitation and collection of contributions, and the presence of the news media, during restricted class candidate appearances.

### a. Collection of Contributions by Candidates and Party Representatives During the Appearance

The NPRM sought comment on whether candidates and party representatives should continue to be able to solicit contributions during an appearance before the restricted class. This had been specifically allowed under previous section 114.3(c)(2) for appearances before the restricted class. The NPRM sought comments on whether the candidate should be able to collect contributions at appearances, such as by "passing the hat" or placing donation boxes in the meeting room.

Given that the proposed rules sought to incorporate the Commission's established policy that corporations and labor organizations are not permitted to facilitate the making of contributions to candidates or political committees other than their separate segregated funds, the NPRM questioned whether allowing candidates to accept contributions during their appearances should be viewed as impermissible facilitation.

Some comments supported allowing candidates to request contributions. The Internal Revenue Service found no conflict between the provisions regarding candidate appearances and its rules.

Section 114.3(c)(2) of the final rules provides that a candidate or party representative may ask for and collect contributions before, during or after the appearance while on corporate or union premises. Candidates and party representatives may also provide information on how to make contributions, such as by giving out a phone number or mailing address or by leaving envelopes or other campaign materials. However, this provision also specifies that corporate or labor organization officials may not collect contributions during the event. The collection of contributions by such officials would go beyond the right to communicate with the restricted class on any subject, and in essence, turn the candidate appearance into a fundraising event sponsored by the corporation or labor organization. As explained above, under new section 114.2(f), corporations and labor organizations may not facilitate the making of contributions to candidates.

### b. Presence of the News Media

Several issues have arisen regarding section 114.3(c)(2), which governs the presence of news media representatives at candidate appearances before only the restricted class. For example, a news organization may wish to reprint or broadcast the candidate's appearance in its entirety. Concerns have been raised that a candidate appearance before a corporation's or labor organization's restricted class would be transformed by this type of gavel-to-gavel coverage into a general public appearance. Accordingly, the Commission sought comments on the two alternative proposals. Under Alternative C-1, such coverage was contemplated for appearances before the restricted class, provided that two conditions were met. First, if the corporation or labor organization permits one media representative to cover the appearance, all *bona fide* media organizations who request to cover the appearance must be given the

opportunity to do so. This could be accomplished through pooling arrangements, if necessary. Secondly, if the corporation or labor organization permits the news media to cover an appearance by one candidate, the news media must be given the opportunity to cover all other candidates who appear on the same or different occasions. Alternative C-2 indicated that the corporation or labor organization may not permit the media to cover such candidate appearances before just the restricted class. Instead, under Alternative C-2, in addition to the two requirements on media access, media coverage of candidate appearances would be permissible only if all rank and file employees may also attend, all candidates for the same seat who request to appear are given a similar opportunity, and the corporation or labor organization does not expressly advocate, or encourage the audience to expressly advocate, the election or defeat of any candidate.

One commenter felt that gavel-to-gavel coverage indicated that the candidate's speech is newsworthy, and that there is no evidence of a problem involving the exclusion of the news media. Others objected that the proposed rule would interfere with their ability to have officeholders address employees on topics of interest to the employees when the officeholders are candidates for office.

The Commission has concluded that a modified version of Alternative C-1 is preferable and has been included in section 114.3(c)(2)(iv). The proposed language of Alternative C-2 which would have required the organization open the event to all rank and file employees, not just the restricted class, has been dropped because this would be administratively difficult to accomplish. However, the requirements in Alternative C-1 that candidates for the same office be treated similarly, and that different news organizations also be treated fairly, have been retained. These new provisions are intended to ensure that the corporation or labor organization does not manipulate the news media coverage of newsworthy events that are subsequently broadcast to the general public in a way that ensures favorable coverage for certain candidates, and no coverage or unfavorable coverage for others. Please note, however, that nothing in the amended rules will force corporations or labor organizations to invite the media to events that they would otherwise prefer to limit to the restricted class.

### 3. Registration and Get-Out-the-Vote Drives

Section 114.3(c)(4) sets forth provisions governing voter registration and get-out-the-vote drives aimed at a corporation's or labor organization's restricted class. The NPRM included one revision to this provision. The proposed language stated explicitly that express advocacy is permissible in voter drive communications aimed solely at a corporation's or labor organization's restricted class. Consequently, the proposed revisions to section 114.3(c)(4) also retained the former language specifically permitting voter drive communications to urge the restricted class to vote for particular candidates and to register with a particular party. The proposed rules also contemplated continuing the long-standing policy that information and assistance in registering and voting shall not be withheld on the basis of support for or opposition to particular candidates or political parties.

The Internal Revenue Service indicated that while the FEC's proposed rules regarding candidate appearances are more specific than theirs, they do not impinge upon the Internal Revenue Service's "facts and circumstances" test.

Some commenters opposed removing the "nonpartisan" requirement from section 114.3(c)(4) because section 441b(b)(2)(B) of the Act requires that drives aimed at a corporation's or labor organization's restricted class be nonpartisan. The Commission believes the basic purpose of this statutory provision will be maintained by continuing to require corporations and labor organizations to make the same voter registration and voter drive services available to those who do not support the organization's preferred candidates or political party. Consequently, the final voter drive rules in this section follow the previous proposals, with one change. The revised rules specify that voter registration efforts may include transportation to the place of registration in addition to transportation to the polls.

#### *Section 114.4 Disbursement for Communications Beyond the Restricted Class in Connection With a Federal Election*

##### 1. Express Advocacy and Coordination

The provisions of section 114.4 regarding communications by corporations and labor organizations to persons outside the restricted class have also been substantially revised and reorganized. First, the nonpartisan standards found in the previous regulations have been replaced by

language prohibiting corporations and labor organizations from including express advocacy in communications directed outside the restricted class when: (1) holding candidate appearances; (2) issuing registration and get-out-the-vote communications; (3) distributing registration and voting information, forms, or absentee ballots; (4) producing voter guides or voting records; or (5) conducting voter registration and get-out-the-vote drives.

Second, in response to the concerns expressed by several commenters which are discussed above, the Commission has substantially revised the concept of coordination in section 114.4. The *MCFL* decision addressed the scope of the FECA's prohibition against corporate expenditures. However, the prohibition against corporate contributions was expressly reaffirmed in *MCFL*, 479 U.S. at 260. Accordingly, the final rules which follow preserve the statutory ban on contributions made by corporations and labor organizations in connection with federal elections. Prohibited contributions include in-kind contributions resulting from the coordination of election-related corporate or union communications with candidates, except for certain activities described in this section and 11 CFR 114.3, which may involve limited types of coordination with candidates.

Under revised section 114.4(a), communications to the general public or to employees outside the restricted class that are based on information about a candidate's plans, projects and needs provided by the candidate or the candidate's agent are considered coordinated, and hence, in-kind contributions. Such coordination may also jeopardize the independence of subsequent communications to the general public, but will not affect future communications to the restricted class.

Qualified nonprofit corporations under 11 CFR 114.10 are subject to the same restriction on coordinating their communications directed to the general public. Consequently, they may not include express advocacy in coordinated communications directed beyond the restricted class. Conversely, if they do include express advocacy in communications to the general public, these communications may not be coordinated with any candidate or political party. The purpose of the limited exception the Supreme Court recognized in *MCFL* was to avoid impermissibly infringing on these organizations' First Amendment rights when making independent expenditures.

##### 2. Candidate and Party Appearances

The NPRM sought comments on several questions and possible amendments regarding corporate and labor organization funding of candidate appearances before employees who are not in the restricted class. Section 114.4(b), as set out in the Notice, followed the previous rules at 11 CFR 114.4(a)(2) by allowing rank and file employees who are not in the restricted class to attend candidate appearances organized by corporations or labor organizations. Please note that corporate appearances are covered in paragraph (b)(1), and parallel provisions for labor organizations are found in paragraph (b)(2).

As explained above, certain contacts with the candidate's campaign may be necessary to arrange the appearance. However, because these communications are being made beyond the restricted class, discussions of the candidate's plans, projects or needs relating to the campaign go beyond the permissible level of coordination, and hence would transform the appearance into an in-kind contribution. Likewise, corporations and labor organizations are also not permitted to expressly advocate the election or defeat of any clearly identified candidates in conjunction with the appearance. Nor should they promote or encourage express advocacy by the audience, thereby transforming the appearance into little more than a campaign rally.

##### a. Notifying and Inviting Other Candidates; Audience

In situations where one candidate appears at a corporate or labor organization event, the proposed rules in section 114.4(b) would have followed the previous provisions by requiring corporations and labor organizations to let the other candidates for that office come and speak if they so request. However, comments were sought on possibly requiring a corporation to notify the other candidates in advance whenever they invite a candidate to appear. The commenters expressed concern that such a requirement would be unworkable. Accordingly, the final rules do not contain a prior notice provision.

Instead, the final rules on candidate appearances generally follow the candidate debate rules in the case of Presidential candidates by requiring corporations and labor organizations to establish, in advance, objective criteria for deciding which Presidential and Vice Presidential candidates may appear, upon request. Under section 114.4(b)(1)(i), appearances by House

and Senate candidates remain subject to the requirement that all candidates for the seat must be given a similar opportunity to appear, upon request. Similarly, the provisions governing appearances by political party representatives in paragraph (b)(1)(iii) generally follow the previous regulations.

Comments were also requested on new language in section 114.4(b)(1)(vi) that would not allow the corporation or labor organization to favor one candidate through the structure or format of the candidate appearance. One example cited was giving rank and file employees time off to listen to one candidate but not to listen to others. Another example arises where candidates receive unequal time or facilities, unless it is clearly impractical to provide all candidates with similar opportunities, such as where a candidate requests to appear after a labor organization's convention is over. In response to another comment which objected to consideration of the format and timing of a candidate appearance, the Commission is revising the language in section 114.4(b)(1)(vi) to clarify that candidates cannot be given unequal amounts of time or substantially different locations for their appearances, unless the corporation can show it is impractical to give each candidate a similar time and location.

In addition, paragraph (b)(1) of section 114.4 allows guests who are being honored or speaking or participating in the event (i.e. those who are part of the program), to be present during the candidate appearance. This provision follows similar language in 11 CFR 114.3(c)(2)(i).

#### b. Collection of Contributions by Candidates and Party Representatives During the Appearance

A question presented in the NPRM was whether the candidate or party representative may solicit and collect contributions during an appearance before employees who are not in the restricted class. Although this has been specifically allowed under section 114.3(c)(2) for appearances before the restricted class, there was no provision in former section 114.4 either allowing or disallowing this practice when the audience extends to all employees. The NPRM sought comments on whether the candidate should be able to pass the hat or place donation boxes in the room.

Some comments supported allowing candidates to request contributions, but indicated that the rules needed to clarify that this would not constitute facilitation by the corporation or labor organization. The Internal Revenue

Service found no conflict between the provisions regarding candidate appearances and its rules.

Section 114.4(b)(1)(iv) of the final rules provides that a candidate or party representative may ask for contributions, may provide information on how to make contributions, and may leave campaign materials and envelopes for making contributions. *See, e.g.*, AO 1987-29, n. 2. However, this provision also specifies that candidates and party representatives may not collect contributions during the event.

Moreover, the corporation or labor organization, and its officers and employees, may not solicit or collect these contributions. This restriction includes corporate and union officials who may also serve on a fundraising committee for the candidate or otherwise be active in the campaign. The collection of contributions by corporate or union officials would, in essence, turn the candidate appearance into a general fundraising event sponsored by the corporation or labor organization, in violation of the new facilitation regulations of section 114.2(f).

#### c. Presence of the News Media

The Notice presented several issues regarding the presence of news media at candidate appearances before employees outside the restricted class. For the reasons stated above, the final rules regarding these appearances follow the new regulations applicable to appearances before the restricted class. *See* discussion of 11 CFR 114.3(c)(2)(iv), including NPRM and comments, *supra*.

#### 3. Use of Logos, Trademarks and Letterhead

Another topic addressed in this rulemaking concerns the use of corporate or labor organization logos, trademarks and letterhead. The Commission has encountered situations in which executives of corporations or labor organizations use official corporate or labor organization stationery, whether or not reproduced at the executive's personal expense, to solicit funds or support for a candidate. *E.g.*, MURs 3066, 1690 and 1261. The question presented in the NPRM was whether such a logo, trademark or letterhead may be used if the corporation or labor organization is reimbursed for the intangible value of the item(s), or whether their use (except through ordinary commercial transactions in the usual course of business) should be prohibited.

Comments were sought on two alternative approaches. The first option, Alternative B-1, was to amend the

definition in section 114.1(a)(1) to treat logos, trademarks and letterhead as something of value and a contribution or expenditure if provided without charge or at less than the fair market value. That approach would have allowed individuals and candidates to reimburse corporations and labor organizations for the cost of the stationery plus the value of using the corporate or union symbol, name, etc. One difficulty, however, would have been ascertaining the fair market value, given subjective consideration such as goodwill. Thus, the second option, which was set forth as Alternative B-2 in section 114.4(c)(1), was to prohibit such uses, whether or not the corporation or labor organization is reimbursed, with four exceptions for: corporations qualifying for the *MCFL* exception; communications to the restricted class, as described under 11 CFR 114.3; communications beyond the restricted class, as permitted under 11 CFR 114.4; and solicitations made in accordance with 11 CFR 114.5 through 114.8.

The Commission received comments supporting and opposing both options. The Internal Revenue Service stated that alternative B-1 may conflict with the Internal Revenue Code requirements applicable to section 501(c)(3) corporations. Other commenters claimed that logos and letterhead were not corporate resources, or were of no value or of *de minimis* value, or that it is too difficult to assign a monetary value.

The Commission considered the alternatives regarding the use of logos, letterhead and trademarks when it prepared the final rules, but could not reach a majority decision by the required four affirmative votes. *See* 2 U.S.C. 437c(c). Consequently, neither alternative has been included in the final rules.

Both alternatives in the NPRM also indicated that when individuals make communications either by using personal stationery or by appearing in a campaign ad, the letter or advertisement cannot indicate that the individual is acting on behalf of the corporation or labor organization, and cannot include references to the individual's official title at that organization. Thus, these proposals were intended to preclude an individual from including an identification such as "Vice President of XYZ Automobile Corporation." However, a general identification such as "auto maker" would be acceptable.

Several commenters opposed this restriction on various grounds, including that the corporate title is part of the individual's identity, the use of

the title enhances disclosure of those who are making the communication and it would encourage fraud if identifications were not allowed, and because the speech of people associated with nonprofit groups would be inhibited.

The Commission considered the use of corporate or labor organization titles in individual communications and advertisements on behalf of a candidate when it prepared the final rules, but could not reach a majority decision by the required four affirmative votes. See 2 U.S.C. 437c(c). Consequently, the proposed language has not been included in the final rules.

#### 4. Registration and Voting Communications; Official Registration and Voting Information

The provisions of previous paragraphs (b)(2) and (b)(3) of section 114.4 regarding the distribution of registration and voting communications and information to the general public have been moved to new paragraphs (c)(2) and (c)(3), respectively. In addition to the changes regarding express advocacy and coordination with candidates, which are discussed above, revised paragraph (c)(3)(ii) no longer contains a reference to "applicable state law" permitting voter registration by mail. That language was made obsolete by the National Voter Registration Act of 1993, 42 U.S.C. 1973gg-1 *et seq.*

Please also note that section 114.4(c)(2), regarding voting communications, does not change the Commission's decision in AO 1980-20 that corporations may place newspaper or magazine advertisements simply urging the general public to register to vote.

#### 5. Voting Records

Provisions regarding the dissemination of voting records of Members of Congress are being moved from previous section 114.4(b)(4) to new section 114.4(c)(4). In response to the *MCFL* decision, the NPRM proposed modifying these rules in two respects. First, new language was put forth prohibiting voting records, and all accompanying communications to the general public, from expressly advocating the election or defeat of one or more clearly identified candidates or the candidates of a clearly identified political party. The proposed amendments also sought to disallow coordination with candidates in distributing voting records. The Internal Revenue Service commented that although their standards were different than the FEC's, the FEC's proposed rules do not impinge on the test used by the

Internal Revenue Service to determine whether voting records or voter guides constitute political activity. Another commenter believed there was no need to discuss these matters with candidates.

The revised version of section 114.4(c)(4) is substantially similar to the proposed rules. However, new language has been included to indicate that the decision as to the content of a voting record also may not be coordinated with a candidate or political party. The NPRM raised the question of whether to include language preventing corporations and labor organizations from obtaining voting record information directly from Members of Congress or political parties. The Commission has decided not to include such a restriction in the revised regulations.

#### 6. Voter Guides

In *Faucher v. Federal Election Commission*, 928 F.2d 468 (1st Cir. 1991), *cert. denied sub nom. Federal Election Commission v. Keefer et al.*, 502 U.S. 820 (1991), the Court of Appeals for the First Circuit invalidated the Commission's previous voter guide regulations at 11 CFR 114.4(b)(5)(i). The Court concluded that the previous provisions of section 114.4(b)(5)(i) exceed the regulatory boundaries imposed by the FECA as interpreted by the Supreme Court. 928 F.2d at 472.

Consequently, the NPRM proposed revisions, located in section 114.4(c)(5), to allow corporations and labor organizations to prepare and distribute to the general public their own voter guides or to obtain voter guides prepared by nonprofit organizations that are tax-exempt under 26 U.S.C. 501(c)(3) or (c)(4). The proposed rules would have required that the same amount of space be provided for each candidate's response, that the voter guide not contain express advocacy, and that contact with candidates be limited to the preparations reasonably necessary to produce the guide, such as written communications regarding the candidate's positions on issues. The proposed revisions also sought to eliminate the previous restrictions on the geographic area in which voter guides could be distributed, and to prohibit coordination of the distribution of voter guides with candidates.

Several commenters and witnesses challenged these proposals as contrary to the intent of the court in *Faucher*. In particular, they questioned the need to reprint the candidates' responses verbatim, the restriction that contacts with campaigns be in writing, the prohibition on coordinating the

distribution of the guides, and the prohibition on distributing voter guides prepared by 501(c) organizations that endorse candidates, when the corporation or labor organization can make its own endorsements.

In view of these comments, the Commission has substantially revised the final rules to provide a choice of two different ways of issuing and distributing voter guides, which are intended to comport with *Faucher*. Revised section 114.4(c)(5) begins by explaining that voter guides consist of candidates' positions on campaign issues, and may include biographical information on the candidates. Voter guides are similar to candidate debates in that they must include at least two candidates in the same election. However, no particular format is required for either type of voter guide.

Under the new rules, both types of voter guides may be obtained from nonprofit organizations described in 26 U.S.C. 501(c)(3) or (c)(4), regardless of whether the nonprofit group endorses candidates. Please note however, that a comment from the Internal Revenue Service indicates that nonprofit corporations organized under 26 U.S.C. 501(c)(3) cannot endorse candidates. The previous rules referred to these groups as "tax exempt," which may be confusing given that they may pay tax on certain categories of income.

The first type of permissible voter guide, which is described in paragraph (c)(5)(i), is one that is prepared and distributed without any contact, cooperation, coordination or consultation with the candidate, the candidate's campaign or the candidate's agent. Hence, the information regarding the candidate's position on issues must be obtained from news articles, voting records, or other non-campaign sources. The voter guide also must not expressly advocate the election or defeat of any clearly identified candidate.

The second type of permissible voter guide, which is described in paragraph (c)(5)(ii), is subject to further restrictions because it contemplates limited written contact with the candidate's campaign committee to obtain the candidate's responses to issues included in the voter guide. For example, further coordination with a candidate or his or her agents, such as a discussion of the candidate's plans, projects, or needs relating to the campaign, does not fall within this limited exception, and would thus result in an in-kind contribution. The *Faucher* decision does not mandate eliminating all restrictions on voter guides save for the prohibition on express advocacy. Accordingly, organizations preparing the second type

of voter guide must give all candidates in the election (except for Presidential candidates) an equal opportunity to respond to the questions posed. Moreover, no candidate may receive greater prominence or substantially more space than other candidates participating in the voter guide. This requirement is similar to the candidate debate situation in which the forum may not be structured to promote one candidate over others.

The second type of voter guide must not contain an electioneering message. See, *Federal Election Commission v. Colorado Republican Federal Campaign Committee*, 59 F. 3d 1015 (1st Cir. 1995), *petition for cert. filed*, No. 95-489 (Sept. 21, 1995) (statement that an office holder has a right to run for the Senate, but doesn't have the right to change the facts constituted an electioneering message); and AOs 1985-14 and 1984-15. Similarly, the voter guide must not score or rate the candidates' responses in a way that conveys an electioneering message, such as by indicating that certain responses are "right" or "wrong" or receive a higher or lower grade than others.

#### 7. Endorsements

The NPRM proposed adding new paragraph (c)(6) to section 114.4 to reflect the Commission's policy regarding public endorsements of candidates by corporations and labor organizations. In AO 1984-23, the Commission permitted a corporation to include an endorsement in a publication directed to its restricted class. In addition, the NPRM indicated that the endorsement could be made during the candidate's appearance before the restricted class. One comment objected to enhancing the publicity corporate endorsements will receive. Another comment opposed these restrictions on corporate endorsements because labor organization endorsements receive wider media coverage. The Commission believes these concerns are misplaced. Media coverage of endorsements by corporations or labor organizations is similar to media coverage of candidate appearances in that both are governed by the news media's determination as to the newsworthiness of the event.

The NPRM also sought comment on two alternative approaches regarding further corporate or labor efforts to publicize the endorsement through press releases and press conferences. Alternative D-1 sought to follow AO 1984-23 by allowing the corporation or labor organization to spend a *de minimis* amount to issue a press release regarding the endorsement to its usual media contacts. This language also

explicitly recognized that the press release may be accompanied by a routine press conference. In contrast, Alternative D-2 would have permitted the corporation or labor organization to publicize the endorsement only by responding to questions posed during a routine press conference.

Several comments preferred Alternative D-1, believing that Alternative D-2 could be easily manipulated, and is an artificial distinction. The Commission agrees, and has therefore decided to adopt Alternative D-1.

The proposed rules would also have permitted corporations and labor organizations to have contact with candidates to the limited extent necessary to make the endorsement, without treating these communications as impermissible in-kind contributions. The Commission sought comment, however, on whether this limitation on candidate contact would inhibit the corporation's or labor organization's ability to obtain the information needed to make an endorsement decision. While one commenter expressed concern that these discussions with candidates and their campaign staff were unnecessary and provided an opportunity to coordinate endorsements with candidates, another commenter believed that organizations need to know the nature and viability and organization of the campaign, and thus the candidate's likelihood of success.

The Commission agrees that organizations need to discuss various issues with candidates and their staff when deciding who to endorse. Hence, the language in section 114.4(c)(6)(ii) has been revised to allow a greater range of discussion with the candidate or campaign staff prior to the endorsement. However, the public announcement of the endorsement may not be coordinated with the candidate or the candidate's agents or authorized committee.

Finally, the new rules advise consulting the Internal Revenue Code and IRS regulations regarding restrictions and prohibitions on endorsements by nonprofit corporations. The Internal Revenue Service indicated in its comment that nonprofit corporations organized under 26 U.S.C. 501(c)(3) cannot endorse candidates.

#### 8. Candidate Appearances on Educational Institution Premises

The FECA prohibits corporations from making contributions to or giving anything of value to a federal candidate, including free use of facilities, such as halls and auditoriums. Since most

private colleges and universities are incorporated, this prohibition applies to them. The NPRM included draft provisions to clarify the Commission's interpretation of this statutory prohibition as it applies to incorporated educational institutions. In the proposed rules, section 114.4(c)(7) included an exception to permit colleges, universities, and other incorporated nonprofit educational institutions which are exempt from federal taxation under 26 U.S.C. 501(c)(3) to make their premises available to groups that are associated with the school and wish to invite candidates to address students, faculty and the general public, under certain conditions.

Several comments and witnesses expressed an overall concern that the Commission was attempting to over-regulate political speech on campuses. They pointed out that historically, universities have sought to promote the free exchange and debate of ideas in an intellectual environment, and have tried to stimulate student interest in democratic processes and institutions. They were also concerned that the new rules could affect classroom discussions. The Internal Revenue Service indicated that the proposed FEC rules were more specific than the "facts and circumstances" test used by the IRS, but did not conflict with that test.

The Commission has now revised new paragraph (c)(7) of section 114.4 in a number of respects to clarify the intent of the new rules. First, language has been added at paragraph (c)(7)(i) to clarify that educational institutions may continue to charge candidates the usual and normal charge for the use of their facilities. Secondly, private colleges, universities, and other incorporated nonprofit educational institutions may make their premises available to candidates who wish to address students, faculty, the academic community, or the general public (whomever is invited) at no cost or for less than the usual and normal charge. See 11 CFR 114.4(c)(7)(ii). However, the school must make reasonable efforts to ensure that the appearances are conducted as speeches, question and answer sessions, or other academic events, and do not constitute campaign rallies. Incorporated educational institutions may also continue to allow individuals who are candidates to appear in another capacity, such as officeholders or prominent speakers on particular issues, if they do not refer to the campaign or their status as candidates. See, e.g., AO 1992-6. The new rules also do not prevent candidates from participating in campus



events in other capacities, such as when the candidate is also a faculty member.

Although the proposed rules in the Notice covered candidate appearances on college campuses, they did not specifically address candidate debates. As noted by the commenters, there is a long tradition of holding candidate debates in college auditoriums. The Commission did not intend to curtail this practice, and the final rules do not prevent such debates from being held. Colleges and universities that qualify for tax-exempt status under 26 U.S.C. 501(c)(3) may stage candidate debates in accordance with the requirements set out in 11 CFR 110.13 and 114.4(f).

The proposed rules in section 114.4(c)(7)(i) would have required educational institutions to have an established policy allowing associated organizations, such as student groups, to sponsor candidate appearances so long as the policy does not favor one candidate or party over any other. Several commenters questioned the need for such a policy, and expressed concern that colleges and universities would be forced to grant access to their facilities to groups not connected with the educational institution. Consequently, the language in new section 114.4(c)(7) is being amended to include a more general requirement that the educational institution does not favor any one candidate or political party in allowing the appearances.

The proposed rules also sought to ensure that admission to a candidate's appearance would not be based on party affiliation, or any other indications of support for or opposition to the candidate by requiring either the educational institution or the sponsoring group to control access to the facility, rather than the candidate's campaign committee. This proposal has been dropped as impracticable.

The NPRM indicated that one objective was to ensure that these candidate appearances will not become campaign rallies, fundraising events, or opportunities for the school or group issuing the invitation to expressly advocate, or encourage the audience to expressly advocate, the election or defeat of the candidate who is appearing. Accordingly, the proposals sought to restrict the presence of campaign banners, posters, balloons and other similar items which would be viewed as indicative of a campaign rally. Several commenters and witnesses recognized the necessity for educational institutions to refrain from express advocacy, so as to avoid jeopardizing their nonprofit status. However, the comments also emphasized the practical difficulties in trying to control

expressions of support or opposition by the audience, and trying to ensure that a campaign rally atmosphere does not ensue. They also questioned distinctions between posters and hats or buttons. Finally, they argued that colleges are public fora, and the government's ability to restrict speech in public fora is limited.

The revised rules in paragraph (c)(7)(ii)(B) retain the prohibition against the educational institution engaging in express advocacy. However, the language regarding a campaign rally atmosphere has been modified to require the educational institution to make reasonable efforts to ensure that the appearance does not turn into a campaign rally. This does not require the college or university to monitor buttons or campaign materials brought in or worn by members of the audience. These provisions are consistent with the requirement that exempt organizations under 26 U.S.C. 501(c)(3) refrain from participating in or intervening in political campaigns.

The NPRM also proposed a prohibition against candidates collecting contributions during the appearance, coupled with language allowing candidates to ask for contributions to be sent to their campaign committees. The Notice also suggested a provision barring educational institutions from soliciting contributions. The comments generally supported these proposals as consistent with the nonprofit status of these educational institutions under the Internal Revenue Code. They also suggested that candidates be informed in advance that they may not collect contributions.

It is not necessary to include in the final rules these restrictions on soliciting and collecting contributions. They are already subsumed within the requirement that the educational institution make a reasonable effort to ensure the candidate appearance does not become a campaign rally. In addition, candidate appearances at incorporated private colleges and universities are already subject to additional requirements under the Internal Revenue Code and regulations issued thereunder.

The NPRM also included provisions allowing educational institutions to invite the media to cover these candidate appearances and to broadcast them to the general public, provided the schools follow the same guidelines that would apply to other corporations, as set forth in section 114.3(c)(2)(iii) and section 114.4(b)(1)(viii). The Commission has decided not to include this provision in the final rules and to

allow educational institutions and the news media to work out their own arrangements.

#### 9. Candidate Appearances in Churches

The NPRM presented the possibility of issuing rules regarding candidate appearances in churches and religious facilities. However, this topic received little attention from the commenters. The large number of other more immediate issues in this rulemaking may have overshadowed considerations of candidate appearances in religious settings. At this point, the Commission has decided to defer this matter for further consideration.

#### 10. Registration and Get-Out-The-Vote Drives

Voter registration and get-out-the-vote drives aimed at the general public or at employees outside the restricted class have been moved from previous paragraph (c) to renumbered paragraph (d) of section 114.4. The NPRM included several revisions to this provision, most of which are included in the attached final rules. First, the regulations distinguish between the speech and nonspeech components of voter drives. Thus, the rules conform to the MCFL decision by applying an express advocacy standard to the speech components of voter drives. Hence, new language in paragraph (d)(1) indicates that communications containing express advocacy may not be made during voter drives aimed at employees outside the restricted class, or during voter drives aimed more broadly at the general public.

The revised voter drive rules also include changes regarding the nonspeech components of voter drives. Under section 114.4(d), corporations and labor organizations may conduct voter registration and get-out-the-vote drives without the involvement of a nonprofit organization which is described in 26 U.S.C. 501(c)(3) or (c)(4). To the extent that AO 1978-102 indicates that such drives must be jointly sponsored with a civic or nonprofit organization, that opinion is superseded by the regulatory changes to this section. However, the validity of AO 1980-45, which affirmed the ability of a 501(c)(3) nonprofit corporation to conduct a voter registration drive, is not affected by the revised rules. Paragraph (d)(2) specifies that these drives cannot be coordinated with any candidate or political party. Moreover, under paragraph (d)(5), workers cannot be paid only to register voters supporting a particular candidate or political party.

Both the proposed and the final rules in section 114.4(d)(4) contemplate



continuing the long-standing policy that information and assistance in registering and voting shall not be withheld on the basis of support for or opposition to particular candidates or political parties. New language in paragraph (d)(6) indicates that those receiving information or assistance must be notified in writing that their party or candidate preferences may not be a basis for refusing them assistance. This requirement can be easily satisfied simply by posting a sign at a voter registration table or in a vehicle used to take voters to the polls.

The comments and testimony revealed little, if any, consensus regarding these proposals. There was opposition to section 114.4(d) on the grounds that voter drives are something of value to candidates, and are therefore contributions or expenditures. There was also concern that the proposals did not contain sufficient safeguards against electioneering and coordination with candidates. On the other hand, others believed that the Commission has no authority to prohibit coordinating voter registration and get-out-the-vote drive communications with candidates, and that the only restriction on this activity should be that the organization must refrain from express advocacy. The provisions requiring certain notifications to the targets of the drive were thought to be unnecessary and expensive. The Internal Revenue Service indicated that while the FEC's rules are more specific than theirs, they do not impinge upon the Internal Revenue Service's "facts and circumstances" test.

After carefully considering the comments, the Commission has decided that the proposals in the NPRM are in keeping with the FECA and the MCFL decision. Thus, the final rules follow the proposed rules, with two minor changes. First, paragraph (d)(3) has been modified to clarify that voter registration and get-out-the-vote drives cannot be targeted primarily at individuals who will register with, or vote for, the party preferred by the drive sponsor. Second, the rules specify that voter registration efforts may include transportation to the place of registration in addition to transportation to the polls.

11. Membership Organizations, Trade Associations, Cooperatives and Corporations Without Capital Stock

Paragraph (e) of section 114.4 generally follows previous paragraph (d) by specifying that these organizations may hold candidate appearances under the same conditions as other corporations.

12. Candidate Debates

Provisions governing the funding of candidate debates, which were previously located in section 114.4(e), are now located in section 114.4(f). These rules have been revised in two respects. First, these debates are no longer referred to as "nonpartisan." Second, the term "bona fide" has been moved so that it modifies "newspaper, magazine and other periodical publication," instead of modifying "broadcaster." This change conforms to the wording of the candidate debate rules in 11 CFR 110.13.

Section 114.12 Incorporation of Political Committees; Payment of Fringe Benefits

This section has been renamed to make it easier for the reader to locate the topics covered. In addition, paragraph (b) of section 114.12, which pertains to candidates using corporate and labor organization meeting rooms, has been moved to new section 114.13.

Section 114.13 Use of Meeting Rooms

This new section replaces previous 11 CFR 114.12(b). It permits corporations and labor organizations to make meeting rooms available to a candidate or political committee if the room is customarily made available to clubs, civic or community groups, and if the rooms are made available to any other candidate or committee upon request. It differs from the previous rule, however, in that it does not refer to making rooms available on a "nonpartisan basis." One commenter objected to this provision arguing that it sanctions the political use of labor organization facilities paid for, in part, with the forced dues of employees. Issues involving compulsory union dues are more properly within the jurisdiction of the Department of Labor.

Certification of no Effect Pursuant to 5 U.S.C. 605(b) [Regulatory Flexibility Act]

The attached final rules will not, if promulgated, have a significant economic impact on a substantial number of small entities. The basis for this certification is that, few, if any, small entities will be affected by these final rules. In addition, any small entities affected are already required to comply with the requirements of the Federal Election Campaign Act.

List of Subjects

11 CFR Part 100

Elections.

11 CFR Part 102

Political committees and parties, Reporting and recordkeeping requirements.

11 CFR Part 109

Elections, Reporting and recordkeeping requirements.

11 CFR Part 110

Campaign funds, Political committees and parties.

11 CFR Part 114

Business and industry, Elections, Labor.

For the reasons set out in the preamble, Subchapter A, Chapter I of Title 11 of the Code of Federal Regulations is amended as follows:

**PART 100—SCOPE AND DEFINITIONS (2 U.S.C. 431)**

1. The authority citation for Part 100 continues to read as follows:

**Authority:** 2 U.S.C. 431, 438(a)(8).

2. 11 CFR part 100 is amended by revising paragraph (b)(21) of section 100.7 to read as follows:

**§ 100.7 Contribution (2 U.S.C. 431(8)).**

\* \* \* \* \*

(b) \* \* \*

(21) Funds provided to defray costs incurred in staging candidate debates in accordance with the provisions of 11 CFR 110.13 and 114.4(f).

\* \* \* \* \*

3. 11 CFR Part 100 is amended by revising paragraphs (b)(3) and (b)(23) of section 100.8 to read as follows:

**§ 100.8 Expenditure (2 U.S.C. 431(9)).**

\* \* \* \* \*

(b) \* \* \*

(3) Any cost incurred for activity designed to encourage individuals to register to vote or to vote is not an expenditure if no effort is or has been made to determine the party or candidate preference of individuals before encouraging them to register to vote or to vote, except that corporations and labor organizations shall engage in such activity in accordance with 11 CFR 114.4 (c) and (d). See also 11 CFR 114.3(c)(4).

\* \* \* \* \*

(23) Funds used to defray costs incurred in staging candidate debates in accordance with the provisions of 11 CFR 110.13 and 114.4(f).

\* \* \* \* \*

acceptable and unacceptable purpose descriptions to be reported by authorized committees. Paragraph (B) requires authorized committees, when itemizing certain disbursements for which reimbursements are required, to provide a brief explanation of the activity for which reimbursement is required. These provisions have been in Title 11 of the **Code of Federal Regulations** since 1980 and 1995, respectively, and were not affected by the recent statutory changes to the election cycle reporting requirements.

#### Need for Correction

As published, the final rules inadvertently omit two paragraphs describing information to be reported by authorized committees of Federal candidates.

All committees must report the purpose of itemized disbursements (i.e., those disbursements aggregating in excess of \$200). Omitted paragraph (A) contains examples of suitably specific purpose descriptions as well as examples of those descriptions that are unacceptably vague. This paragraph is inconsistent with the reporting of rules for unauthorized committees (committees other than candidate committees) in 11 CFR 104.3(b)(3).

Omitted paragraph (B) is used in administering the "personal use" rules in 11 CFR 113.1. Federal candidates are barred from using campaign funds for personal benefit. Paragraph (B) requires authorized committees of Federal candidates itemizing disbursements for which partial or total reimbursement is required under 11 CFR 113.1(g)(1)(iii)(C) or (D) to provide a brief explanation of the activity for which the reimbursement is made.

Section 801 of Title 5 of the United States Code requires Federal agencies to submit regulations to Congress. These regulations were submitted to the Speaker of the House of Representatives and the President of the Senate on November 26, 2001.

#### Certification of No Effect Pursuant to 5 U.S.C. § 605(b) [Regulatory Flexibility Act]

This correction will not have significant economic impact on a substantial number of small entities. The basis of this certification is that this correction only requires political committees to once again add information to the reports they are required to file. These regulations were in 11 CFR since 1980 and 1995, respectively, before being inadvertently omitted in 2000.

#### List of Subjects in 11 CFR Part 104

Campaign funds, Political committees and parties, Reporting and recordkeeping requirements.

Accordingly, 11 CFR part 104 is corrected by making the following correcting amendment:

#### PART 104—REPORTS BY POLITICAL COMMITTEES

1. The authority citation for part 104 continues to read as follows:

**Authority:** 2 U.S.C. 431(1), 431(8), 431(9), 432(i), 434, 438(a)(8), 438(b), 439a.

#### § 104.3 Contents of reports (2 U.S.C. 434(b), 439a).

\* \* \* \* \*

2. In § 104.3 add the following paragraphs (b)(4)(i)(A) and (B):

(b) \* \* \*

(4) \* \* \*

(i) \* \* \*

(A) As used in this paragraph, *purpose* means a brief statement or description of why the disbursement was made. Examples of statements or descriptions which meet the requirements of this paragraph include the following: dinner expenses, media, salary, polling, travel, party fees, phone banks, travel expenses, travel expense reimbursement, and catering costs. However, statements or descriptions such as *advance*, *election day expenses*, *other expenses*, *expenses*, *expense reimbursement*, *miscellaneous*, *outside services*, *get-out-the-vote* and *voter registration* would not meet the requirements of this paragraph for reporting the purpose of an expenditure.

(B) In addition to reporting the purpose described in paragraph (b)(4)(i)(A) of this section, whenever an authorized committee itemizes a disbursement that is partially or entirely a personal use for which reimbursement is required under 11 CFR 113.1(g)(1)(ii)(C) or (D), it shall provide a brief explanation of the activity for which reimbursement is required.

\* \* \* \* \*

Dated: November 26, 2001.

**Danny L. McDonald,**  
Chairman, Federal Election Commission.  
[FR Doc. 01-29679 Filed 11-29-01; 8:45 am]  
**BILLING CODE 6715-01-P**

#### FEDERAL ELECTION COMMISSION

#### 11 CFR Part 111

#### [Notice 2001-18]

#### Extension to Administrative Fines

**AGENCY:** Federal Election Commission.

**ACTION:** Final rule; revision of the sunset date.

**SUMMARY:** The Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the expiration date in which the Federal Election Commission (hereinafter "the Commission") may assess civil money penalties for violations of the reporting requirements of section 434(a) of the Federal Election Campaign Act (hereinafter "the Act" or "FECA").

**DATES:** Effective on December 31, 2001.

**FOR FURTHER INFORMATION CONTACT:** Ms. Rosemary C. Smith, Assistant General Counsel, or Ms. Mai T. Dinh, Attorney, 999 E Street, NW., Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

#### SUPPLEMENTARY INFORMATION:

#### Explanation and Justification

Section 640 of the Treasury and General Government Appropriations Act, 2000, Pub. L. No. 106-58, 106th Cong., 113 Stat. 430, 476-77 (1999), amended § 309(a)(4) of the FECA, 2 U.S.C. 437g(a)(4), to provide for a modified enforcement process for violations of reporting requirements. Under § 437g(a)(4)(C) of the FECA, the Commission may assess a civil money penalty for violations of the reporting requirements of 2 U.S.C. 434(a). This authority, however, was to sunset on December 31, 2001. Pub. L. No. 106-58, 106th Cong., § 640(c). Recently, § 642 of the Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the sunset date to include all reports that cover activity between January 1, 2000, to December 31, 2003.

The Commission published final rules on May 19, 2000, to implement the amendment contained in the Treasury and General Government Appropriations Act, 2000. Section 111.30 of the regulations reflects the sunset provision of Pub. L. No. 106-58, 106th Cong., § 640(c). Therefore, the Commission is issuing this final rule to amend section 111.30 to extend the application of the administrative fine regulations, 11 CFR part 111, subpart B, to include all violations relating to reports that cover the period between January 1, 2000, to December 31, 2003.

The Commission is promulgating this final rule without notice or opportunity for comment because it falls under the "good cause" exemption of the Administrative Procedures Act, 5 U.S.C. 553(b)(B). The exemption allows

| Class of substance | Substance  | Purpose  | Products  | Amount   |
|--------------------|--|--|---|--|
| *                  | *  | *  | *   | *  |
| Miscellaneous      |  |  |   |  |
| *                  | Sodium citrate buffered with citric acid to a pH of 5.6. | To inhibit the growth of micro-organisms and retain product flavor during storage. | Cured and uncured, processed whole-muscle poultry food products, e.g., chicken breasts. | Not to exceed 1.3 percent of the formulation weight of the product in accordance with 21 CFR 184.1751. |
| *                  | *  | *  | *   | *  |

Done at Washington, DC, on April 17, 1996.

**Michael R. Taylor,**

*Acting Under Secretary for Food Safety.*

[FR Doc. 96-9980 Filed 4-23-96; 8:45 am]

**BILLING CODE 3410-DM-P**

**FEDERAL ELECTION COMMISSION**

**11 CFR Parts 100, 110 and 114**

**[Notice 1996-11]**

**Candidate Debates and News Stories**

**AGENCY:** Federal Election Commission.

**ACTION:** Final rule and transmittal of regulations to Congress.

**SUMMARY:** The Federal Election Commission is issuing revised regulations governing candidate debates and new stories produced by cable television organizations. These regulations implement the provisions of the Federal Election Campaign Act (FECA) which exempt news stories from the definition of expenditure under certain conditions. The revisions indicate that cable television programmers, producers and operators may cover or stage candidate debates in the same manner as broadcast and print news media. The rules also restate Commission policy that news organizations may not stage candidate debates if they are owned or controlled by any political party, political committee or candidate.

**DATES:** Further action, including the publication of a document in the **Federal Register** announcing an effective date, will be taken after these regulations have been before Congress for 30 legislative days pursuant to 2 U.S.C. 438(d).

**FOR FURTHER INFORMATION CONTACT:** Ms. Susan E. Propper, Assistant General Counsel, or Ms. Rosemary C. Smith, Senior Attorney, 999 E Street NW., Washington, DC 20463, (202) 219-3690 or (800) 424-9530.

**SUPPLEMENTARY INFORMATION:** The Commission is publishing today the final text of revisions to its regulations at 11 CFR 100.7(b)(2), 100.8(b)(2), 110.13 and 114.4(f) regarding news stories and candidate debates produced by cable television operators, programmers and producers. The revised rules also address candidate debates sponsored by news organizations owned or controlled by candidates, political parties and political committees. These provisions implement 2 U.S.C. 431(9) and 441b, provisions of the Federal Election Campaign Act of 1971, as amended (the Act or FECA), 2 U.S.C. 431 *et seq.*

On February 1, 1996, the Commission issued a Notice of Proposed Rulemaking (NPRM) in which it sought comments on proposed revisions to these regulations. 61 FR 3621 (Feb. 1, 1996). Four written comments were received from the Internal Revenue Service (IRS), the Federal Communications Commission (FCC), Turner Broadcasting System, Inc. (Turner), and the National Cable Television Association, Inc. (NCTA). A public hearing on these changes was scheduled for March 20, 1996. The hearing was subsequently canceled when the Commission received no requests to testify.

Section 438(d) of Title 2, United States Code, requires that any rules or regulations prescribed by the Commission to carry out the provisions of Title 2 of the United States Code be transmitted to the Speaker of the House of Representatives and the President of the Senate 30 legislative days before they are finally promulgated. These regulations were transmitted to Congress on April 18, 1996.

**Explanation and Justification for 11 CFR 100.7(b)(2), § 100.8(b)(2), § 110.13, and § 114.4(f)**

The FECA generally prohibits corporations from making contributions or expenditures in connection with any election. 2 U.S.C. 441b. However, the definition of "expenditure" in section 431(9) indicates that news stories,

commentaries, and editorials distributed through the facilities of any broadcast station, newspaper, magazine, or other periodical publication are not considered to be expenditures unless the facilities are owned or controlled by a political party, political committee, or candidate. 2 U.S.C. 431(9)(B)(i). This statutory exemption forms the basis for the Commission's long-standing regulations at 11 CFR 100.7(b)(2) and 100.8(b)(2) exempting such communications from the definitions of contribution and expenditure. Section 431(9) is also the basis underlying sections 110.13 and 114.4(f), which permit broadcasters and *bona fide* print media to stage candidate debates under certain conditions.

The Commission has decided to expand the types of media entities that may stage candidate debates under sections 110.13 and 114.4 to include cable television operators, programmers and producers. Hence, revised sections 110.13(a)(2) and 114.4(f) allows these types of cable organizations to stage debates under the same terms and conditions as other media organizations such as broadcasters, and *bona fide* print media organizations. New language in sections 110.13, 100.7(b)(2) and 100.8(b)(2) also permits cable organizations, acting in their capacity as news media, to cover or carry candidate debates staged by other groups. Examples of the types of programming that the Federal Communications Commission considers to be *bona fide* newscasts and news interview programs are provided in *The Law of Political Broadcasting and Cablecasting: A Political Primer*, 1984 ed., Federal Communications Commission, at p. 1994-99.

The revised rules are consistent with the intent of Congress not "to limit or burden in any way the first amendment freedoms of the press \* \* \*." H.R. Rep. No. 93-1239, 93d Cong., 2d Sess. at 4 (1974). In *Turner Broadcasting System, Inc. v. Federal Communications Commission*, \_\_\_\_\_ U.S. \_\_\_\_\_, 114 S.

Ct. 2445, 2456 (1994), the Supreme Court recognized that cable operators and cable programmers "engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment."

The 1974 legislative history of the FECA also indicates that in exempting news stories from the definition of "expenditure," Congress intended to assure "the unfettered right of the newspapers, TV networks, and other media to cover and comment on political campaigns." H.R. Rep. No. 93-1239, 93d Cong., 2d Sess. at 4 (1974). Although the cable television industry was much less developed when Congress express this intent, it is reasonable to conclude that cable operators, programmers and producers, when operating in their capacity as news producers and distributors, would be precisely the type of "other media" appropriately included within this exemption. For these reasons, the Commission has decided to allow cable operators, programmers and producers to act as debate sponsors.

The Internal Revenue Service found no conflict with the Internal Revenue Code or regulations thereunder. The Federal Communications Commission stated that the proposed amendments regarding candidate debates and news stories are not inconsistent with the FCC's policies in implementing the Communications Act of 1934, and appear to complement and further the FCC's regulatory scheme and goals. Two other commenters supported the Commission's efforts to confirm that the FECA's exemption applies to candidate debates, news, commentary and editorial programming produced and distributed by cable news organizations. These commenters stated they felt any other course of action would present serious Constitutional problems under the First Amendment. They also argued that the Commission's interpretation is consistent with the statutory framework established by Congress when it enacted the 1974 Amendments to the FECA, and would serve the public interest.

The NPRM sought comments on whether there are distinctions between cable operators, programmers and producers that should be considered in determining which of these types of organizations may stage candidate debates, and in determining which of these organizations are *bona fide* news organizations entitled to the press exemption. It also asked if there other types of cable news organizations that should be included as debate sponsors. One commenter stated that the Commission should confirm that the FECA's exemption applies to cable

operators and cable networks as well as to independent producers of news, commentary and editorials they carry. Under the new regulations, the exemption applies to each of these entities. The commenter also urged the Commission to expand the list of permissible debate sponsors and *bona fide* news media to include regional, state and national trade associations whose members are cable operators and programmers. The role of trade associations was not addressed in the NPRM and is beyond the scope of this rulemaking.

The revised rules are also consistent with Advisory Opinion 1982-44, in which the Commission concluded that the press exemption permitted Turner Broadcasting System, Inc. to donate free cable cast time to the Republican and Democratic National Committees without making a prohibited corporate contribution. The cablecast programming on "super satellite" television station, WTBS in Atlanta, Georgia, was to be provided to a network of cable system operators. The Commission stated *inter alia* that "the distribution of free time to both political parties is within the broadcaster's legitimate broadcast function and, therefore, within the purview of the press exemption." AO 1982-44.

The courts have examined the application of the press exemption in section 431(9)(B)(i) on several occasions. See e.g., *Readers Digest Ass'n v. FEC*, 509 F. Supp. 1210 (S.D.N.Y. 1981); *FEC v. Phillips Publishing Company, Inc.*, 517 F. Supp. 1308 (D.D.C. 1981); and *Federal Election Commission v. Multimedia Cablevision, Inc.*, Civ. Action No. 94-1520-MLB, slip op. (D. Kan. Aug. 15, 1995). In *Readers Digest*, the court articulated a two part test "on which the exemption turns: whether the press entity is owned by the political party or candidate and whether the press entity was acting as a press entity in making the distribution complained of." *Readers Digest*, at p. 1215. The first prong is discussed more fully below. With regard to the second prong, the court stated that "the statute would seem to exempt only those kinds of distribution that fall broadly within the press entity's legitimate press function." *Id.* at 1214. The Commission believes a cable operator, producer or programmer can satisfy this standard if it follows the same guidelines as other news media follow when they stage candidate debates. For example, it must invite at least two candidates and refrain from promoting or advancing one over the other(s).

The Commission is also adding language to sections 100.7(b)(2) and

100.8(b)(2) indicating that the news story exception in 2 U.S.C. 431(9) allows cable operators, producers and programmers to exercise legitimate press functions by covering or carrying news stories, commentaries and editorials in accordance with the same guidelines that apply to the print or broadcast media. For example, they are subject to the same provisions regarding ownership by candidates and political parties as are broadcasters or print media. The public comments regarding these changes are summarized above.

The approach taken in the new rules regarding cable television entities avoids conflict with the FCC's application of the equal opportunity requirements under the Communications Act of 1934. Section 315(a) of the Communications Act requires that broadcast station licensees, including cable television operators, who permit any legally qualified candidate to use a broadcasting station, must afford equal opportunities to all other such candidates for that office in the use of that broadcasting station. 47 U.S.C. 315(a). However, the equal opportunity requirement is not triggered if the broadcasting station airs a *bona fide* newscast, *bona fide* news interview, *bona fide* news documentary or on-the-spot coverage of *bona fide* news events (including political conventions). 47 U.S.C. 315(a)(1)-(4). In 1975, the FCC decided that broadcasts of debates between political candidates would be exempt from the equal opportunities requirement as on-the-spot coverage of *bona fide* news events where, *inter alia*, the broadcaster exercised a reasonable, good faith judgment that it was newsworthy, and not for the purpose of giving political advantage to any candidate. See *The Law of Political Broadcasting and Cablecasting: A Political Primer*, 1984 ed., Federal Communications Commission, at p. 1502. This ruling was expanded in 1983 to permit broadcaster-sponsorship of candidate debates. *Id.* Similarly, in 1992, the FCC ruled that independently produced *bona fide* news interview programs qualify for exemption from the equal opportunities requirement of the Communications Act. In *Matter of Request for Declaratory Ruling That Independently Produced Bona Fide News Interview Programs Qualify for the Equal Opportunities Exemption Provided in Section 315(a)(2) of the Communications Act*, FCC 92-288 (July 15, 1992).

The third change in the revised rules is the addition of language in paragraph (a)(2) of section 110.13 regarding ownership of organizations staging candidate debates. Broadcast, cable and

print media organizations may not stage candidate debates if they are owned or controlled by a political party, political committee or candidate. This policy was not stated in the previous candidate debate rules, although it was included in the 1979 Explanation and Justification for those rules. See 44 F.R. 76735 (December 27, 1979). It is based on 2 U.S.C. 431(9)(B)(i), which specifies that the news story exemption does not apply to media entities that are owned or controlled by a political party, political committee or candidate. Please note that this new language applies only to media corporations, and thus does not change the rules in 11 CFR 110.13 regarding candidate debates staged by nonprofit corporations described in section 501(c)(3) or (c)(4) of the Internal Revenue Code. None of the commenters specifically addressed this change in the regulations.

**Certification of No Effect Pursuant to 5 U.S.C. 605(b) [Regulatory Flexibility Act]**

The attached final rules will not, if promulgated, have a significant economic impact on a substantial number of small entities. The basis for this certification is that any small entities affected are already required to comply with the requirements of the Act in these areas.

**List of Subjects**

11 CFR Part 100

Elections.

11 CFR Part 110

Campaign funds, Political candidates, Political committees and parties.

11 CFR Part 114

Business and industry, Elections, Labor.

For the reasons set out in the preamble, Subchapter A, Chapter I of Title 11 of the Code of Federal Regulations is amended as follows:

**PART 100—SCOPE AND DEFINITIONS (2 U.S.C. 431)**

1. The authority citation for Part 100 continues to read as follows:

**Authority:** 2 U.S.C. 431, 438(a)(8)

2. Part 100 is amended by revising paragraph (b)(2) of section 100.7 to read as follows:

**§ 100.7 Contribution (2 U.S.C. 431(8)).**

(b) \* \* \*  
 (2) Any cost incurred in covering or carrying a news story, commentary, or editorial by any broadcasting station (including a cable television operator,

programmer or producer), newspaper, magazine, or other periodical publication is not a contribution unless the facility is owned or controlled by any political party, political committee, or candidate, in which case the costs for a news story (i) which represents a *bona fide* news account communicated in a publication of general circulation or on a licensed broadcasting facility, and (ii) which is part of a general pattern of campaign-related news accounts which give reasonably equal coverage to all opposing candidates in the circulation or listening area, is not a contribution.

3. Part 100 is amended by revising paragraph (b)(2) of section 100.8 to read as follows:

**§ 100.8 Expenditure (2 U.S.C. 431(9)).**

(b) \* \* \*  
 (2) Any cost incurred in covering or carrying a new story, commentary, or editorial by any broadcasting station (including a cable television operator, programmer or producer), newspaper, magazine, or other periodical publication is not an expenditure unless the facility is owned or controlled by any political party, political committee, or candidate, in which case the costs for a news story (i) which represents a *bona fide* news account communicated in a publication of general circulation or on a licensed broadcasting facility, and (ii) which is part of a general pattern of campaign-related news account which give reasonably equal coverage to all opposing candidates in the circulation or listening area, is not an expenditure.

**PART 110—CONTRIBUTION AND EXPENDITURE LIMITATIONS AND PROHIBITIONS**

4. The authority citation for Part 110 continues to read as follows:

**Authority:** 2 U.S.C. 431(8), 431(9), 432(c)(2), 437d(a)(8), 438(a)(8), 441a, 441b, 441d, 441e, 441f, 441g and 441h.

5. Part 110 is amended by revising section 110.13 to read as follows:

**§ 110.13 Candidate debates.**

(a) *Staging organizations.* (1) Nonprofit organizations described in 26 U.S.C. 501 (c)(3) or (c)(4) and which do not endorse, support, or oppose political candidates or political parties may stage candidate debates in accordance with this section and 11 CFR 114.4(f).

(2) Broadcasters (including a cable television operator, programmer or producer), *bona fide* newspapers, magazines and other periodical publications may stage candidate

debates in accordance with this section and 11 CFR 114.4(f), provided that they are owned or controlled by a political party, political committee or candidate. In addition, broadcasters (including a cable television operator, programmer or producer), *bona fide* newspapers, magazines and other periodical publications, acting as press entities, may also cover or carry candidate debates in accordance with 11 CFR 100.7 and 100.8.

(b) *Debate structure.* The structure of debates staged in accordance with this section and 11 CFR 114.4(f) is left to the discretion of the staging organizations(s), provided that:

(1) Such debates include at least two candidates; and

(2) The staging organization(s) does not structure the debates to promote or advance one candidate over another.

(c) *Criteria for candidate selection.* For all debates, staging organization(s) must use pre-established objective criteria to determine which candidates may participate in a debate. For general election debates, staging organizations(s) shall not use nomination by a particular political party as the sole objective criterion to determine whether to include a candidate in a debate. For debates held prior to a primary election, caucus or convention, staging organizations may restrict candidate participation to candidates seeking the nomination of one party, and need not stage a debate for candidates seeking the nomination of any other political party or independent candidates.

**PART 114—CORPORATE AND LABOR ORGANIZATION ACTIVITY**

6. The authority citation for Part 114 continues to read as follows:

**Authority:** 2 U.S.C. 431(8)(B), 431(9)(B), 432, 437d(a)(8), 438(a)(8), and 441b.

7. Part 114 is amended by revising paragraph (f) of section 114.4. to read as follows:

**§ 114.4 Disbursements for communications beyond the restricted class in connection with a Federal election.**

(f) *Candidate debates.*

(1) A nonprofit organization described in 11 CFR 110.13(a)(1) may use its own funds and may accept funds donated by corporations or labor organizations under paragraph (f)(3) of this section to defray costs incurred in staging candidate debates held in accordance with 11 CFR 110.13.

(2) A broadcaster (including a cable television operator, programmer or producer), *bona fide* newspaper,

acceptable and unacceptable purpose descriptions to be reported by authorized committees. Paragraph (B) requires authorized committees, when itemizing certain disbursements for which reimbursements are required, to provide a brief explanation of the activity for which reimbursement is required. These provisions have been in Title 11 of the **Code of Federal Regulations** since 1980 and 1995, respectively, and were not affected by the recent statutory changes to the election cycle reporting requirements.

#### Need for Correction

As published, the final rules inadvertently omit two paragraphs describing information to be reported by authorized committees of Federal candidates.

All committees must report the purpose of itemized disbursements (i.e., those disbursements aggregating in excess of \$200). Omitted paragraph (A) contains examples of suitably specific purpose descriptions as well as examples of those descriptions that are unacceptably vague. This paragraph is inconsistent with the reporting of rules for unauthorized committees (committees other than candidate committees) in 11 CFR 104.3(b)(3).

Omitted paragraph (B) is used in administering the "personal use" rules in 11 CFR 113.1. Federal candidates are barred from using campaign funds for personal benefit. Paragraph (B) requires authorized committees of Federal candidates itemizing disbursements for which partial or total reimbursement is required under 11 CFR 113.1(g)(1)(iii)(C) or (D) to provide a brief explanation of the activity for which the reimbursement is made.

Section 801 of Title 5 of the United States Code requires Federal agencies to submit regulations to Congress. These regulations were submitted to the Speaker of the House of Representatives and the President of the Senate on November 26, 2001.

#### Certification of No Effect Pursuant to 5 U.S.C. § 605(b) [Regulatory Flexibility Act]

This correction will not have significant economic impact on a substantial number of small entities. The basis of this certification is that this correction only requires political committees to once again add information to the reports they are required to file. These regulations were in 11 CFR since 1980 and 1995, respectively, before being inadvertently omitted in 2000.

#### List of Subjects in 11 CFR Part 104

Campaign funds, Political committees and parties, Reporting and recordkeeping requirements.

Accordingly, 11 CFR part 104 is corrected by making the following correcting amendment:

#### PART 104—REPORTS BY POLITICAL COMMITTEES

1. The authority citation for part 104 continues to read as follows:

**Authority:** 2 U.S.C. 431(1), 431(8), 431(9), 432(i), 434, 438(a)(8), 438(b), 439a.

#### § 104.3 Contents of reports (2 U.S.C. 434(b), 439a).

\* \* \* \* \*

2. In § 104.3 add the following paragraphs (b)(4)(i)(A) and (B):

(b) \* \* \*  
(4) \* \* \*  
(i) \* \* \*

(A) As used in this paragraph, *purpose* means a brief statement or description of why the disbursement was made. Examples of statements or descriptions which meet the requirements of this paragraph include the following: dinner expenses, media, salary, polling, travel, party fees, phone banks, travel expenses, travel expense reimbursement, and catering costs. However, statements or descriptions such as *advance*, *election day expenses*, *other expenses*, *expenses*, *expense reimbursement*, *miscellaneous*, *outside services*, *get-out-the-vote* and *voter registration* would not meet the requirements of this paragraph for reporting the purpose of an expenditure.

(B) In addition to reporting the purpose described in paragraph (b)(4)(i)(A) of this section, whenever an authorized committee itemizes a disbursement that is partially or entirely a personal use for which reimbursement is required under 11 CFR 113.1(g)(1)(ii)(C) or (D), it shall provide a brief explanation of the activity for which reimbursement is required.

\* \* \* \* \*

Dated: November 26, 2001.

**Danny L. McDonald,**  
*Chairman, Federal Election Commission.*  
[FR Doc. 01-29679 Filed 11-29-01; 8:45 am]  
**BILLING CODE 6715-01-P**

#### FEDERAL ELECTION COMMISSION

#### 11 CFR Part 111

#### [Notice 2001-18]

#### Extension to Administrative Fines

**AGENCY:** Federal Election Commission.

**ACTION:** Final rule; revision of the sunset date.

**SUMMARY:** The Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the expiration date in which the Federal Election Commission (hereinafter "the Commission") may assess civil money penalties for violations of the reporting requirements of section 434(a) of the Federal Election Campaign Act (hereinafter "the Act" or "FECA").

**DATES:** Effective on December 31, 2001.

**FOR FURTHER INFORMATION CONTACT:** Ms. Rosemary C. Smith, Assistant General Counsel, or Ms. Mai T. Dinh, Attorney, 999 E Street, NW., Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

#### SUPPLEMENTARY INFORMATION:

#### Explanation and Justification

Section 640 of the Treasury and General Government Appropriations Act, 2000, Pub. L. No. 106-58, 106th Cong., 113 Stat. 430, 476-77 (1999), amended § 309(a)(4) of the FECA, 2 U.S.C. 437g(a)(4), to provide for a modified enforcement process for violations of reporting requirements. Under § 437g(a)(4)(C) of the FECA, the Commission may assess a civil money penalty for violations of the reporting requirements of 2 U.S.C. 434(a). This authority, however, was to sunset on December 31, 2001. Pub. L. No. 106-58, 106th Cong., § 640(c). Recently, § 642 of the Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the sunset date to include all reports that cover activity between January 1, 2000, to December 31, 2003.

The Commission published final rules on May 19, 2000, to implement the amendment contained in the Treasury and General Government Appropriations Act, 2000. Section 111.30 of the regulations reflects the sunset provision of Pub. L. No. 106-58, 106th Cong., § 640(c). Therefore, the Commission is issuing this final rule to amend section 111.30 to extend the application of the administrative fine regulations, 11 CFR part 111, subpart B, to include all violations relating to reports that cover the period between January 1, 2000, to December 31, 2003.

The Commission is promulgating this final rule without notice or opportunity for comment because it falls under the "good cause" exemption of the Administrative Procedures Act, 5 U.S.C. 553(b)(B). The exemption allows

**FEDERAL ELECTION COMMISSION****11 CFR Part 110**

[Notice 1996-14]

**Coordinated Party Expenditures****AGENCY:** Federal Election Commission.**ACTION:** Final rule; technical amendment

**SUMMARY:** On June 26, 1996, the Supreme Court issued a decision in *Colo. Repub. Fed. Camp. Comm. et al. v. F.E.C.* regarding coordinated party expenditures. The Commission today is publishing a technical amendment to conform its regulations to the decision. The Commission also is publishing today a Notice of Availability for a Petition for Rulemaking it received after the decision.

**EFFECTIVE DATE:** August 7, 1996.

**FOR FURTHER INFORMATION CONTACT:** Ms. Susan E. Propper, Assistant General Counsel, or Ms. Teresa A. Hennessy, Attorney, 999 E Street, N.W., Washington, D.C. 20463, (202)219-3690 or (800) 424-9530.

**SUPPLEMENTARY INFORMATION:** The Federal Election Campaign Act of 1971 ("FECA") governs, *inter alia*, coordinated party expenditures by party committees. 2 U.S.C. 441a(d). A party committee is a political committee that represents a political party and is part of the official party structure. 11 CFR 100.5(e)(4). Pursuant to 11 CFR 110.7, a party committee may make coordinated expenditures on behalf of a candidate for Federal office who is affiliated with the party in addition to direct contributions to the candidate under 2 U.S.C. 441a(a). The Commission's regulations specifically provide that a national committee of a political party, and a State committee of the party, may make these expenditures in connection with the general election campaign of a candidate for the U.S. House of Representatives ("House") or the U.S. Senate ("Senate"). 11 CFR 110.7(b)(1). The regulations also provided that party committees may not make independent expenditures on behalf of a candidate for the House or the Senate. 11 CFR 110.7(b)(4). An independent expenditure is an expenditure that expressly advocates the election or defeat of a candidate for Federal office, *see* 11 CFR 100.22(a), and is not coordinated with the candidate on whose behalf it is made. 11 CFR 109.1.

In *Colo. Repub. Fed. Camp. Comm. et al. v. F.E.C.*, 116 S.Ct. 2309 (1996), the Commission had alleged, *inter alia*, that the Colorado Republican Federal Campaign Committee exceeded the Act's limits for coordinated party

expenditures when it financed advertisements referring to a Democratic candidate for the U.S. Senate from Colorado. The Court ruled that party committees are capable of making independent expenditures on behalf of their candidates for Federal office and that these expenditures are not subject to the coordinated party expenditure limits at 2 U.S.C. § 441a(d). 116 S.Ct. 2312-15. The Court also stated that, because the coordinated party expenditure limits for presidential elections were not at issue in the case, the decision did not "\* \* \* address issues that might grow out of the public funding of Presidential campaigns". 116 S.Ct. 2314. Section 110.7(b)(4) of the Commission's regulations has been deleted to follow the Supreme Court's decision. Since the ruling is limited to congressional campaigns, the Notice does not revise the provisions for coordinated party expenditures on behalf of presidential candidates.

Therefore, the Commission is publishing this Notice to make the necessary technical amendment to its regulations. The Notice amends 11 CFR 110.7 to conform to the Court's decision. Because the amendment is merely technical, it is exempt from the notice and comment requirements of the Administrative Procedure Act. *See* 2 U.S.C. 553(b)(B). It is also exempt from the legislative review provisions of the FECA. *See* 2 U.S.C. 438(d). These exemptions allow the amendment to be made effective immediately upon publication in the **Federal Register**. As a result, this amendment is made effective on August 7, 1996.

**Certification of No Effect Pursuant to 5 U.S.C. 605(b) (Regulatory Flexibility Act)**

I certify that the attached final rule will not have a significant economic impact on a substantial number of small entities. The basis of the certification is that the rule's repeal is necessary to conform to a recent Supreme Court decision. The repeal permits, but does not require, the expenditure of funds in certain Federal campaigns. Therefore, no significant economic impact is caused by the final rule.

**List of Subjects in 11 CFR Part 110**

Campaign funds, Political committees and parties.

For the reasons set out in the preamble, Subchapter A, Chapter I, Title 11 of the Code of Federal Regulations is amended as follows:

**PART 110—CONTRIBUTION AND EXPENDITURE LIMITATIONS AND PROHIBITIONS**

1. The authority citation for Part 110 continues to read as follows:

**Authority:** 2 U.S.C. 431(8), 431(9), 432(c)(2), 437d(a)(8), 438(a)(8), 441a, 441b, 441d, 441e, 441f, 441g and 441h.

**§ 110.7 Party Committee Expenditure Limitations (2 U.S.C. 441a(d)).**

2. Section 110.7(b)(4) is removed.

Dated: August 2, 1996

**John Warren McGarry,**

*Vice Chairman, Federal Election Commission.*

[FR Doc. 96-20102 Filed 8-06-96; 8:45 am]

**BILLING CODE 6715-01-P**

**DEPARTMENT OF TRANSPORTATION****Federal Aviation Administration****14 CFR Part 71**

[Airspace Docket No. 96-AEA-03]

**Amendment of Class E Airspace; New York, NY**

**AGENCY:** Federal Aviation Administration (FAA) DOT.

**ACTION:** Final rule.

**SUMMARY:** This amendment modifies the Class E airspace area at New York, NY to accommodate a planned Global Positioning System (GPS) Standard Instrument Approach Procedure (SIAP) at the Lincoln Park Airport, Lincoln Park, NJ. This amendment also corrects the description of the New York, NY Class E Airspace Area published as a Notice of Proposed Rulemaking in the **Federal Register** April 30, 1996 (61 FR 19001). The intended effect of this action is to provide adequate controlled airspace for Instrument Flight Rules (IFR) operations at Lincoln Park Airport. **EFFECTIVE DATE:** 0901 UTC, October 10, 1996.

**FOR FURTHER INFORMATION CONTACT:** Mr. Frances T. Jordan, Airspace Specialist, Operations Branch, AEA-530, Air Traffic Division, Eastern Region, Federal Aviation Administration, Federal Building #111, John F. Kennedy International Airport, Jamaica, New York 11430, telephone: (718) 553-4521.

**SUPPLEMENTARY INFORMATION:****History**

On April 30, 1996, the FAA proposed to amend Part 71 of the Federal Aviation Regulations (14 CFR Part 71) by establishing a Class E airspace area at New York, NY (61 FR 19001). The



acceptable and unacceptable purpose descriptions to be reported by authorized committees. Paragraph (B) requires authorized committees, when itemizing certain disbursements for which reimbursements are required, to provide a brief explanation of the activity for which reimbursement is required. These provisions have been in Title 11 of the **Code of Federal Regulations** since 1980 and 1995, respectively, and were not affected by the recent statutory changes to the election cycle reporting requirements.

#### Need for Correction

As published, the final rules inadvertently omit two paragraphs describing information to be reported by authorized committees of Federal candidates.

All committees must report the purpose of itemized disbursements (i.e., those disbursements aggregating in excess of \$200). Omitted paragraph (A) contains examples of suitably specific purpose descriptions as well as examples of those descriptions that are unacceptably vague. This paragraph is inconsistent with the reporting of rules for unauthorized committees (committees other than candidate committees) in 11 CFR 104.3(b)(3).

Omitted paragraph (B) is used in administering the "personal use" rules in 11 CFR 113.1. Federal candidates are barred from using campaign funds for personal benefit. Paragraph (B) requires authorized committees of Federal candidates itemizing disbursements for which partial or total reimbursement is required under 11 CFR 113.1(g)(1)(iii)(C) or (D) to provide a brief explanation of the activity for which the reimbursement is made.

Section 801 of Title 5 of the United States Code requires Federal agencies to submit regulations to Congress. These regulations were submitted to the Speaker of the House of Representatives and the President of the Senate on November 26, 2001.

#### Certification of No Effect Pursuant to 5 U.S.C. § 605(b) [Regulatory Flexibility Act]

This correction will not have significant economic impact on a substantial number of small entities. The basis of this certification is that this correction only requires political committees to once again add information to the reports they are required to file. These regulations were in 11 CFR since 1980 and 1995, respectively, before being inadvertently omitted in 2000.

#### List of Subjects in 11 CFR Part 104

Campaign funds, Political committees and parties, Reporting and recordkeeping requirements.

Accordingly, 11 CFR part 104 is corrected by making the following correcting amendment:

#### PART 104—REPORTS BY POLITICAL COMMITTEES

1. The authority citation for part 104 continues to read as follows:

**Authority:** 2 U.S.C. 431(1), 431(8), 431(9), 432(i), 434, 438(a)(8), 438(b), 439a.

#### § 104.3 Contents of reports (2 U.S.C. 434(b), 439a).

\* \* \* \* \*

2. In § 104.3 add the following paragraphs (b)(4)(i)(A) and (B):

(b) \* \* \*  
(4) \* \* \*  
(i) \* \* \*

(A) As used in this paragraph, *purpose* means a brief statement or description of why the disbursement was made. Examples of statements or descriptions which meet the requirements of this paragraph include the following: dinner expenses, media, salary, polling, travel, party fees, phone banks, travel expenses, travel expense reimbursement, and catering costs. However, statements or descriptions such as *advance*, *election day expenses*, *other expenses*, *expenses*, *expense reimbursement*, *miscellaneous*, *outside services*, *get-out-the-vote* and *voter registration* would not meet the requirements of this paragraph for reporting the purpose of an expenditure.

(B) In addition to reporting the purpose described in paragraph (b)(4)(i)(A) of this section, whenever an authorized committee itemizes a disbursement that is partially or entirely a personal use for which reimbursement is required under 11 CFR 113.1(g)(1)(ii)(C) or (D), it shall provide a brief explanation of the activity for which reimbursement is required.

\* \* \* \* \*

Dated: November 26, 2001.

**Danny L. McDonald,**  
*Chairman, Federal Election Commission.*  
[FR Doc. 01-29679 Filed 11-29-01; 8:45 am]  
**BILLING CODE 6715-01-P**

#### FEDERAL ELECTION COMMISSION

#### 11 CFR Part 111

#### [Notice 2001-18]

#### Extension to Administrative Fines

**AGENCY:** Federal Election Commission.

**ACTION:** Final rule; revision of the sunset date.

**SUMMARY:** The Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the expiration date in which the Federal Election Commission (hereinafter "the Commission") may assess civil money penalties for violations of the reporting requirements of section 434(a) of the Federal Election Campaign Act (hereinafter "the Act" or "FECA").

**DATES:** Effective on December 31, 2001.

**FOR FURTHER INFORMATION CONTACT:** Ms. Rosemary C. Smith, Assistant General Counsel, or Ms. Mai T. Dinh, Attorney, 999 E Street, NW., Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

#### SUPPLEMENTARY INFORMATION:

#### Explanation and Justification

Section 640 of the Treasury and General Government Appropriations Act, 2000, Pub. L. No. 106-58, 106th Cong., 113 Stat. 430, 476-77 (1999), amended § 309(a)(4) of the FECA, 2 U.S.C. 437g(a)(4), to provide for a modified enforcement process for violations of reporting requirements. Under § 437g(a)(4)(C) of the FECA, the Commission may assess a civil money penalty for violations of the reporting requirements of 2 U.S.C. 434(a). This authority, however, was to sunset on December 31, 2001. Pub. L. No. 106-58, 106th Cong., § 640(c). Recently, § 642 of the Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the sunset date to include all reports that cover activity between January 1, 2000, to December 31, 2003.

The Commission published final rules on May 19, 2000, to implement the amendment contained in the Treasury and General Government Appropriations Act, 2000. Section 111.30 of the regulations reflects the sunset provision of Pub. L. No. 106-58, 106th Cong., § 640(c). Therefore, the Commission is issuing this final rule to amend section 111.30 to extend the application of the administrative fine regulations, 11 CFR part 111, subpart B, to include all violations relating to reports that cover the period between January 1, 2000, to December 31, 2003.

The Commission is promulgating this final rule without notice or opportunity for comment because it falls under the "good cause" exemption of the Administrative Procedures Act, 5 U.S.C. 553(b)(B). The exemption allows



# Rules and Regulations

Federal Register

Vol. 61, No. 159

Thursday, August 15, 1996

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

## DEPARTMENT OF AGRICULTURE

### 7 CFR Part 19

#### Licensing Department Inventions

**AGENCY:** Agricultural Research Service, USDA.

**ACTION:** Final rule.

**SUMMARY:** This action is being taken as part of the National Performance Review program to eliminate unnecessary regulations and improve those that remain. This final rule removes obsolete regulations pertaining to licensing departmental inventions. USDA regulations have been superseded by Department of Commerce regulations governing the licensing of Government-owned inventions.

**EFFECTIVE DATE:** August 15, 1996.

**FOR FURTHER INFORMATION CONTACT:** Richard M. Parry, Jr., Assistant Administrator, Agricultural Research Service, USDA, Room 358-A, Jamie L. Whitten Federal Building, 1400 Independence Avenue, S.W., Washington, DC 20250, (202) 720-3973.

**SUPPLEMENTARY INFORMATION:** 7 CFR Part 19 was issued in 1970 pursuant to the authority of the Secretary under 5 U.S.C. 301 and the President's Memorandum of October 10, 1963, and Statement of Government Patent Policy, 28 FR 10943. The enactment of a Governmentwide regulation in 1987, 37 CFR 404, under the authority of 35 U.S.C. 206, superseded 7 CFR Part 19. Therefore, pursuant to 5 U.S.C. 553, good cause is found that notice of proposed rulemaking and opportunity for comment are not required, and good cause is found for making this rule effective less than 30 days after publication in the **Federal Register**. This rule has been determined to be not significant for the purpose of Executive Order 12866 and, therefore, has not been reviewed by the Office of Management and Budget. Also, this rule

will not cause a significant economic impact or other substantial effect on small entities and, therefore, the provisions of the Regulatory Flexibility Act, 5 U.S.C. et seq., do not apply. Requests for information relating to licensing departmental inventions may be obtained through the ARS Assistant Administrator pursuant to 7 CFR Part 3700.

#### List of Subjects in 7 CFR Part 19

Inventions and patents.

#### PART 19—[REMOVED AND RESERVED]

Accordingly, 7 CFR Part 19 is removed and reserved.

**Authority:** 5 U.S.C. 301

Done at Washington, DC, this 12th day of August 1996.

**Floyd P. Horn,**

*Administrator, Agricultural Research Service.*

[FR Doc. 96-20884 Filed 8-14-96; 8:45 am]

**BILLING CODE 3410-03-M**

### 7 CFR Part 4000

#### Organization and Functions

**AGENCY:** Economics Management Staff, USDA.

**ACTION:** Final rule.

**SUMMARY:** This final rule removes obsolete regulations pertaining to the organization and function of the Economics Management Staff (EMS) to reflect an internal reorganization of the Department of Agriculture (USDA).

**EFFECTIVE DATE:** August 15 1996.

**FOR FURTHER INFORMATION CONTACT:** Jane L. Giles, Deputy Administrator, Agricultural Research Service, USDA, Room 324-A, Jamie L. Whitten Federal Building 1400 Independence Avenue, SW., Washington, DC 20250, (202) 690-2575.

**SUPPLEMENTARY INFORMATION:** The Freedom of Information Act, 5 U.S.C. 552(a)(1), requires Federal agencies to publish in the **Federal Register** descriptions of its central and field organizations. 7 CFR Part 4000 set forth the organization and functions of the EMS. It was issued pursuant to the authority formerly delegated to EMS in 7 CFR 2.87. Pursuant to the internal reorganization of USDA, EMS has been integrated into the Agricultural Research Service (ARS). This document

removes 7 CFR Part 4000. Requests for information relating to functions formerly performed by EMS may be obtained through the ARS Deputy Administrator pursuant to 7 CFR Part 3700. Pursuant to 5 U.S.C. 553, since this rule relates to internal agency management, notice of proposed rulemaking and opportunity for comment are not required, and this rule may be made effective less than 30 days after publication in the **Federal Register**. Further, because it relates to internal agency management, it is exempt from the provisions of Executive Orders 12988 and 12866. In addition, this rule will not cause a significant economic impact or other substantial effect on small entities. Therefore, the requirements of the Regulatory Flexibility Act, 5 U.S.C. 602, do not apply.

#### List of Subjects in 7 CFR Part 4000

Organization and functions, (Government agencies).

#### PART 4000—[REMOVED AND RESERVED]

Accordingly, 7 CFR Part 4000 is removed and reserved.

**Authority:** 5 U.S.C. 301 and 552.

Done at Washington, DC, this 12th day of August 1996.

**Floyd P. Horn,**

*Administrator, Agricultural Research Service.*

[FR Doc. 96-20883 Filed 8-14-96; 8:45 am]

**BILLING CODE 3410-03-M**

## FEDERAL ELECTION COMMISSION

### 11 CFR Part 104

[Notice 1996-16]

#### Electronic Filing of Reports by Political Committees

**AGENCY:** Federal Election Commission.

**ACTION:** Final rules; transmittal of regulations to Congress.

**SUMMARY:** The Federal Election Commission is implementing an electronic filing system for reports of campaign finance activity filed with the agency. The Commission is publishing new rules today as part of the process of implementing this system. The new rules establish general requirements for

filing reports electronically; specify the format for data to be submitted by filers; set up procedures for submitting amendments to reports; and explain methods of complying with the signature requirements of the law. Further information is provided in the supplementary information that follows.

**EFFECTIVE DATE:** Further action, including the announcement of an effective date, will be taken after these regulations have been before Congress for 30 legislative days pursuant to 2 U.S.C. 438(d). A document announcing the effective date will be published in the **Federal Register**.

**FOR FURTHER INFORMATION CONTACT:** Ms. Susan E. Propper, Assistant General Counsel, or Paul Sanford, Staff Attorney, 999 E Street, NW., Washington, DC 20463, (202) 219-3690 or (800) 424-9530.

**SUPPLEMENTARY INFORMATION:** The Commission is today publishing the final text of new regulations to be added to 11 CFR Part 104 regarding the electronic filing of reports by political committees. These rules implement provisions of Public Law 104-79, which amended the Federal Election Campaign Act of 1971, 2 U.S.C. 431 *et seq.* ["the Act"], to require, *inter alia*, that the Commission create a system to "permit reports required by this Act to be filed and preserved by means of computer disk or any other electronic format or method, as determined by the Commission." Federal Election Campaign Act of 1971, Amendment, Pub. L. No. 104-79, section 1(a), 109 Stat. 791 (December 28, 1995). The final rules announced today set out the requirements and procedures for filing reports electronically.

The electronic filing system is intended to reduce paper filing and manual processing of reports, resulting in more efficient and cost-effective methods of operation for filers and for the Commission. The system will also provide the public with more complete on-line access to reports on file with the Commission, thereby furthering the disclosure purposes of the Act. Public Law 104-79 requires the Commission to make this filing method available for reports covering periods after December 31, 1996. Thus, the new system will be in place for the first reports filed in the 1998 election cycle.

Public Law 104-79 requires the Commission to make the electronic filing option available for all "report[s], designation[s], or statement[s] required by this Act to be filed with the Commission." Previously, this would not have included reports filed by the authorized committees of candidates for

the House of Representatives, as these committees filed their reports with the Clerk of the House. However, section 3 of Public Law 104-79 amended 2 U.S.C. 432(g) to require the authorized committees of House candidates to file their reports with the Commission. Consequently, these committees, as well as those that have historically filed with the Commission, will have the opportunity to file electronically under the new system. Committees that are required to file reports with the Secretary of the Senate will not be covered by the new rules.

While the Commission encourages political committees and other persons to file their reports electronically, doing so is not required. Under Public Law 104-79, participation in the Commission's electronic filing program is voluntary. Therefore, filers have the option of continuing to submit paper reports as they have in the past.

Section 438(d) of Title 2, United States Code requires that any rules or regulations prescribed by the Commission to carry out the provisions of Title 2 of the United States Code be transmitted to the Speaker of the House of Representatives and the President of the Senate 30 legislative days before they are finally promulgated. These regulations were transmitted to Congress on August 9, 1996.

#### **Explanation and Justification for 11 CFR 104.18**

The Commission initiated this rulemaking with a Notice of Proposed Rulemaking ["NPRM"] published in the **Federal Register** on March 27, 1996. 61 FR 13465 (March 27, 1996). The NPRM contained proposed rules covering general filing requirements, the format for electronic reports, report validation procedures, amendments to electronically filed reports, signature requirements, and the preservation of reports filed electronically. The NPRM sought comments on the proposed rules and on other issues from various segments of the regulated community, including (1) committees that will be affected by the new rules; (2) vendors with knowledge of the software issues involved in implementing such a system; and (3) state and local jurisdictions that have experience with electronic filing. The Commission received ten comments in response to the NPRM. Several commenters offered general observations about the features that an electronic filing system should include. Other commenters offered specific comments on the proposed rules set out in the notice. The Internal Revenue Service submitted a comment in which it said that the proposed rules

are not inconsistent with IRS regulations or the Internal Revenue Code. The comments received provided valuable information that serves as the basis for the final rules published today.

#### *General Comments About System Features*

Some commenters offered general comments about the features that should be incorporated into the electronic filing system. One commenter urged the Commission to make the software for the system as user friendly as possible, in order to make filing FEC reports easier, and also urged the Commission to make the software available free of charge through its World Wide Web site. This commenter said that filers should be required to include the FEC identification number of the candidates and PACs listed on their reports in order to ensure accurate incorporation of the reports into the Commission's data base, and suggested that pop-up menus could be incorporated into the software that would allow filers to select this and other information from a master list.

Similarly, this commenter along with one other commenter, urged the Commission to establish a standardized list of codes for reported disbursements. This proposal was set out in the narrative portion of the NPRM. However, the commenter said filers should be able to include a written elaboration. This commenter also said that any software made available by the Commission should not include any campaign management features, since these features would suggest assistance to candidates and would present practical problems.

Another commenter said that encryption capabilities should be incorporated into the electronic filing software, since this would serve the dual purposes of compressing files and providing security in the reporting.

The Commission shares the commenter's view that the electronic filing system must be as easy to use as possible, and intends to make any software that it creates available free of charge through the Internet and other electronic means. Initially, this will be limited to the validation software that filers will use to validate their reports before submitting them to the Commission on diskette. Additional software, such as encryption software, will be made available after initial implementation, as the Commission moves towards filing by telecommunications. The Commission will also make a list of the identification numbers of all registered candidates and committees available on the Internet for committees to download and

incorporate into their reports. Committees can access this list through the Commission's home page at [www.fec.gov](http://www.fec.gov).

#### *General Rule*

Paragraph (a) of the proposed rules set out the general rule that political committees who file reports with the Commission may choose to file their reports in an electronic format that meets the requirements of the section. Paragraph (a) also states that committees that choose to file electronically and whose reports satisfy the validation program described in paragraph (c), below, must continue to file electronically all reports covering financial activity for that calendar year. The Commission sought comment on whether the rules should distinguish between committees that begin filing electronically but later encounter problems and are unable to do so from those who simply decide to discontinue filing electronic reports.

The Commission received no comments on the general rule or on the one year continuation requirement. Generally, the final rule tracks the proposed rule. Requiring committees that begin to file reports electronically to continue to do so for the rest of the year will enable the Commission to more efficiently process the committee's reports and place them on the public record. However, the rule now contains an exception that waives this requirement if the Commission determines that extraordinary and unforeseeable circumstances have made it impracticable for the committee to continue filing electronically. In order to obtain a waiver, a committee must submit a written request to the Commission's Data Systems Development Division explaining the circumstances that make continued electronic filing impracticable. The Data Division will review these requests and make a determination as to whether the committee may revert to paper filing. Generally, waivers will only be granted if circumstances such as destruction of the committee's computer equipment make continued electronic filing technologically impossible. Committees that revert to paper filing will be required to report on paper for the remainder of the calendar year.

#### *Standard format*

Under paragraph (b) of the proposed rules, reports filed electronically must conform to the technical specifications, including file requirements, described in the Commission's Electronic Filing Specification Requirements ["EFSR"], and must be organized in the order

specified in those requirements. The narrative portion of the NPRM indicated that the Commission would develop these requirements in a parallel process to the Electronic Filing rulemaking, and would make the requirements available to the public during the development process. The notice invited interested persons to comment on the requirements as they were being developed.

The draft electronic filing specification requirements were made available for comment on May 31, 1996. Several comments were submitted on the draft requirements. The Commission expects to issue a final version of the EFSR during mid-August, 1996.

A few commenters addressed the issue of standardized format specifications in their comments on the NPRM. Two commenters expressed support for the Commission's plans to develop a standard format. One of these commenters suggested that the Commission use the same field structures and lengths as those in the Computerized Magnetic Media Requirements ["CMMR"] currently used by publicly financed presidential campaigns. The other commenter said the need to develop a standard format for electronically filed reports was obvious, but said that the format should not be so technical that users are unable to generate properly formatted reports themselves.

The format required for electronically filed reports will be relatively simple, and users should be able to easily generate properly formatted reports using the EFSR documentation. The Commission has used the CMMR as a model for the EFSR, and incorporated similar field structures and lengths where appropriate. However, the EFSR will differ in many significant respects, because the CMMR was designed to facilitate the matching fund submission process for presidential primary candidates, whereas the EFSR must serve the broader purposes of reporting under Part 104 of the regulations. Thus, while the EFSR will share some of the characteristics of the CMMR, the EFSR will include specifications for the full range of activities that are reportable under section 434 of the Act and Part 104 of the regulations.

In contrast to the two comments described above, a third commenter suggested an entirely different approach for filing reports electronically. This commenter said that filers should simply scan the Commission's forms into their databases, complete the forms, and submit them to the Commission by electronic mail. Or, as an alternative to

scanning, the Commission should make the forms available on a diskette for \$25.

Accepting scanned forms as electronically filed reports would complicate the electronic filing process, because scanned forms would be more difficult to directly integrate into the Commission's disclosure data base. Direct integration will be achieved most efficiently if reports are made up of a series of fields of ASCII characters. Scanned forms are digitized images, rather than fields of ASCII characters. Since direct integration is one of the main goals of electronic filing, the Commission has decided not to accept scanned images as electronically filed reports.

#### *Acceptance of Reports Filed Electronically*

1. Validation checks. Under paragraph (c) of the proposed rules, committees submitting reports electronically would be required to check each report against the Commission's validation software before it is submitted, to ensure that it meets the standard format specification requirements. Paragraph (c)(1) also indicated that electronically filed reports would be checked again when they are received by the Commission. The Commission would not accept reports that do not pass the validation program, and would notify a committee if its reports are rejected.

One commenter suggested that, instead of supplying validation software, the Commission certify a commercial disclosure software package. This, the commenter said, would allow filers to bypass the process of validating each submission.

The Commission is unable to adopt this commenter's suggestion. The validation software will ensure that electronic reports submitted to the Commission conform to the electronic filing specification requirements and can be integrated into the Commission's disclosure data base. The Commission is making the validation software available to committees so that reports can be checked before they are submitted. This will allow filers to remedy filing problems before sending their reports to the Commission. Although commercial software packages may become available that will perform this function, the Commission is reluctant to treat any of these packages as a substitute for the validation software, because doing so would require ongoing oversight of these software packages to ensure continued compliance with the EFSR. The Commission is unwilling and unable to perform this oversight. Therefore, the Commission will not

recognize commercial software as a substitute for the validation process.

Another commenter suggested that the Commission develop what the commenter described as "pre-auditing" software that would automatically review reports before they are submitted in order to ensure that the reports are complete and correct to the greatest extent possible. The commenter said that this software should check for math errors, look for inconsistencies between the summary page and the detailed reporting pages, and notify the filer if mandatory fields have been left blank, contributions have been listed that exceed the applicable limits, or data has been included that is outside the reporting period range.

The validation software filers will be required to use in 1997 will perform some of these functions. Specifically, this software will ensure that all required information is included in the report, and will also examine the report for inconsistencies between the summary pages and detailed reporting pages. The Commission's current plans are to incorporate other pre-auditing functions, such as checking for math errors, etc., into the more sophisticated validation software that will be made available for the next phase of the program in 1998. This may further increase the accuracy of electronically filed reports as the Commission moves towards submission by telecommunications and direct integration into the disclosure data base.

2. Methods of transmission. The narrative portion of the NPRM explained that the Commission initially intends to accept reports only on floppy disk. However, the Commission will begin accepting reports submitted through telecommunications as soon as practicable. One commenter urged the Commission to begin accepting reports submitted by electronic mail right away. However, another commenter said that there are space limitations on electronic mail that preclude it from serving this purpose, and that it is not reliable enough to serve as a filing medium.

The Commission continues to believe that a gradual implementation of the electronic filing program will minimize the transitional difficulties and will be more likely to lead to a viable electronic filing system. Accepting reports by electronic mail would raise security issues that the Commission would rather address during the second phase of the electronic filing program. Therefore, the Commission has decided to adhere to its plan to initially accept electronic reports only on floppy disk. The Commission will move toward

accepting reports through telecommunications as soon as possible.

#### *Amended Reports*

Paragraph (d) of the proposed rules would require that amendments to electronically filed reports be filed electronically. This provision would also require that amendments consist of a complete version of the report as amended, rather than just those portions of the report that have been revised. In the narrative portion of the NPRM, the Commission recognized that requiring submission of a complete version of the amended report has one drawback in that the complete version will not immediately indicate which aspects of the earlier report had changed. Thus, persons reviewing the report will have difficulty identifying new information. The Commission specifically sought comment on whether another approach would be preferable.

All three commenters that addressed this issue supported the approach set out in the proposed rule. One commenter suggested that the Commission require filers to flag revised information in the amended report so that persons reviewing the report will be able to readily determine which portions have been changed. Another commenter said that information that has been amended should be highlighted in the Commission's data base. This would be achieved by replacing the amended field in the original report with the identification number of the amended report containing the superseding information. This commenter also suggested that the Commission produce a cumulative electronic list of amended items.

The final rule tracks the proposed rule in that it requires filers to submit a complete version of the report as amended, rather than just those portions of the report that are being amended. However, the final rule also adopts the commenter's suggestion in that it requires filers to include electronic flags or markings in their amended reports that point to the portions of the report that are being amended. These flags will be incorporated into the Commission's disclosure process so that persons reviewing the committee's reports will know which portions have been revised.

#### *Signature Requirements*

1. Committee signatures. Paragraph (e) of the proposed rules would require the committee treasurer or other person responsible for filing the committee's report to verify the report either by submitting a signed paper certification with the computerized magnetic media, or by submitting a digitized copy of the

signed certification as a separate file in the electronic submission. This provision would also require the person signing the report to certify that, to the best of the signatory's knowledge, the report is true, correct and complete. These verifications would be treated the same as verification by signature on a paper report. When the Commission begins to accept reports by telecommunications, it may provide other methods for verification, such as providing an encryption key to the committee treasurer or allowing simultaneous mailing of the signature page. The Commission sought comment on these proposals, and invited commenters to suggest other ways for complying with the signature requirement.

One commenter said the Commission should be responsible for comparing electronically submitted signatures with signatures already on file. If the signatures look correct, they should be treated as valid, with the burden of proving otherwise on the person alleging the signature is not genuine.

Comments submitted by the New York City Campaign Finance Board indicate that the Board requires candidates who file on disk to submit a paper control page that lists the schedule totals, file creation dates, and contains the committee treasurer's original signature. Under the system used by New York City, these pages cannot be created until all report data has been entered and submission disks have been created.

As explained above, the Commission's validation program will ensure that electronically filed reports contain all of the necessary information. However, Congress has specifically directed the Commission to "provide for one or more methods (other than requiring a signature on the report being filed) for verifying reports filed by means of computer disk or other electronic format or method." 2 U.S.C. 434(a)(11)(B), as added by Pub. L. No. 104-79, section 1(a), 109 Stat. 791 (1995). Thus, the Commission is unable to require submission of a signature page. For these reasons, the Commission has structured this program so that filers will include all of the required information within the electronic data submitted. With a few exceptions, no paper submissions will be required. The exceptions will be explained further below.

With regard to encryption, another commenter expressed the view that implementing a program such as "PGP" or "Pretty Good Privacy" to provide a digital signature would be nearly impossible because of the

administrative difficulties of issuing and receiving the necessary keys. This commenter suggested that it would be better to achieve security by issuing a PIN-like password to each filer by regular mail. This commenter also recommended implementation of a cross-checking program under which each filer would submit a signed paper summary page for each report. The amounts listed on the summary page could then be compared to the more detailed portions of the electronically submitted reports to provide an additional level of security and assurance.

The Commission's validation software will compare a report's summary page with its detailed summary page to ensure that they are consistent, thereby providing an additional level of security. However, the Commission has not addressed the encryption issue in this set of final rules. The Commission expects to incorporate a more sophisticated security system into the electronic filing program when it moves closer to accepting reports through telecommunications.

2. Signatures of third parties. The NPRM also noted that certain forms and schedules required by the Act and regulations must be submitted with the signatures of third parties. For example, Schedule E and Form 5, which are used to report independent expenditures, must be notarized. Paragraph (f) of the proposed rules contains a list of the schedules, materials and forms that have special signature requirements. Under this provision, electronic filers that are required to submit these items could do so by submitting a paper copy of the item with their electronic report, or by including a digitized version of the item as a separate file in the electronic submission. This would be in addition to the general requirement that the data contained on the form or schedule be included in the electronic report. The Commission received no comments on this requirement.

The final rule tracks the proposed rule. Filers have the option of submitting paper copies or a digitized image as part of their electronic report.

#### *Preservation of Reports*

Section 104.14(b)(2) of the Commission's current regulations requires committee treasurers to retain copies of all reports or statements submitted for a period of three years after they are filed. Paragraph (g) of the proposed rules would require committee treasurers to retain machine readable copies of all reports filed electronically as the copy preserved under this section. Paragraph (g) would

also require a treasurer to retain the original signed version of any documents submitted in a digitized format under paragraphs (e) or (f), as explained above.

One commenter argued that PACs should be permitted to retain files exclusively on diskette, and said that keeping a hard copy is redundant and self-defeating.

A file of a report retained on a diskette would be considered a machine readable copy of that report under the final rules. Thus, a committee could retain its reports almost exclusively on diskette. However, if a committee submits a digitized image of the signature page of a report, schedule or other document to the Commission, in lieu of submitting the signed paper original, the committee must retain the signed original signature page for three years after the report is filed. Thus, in certain situations, committees will be required to maintain paper copies of portions of some reports.

#### *Additional Issues*

The Notice of Proposed Rulemaking sought additional information and comment from the regulated community on other subjects related to the electronic filing program. Specifically, the NPRM invited commenters to describe their current computer capabilities and indicate what kind of records they are currently maintaining electronically. The NPRM also asked commenters to indicate whether they intend to file their reports electronically, and to describe how they expect to benefit from the electronic filing program. Commenters were also asked to describe the technical and procedural problems they perceive with the system, and provide suggestions on how these problems might be averted.

Several commenters addressed these issues. Two commenters indicated they have PC-based systems and use software such as Microsoft Office, Microsoft Excel, WordPerfect, and Lotus 123. These commenters intend to file their reports electronically once the program has been implemented. In contrast, one software vendor said that the program would not save its clients any time or money. Thus, they would not benefit from participating in the program.

The two commenters who intend to participate in the program said they expect it to make the filing process more efficient by reducing the duplication of efforts in keeping records and submitting reports to the Commission. They hope the program will save staff time and reduce the anxiety of timely filing.

With regard to potential problems, one of these commenters expressed concern that the continued requirement that forms be submitted to state offices would dilute the benefits of the electronic filing system. See 2 U.S.C. 439, 11 CFR Part 108. This commenter also cited the delay in the availability of electronic filing as a source of frustration. Another commenter expressed concern about whether its current equipment would be compatible with the system, and whether the committee would incur significant setup costs in preparing for electronic filing. This commenter also asked whether technical support will be readily available.

Section 2 of Public Law 104-79 waives the duplicate filing requirements in states that have a system for electronically accessing and duplicating reports filed with the Commission. The Commission expects that, in the future, states will make such a system available. Over time, this will reduce the need for filers to generate paper reports to send to their state filing offices. However, as with the requirement for the preservation of reports, section 439 is nondiscretionary for states that do not have an electronic access and duplication system. Therefore, filers in those states will be required to continue generating paper reports and submitting them to their state filing offices.

The electronic filing system that the Commission will implement at the beginning of 1997 should cause very few compatibility problems. Files that have been created or are readable by an operating system compatible with Microsoft DOS 2.1 or higher, including Microsoft Windows, may be submitted under the new system. The Commission does not expect those who wish to file electronically to incur significant setup expenses. Validation software will be available, and the Commission will provide this software free of charge.

As with any computer implementation effort, technical glitches may occur. However, the Commission is committed to establishing a viable electronic filing system, and will provide whatever technical support filing committees need to make the program a success.

#### **Certification of No Effect Pursuant to 5 U.S.C. 605(b) (Regulatory Flexibility Act)**

I certify that the attached final rules, if promulgated, will not have a significant economic impact on a substantial number of small entities. The basis of this certification is that no small entities are required to submit

acceptable and unacceptable purpose descriptions to be reported by authorized committees. Paragraph (B) requires authorized committees, when itemizing certain disbursements for which reimbursements are required, to provide a brief explanation of the activity for which reimbursement is required. These provisions have been in Title 11 of the **Code of Federal Regulations** since 1980 and 1995, respectively, and were not affected by the recent statutory changes to the election cycle reporting requirements.

#### Need for Correction

As published, the final rules inadvertently omit two paragraphs describing information to be reported by authorized committees of Federal candidates.

All committees must report the purpose of itemized disbursements (i.e., those disbursements aggregating in excess of \$200). Omitted paragraph (A) contains examples of suitably specific purpose descriptions as well as examples of those descriptions that are unacceptably vague. This paragraph is inconsistent with the reporting of rules for unauthorized committees (committees other than candidate committees) in 11 CFR 104.3(b)(3).

Omitted paragraph (B) is used in administering the "personal use" rules in 11 CFR 113.1. Federal candidates are barred from using campaign funds for personal benefit. Paragraph (B) requires authorized committees of Federal candidates itemizing disbursements for which partial or total reimbursement is required under 11 CFR 113.1(g)(1)(iii)(C) or (D) to provide a brief explanation of the activity for which the reimbursement is made.

Section 801 of Title 5 of the United States Code requires Federal agencies to submit regulations to Congress. These regulations were submitted to the Speaker of the House of Representatives and the President of the Senate on November 26, 2001.

#### Certification of No Effect Pursuant to 5 U.S.C. § 605(b) [Regulatory Flexibility Act]

This correction will not have significant economic impact on a substantial number of small entities. The basis of this certification is that this correction only requires political committees to once again add information to the reports they are required to file. These regulations were in 11 CFR since 1980 and 1995, respectively, before being inadvertently omitted in 2000.

#### List of Subjects in 11 CFR Part 104

Campaign funds, Political committees and parties, Reporting and recordkeeping requirements.

Accordingly, 11 CFR part 104 is corrected by making the following correcting amendment:

#### PART 104—REPORTS BY POLITICAL COMMITTEES

1. The authority citation for part 104 continues to read as follows:

**Authority:** 2 U.S.C. 431(1), 431(8), 431(9), 432(i), 434, 438(a)(8), 438(b), 439a.

#### § 104.3 Contents of reports (2 U.S.C. 434(b), 439a).

\* \* \* \* \*

2. In § 104.3 add the following paragraphs (b)(4)(i)(A) and (B):

(b) \* \* \*

(4) \* \* \*

(i) \* \* \*

(A) As used in this paragraph, *purpose* means a brief statement or description of why the disbursement was made. Examples of statements or descriptions which meet the requirements of this paragraph include the following: dinner expenses, media, salary, polling, travel, party fees, phone banks, travel expenses, travel expense reimbursement, and catering costs. However, statements or descriptions such as *advance*, *election day expenses*, *other expenses*, *expenses*, *expense reimbursement*, *miscellaneous*, *outside services*, *get-out-the-vote* and *voter registration* would not meet the requirements of this paragraph for reporting the purpose of an expenditure.

(B) In addition to reporting the purpose described in paragraph (b)(4)(i)(A) of this section, whenever an authorized committee itemizes a disbursement that is partially or entirely a personal use for which reimbursement is required under 11 CFR 113.1(g)(1)(ii)(C) or (D), it shall provide a brief explanation of the activity for which reimbursement is required.

\* \* \* \* \*

Dated: November 26, 2001.

**Danny L. McDonald,**  
Chairman, Federal Election Commission.  
[FR Doc. 01-29679 Filed 11-29-01; 8:45 am]  
**BILLING CODE 6715-01-P**

#### FEDERAL ELECTION COMMISSION

#### 11 CFR Part 111

[Notice 2001-18]

#### Extension to Administrative Fines

**AGENCY:** Federal Election Commission.

**ACTION:** Final rule; revision of the sunset date.

**SUMMARY:** The Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the expiration date in which the Federal Election Commission (hereinafter "the Commission") may assess civil money penalties for violations of the reporting requirements of section 434(a) of the Federal Election Campaign Act (hereinafter "the Act" or "FECA").

**DATES:** Effective on December 31, 2001.

**FOR FURTHER INFORMATION CONTACT:** Ms. Rosemary C. Smith, Assistant General Counsel, or Ms. Mai T. Dinh, Attorney, 999 E Street, NW., Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

#### SUPPLEMENTARY INFORMATION:

#### Explanation and Justification

Section 640 of the Treasury and General Government Appropriations Act, 2000, Pub. L. No. 106-58, 106th Cong., 113 Stat. 430, 476-77 (1999), amended § 309(a)(4) of the FECA, 2 U.S.C. 437g(a)(4), to provide for a modified enforcement process for violations of reporting requirements. Under § 437g(a)(4)(C) of the FECA, the Commission may assess a civil money penalty for violations of the reporting requirements of 2 U.S.C. 434(a). This authority, however, was to sunset on December 31, 2001. Pub. L. No. 106-58, 106th Cong., § 640(c). Recently, § 642 of the Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the sunset date to include all reports that cover activity between January 1, 2000, to December 31, 2003.

The Commission published final rules on May 19, 2000, to implement the amendment contained in the Treasury and General Government Appropriations Act, 2000. Section 111.30 of the regulations reflects the sunset provision of Pub. L. No. 106-58, 106th Cong., § 640(c). Therefore, the Commission is issuing this final rule to amend section 111.30 to extend the application of the administrative fine regulations, 11 CFR part 111, subpart B, to include all violations relating to reports that cover the period between January 1, 2000, to December 31, 2003.

The Commission is promulgating this final rule without notice or opportunity for comment because it falls under the "good cause" exemption of the Administrative Procedures Act, 5 U.S.C. 553(b)(B). The exemption allows

Although this assessment rate is effective for an indefinite period, the Committee will continue to meet prior to or during each fiscal year to recommend a budget of expenses and consider recommendations for modification of the assessment rate. The dates and times of Committee meetings are available from the Committee or the Department. Committee meetings are open to the public and interested persons may express their views at these meetings. The Department will evaluate Committee recommendations and other available information to determine whether modification of the assessment rate is needed. Further rulemaking will be undertaken as necessary. The Committee's 1997 budget and those for subsequent fiscal years will be reviewed and, as appropriate, approved by the Department.

After consideration of all relevant material presented, including the information and recommendation submitted by the Committee and other available information, it is hereby found that this rule, as hereinafter set forth, will tend to effectuate the declared policy of the Act.

Pursuant to 5 U.S.C. 553, it is also found and determined that good cause exists for not postponing the effective date of this rule until 30 days after publication in the **Federal Register** because: (1) The Committee needs to have sufficient funds to pay its expenses which are incurred on a continuous basis; (2) the 1997 fiscal year began on January 1, 1997, and the marketing order requires that the rate of assessment for each fiscal year apply to all assessable olives handled during the appropriate crop year; (3) handlers are aware of this action which was recommended by the Committee at a public meeting and is similar to other assessment rate actions issued in past years; and (4) an interim final rule was published on this action and provided a 30-day comment period, no comments were received.

#### List of Subjects in 7 CFR Part 932

Marketing agreements, Olives, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR part 932 is amended as follows:

#### **PART 932—OLIVES GROWN IN CALIFORNIA**

Accordingly, the interim final rule amending 7 CFR part 932 which was published at 62 FR 2549 on January 17, 1997, is adopted as a final rule without change.

Dated: March 4, 1997.

**Robert C. Keeney,**

*Director, Fruit and Vegetable Division.*

[FR Doc. 97-6203 Filed 3-11-97; 8:45 am]

**BILLING CODE 3410-02-P**

### **FEDERAL ELECTION COMMISSION**

#### **11 CFR Part 111**

**[Notice 1997-3]**

#### **Adjustments to Civil Monetary Penalty Amounts**

**AGENCY:** Federal Election Commission.

**ACTION:** Final rule.

**SUMMARY:** This rule implements the Debt Collection Improvement Act of 1996 ("DCIA"), which requires the Commission to adopt a regulation adjusting for inflation the maximum amount of civil monetary penalties ("CMP") under the Federal Election Campaign Act of 1971 ("FECA" or "Act"), as amended. Any increase in CMP shall apply only to violations that occur after the effective date of this regulation.

**EFFECTIVE DATE:** March 12, 1997.

**FOR FURTHER INFORMATION CONTACT:** Ms. Susan E. Propper, Assistant General Counsel, or Rita A. Reimer, Attorney, 999 E Street, N.W., Washington, D.C. 20463, (202) 219-3690 or (800) 424-9530.

**SUPPLEMENTARY INFORMATION:** The Commission is publishing final rules implementing the Debt Collection Improvement Act of 1996, Pub. L. 104-134, section 31001(s), 110 Stat. 1321-358, 1321-373 (April 26, 1996). The DCIA amended the Federal Civil Penalties Inflation Adjustment Act "Inflation Adjustment Act", 28 U.S.C. 2461 nt., to require that the Commission adopt regulations no later than 180 days after enactment of the statute and at least once every four years thereafter, adjusting for inflation that maximum amount of the CMP's contained in the status administered by the Commission.

#### **Explanation and Justification**

A CMP is defined at section 3(2) of the Interest Adjustment Act as any penalty, fine, or other sanction that (1) is for a specific amount, or has a maximum amount, as provided by federal law; and (2) is assessed or enforced by an agency in an administrative proceedings or by federal law. This definition covers the monetary penalty provisions administered by the Commission.

The DCIA requires that these penalties be adjusted by the cost of

living adjustment set forth in section 5 of the Interest Adjustment Act. The cost of living adjustment is defined as the percentage by which the U.S. Department of Labor's Consumer Price Index ("CPI") for the month of June of the year preceding the adjustment exceeds the CPI for the month of June for the year in which the amount of the penalty was last set or adjusted pursuant to law. The adjusted amounts are then rounded in accordance with a specified rounding formula. However, the DCIA imposes a 10% maximum increase for each penalty for the first adjustment following its enactment.

#### **Part 111—Compliance Procedure (2 U.S.C. 437g, 437d(a))**

*Section 11.24 Civil Penalties (2 U.S.C. 437g(a)(5), (6), (12), 28 U.S.C. 2461 nt.*

The Commission's general CMP provisions for violations of the FECA are found at 2 U.S.C. 437g(a) (5) and (6). They provide for a civil penalty not to exceed the greater of \$5,000 or an amount equal to any contribution or expenditure involved in the violation.

These amounts are doubled in the case of a knowing and willful violation, to \$10,000 or an amount equal to 200 percent of any contribution or expenditure involved in the violation.

In addition, the Act imposes CMP's on those who violate certain of its confidentiality provisions. 2 U.S.C. 437g(a)(12). The penalty for violating this section is a fine of not more than \$2,000 or \$5,000 in the case of a knowing and willful violation.

Sections 437g(a) (5) and (6) were enacted in 1976. Pub. L. 94-283, sec. 109, 90 Stat. 475, 483 (May 11, 1976). Section 437g(a)(12) was added in 1980. Pub. L. 96-187, sec. 108.93 Stat. 1339, 1361 (Jan. 8, 1980).

The civil penalties established in those sections have not subsequently been revised. The Commission is therefore increasing the amount of each maximum CMP by 10%. As explained above, neither the CPI formula nor the rounding off formula applies to this situation, since the Interest Adjustment Act limits the first post-enactment adjustment to 10%.

Accordingly, as of March 12, 1997, the maximum civil penalties set forth in 2 U.S.C. 437g(a) (5) and (6) are increased to the greater of the amount of any contribution or expenditure involved in the violation or \$5,500. The maximum penalty for a knowing and willful violation is increased to the greater of twice the amount of any contribution or expenditure involved in the violation or \$11,000. The maximum penalty for a violation of 2 U.S.C. 437g(a)(12) is



increased to \$2,200, or \$5,500 for a knowing and willful violation. These increased CMP's shall apply only to violations that occur after March 12, 1997.

These CMP provisions do not currently appear in the Commission's rules. However, section 4(1) of the Interest Adjustment Act directs the Commission to "by regulation adjust each civil monetary penalty" by the specified percentage (emphasis added). The Commission is accordingly adopting new 11 CFR 111.24, "Civil Penalties," for this purpose. This section lists each penalty established at 2 U.S.C. 437g(a)(5), (6) and (12), adjusted upwards by 10% as required by the Interest Adjustment Act.

The Commission has no discretion in taking this action, but is doing so pursuant to a statutory mandate. These are thus technical amendments that are exempt from the notice and comment requirements of the Administrative Procedure Act at 5 U.S.C. 553(b)(B) and the legislative review requirements of 2 U.S.C. 438(d). These exemptions allow the rule to become effective immediately upon publication in the **Federal Register**. Accordingly, these amendments are effective on March 12, 1997.

#### **Certification of No Effect Pursuant to 5 U.S.C. 605(b) Regulatory Flexibility Act**

The provisions of the Regulatory Flexibility Act are not applicable to this final rule because the agency was not required to publish a notice of proposed rulemaking under 5 U.S.C. 553 or any other laws. Therefore, no regulatory flexibility analysis is required.

#### **List of Subjects in 11 CFR Part 111**

Administrative practice and procedure, Elections, Law enforcement.

For the reasons set out in the preamble, Subchapter A, Chapter I of Title 11 of the Code of Federal Regulations is amended to read as follows:

#### **PART 111—COMPLIANCE PROCEDURE (2 U.S.C. 437g, 437d(a))**

1. The authority citation for Part 111 is revised to read as follows:

**Authority:** 2 U.S.C. 437g, 437d(a), 438(a)(8); 28 U.S.C. 2461 nt.

2. Part 111 is amended by adding new section 111.24, to read as follows:

#### **§ 111.24 Civil Penalties (2 U.S.C. 437g(a)(5), (6), (12), 28 U.S.C. 2461 nt.).**

(a) Except as provided in paragraph (b) of this section, a civil penalty negotiated by the Commission or imposed by a court for a violation of the

Act or chapter 95 or 96 of title 26 shall not exceed the greater of \$5,500 or an amount equal to any contribution or expenditure involved in the violation. In the case of a knowing and willful violation, the civil penalty shall not exceed the greater of \$11,000 or an amount equal to 200% of any contribution or expenditure involved in the violation.

(b) Any Commission member or employee, or any other person, who in violation of 2 U.S.C. 437g(a)(912)(A) makes public any notification or investigation under 2 U.S.C. 437g without receiving the written consent of the person receiving such notification, or the person with respect to whom such investigation is made, shall be fined not more than \$2,200. Any such member employee, or other person who knowingly and willfully violates this provision shall be fined not more than \$5,500.

Dated: March 6, 1997.

**John Warren McGarry,**

*Chairman, Federal Election Commission.*

[FR Doc. 97-6098 Filed 3-11-97; 8:45 am]

**BILLING CODE 6715-01-M**

## **SMALL BUSINESS ADMINISTRATION**

### **13 CFR Part 121**

#### **Small Business Size Regulations; Affiliation With Investment Companies**

**AGENCY:** Small Business Administration.

**ACTION:** Final rule.

**SUMMARY:** The Small Business Administration (SBA) is amending part 121 section 103(b)(5) of its size regulations to make clear that, for purposes of the Small Business Investment Act of 1958 (SBIAct), certain venture capital firms and pension plans that make investments in small firms are not considered affiliated with those firms in which they invest. As a result, for any assistance under the SBIAct, an applicant concern is not affiliated with these investors. This final rule is in accordance with section 208 of the Small Business Programs Improvement Act of 1996.

**EFFECTIVE DATE:** March 12, 1997.

**FOR FURTHER INFORMATION CONTACT:** Gary M. Jackson, Assistant Administrator for Size Standards, 409 3rd Street, SW, Washington, DC 20416, (202) 205-6618.

**SUPPLEMENTARY INFORMATION:** Division D of the Omnibus Consolidated Appropriations Act for Fiscal Year 1997 (Public Law 104-208) is the Small Business Programs Improvement Act of 1996 (SBPIAct), which amended the

Small Business Investment Act of 1958 (SBIAct). Title II, Section 208 of the SBPIAct amends the definition of "small business concern" to clarify that, for purposes of the SBIAct, a business which receives an investment from certain types of venture capital firms and pension plans shall not be considered affiliates of one another. Specifically, section 208 of the amendment provides that such investments shall not cause a business concern to be deemed not independently owned and operated; and further, the investments shall be disregarded in determining whether or not a business is a small concern under the SBA's size standards. The types of venture capital and pension plans covered by this amendment are listed in § 121.103(b)(5), and include venture capital firms, investment companies, small business investment companies, employee welfare benefit plans or pension plans, and trusts, foundations, or endowments exempt from Federal income taxation.

The SBA had recently revised its Small Business Size Regulation (**Federal Register**, Wednesday, January 31, 1996, Vol. 61, No. 21 FR 3280) to extend its exclusion from affiliation for SBICs that invests in small businesses to include venture capital firms, pension funds, and certain charitable entities exempt from Federal taxation, as long as the investors do not control the concern. For purposes of that provision, control was defined in § 107.865 of this part. This rule eliminates the condition that affiliation between certain investors and small business would be found present if control by an investor existed over the small business. However, SBICs continue to be restricted in the exercise of control over a small business they invest in as stated in § 107.865 of this part.

Also, under that regulation and prior to this legislation, the exclusion from affiliation had been limited to applicants for assistance under the Small Business Investment Company (SBIC) Program, and only, as stated above, where the investor(s) did not control the concern. In addition to the SBIC Program, the SBIAct has established a number of other SBA financial and management assistance programs, namely: the Surety Bond Guarantee Program, the Certified State and Local Development Company Program the Lease Guarantees and the Pollution Control Guarantee Program. While the SBIAct may authorize all of these programs, assistance under the Lease Guarantee and the Pollution Control Guarantee Programs has not been available for several years. Nor



acceptable and unacceptable purpose descriptions to be reported by authorized committees. Paragraph (B) requires authorized committees, when itemizing certain disbursements for which reimbursements are required, to provide a brief explanation of the activity for which reimbursement is required. These provisions have been in Title 11 of the **Code of Federal Regulations** since 1980 and 1995, respectively, and were not affected by the recent statutory changes to the election cycle reporting requirements.

#### Need for Correction

As published, the final rules inadvertently omit two paragraphs describing information to be reported by authorized committees of Federal candidates.

All committees must report the purpose of itemized disbursements (i.e., those disbursements aggregating in excess of \$200). Omitted paragraph (A) contains examples of suitably specific purpose descriptions as well as examples of those descriptions that are unacceptably vague. This paragraph is inconsistent with the reporting of rules for unauthorized committees (committees other than candidate committees) in 11 CFR 104.3(b)(3).

Omitted paragraph (B) is used in administering the "personal use" rules in 11 CFR 113.1. Federal candidates are barred from using campaign funds for personal benefit. Paragraph (B) requires authorized committees of Federal candidates itemizing disbursements for which partial or total reimbursement is required under 11 CFR 113.1(g)(1)(iii)(C) or (D) to provide a brief explanation of the activity for which the reimbursement is made.

Section 801 of Title 5 of the United States Code requires Federal agencies to submit regulations to Congress. These regulations were submitted to the Speaker of the House of Representatives and the President of the Senate on November 26, 2001.

#### Certification of No Effect Pursuant to 5 U.S.C. § 605(b) [Regulatory Flexibility Act]

This correction will not have significant economic impact on a substantial number of small entities. The basis of this certification is that this correction only requires political committees to once again add information to the reports they are required to file. These regulations were in 11 CFR since 1980 and 1995, respectively, before being inadvertently omitted in 2000.

#### List of Subjects in 11 CFR Part 104

Campaign funds, Political committees and parties, Reporting and recordkeeping requirements.

Accordingly, 11 CFR part 104 is corrected by making the following correcting amendment:

#### PART 104—REPORTS BY POLITICAL COMMITTEES

1. The authority citation for part 104 continues to read as follows:

**Authority:** 2 U.S.C. 431(1), 431(8), 431(9), 432(i), 434, 438(a)(8), 438(b), 439a.

#### § 104.3 Contents of reports (2 U.S.C. 434(b), 439a).

\* \* \* \* \*

2. In § 104.3 add the following paragraphs (b)(4)(i)(A) and (B):

(b) \* \* \*  
(4) \* \* \*  
(i) \* \* \*

(A) As used in this paragraph, *purpose* means a brief statement or description of why the disbursement was made. Examples of statements or descriptions which meet the requirements of this paragraph include the following: dinner expenses, media, salary, polling, travel, party fees, phone banks, travel expenses, travel expense reimbursement, and catering costs. However, statements or descriptions such as *advance*, *election day expenses*, *other expenses*, *expenses*, *expense reimbursement*, *miscellaneous*, *outside services*, *get-out-the-vote* and *voter registration* would not meet the requirements of this paragraph for reporting the purpose of an expenditure.

(B) In addition to reporting the purpose described in paragraph (b)(4)(i)(A) of this section, whenever an authorized committee itemizes a disbursement that is partially or entirely a personal use for which reimbursement is required under 11 CFR 113.1(g)(1)(ii)(C) or (D), it shall provide a brief explanation of the activity for which reimbursement is required.

\* \* \* \* \*

Dated: November 26, 2001.

**Danny L. McDonald,**  
*Chairman, Federal Election Commission.*  
[FR Doc. 01-29679 Filed 11-29-01; 8:45 am]  
**BILLING CODE 6715-01-P**

#### FEDERAL ELECTION COMMISSION

#### 11 CFR Part 111

#### [Notice 2001-18]

#### Extension to Administrative Fines

**AGENCY:** Federal Election Commission.

**ACTION:** Final rule; revision of the sunset date.

**SUMMARY:** The Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the expiration date in which the Federal Election Commission (hereinafter "the Commission") may assess civil money penalties for violations of the reporting requirements of section 434(a) of the Federal Election Campaign Act (hereinafter "the Act" or "FECA").

**DATES:** Effective on December 31, 2001.

**FOR FURTHER INFORMATION CONTACT:** Ms. Rosemary C. Smith, Assistant General Counsel, or Ms. Mai T. Dinh, Attorney, 999 E Street, NW., Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

#### SUPPLEMENTARY INFORMATION:

#### Explanation and Justification

Section 640 of the Treasury and General Government Appropriations Act, 2000, Pub. L. No. 106-58, 106th Cong., 113 Stat. 430, 476-77 (1999), amended § 309(a)(4) of the FECA, 2 U.S.C. 437g(a)(4), to provide for a modified enforcement process for violations of reporting requirements. Under § 437g(a)(4)(C) of the FECA, the Commission may assess a civil money penalty for violations of the reporting requirements of 2 U.S.C. 434(a). This authority, however, was to sunset on December 31, 2001. Pub. L. No. 106-58, 106th Cong., § 640(c). Recently, § 642 of the Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the sunset date to include all reports that cover activity between January 1, 2000, to December 31, 2003.

The Commission published final rules on May 19, 2000, to implement the amendment contained in the Treasury and General Government Appropriations Act, 2000. Section 111.30 of the regulations reflects the sunset provision of Pub. L. No. 106-58, 106th Cong., § 640(c). Therefore, the Commission is issuing this final rule to amend section 111.30 to extend the application of the administrative fine regulations, 11 CFR part 111, subpart B, to include all violations relating to reports that cover the period between January 1, 2000, to December 31, 2003.

The Commission is promulgating this final rule without notice or opportunity for comment because it falls under the "good cause" exemption of the Administrative Procedures Act, 5 U.S.C. 553(b)(B). The exemption allows

# Rules and Regulations

Federal Register

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Wednesday, April 30, 1997

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

## FEDERAL ELECTION COMMISSION

### 11 CFR Part 104

[Notice 1997-7]

#### Recordkeeping and Reporting by Political Committees: Best Efforts

**AGENCY:** Federal Election Commission.

**ACTION:** Final Rule; Transmittal of regulations to Congress.

**SUMMARY:** The Federal Election Commission is revising its regulations implementing the requirement of the Federal Election Campaign Act ("FECA") that treasurers of political committees exercise best efforts to obtain, maintain and report the complete identification of each contributor whose contributions aggregate more than \$200 per calendar year. The new rules change the required statement that must accompany solicitations for contributions. The revisions also state that separate segregated funds must report contributor information in the possession of their connected organizations. Further information is provided in the supplementary information which follows.

**DATES:** Further action, including the announcement of an effective date, will be taken after these regulations have been before Congress for 30 legislative days pursuant to 2 U.S.C. 438(d). A document announcing the effective date will be published in the **Federal Register**.

**FOR FURTHER INFORMATION CONTACT:** Ms. Susan E. Propper, Assistant General Counsel, or Ms. Rosemary C. Smith, Senior Attorney, 999 E Street N.W., Washington, D.C. 20463, (202) 219-3690 or toll free (800) 424-9530.

**SUPPLEMENTARY INFORMATION:** The Commission is publishing today the text of revisions to its regulations at 11 CFR 104.7(b)(1) and (b)(3), which set forth

steps needed to ensure that political committees use their best efforts to obtain, maintain and submit the names, addresses, occupations and employers of contributors whose donations exceed \$200 per year. These regulations implement section 432(i) of the Federal Election Campaign Act of 1971, as amended ("the Act" or "FECA"). 2 U.S.C. 432(i).

On October 9, 1996 the Commission issued a Notice of Proposed Rulemaking (NPRM) in which it sought comments on proposed revisions to these regulations. 61 F.R. 52901 (Oct. 9, 1996). The comment period was subsequently extended to January 31, 1997. 61 F.R. 68688 (Dec. 30, 1996). Written comments were received from the Center for Responsive Politics (CRP), the Republican National Committee (RNC), Washington State Coalition Against Violent Crime (WSCAV), the Internal Revenue Service (IRS), Hervey W. Herron, and a joint comment from Seafarers Political Activity Donation (SPAD) and Seafarers International Union (SIU).

Since these rules are not major rules within the meaning of 5 U.S.C. 804(2), the FECA controls the legislative review process. See 5 U.S.C. 801(a)(4), Small Business Regulatory Reform Enforcement Fairness Act, Public Law 104-121, section 251, 110 Stat. 857, 869 (1996). Section 438(d) of Title 2, United States Code, requires that any rules or regulations prescribed by the Commission to carry out the provisions of Title 2 of the United States Code be transmitted to the Speaker of the House of Representatives and the President of the Senate 30 legislative days before they are finally promulgated. These regulations were transmitted to Congress on April 25, 1997.

#### Explanation and Justification

The FECA specifies that reports filed by political committees disclose "the identification of each \* \* \* person (other than a political committee) who makes a contribution to the reporting committee \* \* \* whose contribution or contributions [aggregate over \$200 per calendar year] \* \* \* together with the date and amount of any such contribution." 2 U.S.C. 434(b)(3)(A). For an individual, "identification" means his or her full name, mailing address, occupation and employer. 2 U.S.C. 431(13). Treasurers of political

committees must be able to show they have exercised their best efforts to obtain, maintain and report this information. 2 U.S.C. 432(i).

The Commission's regulations at 11 CFR 104.7(b), which implement these requirements of the FECA, are being revised to resolve two issues. The first concerns the phrasing of the request for contributor identifications and other information which must be included in all political committee solicitations. The second concerns the measures separate segregated funds should take if they do not receive the necessary information from contributors.

#### Section 104.7(b)(1)

The Commission's current regulations at 11 CFR 104.7(b)(1) require the inclusion of the following statement on all solicitations: "Federal law requires political committees to report the name, mailing address, occupation and name of employer for each individual whose contributions aggregate in excess of \$200 in a calendar year." Recently, the Court of Appeals for the D.C. Circuit concluded that this mandatory statement is inaccurate and misleading. *Republican National Committee v. Federal Election Commission*, 76 F.3d 400, 406 (D.C. Cir. 1996), cert. denied, 117 S.Ct. 682 (1997). The court pointed out that the FECA only requires committees to use their best efforts to collect the information and to report whatever information donors choose to provide. Other provisions of the "best efforts" regulations were upheld by the court.

Consequently, the NPRM proposed revising paragraph (b)(1) of section 104.7 by requiring political committees to include in their solicitations an accurate statement of the statutory requirements. The notice indicated that either of the following two examples would satisfy this requirement, but would not be the only allowable statements: (1) "Federal law requires us to use our best efforts to collect and report the name, mailing address, occupation and name of employer of individuals whose contributions exceed \$200 in a calendar year." (2) "To comply with Federal law, we must use best efforts to obtain, maintain, and submit the name, mailing address, occupation and name of employer of individuals whose contributions exceed \$200 per calendar year." Alternatively,

comments were also sought on whether it would be preferable to simply require all political committees to use one or the other of these two formulations.

The public comments reflected a variety of reactions to this proposed rule. Two commenters misunderstood the proposed rule in that they believed political committees would be penalized if they fail to use one of the FEC-prescribed statements. As explained, below, that would not be the case, as long as political committees use an accurate statement of the law. One commenter expressed concerns as to the statutory authority and constitutionality of the Commission's proposed rule. These considerations have already been resolved in *Republican National Committee v. Federal Election Commission*, 76 F.3d 400, 406 (D.C. Cir. 1996), cert. denied, 117 S.Ct. 682 (1997). Another commenter expressed general concerns regarding the impact of contributions in political campaigns and urged various legislative changes. The Internal Revenue Service found no conflict between the FEC's proposed rules and the Internal Revenue Code or IRS rules promulgated thereunder.

Another commenter urged the adoption of stronger measures, such as notifying contributors that their contributions will not be deposited and must be returned if they do not provide complete contributor identifications. This commenter believes that differences in reporting rates are attributable to variations in the seriousness of different committees' efforts to comply with the statutory requirements. It is concerned that the Commission's present best efforts rules are inadequate in ensuring sufficient disclosure. The Commission has previously considered and rejected this approach because it is beyond the statutory authority granted to the Commission at this time. See Explanation and Justification 58 F.R. 55727-28 (Oct. 27, 1993). The commenter also urged the Commission to prohibit the use of "vague" descriptions of occupations such as "business owner," "chairman," "administrator," "manager," and "self-employed." The Commission is reluctant to bar the use of the titles the commenter believes to be vague because many of them are commonly-used official titles which provide meaningful information in combination with the name of the contributor's employer.

In the final rules which follow, paragraph (b)(1) of section 104.7 states that solicitations must contain an accurate statement, and provides two examples of statements that will be acceptable. However, for the reasons

raised by the commenters, the Commission has decided not to require political committees to use only the statements listed. Consequently, the final regulations have been revised to allow for the use of other accurate statements of federal law regarding best efforts. Thus, the Commission has made every effort to ensure that committees have as much flexibility as possible. Nevertheless, please note that statements such as "Federal law requires political committees to ask for this information," without more, do not provide contributors with a complete statement regarding Federal law, and hence, do not meet the requirements of revised 11 CFR 104.7(b)(1).

#### Section 104.7(b)(3)

The NPRM proposed revising paragraph (b)(3) of section 104.7 to indicate that separate segregated funds are expected to report contributor information in the possession of their connected organizations. This includes corporations (including corporations without capital stock), labor organizations, trade associations, cooperatives and membership organizations. In some situations, it may be more efficient for separate segregated funds to obtain the missing contributor information from their connected organizations than from the contributors.

One commenter supported this proposal. The Internal Revenue Service found no conflict between the FEC's proposed rules and the Internal Revenue Code or IRS rules promulgated thereunder. Another commenter expressed concerns that this proposal would alter the resolution reached by the Commission in Advisory Opinion 1996-25, issued to the Seafarers Political Activity Donation and its connected organization, the Seafarers International Union.

The Commission has decided to add the proposed new language to 11 CFR 104.7(b)(3). This will ensure that contributor identifications are reported as accurately and as completely as possible. Since many separate segregated funds are already reporting most, if not all, of this information, the effect of this provision should be minimal. Given that connected organizations establish, administer and financially support their separate segregated funds, it is reasonable for them to provide necessary information in their records when the contributors do not do so. Please note that it is not the Commission's intention at this time to modify or supersede AO 1996-25. Thus, the procedures described in AO 1996-25 will continue to satisfy the

revised best efforts regulations for those entities entitled to rely on that opinion.

#### Certification of no Effect Pursuant to 5 U.S.C. 605(b) [Regulatory Flexibility Act]

The attached final rules will not, if promulgated, have a significant economic impact on a substantial number of small entities. The basis for this certification is that a portion of the attached rules will provide any small entities affected with greater flexibility in complying with the best efforts requirements of the Act by giving them new options as to the statement to be included in their solicitations. Small entities will be affected by the remaining portion of the attached rules only if they are separate segregated funds. Experience has shown that the large majority of these separate segregated funds are already in compliance with the requirements on reporting contributor information. Thus, obtaining missing contributor information from their connected organizations will not have a significant economic effect on a substantial number of these small entities.

#### List of Subjects in 11 CFR Part 104

Campaign funds, Political candidates, Political committees and parties, Reporting requirements.

For the reasons set out in the preamble, Subchapter A, Chapter I of Title 11 of the *Code of Federal Regulations* is amended as follows:

#### PART 104—REPORTS BY POLITICAL COMMITTEES (2 U.S.C. 434)

1. The authority citation for Part 104 continues to read as follows:

**Authority:** 2 U.S.C. 431(1), 431(8), 431(9), 432(i), 434, 438(a)(8), 438(b).

2. Section 104.7 is amended by revising paragraphs (b)(1) and (b)(3) to read as follows:

#### § 104.7 Best efforts (2 U.S.C. 432(i)).

\* \* \* \* \*

(b) \* \* \*

(1) All written solicitations for contributions include a clear request for the contributor's full name, mailing address, occupation and name of employer, and include an accurate statement of Federal law regarding the collection and reporting of individual contributor identifications. The following are examples of acceptable statements, but are not the only allowable statements: "Federal law requires us to use our best efforts to collect and report the name, mailing address, occupation and name of employer of individuals whose

acceptable and unacceptable purpose descriptions to be reported by authorized committees. Paragraph (B) requires authorized committees, when itemizing certain disbursements for which reimbursements are required, to provide a brief explanation of the activity for which reimbursement is required. These provisions have been in Title 11 of the **Code of Federal Regulations** since 1980 and 1995, respectively, and were not affected by the recent statutory changes to the election cycle reporting requirements.

#### Need for Correction

As published, the final rules inadvertently omit two paragraphs describing information to be reported by authorized committees of Federal candidates.

All committees must report the purpose of itemized disbursements (i.e., those disbursements aggregating in excess of \$200). Omitted paragraph (A) contains examples of suitably specific purpose descriptions as well as examples of those descriptions that are unacceptably vague. This paragraph is inconsistent with the reporting of rules for unauthorized committees (committees other than candidate committees) in 11 CFR 104.3(b)(3).

Omitted paragraph (B) is used in administering the "personal use" rules in 11 CFR 113.1. Federal candidates are barred from using campaign funds for personal benefit. Paragraph (B) requires authorized committees of Federal candidates itemizing disbursements for which partial or total reimbursement is required under 11 CFR 113.1(g)(1)(iii)(C) or (D) to provide a brief explanation of the activity for which the reimbursement is made.

Section 801 of Title 5 of the United States Code requires Federal agencies to submit regulations to Congress. These regulations were submitted to the Speaker of the House of Representatives and the President of the Senate on November 26, 2001.

#### Certification of No Effect Pursuant to 5 U.S.C. § 605(b) [Regulatory Flexibility Act]

This correction will not have significant economic impact on a substantial number of small entities. The basis of this certification is that this correction only requires political committees to once again add information to the reports they are required to file. These regulations were in 11 CFR since 1980 and 1995, respectively, before being inadvertently omitted in 2000.

#### List of Subjects in 11 CFR Part 104

Campaign funds, Political committees and parties, Reporting and recordkeeping requirements.

Accordingly, 11 CFR part 104 is corrected by making the following correcting amendment:

#### PART 104—REPORTS BY POLITICAL COMMITTEES

1. The authority citation for part 104 continues to read as follows:

**Authority:** 2 U.S.C. 431(1), 431(8), 431(9), 432(i), 434, 438(a)(8), 438(b), 439a.

#### § 104.3 Contents of reports (2 U.S.C. 434(b), 439a).

\* \* \* \* \*

2. In § 104.3 add the following paragraphs (b)(4)(i)(A) and (B):

(b) \* \* \*  
(4) \* \* \*  
(i) \* \* \*

(A) As used in this paragraph, *purpose* means a brief statement or description of why the disbursement was made. Examples of statements or descriptions which meet the requirements of this paragraph include the following: dinner expenses, media, salary, polling, travel, party fees, phone banks, travel expenses, travel expense reimbursement, and catering costs. However, statements or descriptions such as *advance*, *election day expenses*, *other expenses*, *expenses*, *expense reimbursement*, *miscellaneous*, *outside services*, *get-out-the-vote* and *voter registration* would not meet the requirements of this paragraph for reporting the purpose of an expenditure.

(B) In addition to reporting the purpose described in paragraph (b)(4)(i)(A) of this section, whenever an authorized committee itemizes a disbursement that is partially or entirely a personal use for which reimbursement is required under 11 CFR 113.1(g)(1)(ii)(C) or (D), it shall provide a brief explanation of the activity for which reimbursement is required.

\* \* \* \* \*

Dated: November 26, 2001.

**Danny L. McDonald,**  
*Chairman, Federal Election Commission.*  
[FR Doc. 01-29679 Filed 11-29-01; 8:45 am]  
**BILLING CODE 6715-01-P**

#### FEDERAL ELECTION COMMISSION

#### 11 CFR Part 111

#### [Notice 2001-18]

#### Extension to Administrative Fines

**AGENCY:** Federal Election Commission.

**ACTION:** Final rule; revision of the sunset date.

**SUMMARY:** The Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the expiration date in which the Federal Election Commission (hereinafter "the Commission") may assess civil money penalties for violations of the reporting requirements of section 434(a) of the Federal Election Campaign Act (hereinafter "the Act" or "FECA").

**DATES:** Effective on December 31, 2001.

**FOR FURTHER INFORMATION CONTACT:** Ms. Rosemary C. Smith, Assistant General Counsel, or Ms. Mai T. Dinh, Attorney, 999 E Street, NW., Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

#### SUPPLEMENTARY INFORMATION:

#### Explanation and Justification

Section 640 of the Treasury and General Government Appropriations Act, 2000, Pub. L. No. 106-58, 106th Cong., 113 Stat. 430, 476-77 (1999), amended § 309(a)(4) of the FECA, 2 U.S.C. 437g(a)(4), to provide for a modified enforcement process for violations of reporting requirements. Under § 437g(a)(4)(C) of the FECA, the Commission may assess a civil money penalty for violations of the reporting requirements of 2 U.S.C. 434(a). This authority, however, was to sunset on December 31, 2001. Pub. L. No. 106-58, 106th Cong., § 640(c). Recently, § 642 of the Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the sunset date to include all reports that cover activity between January 1, 2000, to December 31, 2003.

The Commission published final rules on May 19, 2000, to implement the amendment contained in the Treasury and General Government Appropriations Act, 2000. Section 111.30 of the regulations reflects the sunset provision of Pub. L. No. 106-58, 106th Cong., § 640(c). Therefore, the Commission is issuing this final rule to amend section 111.30 to extend the application of the administrative fine regulations, 11 CFR part 111, subpart B, to include all violations relating to reports that cover the period between January 1, 2000, to December 31, 2003.

The Commission is promulgating this final rule without notice or opportunity for comment because it falls under the "good cause" exemption of the Administrative Procedures Act, 5 U.S.C. 553(b)(B). The exemption allows

**Authority:** 7 U.S.C. 901 *et seq.*, 1921 *et seq.*

2. In § 1753.6, a new sentence is added at the end of paragraph (c) to read as follows:

**§ 1753.6 Standards, specifications, and general requirements.**

\* \* \* \* \*

(c) \* \* \* The materials and equipment must be year 2000 compliant, as defined in 7 CFR 1735.22(e).

\* \* \* \* \*

Dated: August 12, 1998.

**Jill Long Thompson,**

*Under Secretary, Rural Development.*

[FR Doc. 98-22931 Filed 8-26-98; 8:45 am]

BILLING CODE 3410-15-P

## FEDERAL ELECTION COMMISSION

### 11 CFR Parts 9003 and 9033

[Notice 1998-13]

#### Electronic Filing of Reports by Publicly Financed Presidential Primary and General Election Candidates

**AGENCY:** Federal Election Commission.

**ACTION:** Final rule and transmittal of regulations to Congress.

**SUMMARY:** The Commission is issuing regulations concerning the electronic filing of reports by publicly financed Presidential primary and general election candidates. The rules specify that if Presidential candidates and their authorized committees have computerized their campaign finance records, they must agree to participate in the Commission's recently established electronic filing program as a condition of voluntarily accepting federal funding. These regulations implement the provisions of the Presidential Election Campaign Fund Act ("Fund Act") and the Presidential Primary Matching Payment Account Act ("Matching Payment Act"), which establish eligibility requirements for Presidential candidates seeking public financing, as well as Public Law 104-79, which amended the reporting provisions of the Federal Election Campaign Act of 1971 ("FECA"). Further information is provided in the supplementary information which follows.

**DATES:** Further action, including the publication of a document in the **Federal Register** announcing an effective date, will be taken after these regulations have been before Congress for 30 legislative days pursuant to 26 U.S.C. 9009(c) and 9039(c).

**FOR FURTHER INFORMATION CONTACT:** Ms. Susan E. Propper, Assistant General Counsel, or Ms. Rosemary C. Smith, Senior Attorney, 999 E Street, N.W., Washington, D.C. 20463, (202) 694-1650 or toll free (800) 424-9530.

**SUPPLEMENTARY INFORMATION:** The Commission is publishing today the final text of revisions to its regulations at 11 CFR 9003.1(b)(11) and 9033.1(b)(13), which set forth conditions that Presidential candidates agree to abide by in exchange for receiving public financing for their campaigns. The amendments indicate that Presidential candidates and their authorized committees must agree to file their campaign finance reports electronically. On June 17, 1998, the Commission issued a Notice of Proposed Rulemaking (NPRM) in which it sought comments on proposed revisions to these regulations. 63 F.R. 33012 (June 17, 1998). Written comments were received from the Internal Revenue Service and Bob DeWeese of Seattle, Washington in response to the NPRM. Other aspects of the public financing process for Presidential primary and general elections will be addressed separately in a forthcoming Notice of Proposed Rulemaking.

Since these rules are not major rules within the meaning of 5 U.S.C. 804(2), the Fund Act and Matching Payment Act control the legislative review process. See 5 U.S.C. 801(a)(4), Small Business Regulatory Reform Enforcement Fairness Act, Pub. L. No. 104-121, section 251, 110 Stat. 857, 869 (1996). Section 9009(c) and 9039(c) of Title 26, United States Code, require that any rules or regulations prescribed by the Commission to carry out the provisions of Title 26 of the United States Code be transmitted to the Speaker of the House of Representatives and the President of the Senate 30 legislative days before they are finally promulgated. These regulations were transmitted to Congress on August 21, 1998.

#### Explanation and Justification

*§ 9003.1 Candidate and committee agreements; and § 9033.1 Candidate and committee agreements*

Recently, the Federal Election Commission implemented a system permitting political committees and other persons to file reports of campaign finance activity via computer diskettes and direct transmission of electronic data. See Explanation and Justification of 11 CFR 104.18, 61 F.R. 42371 (Aug. 15, 1996). The Commission was required to make the electronic filing

option available for all "report[s], designation[s], or statement[s] required by this Act to be filed with the Commission." Public Law 104-79, 109 Stat. 791 (1995) (adding 2 U.S.C. 434(a)(11)). The goals of the new system include the enhancement of on-line access to reports on file with the Commission, the reduction of paper filing and manual processing, and the promotion of more efficient and more cost-effective methods of operation for the filers and for the Commission. While the Commission encourages all political committees and other persons to file their reports electronically, under Public Law 104-79, participation in the Commission's electronic filing program is voluntary.

With the advent of the first Presidential election cycle since the implementation of the new electronic filing system, the Commission published a NPRM seeking comments on modifying its candidate agreement regulations at 11 CFR 9003.1 and 9033.1 to provide that certain Presidential committees must agree to file their campaign finance reports electronically as a condition of voluntarily accepting public funding.

Two comments were received in response to the NPRM. The Internal Revenue Service stated that it does not anticipate that the changes to the FEC's rules will conflict with the Internal Revenue Code or any rules or regulations thereunder. The other comment strongly urged the Commission to adopt the proposed changes to greatly improve the Commission's ability to provide timely and useful disclosure data to the public and to ensure ongoing campaign compliance by candidates throughout the campaign. This commenter pointed out that when the House of Representatives debated another portion of H.R. 2527 (Public Law 104-79), several members extolled the bill's elimination of the three day delay for paper filings traveling from the Clerk of the House to the Commission, thereby demonstrating the importance of timeliness in the public availability of campaign finance reports. This commenter also believed that change in the Commission's rules would enhance the accuracy and usefulness of the information disclosed, improve the news media's ability to file timely stories on candidates' finances, and assist Commission staff in monitoring compliance with campaign finance laws during the campaign.

The Commission has decided to proceed with the changes to the candidate agreement regulations that were described in the NPRM.

Consequently, the final rules which follow establish electronic filing as an additional prerequisite for the receipt of public funding. Please note, however, this new language only applies to the authorized committees of Presidential primary and general election candidates that decide to rely upon a computer system to maintain and use their campaign finance data. Currently, Presidential candidates whose committees have computerized their financial records must agree to produce magnetic tapes or diskettes of receipts, disbursements and other data prior to the beginning of audit fieldwork. 11 CFR 9003.1(b)(4) and 9033.1(b)(5); see also, 11 CFR 9003.6, 9007.1(b)(1), 9033.12, and 9038.1(b)(1). Thus, the revised rules, like the current rules, do not burden campaign committees with new requirements if they are not computerized.

Electronic filing of Presidential committees' reports is intended to save a substantial amount of time and Commission resources that would otherwise be devoted to inputting these reports into the FEC's database. Although the number of political committees affected by this amendment to the regulations is relatively small, their reports can be voluminous, given the substantial number of contributions and expenditures listed in each report. Thus, these changes to the candidate agreement rules are expected to speed the reporting of campaign finance information and enhance public disclosure.

Previously, the Commission issued technical specifications for reports filed electronically in its Electronic Filing Specification Requirements (EFSR), which is available free of charge. The EFSR contains technical specifications, including file requirements, for reports filed by Presidential campaign committees. However, the electronic filing software available from the FEC at no charge will not generate the forms used by Presidential committees. On request, the Commission's Data System Development Division will work with committees to assist them in generating the proper output. Any additional costs entailed may be treated and paid for like any other compliance cost pursuant to 11 CFR 9003.3(a)(2)(i)(B) and (F) or 9035.1(c)(1) if incurred after January 1, 1999. The NPRM noted that there are a number of differences between the specifications contained in the EFSR and those found in the Computerized Magnetic Media Requirements (CMMR) used by publicly financed committees to submit financial data for the

Commission's audit and to submit digital images of contributions for matching funds. These differences are necessitated, in part, by the different purposes for which each of these databases are used. Neither of the comments received suggested ways in which these two standards could be better synchronized.

The revisions to the candidate agreement regulations do not require electronic filing for statements of candidacy or statements of organization. While Presidential candidates and their authorized committees may file these statements electronically, if they wish, these forms have not been included in the free software available from the FEC. Also please note that the candidate agreements, themselves, should not be submitted in electronic form under the changes to 11 CFR 9003.1 and 9033.1 which follow.

Congress intended the new system of electronic filing to be voluntary. 141 Cong. Rec. H 12140-41 (daily ed. Nov. 13, 1995) (statements of Reps. Thomas, Hoyer, Fazio and Livingston). The Commission believes that a candidate's agreement to file campaign finance reports electronically in exchange for public funding is a voluntary decision materially indistinguishable from the candidate's voluntary decision to abide by the spending limits in exchange for federal funds. For this reason, it appears that the rules set forth below are within the scope of the Commission's authority under the Fund Act, the Matching Payment Act, the FECA, and Public Law 104-79.

**Certification of No Effect Pursuant to 5 U.S.C. 605(b) [Regulatory Flexibility Act]**

The attached final rules will not have a significant economic impact on a substantial number of small entities. The basis for this certification is that very few small entities will be affected by these rules, and the cost is not expected to be significant. Further, any small entities affected have voluntarily chosen to receive public funding and to comply with the requirements of the Presidential Election Campaign Fund Act or the Presidential Primary Matching Payment Account Act.

**List of Subjects in 11 CFR Parts 9003 and 9033**

Campaign funds, Elections, Political candidates.

For the reasons set out in the preamble, Subchapters E and F of Chapter I of Title 11 of the Code of

*Federal Regulations* is amended as follows:

**PART 9003—ELIGIBILITY FOR PAYMENTS**

1. The authority citation for 11 CFR Part 9003 continues to read as follows:

**Authority:** 26 U.S.C. 9003 and 9009(b).

2. In § 9003.1, the introductory text of paragraph (b) is republished, and new paragraph (b)(11) is added to read as follows:

**§ 9003.1 Candidate and committee agreements.**

\* \* \* \* \*

(b) *Conditions.* The candidates shall:

\* \* \* \* \*

(11) Agree that they and their authorized committee(s) shall file all reports with the Commission in an electronic format that meets the requirements of 11 CFR 104.18 if the candidate or the candidate's authorized committee(s) maintain or use computerized information containing any of the information described in 11 CFR 104.3.

**PART 9033—ELIGIBILITY FOR PAYMENTS**

3. The authority citation for Part 9033 continues to read as follows:

**Authority:** 26 U.S.C. 9003(e), 9033 and 9039(b).

4. In § 9033.1, the introductory text of paragraph (b) is republished, and new paragraph (b)(13) is added to read as follows:

**§ 9033.1 Candidate and committee agreements.**

\* \* \* \* \*

(b) *Conditions.* The candidate shall agree that:

\* \* \* \* \*

(13) The candidate and the candidate's authorized committee(s) will file all reports with the Commission in an electronic format that meets the requirements of 11 CFR 104.18 if the candidate or the candidate's authorized committee(s) maintain or use computerized information containing any of the information described in 11 CFR 104.3.

Dated: August 21, 1998.

**Joan D. Aikens,**

*Chairman, Federal Election Commission.*

[FR Doc. 98-22967 Filed 8-26-98; 8:45 am]

**BILLING CODE 6715-01-P**

acceptable and unacceptable purpose descriptions to be reported by authorized committees. Paragraph (B) requires authorized committees, when itemizing certain disbursements for which reimbursements are required, to provide a brief explanation of the activity for which reimbursement is required. These provisions have been in Title 11 of the **Code of Federal Regulations** since 1980 and 1995, respectively, and were not affected by the recent statutory changes to the election cycle reporting requirements.

#### Need for Correction

As published, the final rules inadvertently omit two paragraphs describing information to be reported by authorized committees of Federal candidates.

All committees must report the purpose of itemized disbursements (i.e., those disbursements aggregating in excess of \$200). Omitted paragraph (A) contains examples of suitably specific purpose descriptions as well as examples of those descriptions that are unacceptably vague. This paragraph is inconsistent with the reporting of rules for unauthorized committees (committees other than candidate committees) in 11 CFR 104.3(b)(3).

Omitted paragraph (B) is used in administering the "personal use" rules in 11 CFR 113.1. Federal candidates are barred from using campaign funds for personal benefit. Paragraph (B) requires authorized committees of Federal candidates itemizing disbursements for which partial or total reimbursement is required under 11 CFR 113.1(g)(1)(iii)(C) or (D) to provide a brief explanation of the activity for which the reimbursement is made.

Section 801 of Title 5 of the United States Code requires Federal agencies to submit regulations to Congress. These regulations were submitted to the Speaker of the House of Representatives and the President of the Senate on November 26, 2001.

#### Certification of No Effect Pursuant to 5 U.S.C. § 605(b) [Regulatory Flexibility Act]

This correction will not have significant economic impact on a substantial number of small entities. The basis of this certification is that this correction only requires political committees to once again add information to the reports they are required to file. These regulations were in 11 CFR since 1980 and 1995, respectively, before being inadvertently omitted in 2000.

#### List of Subjects in 11 CFR Part 104

Campaign funds, Political committees and parties, Reporting and recordkeeping requirements.

Accordingly, 11 CFR part 104 is corrected by making the following correcting amendment:

#### PART 104—REPORTS BY POLITICAL COMMITTEES

1. The authority citation for part 104 continues to read as follows:

**Authority:** 2 U.S.C. 431(1), 431(8), 431(9), 432(i), 434, 438(a)(8), 438(b), 439a.

#### § 104.3 Contents of reports (2 U.S.C. 434(b), 439a).

\* \* \* \* \*

2. In § 104.3 add the following paragraphs (b)(4)(i)(A) and (B):

(b) \* \* \*  
(4) \* \* \*  
(i) \* \* \*

(A) As used in this paragraph, *purpose* means a brief statement or description of why the disbursement was made. Examples of statements or descriptions which meet the requirements of this paragraph include the following: dinner expenses, media, salary, polling, travel, party fees, phone banks, travel expenses, travel expense reimbursement, and catering costs. However, statements or descriptions such as *advance*, *election day expenses*, *other expenses*, *expenses*, *expense reimbursement*, *miscellaneous*, *outside services*, *get-out-the-vote* and *voter registration* would not meet the requirements of this paragraph for reporting the purpose of an expenditure.

(B) In addition to reporting the purpose described in paragraph (b)(4)(i)(A) of this section, whenever an authorized committee itemizes a disbursement that is partially or entirely a personal use for which reimbursement is required under 11 CFR 113.1(g)(1)(ii)(C) or (D), it shall provide a brief explanation of the activity for which reimbursement is required.

\* \* \* \* \*

Dated: November 26, 2001.

**Danny L. McDonald,**  
*Chairman, Federal Election Commission.*  
[FR Doc. 01-29679 Filed 11-29-01; 8:45 am]  
**BILLING CODE 6715-01-P**

#### FEDERAL ELECTION COMMISSION

#### 11 CFR Part 111

#### [Notice 2001-18]

#### Extension to Administrative Fines

**AGENCY:** Federal Election Commission.

**ACTION:** Final rule; revision of the sunset date.

**SUMMARY:** The Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the expiration date in which the Federal Election Commission (hereinafter "the Commission") may assess civil money penalties for violations of the reporting requirements of section 434(a) of the Federal Election Campaign Act (hereinafter "the Act" or "FECA").

**DATES:** Effective on December 31, 2001.

**FOR FURTHER INFORMATION CONTACT:** Ms. Rosemary C. Smith, Assistant General Counsel, or Ms. Mai T. Dinh, Attorney, 999 E Street, NW., Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

#### SUPPLEMENTARY INFORMATION:

#### Explanation and Justification

Section 640 of the Treasury and General Government Appropriations Act, 2000, Pub. L. No. 106-58, 106th Cong., 113 Stat. 430, 476-77 (1999), amended § 309(a)(4) of the FECA, 2 U.S.C. 437g(a)(4), to provide for a modified enforcement process for violations of reporting requirements. Under § 437g(a)(4)(C) of the FECA, the Commission may assess a civil money penalty for violations of the reporting requirements of 2 U.S.C. 434(a). This authority, however, was to sunset on December 31, 2001. Pub. L. No. 106-58, 106th Cong., § 640(c). Recently, § 642 of the Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the sunset date to include all reports that cover activity between January 1, 2000, to December 31, 2003.

The Commission published final rules on May 19, 2000, to implement the amendment contained in the Treasury and General Government Appropriations Act, 2000. Section 111.30 of the regulations reflects the sunset provision of Pub. L. No. 106-58, 106th Cong., § 640(c). Therefore, the Commission is issuing this final rule to amend section 111.30 to extend the application of the administrative fine regulations, 11 CFR part 111, subpart B, to include all violations relating to reports that cover the period between January 1, 2000, to December 31, 2003.

The Commission is promulgating this final rule without notice or opportunity for comment because it falls under the "good cause" exemption of the Administrative Procedures Act, 5 U.S.C. 553(b)(B). The exemption allows



administering Federal Regional Commission grant funds.

(f) When RHS has no loan or grant funds in the project, an administrative charge will be made pursuant to the Economy Act (31 U.S.C. 1535).

**§§ 3570.94–3570.99 [Reserved]**

**§ 3570.100 OMB control number.**

The information collection requirements contained in this regulation have been approved by the Office of Management and Budget (OMB) and have been assigned OMB control number 0575–0173. You are not required to respond to this collection of information unless it displays a valid OMB control number.

Dated: June 1, 1999.

**Inga Smulkstys,**

*Deputy Under Secretary, Operations & Management, Rural Development.*

[FR Doc. 99–15106 Filed 6–16–99; 8:45 am]

**BILLING CODE 3410–XV–U**

**FEDERAL ELECTION COMMISSION**

**11 CFR Part 9034**

[Notice 1999–9]

**Matching Credit Card and Debit Card Contributions in Presidential Campaigns**

**AGENCY:** Federal Election Commission.

**ACTION:** Final rules and transmittal of regulations to Congress.

**SUMMARY:** The Commission has adopted new regulations that allow contributions made by credit or debit card, including contributions made over the Internet, to be matched under the Presidential Primary Matching Payment Account Act. “Matchable contributions” are those which, when received by candidates who qualify for payments under the Presidential Primary Matching Payment Account Act, are matched by the Federal Government. The new rules provide that credit and debit card contributions, including those made over the Internet, are matchable to the extent provided by law, provided that controls and procedures are in place to detect excessive and prohibited contributions. Please note that further documentation requirements may be addressed in the Commission’s upcoming final rules governing public financing of presidential primary and general election candidates.

**DATES:** Further action, including the publication of a document in the **Federal Register** announcing an effective date, will be taken after these

regulations have been before Congress for 30 legislative days pursuant to 26 U.S.C. 9039(c).

**FOR FURTHER INFORMATION CONTACT:** N. Bradley Litchfield, Associate General Counsel, or Rita A. Reimer, Attorney, 999 E Street, N.W., Washington, D.C. 20463, (202) 694–1650 or (800) 424–9530 (toll free).

**SUPPLEMENTARY INFORMATION:** The Commission is publishing today revisions to its regulations at 11 CFR 9034.2 and 9034.3 to permit the matching of credit card and debit card contributions, including contributions received over the Internet, under the Presidential Primary Matching Payment Account Act, 26 U.S.C. 9031 *et seq.* (“Matching Payment Act”). Please note that other revisions to the Commission’s rules concerning the public financing of presidential primary and general election campaigns will be addressed in a separate document. In addition, the Commission may address further documentation requirements of these new rules in that document.

Debit card contributions are deducted directly from the contributor’s checking, savings, or other financial account. Credit card contributions are billed to the contributor and are usually processed by a third-party entity.

Under the Matching Payment Act, if a candidate for the presidential nomination of his or her party agrees to certain conditions and raises in excess of \$5,000 in contributions of \$250 or less from residents of each of at least 20 States, the first \$250 of each eligible contribution is matched by the Federal Government. 26 U.S.C. 9033, 9034. In the past the Commission has declined to match credit card contributions, although it has allowed them in other contexts. The Commission has always held contributions submitted for matching to a higher documentation standard, because the matching fund program involves the disbursement of millions of dollars in taxpayer funds. However, the Commission has now determined that such contributions may be matched under certain circumstances.

On December 16, 1998, the Commission published a Notice of Proposed Rulemaking (“NPRM”) in which it sought comments on a wide range of issues involved in the public financing of presidential primary and general election campaigns. 63 FR 69524 (Dec. 16, 1998). While the NPRM did not specifically seek comments on credit card and Internet contributions, it stated that the Commission would welcome comments on “other aspects of the public financing process that could

be addressed in these regulations.” *Id.* at 69532.

In response to the NPRM, several commenters urged the Commission to match qualified contributions made by credit or debit card over the Internet. These commenters included America Online (“AOL”); Aristotle Publishing, Inc.; the Democratic National Committee (“DNC”); the Republican National Committee (“RNC”); and a joint comment by Lyn Utrecht and Eric Kleinfeld of Ryan, Phillips, Utrecht, & MacKinnon, and Patricia Fiori. In addition, the Commission held a public hearing on March 24, 1999, at which representatives of AOL, the DNC, the RNC, and Ms. Utrecht testified on this issue. After considering the comments, testimony and other relevant material, the Commission has decided to authorize the matching of such contributions under the circumstances described below.

It is well established that the Administrative Procedure Act (“APA”) requires only that an agency give notice which contains “either the terms or substance of the proposed rule or a description of the subjects and issues involved.” 5 U.S.C. 553(b)(3). Under the APA, the final rule must be a “logical outgrowth” of the proposed rule on which it solicited comments. *Chocolate Manufacturers Ass’n v. Block*, 755 F.2d 1098 (4th Cir. 1985).

Since these rules are not major rules within the meaning of 5 U.S.C. 804(2), the Matching Payment Act controls the legislative review process. *See* 5 U.S.C. 801(a)(4), Small Business Enforcement Fairness Act, Pubic Law 104–121, section 251, 110 Stat. 857, 869 (1996). Section 9039(c) of Title 26, United States Code, requires that any rules or regulations prescribed by the Commission to carry out the provisions of the Matching Payment Act be transmitted to the Speaker of the House of Representatives and the President of the Senate 30 legislative days before they are finally promulgated. These regulations were transmitted to Congress on Friday, June 11, 1999.

**Explanation and Justification**

A matchable contribution for purposes of the Matching Fund Act is generally defined at 26 U.S.C. 9034(a) as “a gift of money made by a written instrument which identifies the person making the contribution by full name and mailing address.” The Commission’s regulations at 11 CFR 9034.2(b) define the term *written instrument* to mean a check written on a personal, escrow or trust account representing or containing the contributor’s personal funds; a money



order; or any similar negotiable instrument." The written instrument must contain the full name and signature of the contributor(s), the amount and date of the contribution, and the mailing address of the contributor(s). 11 CFR 9034.2(c). The Commission's rules at 11 CFR 9034.3(c) state that "a contract, promise, or agreement, whether or not legally enforceable, such as a pledge card or credit card transaction" is a non-matchable contribution.

All contributions received in connection with Federal elections are subject to the limitations and prohibitions of the Federal Election Campaign Act ("FECA" or the "Act"), 2 U.S.C. 431 *et seq.* The Act prohibits corporations, labor organizations and national banks from making any contribution in connection with a Federal election, 2 U.S.C. 441b(a). The Act also prohibits contributions by Federal contractors, 2 U.S.C. 441c, and by foreign nationals who are not permanent legal residents, 2 U.S.C. 441e. Contributions by persons whose contributions are not prohibited by the Act are subject to the limits set out in 2 U.S.C. 441a(a), generally \$1,000 per candidate per election to Federal office. 2 U.S.C. 441a(a)(1). Individual contributions to candidates and political committees may not aggregate more than \$25,000 in any calendar year. 2 U.S.C. 441a(a)(3).

The Commission considered the possibility of matching credit card contributions in 1983 but declined to match such payments "because credit cards present problems for ensuring that the requirements of matchability are met." 48 FR 5224, 5228 (Feb. 4, 1983). The Commission cited as examples of such problems the fact that credit card contributions made by phone would lack the contributor's signature; determining the source of the funds used for the contributions could be complicated, since some accounts that appear to be personal are actually paid for by corporations; and candidates would be requesting more in matching funds than they receive in contributions, since credit card companies deduct varying amounts to pay for their services. *Id.*

The Commission has, however, authorized the use of credit cards for unmatched contributions since 1978. See Advisory Opinion ("AO") 1978-68. It has also authorized corporations to reimburse their Political Action Committees ("PAC") for service charges incurred by credit card contributions, AO 1984-45; automatic fund transfers from contributors' bank accounts to committee accounts, AO 1989-26;

contributions and membership dues to be paid to a PAC via credit card, AO 1990-4; and campaigns to solicit contributions to be made by advance authorization of credit card charges, AO 1991-1.

In AO 1978-68 the Commission assumed that credit card issuers would follow their usual and normal collection procedures with respect to obtaining payment from persons who used their cards to make political contributions; and that credit card issuers, as well as the companies processing the credit card charges, would render their services in the ordinary course of business and receive the usual and normal charge for their services, i.e., the prevailing charge for the services at the time they were rendered. See 11 CFR 100.4(a)(1)(iii)(B). Otherwise, the difference would constitute an in-kind corporate contribution in violation of 2 U.S.C. 441b. The Commission is making the same assumptions for purposes of this rulemaking.

The Commission is making this change for several reasons. The use of credit cards has expanded dramatically since this issue was last considered in 1983. The Commission is convinced that credit and debit card contributions present no greater danger of fraud than do other contributions, if adequate precautions are taken. This approach also allows matching contributions to be made over the Internet, consistent with the Commission's expressed interest in utilizing this evolving medium where appropriate in FECA and public funding contexts.

#### *Contributions Made Over the Internet—Background*

The Commission has interpreted its regulations to be consistent with contemporary technological innovations where the use of the technology would not compromise the intent of law. However, the Commission believes that additional precautions must be taken when credit and debit card contributions are made over the Internet, because there is no direct paper transfer involved in such transactions. In contrast, if a credit card contribution is solicited over the telephone, the person taking the information can inform the contributor directly of the Act's limits and prohibitions, and check any potentially troublesome information, such as a foreign residential address. Where contributions are solicited by mail or other printed material, the recipient has a written document setting out the Act's requirements and prohibitions for permanent reference.

In AO 1995-9, the Commission authorized political contributions to be made via credit card over the Internet, provided that safeguards were in place to screen out excessive and prohibited contributions. It subsequently authorized the *solicitation* of matchable contributions over the Internet, in AO 1995-35. However, the requester of that AO sought permission only to solicit funds over the Internet—contributors were asked to mail the resulting contributions to the campaign in the form of personal checks. Those who commented on the current NPRM asked the Commission to match contributions that are both solicited and paid for by credit card over the Internet, thus eliminating this middle step.

On March 18, 1999, the Commission received Advisory Opinion Request 1999-9, which sought to accomplish this same result through the AO process. The Commission approved that request on June 10, 1999, but made its approval contingent on final promulgation of the regulations following the Congressional review period.

The Commission has determined in these advisory opinions that certain conditions and procedures are sufficient to allay concerns over the receipt of prohibited contributions using credit cards, and to meet other FECA requirements. While the Commission is not mandating any particular language or procedures for this purpose, it notes that the following measures constitute "safe harbors" which have already been deemed satisfactory. Additional information on this topic will be included in the Commission's Guideline for Presentation in Good Order ("PIGO"), which is made available to all candidates who qualify for funding under the Matching Payment Act, as well as to other interested parties. See 11 CFR 9033.1(b)(9).

#### *Section 9034.2(b) The "Written Instrument" Requirement*

The Commission is amending paragraph (b) of section 9034.2 to clarify the meaning of the term *written instrument* in the context of contributions by credit or debit card. Consistent with the *Black's Law Dictionary* definition discussed below, the new rule specifically states that this term covers either a transaction slip or other writing signed by the cardholder, or in the case of such a contribution made over the Internet, an electronic record of the transaction created and transmitted by the cardholder, and including the name of the cardholder and the card number, which can be maintained electronically and reproduced in a written form by the

recipient candidate or candidate's committee.

*Black's Law Dictionary* defines *written instrument* as "[s]omething reduced to writing as a means of evidence, and as the means of giving formal expression to some act or contract" (6th Ed., 1990, at 1612). Clearly this would cover credit card transactions that were "reduced to writing" at some stage of the process. In fact, there is a small but growing body of case law holding that computer records also constitute written instruments, as long as they can be printed out in paper form. *Clyburn v. Allstate Insurance Co.*, 826 F.Supp. 955, 956 (D.S.C. 1993); *People v. Perry*, 605 N.Y.S.2d 790, 199 A.D.2d 889 (1993); *Colonial Dodge, Inc. v. Chrysler Corporation*, 11 F.Supp.3d 737, 750-51 (D.Md. 1996); see also *People v. LeGrand*, 439 N.Y.S.2d 695, 81 A.D.2d 945 (1981) (credit card vouchers and receipts held to be "written instruments" for purposes of state forgery statute).

While the use of the Internet for campaign contributions does not entail a "written instrument" in the traditional sense, this does not foreclose its use for this purpose. The Commission stated in AO 1995-9 that, in order to be valid under the FECA, electronic transactions of this nature must entail the creation and maintenance of a complete and reliable "paper trail" for recordkeeping, disclosure, and audit purposes. The campaign can then print out these forms as required. Please note that the Commission is not requiring campaigns to print out these records at the time they are received, but only that they be kept in a form which will allow them to be printed out as needed.

#### *Section 9034.2(c) Definition of Signature*

The Commission is revising paragraph (c) of section 9034.2 to clarify that the term *signature* means, in the case of a contribution by a credit or debit card, either an actual signature by the cardholder who is the donor on a transaction slip or other writing, or in the case of such a contribution made over the Internet, the full name and card number of the cardholder who is the donor, entered and transmitted by the cardholder.

The Commission does not believe that the term *signature* can be extended to telephone transactions where the only record is being created wholly by the recipient committee. While the use of electronic signatures is becoming increasingly common, it is universally understood that it is the signatory's (in this case, the donor's) act of entering his or her name that represents a legal act. However, if the committee sends out a

voucher and receives a contributor-signed return of the voucher, or obtains some other verification of the contribution from the contributor, the credit card contribution initially approved over the telephone could then be matched.

#### *Section 9034.2(c)(8) Credit and Debit Card Contributions, Including Those Made Over the Internet*

##### Section 9034.2(c)(8)(i) General Requirement

This section establishes the requirements for matching credit and debit card contributions, including those received over the Internet. It generally states at paragraph (c)(8)(i) that such contributions are matchable, provided that the requirements of 11 CFR 9034.2(b) concerning a written instrument and of 11 CFR 9034.2(c) concerning a signature are satisfied. As explained above, it excludes telephone transactions where the only record is being created wholly by the recipient committee.

##### Section 9034.2(c)(8)(ii) Prohibited Contributions

The new rules state at paragraph (c)(8)(ii) that credit card and debit card contributions will be matched, if evidence is submitted by the committee that the contributor has affirmed that the contribution is from personal funds and not from funds otherwise prohibited by law.

In order to comply with this provision, a committee should take steps to insure that controls and procedures are in place to minimize the possibility of contributions by foreign nationals, by Federal Government contractors, and by labor organizations, or by an individual using corporate or other business entity credit accounts. Such controls and procedures should also help the recipient committee identify contributions made by the same individual using different or multiple credit card accounts; and contributions by two or more individuals who are each authorized to use the same account, but where the legal obligation to pay the account only extends to one (or more) of the card holders, and not to all of them.

In Advisory Opinion 1999-9 the requester outlined numerous steps and procedures that campaign intended to take to screen for prohibited and excessive contributions. In Advisory Opinion 1995-9 the Commission approved other specific procedures for this purpose. While these regulations do not mandate all of these procedures, campaigns are still required to make

reasonable efforts to prevent receipt of prohibited or excessive contributions. In Advisory Opinion 1999-9, for instance, to screen further for corporate or business entity cards, the committee explained that it intended to take advantage of the fact that corporate or business entity credit cards are generally billed directly to the entity's offices, rather than to an individual's home. If the billing and residential addresses provided by the prospective donor were different, the committee's web site would display a message noting the discrepancy and reminding the donor that it cannot accept contributions made on corporate or business entity credit cards, or on any card that does not represent the contributor's own personal funds. It was noted at the Commission's public hearing that similar action could be taken in an effort to bar prohibited contributions from foreign nationals, if the residence address was outside the United States. However, the rules do not prescribe particular language and procedures to assure that these concerns are met.

If contributions are not rejected for one of the foregoing reasons, soliciting campaigns present them for payment by the credit card company or other servicing entity in the usual manner. That entity will, in turn, ascertain that the name, address and other identifying information provided by the contributor matches that on record. If so, it will forward the amount of the contribution, less applicable fees, to the campaign. In the case of a debit card transaction, the financial institution that administers the account will forward the money to the campaign without this intermediate step. The receipt of the money by the campaign will serve as confirmation that the financial institution or other processing entity considers the transaction to be legal.

#### *Section 9034.3(c) Non-Matchable Contributions*

The Commission is revising section 9034.3(c) to delete from the definition of non-matchable contributions the term "credit card transactions," because it has determined that credit card contributions may be matched under the circumstances set forth in this document.

#### **Other Issues**

##### *Best Efforts*

Treasurers of political committees are required to exercise "best efforts" to report all contributions, 2 U.S.C. 432(i), and to include in these reports the complete identification of each

contributor whose contributions aggregate more than \$200 per calendar year. 2 U.S.C. 434(b)(3)(A). For an individual, "identification" means the full name, mailing address, occupation and employer. 2 U.S.C. 431(13). A contributor's failure to provide this information does not bar the recipient committee from accepting the contribution, since the FECA requires only that the committee make "best efforts" to obtain it. However, the Commission's rules at 11 CFR 104.7(b)(2) require the recipient to make one oral or written follow-up attempt to obtain the contributor information for any contribution that exceeds \$200 per calendar year.

The Commission is not revising its "best efforts" regulations in this rulemaking because those rules apply to all categories of political committees, including presidential campaign committees that qualify for matching Federal payments under 26 U.S.C. 9031 *et seq.* Furthermore, Commission regulations impose additional documentation requirements for matchable contributions whether or not a presidential campaign has exerted "best efforts" to obtain the contributor information that it is required to report under 2 U.S.C. 434(b)(3)(A). See 11 CFR 9036.1(b)(1)(i) and (ii) and 9036.2(b)(1)(v). Nevertheless, the Commission notes that the use of computer technology to solicit and receive matchable contributions through the Internet does present new options for a committee's compliance with the "best efforts" rules.

The requesters of both AO 1995-9 and 1999-9 stated that, if a contributor did not provide the required donor information, he or she would immediately receive another message asking again for the information. Some witnesses at the public hearing stated that contributors are more likely to provide information when prompted to do so by a computer than they might in other circumstances. In AO 1995-9, the Commission determined that, in the unique case of a contribution received over the Internet, the request could consist of an electronic message sent to the contributor's e-mail address. Any such request must be made after the committee receives the confirmation discussed above, and must meet the specific "best efforts" requirements set forth in 11 CFR 104.7(b)(2).

#### *Credit Card Costs*

The Commission has reconsidered the concern which it expressed in 1983 over the percentage of credit card contributions that could be matched, and determined that the costs of

processing credit and debit card contributions should be an allowable fundraising expense. Several commenters and witnesses pointed out that the costs of processing credit card contributions may be a significantly smaller cost to the campaign than the expenses associated with direct mail solicitations, holding a physical fundraising event such as a dinner or a reception, or paying fundraising consultants.

#### *Retroactive Application*

These regulations will have retroactive application to otherwise qualified credit and debit card contributions made on January 1, 1999 and thereafter, unless Congress and the President disapprove the regulations. Now that the Commission has determined that credit and debit card contributions may be matched, it believes it is appropriate to retroactively match such contributions, since many presidential campaigns will have engaged in substantial fundraising by the time these rules take effect. Since matching funds will not be disbursed until after the start of the matching payment period on January 1, 2000, 26 U.S.C. 9032(6), 9037, this provides ample notice to those campaigns that wish to utilize this fundraising approach.

#### **Certification of No Effect Pursuant to 5 U.S.C. 605(b) (Regulatory Flexibility Act)**

The attached final rules will not, if promulgated, have a significant economic impact on a substantial number of small entities. The basis for this certification is that these regulations do not affect a substantial number of entities, and most covered entities are not "small entities" for purposes of the Regulatory Flexibility Act. Therefore the rules would not have a significant economic effect on a substantial number of small entities.

#### **List of Subjects 11 CFR Part 9034**

Campaign funds, recordkeeping and reporting requirements.

For the reasons set forth in the preamble, Subchapter A, Chapter I of Title 11 of the Code of Federal Regulations is amended to read as follows:

#### **PART 9034—ENTITLEMENTS**

1. The authority citation for Part 9034 continues to read as follows:

**Authority:** 26 U.S.C. 9034 and 9039(b).

2. Section 9034.2 is amended by revising paragraph (b), by adding a sentence at the end of the introductory

text of paragraph (c), and by adding new paragraph (c)(8), to read as follows:

#### **§ 9034.2 Matchable contributions.**

\* \* \* \* \*

(b) For purposes of this section, the term *written instrument* means a check written on a personal, escrow or trust account representing or containing the contributor's personal funds; a money order; any similar negotiable instrument; or, for contributions by credit or debit card, a paper record, or an electronic record that can be reproduced on paper, of the transaction. For purposes of this section, the term *written instrument* also means, in the case of a contribution by a credit card or debit card, either a transaction slip or other writing signed by the cardholder, or in the case of such a contribution made over the Internet, an electronic record of the transaction created and transmitted by the cardholder, and including the name of the cardholder and the card number, which can be maintained electronically and reproduced in a written form by the recipient candidate or candidate's committee.

(c) \* \* \* For purposes of this section, the term *signature* means, in the case of a contribution by a credit card or debit card, either an actual signature by the cardholder who is the donor on a transaction slip or other writing, or in the case of such a contribution made over the Internet, the full name and card number of the cardholder who is the donor, entered and transmitted by the cardholder.

\* \* \* \* \*

(8) Contributions by credit or debit card are matchable contributions, provided that:

(i) The requirements of paragraph (b) of this section concerning a written instrument and of paragraph (c) of this section concerning a signature are satisfied. Contributions by credit card or debit card where the cardholder's name and card number are given to the recipient candidate or candidate's committee only orally are not matchable.

(ii) Evidence is submitted by the committee that the contributor has affirmed that the contribution is from personal funds and not from funds otherwise prohibited by law.

3. Section 9034.3 is amended by removing the phrase "or credit card transaction" in paragraph (c).

Dated: June 11, 1999.

**Scott E. Thomas,**

*Chairman, Federal Election Commission.*

[FR Doc. 99-15253 Filed 6-16-99; 8:45 am]

**BILLING CODE 6715-01-P**

acceptable and unacceptable purpose descriptions to be reported by authorized committees. Paragraph (B) requires authorized committees, when itemizing certain disbursements for which reimbursements are required, to provide a brief explanation of the activity for which reimbursement is required. These provisions have been in Title 11 of the **Code of Federal Regulations** since 1980 and 1995, respectively, and were not affected by the recent statutory changes to the election cycle reporting requirements.

#### Need for Correction

As published, the final rules inadvertently omit two paragraphs describing information to be reported by authorized committees of Federal candidates.

All committees must report the purpose of itemized disbursements (i.e., those disbursements aggregating in excess of \$200). Omitted paragraph (A) contains examples of suitably specific purpose descriptions as well as examples of those descriptions that are unacceptably vague. This paragraph is inconsistent with the reporting of rules for unauthorized committees (committees other than candidate committees) in 11 CFR 104.3(b)(3).

Omitted paragraph (B) is used in administering the "personal use" rules in 11 CFR 113.1. Federal candidates are barred from using campaign funds for personal benefit. Paragraph (B) requires authorized committees of Federal candidates itemizing disbursements for which partial or total reimbursement is required under 11 CFR 113.1(g)(1)(iii)(C) or (D) to provide a brief explanation of the activity for which the reimbursement is made.

Section 801 of Title 5 of the United States Code requires Federal agencies to submit regulations to Congress. These regulations were submitted to the Speaker of the House of Representatives and the President of the Senate on November 26, 2001.

#### Certification of No Effect Pursuant to 5 U.S.C. § 605(b) [Regulatory Flexibility Act]

This correction will not have significant economic impact on a substantial number of small entities. The basis of this certification is that this correction only requires political committees to once again add information to the reports they are required to file. These regulations were in 11 CFR since 1980 and 1995, respectively, before being inadvertently omitted in 2000.

#### List of Subjects in 11 CFR Part 104

Campaign funds, Political committees and parties, Reporting and recordkeeping requirements.

Accordingly, 11 CFR part 104 is corrected by making the following correcting amendment:

#### PART 104—REPORTS BY POLITICAL COMMITTEES

1. The authority citation for part 104 continues to read as follows:

**Authority:** 2 U.S.C. 431(1), 431(8), 431(9), 432(i), 434, 438(a)(8), 438(b), 439a.

#### § 104.3 Contents of reports (2 U.S.C. 434(b), 439a).

\* \* \* \* \*

2. In § 104.3 add the following paragraphs (b)(4)(i)(A) and (B):

(b) \* \* \*  
(4) \* \* \*  
(i) \* \* \*

(A) As used in this paragraph, *purpose* means a brief statement or description of why the disbursement was made. Examples of statements or descriptions which meet the requirements of this paragraph include the following: dinner expenses, media, salary, polling, travel, party fees, phone banks, travel expenses, travel expense reimbursement, and catering costs. However, statements or descriptions such as *advance*, *election day expenses*, *other expenses*, *expenses*, *expense reimbursement*, *miscellaneous*, *outside services*, *get-out-the-vote* and *voter registration* would not meet the requirements of this paragraph for reporting the purpose of an expenditure.

(B) In addition to reporting the purpose described in paragraph (b)(4)(i)(A) of this section, whenever an authorized committee itemizes a disbursement that is partially or entirely a personal use for which reimbursement is required under 11 CFR 113.1(g)(1)(ii)(C) or (D), it shall provide a brief explanation of the activity for which reimbursement is required.

\* \* \* \* \*

Dated: November 26, 2001.

**Danny L. McDonald,**  
*Chairman, Federal Election Commission.*  
[FR Doc. 01-29679 Filed 11-29-01; 8:45 am]  
**BILLING CODE 6715-01-P**

#### FEDERAL ELECTION COMMISSION

#### 11 CFR Part 111

#### [Notice 2001-18]

#### Extension to Administrative Fines

**AGENCY:** Federal Election Commission.

**ACTION:** Final rule; revision of the sunset date.

**SUMMARY:** The Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the expiration date in which the Federal Election Commission (hereinafter "the Commission") may assess civil money penalties for violations of the reporting requirements of section 434(a) of the Federal Election Campaign Act (hereinafter "the Act" or "FECA").

**DATES:** Effective on December 31, 2001.

**FOR FURTHER INFORMATION CONTACT:** Ms. Rosemary C. Smith, Assistant General Counsel, or Ms. Mai T. Dinh, Attorney, 999 E Street, NW., Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

#### SUPPLEMENTARY INFORMATION:

#### Explanation and Justification

Section 640 of the Treasury and General Government Appropriations Act, 2000, Pub. L. No. 106-58, 106th Cong., 113 Stat. 430, 476-77 (1999), amended § 309(a)(4) of the FECA, 2 U.S.C. 437g(a)(4), to provide for a modified enforcement process for violations of reporting requirements. Under § 437g(a)(4)(C) of the FECA, the Commission may assess a civil money penalty for violations of the reporting requirements of 2 U.S.C. 434(a). This authority, however, was to sunset on December 31, 2001. Pub. L. No. 106-58, 106th Cong., § 640(c). Recently, § 642 of the Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the sunset date to include all reports that cover activity between January 1, 2000, to December 31, 2003.

The Commission published final rules on May 19, 2000, to implement the amendment contained in the Treasury and General Government Appropriations Act, 2000. Section 111.30 of the regulations reflects the sunset provision of Pub. L. No. 106-58, 106th Cong., § 640(c). Therefore, the Commission is issuing this final rule to amend section 111.30 to extend the application of the administrative fine regulations, 11 CFR part 111, subpart B, to include all violations relating to reports that cover the period between January 1, 2000, to December 31, 2003.

The Commission is promulgating this final rule without notice or opportunity for comment because it falls under the "good cause" exemption of the Administrative Procedures Act, 5 U.S.C. 553(b)(B). The exemption allows

Dated: July 30, 1999.

**Scott E. Thomas,**

*Chairman, Federal Election Commission.*

[FR Doc. 99-20102 Filed 8-4-99; 8:45 am]

BILLING CODE 6715-01-P

## FEDERAL ELECTION COMMISSION

### 11 CFR Part 9036

[NOTICE 1999-15]

#### Matching Credit Card and Debit Card Contributions in Presidential Campaigns

**AGENCY:** Federal Election Commission.

**ACTION:** Final rules and transmittal of regulations to Congress.

**SUMMARY:** On June 10, 1999, the Commission approved new regulations that allow contributions made by credit or debit card, including contributions made over the Internet, to be matched under the Presidential Primary Matching Payment Account Act. "Matchable contributions" are those which, when received by candidates who qualify for payments under the Matching Payment Act, are matched by the Federal Government. The rules published today provide general guidance on the documentation that must be provided before credit and debit card contributions will be matched, and state that more detailed guidance will be found in the Commission's Guideline for Presentation in Good Order.

**DATES:** Further action, including the publication of a document in the **Federal Register** announcing an effective date, will be taken after these regulations have been before Congress for 30 legislative days pursuant to 26 U.S.C. 9039(c).

**FOR FURTHER INFORMATION CONTACT:** Rosemary C. Smith, Acting Assistant General Counsel, or Rita A. Reimer, Attorney, 999 E Street, NW, Washington, DC 20463, (202) 694-1650 or (800) 424-9530 (toll free).

**SUPPLEMENTARY INFORMATION:** On June 17, 1999, the Commission published revisions to its regulations at 11 CFR 9034.2 and 9034.3 to permit the matching of credit card and debit card contributions, including contributions received over the Internet, under the Presidential Primary Matching Payment Account Act, 26 U.S.C. 9031 *et seq.* ("Matching Payment Act"). 64 FR 32394. In that document the Commission announced that further documentation requirements for these contributions would be addressed in the Commission's upcoming rules

concerning the public financing of presidential primary and general election campaigns. *Id.* The Commission is publishing this separate document for this purpose in order to give the regulated community the earliest possible guidance in this area.

Under the Matching Payment Act, if a candidate for the presidential nomination of his or her party agrees to certain conditions and raises in excess of \$5,000 in contributions of \$250 or less from residents of each of at least 20 States, the first \$250 of each eligible contribution is matched by the Federal Government. 26 U.S.C. 9033, 9034. In the past, the Commission declined to match credit card contributions, although it has permitted campaign committees to accept them. The Commission has always held contributions submitted for matching to a higher documentation standard because the matching fund program involves the disbursement of millions of dollars in taxpayer funds. However, the Commission decided earlier this year such contributions should be matched, if appropriate safeguards and procedures were in place to guard against the receipt of excessive and prohibited contributions.

On December 16, 1998, the Commission published a Notice of Proposed Rulemaking ("NPRM") in which it sought comments on a wide range of issues involved in the public financing of presidential primary and general election campaigns. 63 F.R. 69524 (Dec. 16, 1998). Several of those who commented on the NPRM and several witnesses who testified at the Commission's March 24, 1999 public hearing on the NPRM urged the Commission to match qualified contributions made by credit or debit card over the Internet. After considering the comments, testimony and other relevant material, the Commission decided to authorize the matching of such contributions as long as safeguards were present to limit the possibility of fraudulent, illegal or excessive contributions. *See Explanation and Justification to the Federal Election Commission's Rules Addressing Matching Credit Card and Debit Card Contributions in Presidential Campaigns*, 64 F.R. 32394 (June 17, 1999). The new rules are codified at 11 CFR 9034.2(b) and (c), and 11 CFR 9034.3(c). The Commission also approved an Advisory Opinion, AO 1999-9, that authorized the matching of Internet contributions, but made its approval contingent on the expiration of the Congressional review period discussed below.

Section 9039(c) of Title 26, United States Code, requires that any rules or regulations prescribed by the Commission to carry out the provisions of the Matching Payment Act be transmitted to the Speaker of the House of Representatives and the President of the Senate 30 legislative days before they are finally promulgated.

The regulations at 11 CFR 9034.2 and 9034.3 on matching credit card and debit card contributions were sent to Congress on June 11, 1999. The legislative review period for those rules has not yet expired. However, if those rules are disapproved, then the new rules at 11 CFR 9036.1 and 9036.2 would not take effect, because they are a corollary to the earlier rules. The revisions to 9036.1 and 9036.2 are also subject to their own legislative review period, which began when they were transmitted to Congress on Aug. 2, 1999.

The Commission announced in the June 17, 1999 document that, unless Congress and the President enact legislation disapproving the amendments to 11 CFR 9034.2 and 9034.3, these changes will apply retroactively to contributions made on January 1, 1999 and thereafter. The same is true of these further regulations.

#### Explanation and Justification

##### *Section 9036.1 Threshold Submission*

This section sets forth the requirements a candidate must meet in making the threshold submission to the Commission, that is, the submission in which the candidate demonstrates that the requirements of 26 U.S.C. 9033 and 9034 have been met. The Commission is adding a new paragraph (b)(7) to this section, dealing with credit and debit card contributions, and renumbering paragraphs (b)(7) and (b)(8) as paragraphs (b)(8) and (b)(9), respectively.

The Commission has issued several Advisory Opinions dealing with the Internet, *see, e.g.*, AO's 1995-9, 1995-35, 1997-16, 1999-7, 1998-22, and 1999-9. It has also initiated a project to determine the potential impact of the Internet on various aspects of political committees' operations. It has become clear to the Commission that even cutting-edge advancements in computer technology may quickly become obsolete. Consequently, the Commission has decided to include the technical requirements for making these submissions in its Guideline for Presentation in Good Order, commonly known as "PIGO." Therefore, paragraph (b)(7) states without further elaboration that, in the case of a contribution made by a credit or debit card, including one

made over the Internet, the candidate shall provide sufficient documentation to the Commission to insure that each such contribution was made by a lawful contributor who manifested an intention to make the contribution to the campaign committee that submits it for matching fund payments. It further states that additional information on the documentation required to accompany such contributions will be found in PIGO. This approach will enable the Commission to update the technical requirements much more rapidly than would be possible if these requirements were to be included in the text of the rules.

The Commission notes, however, that PIGO has been incorporated by reference into the rules, and therefore is binding on candidates and their campaigns. 11 CFR 9036.1(b)(7), 9036.2(b). A candidate seeking matching funds for his or her presidential campaign must first sign a candidate agreement that provides, *inter alia*, that the candidate and the candidate's authorized committee(s) will prepare matching fund submissions in accordance with PIGO requirements. 11 CFR 9033.1(a)(9). Contributions submitted for matching will therefore not be matched unless these procedures are followed.

#### *Section 9036.2 Additional Submissions for Matching Fund Payments*

This section contains information on how subsequent submissions for matching fund payments, i.e., those made after the threshold submission, should be made. For the most part these requirements are identical to those for threshold submissions, except that additional submissions need not break down contributions by State, as is required of threshold submissions.

New paragraph (b)(1)(vii) of this section is identical to new paragraph 11 CFR 9036.1(b)(7), discussed *supra*. The new paragraph reinforces the requirement found in the introductory language of paragraph (b) of this section, which states that all additional submissions for matching fund payments shall be made in accordance with PIGO.

#### **Certification of No Effect Pursuant to 5 U.S.C. § 605(b) (Regulatory Flexibility Act)**

The attached final rules will not, if promulgated, have a significant economic impact on a substantial number of small entities. The basis for this certification is that these regulations do not affect a substantial number of entities, and most of the

covered entities are not "small entities" for purposes of the Regulatory Flexibility Act. Therefore the rules would not have a significant economic effect on a substantial number of small entities.

#### **List of Subjects**

##### *11 CFR Part 9036*

Administrative practice and procedure, Campaign funds, Recordkeeping and reporting requirements.

For the reasons set forth in the preamble, Subchapter F, Chapter I of Title 11 of the Code of Federal Regulations is amended to read as follows:

#### **PART 9036—REVIEW OF SUBMISSION AND CERTIFICATION OF PAYMENTS BY COMMISSION**

1. The authority citation for Part 9036 continues to read as follows:

**Authority:** 26 U.S.C. 9036 and 9039(b).

2. Section 9036.1 is amended by redesignating paragraphs (b)(7) and (b)(8) as paragraphs (b)(8) and (b)(9), respectively, and by adding new paragraph (b)(7) to read as follows:

##### **§ 9036.1 Threshold submission.**

(b) \* \* \*  
(7) In the case of a contribution made by a credit or debit card, including one made over the Internet, the candidate shall provide sufficient documentation to the Commission to insure that each such contribution was made by a lawful contributor who manifested an intention to make the contribution to the candidate or authorized committee that submits it for matching fund payments. Additional information on the documentation required to accompany such contributions is found in the Commission's Guideline for Presentation in Good Order. *See* 11 CFR 9033.1(b)(9).

3. Section 9036.2 is amended by adding new paragraph (b)(1)(vii), to read as follows:

##### **§ 9036.2 Additional submissions for matching fund payments.**

(b) \* \* \*  
(1) \* \* \*  
(vii) In the case of a contribution made by a credit or debit card, including one made over the Internet, the candidate shall provide sufficient documentation to the Commission to insure that each such contribution was made by a lawful contributor who

manifested an intention to make the contribution to the candidate or authorized committee that submits it for matching fund payments. Additional information on the documentation required to accompany such contributions is found in the Commission's Guideline for Presentation in Good Order. *See* 11 CFR 9033.1(b)(9).

\* \* \* \* \*

Dated: August 2, 1999.

**Scott E. Thomas,**

*Chairman, Federal Election Commission.*

[FR Doc. 99-20181 Filed 8-4-99; 8:45 am]

**BILLING CODE 6715-01-P**

#### **DEPARTMENT OF TRANSPORTATION**

##### **Federal Aviation Administration**

##### **14 CFR Part 71**

[Airspace Docket No. 95-AWA-4]

RIN 2120-AA66

#### **Modification of the Orlando Class B Airspace Area, Orlando, FL; and Modification of the Orlando Sanford Airport Class D Airspace Area, Sanford, FL**

**AGENCY:** Federal Aviation Administration (FAA) DOT.

**ACTION:** Final rule.

**SUMMARY:** This action modifies the Orlando Class B airspace area, Orlando, FL; and the Orlando Sanford Airport Class D airspace area, Sanford, FL. Specifically, this action modifies several subareas within the lateral boundaries of the existing Orlando Class B airspace area; and lowers the vertical limits of the Orlando Sanford Airport Class D airspace area. The FAA is taking this action to enhance safety, reduce the potential for midair collision, and improve the management of air traffic operations into, out of, and through the Orlando terminal area while accommodating the concerns of airspace users. Additionally, this action corrects the coordinates for the Orlando Sanford Airport.

**EFFECTIVE DATE:** 0901 UTC, September 9, 1999.

**FOR FURTHER INFORMATION CONTACT:** Sheri Edgett Baron, Airspace and Rules Division, ATA-400, Office of Air Traffic Airspace Management, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone: (202) 267-8783.

**SUPPLEMENTARY INFORMATION:**

acceptable and unacceptable purpose descriptions to be reported by authorized committees. Paragraph (B) requires authorized committees, when itemizing certain disbursements for which reimbursements are required, to provide a brief explanation of the activity for which reimbursement is required. These provisions have been in Title 11 of the **Code of Federal Regulations** since 1980 and 1995, respectively, and were not affected by the recent statutory changes to the election cycle reporting requirements.

#### Need for Correction

As published, the final rules inadvertently omit two paragraphs describing information to be reported by authorized committees of Federal candidates.

All committees must report the purpose of itemized disbursements (i.e., those disbursements aggregating in excess of \$200). Omitted paragraph (A) contains examples of suitably specific purpose descriptions as well as examples of those descriptions that are unacceptably vague. This paragraph is inconsistent with the reporting of rules for unauthorized committees (committees other than candidate committees) in 11 CFR 104.3(b)(3).

Omitted paragraph (B) is used in administering the "personal use" rules in 11 CFR 113.1. Federal candidates are barred from using campaign funds for personal benefit. Paragraph (B) requires authorized committees of Federal candidates itemizing disbursements for which partial or total reimbursement is required under 11 CFR 113.1(g)(1)(iii)(C) or (D) to provide a brief explanation of the activity for which the reimbursement is made.

Section 801 of Title 5 of the United States Code requires Federal agencies to submit regulations to Congress. These regulations were submitted to the Speaker of the House of Representatives and the President of the Senate on November 26, 2001.

#### Certification of No Effect Pursuant to 5 U.S.C. § 605(b) [Regulatory Flexibility Act]

This correction will not have significant economic impact on a substantial number of small entities. The basis of this certification is that this correction only requires political committees to once again add information to the reports they are required to file. These regulations were in 11 CFR since 1980 and 1995, respectively, before being inadvertently omitted in 2000.

#### List of Subjects in 11 CFR Part 104

Campaign funds, Political committees and parties, Reporting and recordkeeping requirements.

Accordingly, 11 CFR part 104 is corrected by making the following correcting amendment:

#### PART 104—REPORTS BY POLITICAL COMMITTEES

1. The authority citation for part 104 continues to read as follows:

**Authority:** 2 U.S.C. 431(1), 431(8), 431(9), 432(i), 434, 438(a)(8), 438(b), 439a.

#### § 104.3 Contents of reports (2 U.S.C. 434(b), 439a).

\* \* \* \* \*

2. In § 104.3 add the following paragraphs (b)(4)(i)(A) and (B):

(b) \* \* \*

(4) \* \* \*

(i) \* \* \*

(A) As used in this paragraph, *purpose* means a brief statement or description of why the disbursement was made. Examples of statements or descriptions which meet the requirements of this paragraph include the following: dinner expenses, media, salary, polling, travel, party fees, phone banks, travel expenses, travel expense reimbursement, and catering costs. However, statements or descriptions such as *advance*, *election day expenses*, *other expenses*, *expenses*, *expense reimbursement*, *miscellaneous*, *outside services*, *get-out-the-vote* and *voter registration* would not meet the requirements of this paragraph for reporting the purpose of an expenditure.

(B) In addition to reporting the purpose described in paragraph (b)(4)(i)(A) of this section, whenever an authorized committee itemizes a disbursement that is partially or entirely a personal use for which reimbursement is required under 11 CFR 113.1(g)(1)(ii)(C) or (D), it shall provide a brief explanation of the activity for which reimbursement is required.

\* \* \* \* \*

Dated: November 26, 2001.

**Danny L. McDonald,**  
Chairman, Federal Election Commission.  
[FR Doc. 01-29679 Filed 11-29-01; 8:45 am]  
**BILLING CODE 6715-01-P**

#### FEDERAL ELECTION COMMISSION

#### 11 CFR Part 111

#### [Notice 2001-18]

#### Extension to Administrative Fines

**AGENCY:** Federal Election Commission.

**ACTION:** Final rule; revision of the sunset date.

**SUMMARY:** The Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the expiration date in which the Federal Election Commission (hereinafter "the Commission") may assess civil money penalties for violations of the reporting requirements of section 434(a) of the Federal Election Campaign Act (hereinafter "the Act" or "FECA").

**DATES:** Effective on December 31, 2001.

**FOR FURTHER INFORMATION CONTACT:** Ms. Rosemary C. Smith, Assistant General Counsel, or Ms. Mai T. Dinh, Attorney, 999 E Street, NW., Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

#### SUPPLEMENTARY INFORMATION:

#### Explanation and Justification

Section 640 of the Treasury and General Government Appropriations Act, 2000, Pub. L. No. 106-58, 106th Cong., 113 Stat. 430, 476-77 (1999), amended § 309(a)(4) of the FECA, 2 U.S.C. 437g(a)(4), to provide for a modified enforcement process for violations of reporting requirements. Under § 437g(a)(4)(C) of the FECA, the Commission may assess a civil money penalty for violations of the reporting requirements of 2 U.S.C. 434(a). This authority, however, was to sunset on December 31, 2001. Pub. L. No. 106-58, 106th Cong., § 640(c). Recently, § 642 of the Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the sunset date to include all reports that cover activity between January 1, 2000, to December 31, 2003.

The Commission published final rules on May 19, 2000, to implement the amendment contained in the Treasury and General Government Appropriations Act, 2000. Section 111.30 of the regulations reflects the sunset provision of Pub. L. No. 106-58, 106th Cong., § 640(c). Therefore, the Commission is issuing this final rule to amend section 111.30 to extend the application of the administrative fine regulations, 11 CFR part 111, subpart B, to include all violations relating to reports that cover the period between January 1, 2000, to December 31, 2003.

The Commission is promulgating this final rule without notice or opportunity for comment because it falls under the "good cause" exemption of the Administrative Procedures Act, 5 U.S.C. 553(b)(B). The exemption allows



regulations and to find less burdensome ways to achieve regulatory goals.

#### List of Subjects in 9 CFR Part 72

Animal diseases, Cattle, Incorporation by reference, Quarantine, Transportation.

Accordingly, we are amending 9 CFR part 72 as follows:

#### PART 72—TEXAS (SPLENETIC) FEVER IN CATTLE

1. The authority citation for part 72 continues to read as follows:

**Authority:** 21 U.S.C. 111–113, 115, 117, 120, 121, 123–126, 134b, and 134f; 7 CFR 2.22, 2.80, and 371.2(d).

2. Section 72.5 is revised to read as follows:

##### § 72.5 Area quarantined in Texas.

The area quarantined in Texas is the permanent quarantined area described in the regulations of the Texas Animal Health Commission (TAHC) contained in § 41.2 of title 4, part II, of the Texas Administrative Code (4 TAC 41.2), effective July 22, 1994, which is incorporated by reference. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies of 4 TAC 41.2 may be obtained from the TAHC at 2105 Kramer Lane, Austin, TX 78758, and from area offices of the TAHC, which are listed in local Texas telephone directories. The TAHC also maintains a copy of its regulations on its Internet homepage at <http://www.taahc.state.tx.us/>. Copies may be inspected at the Animal and Plant Health Inspection Service, Veterinary Services, Emergency Programs, Suite 3B08, 4700 River Road, Riverdale, MD, or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

Done in Washington, DC, this 23rd day of July 1999.

**Alfonso Torres,**

*Acting Administrator, Animal and Plant Health Inspection Service.*

[FR Doc. 99–19421 Filed 7–29–99; 8:45 am]

BILLING CODE 3410–34–P

#### DEPARTMENT OF AGRICULTURE

#### Animal and Plant Health Inspection Service

#### 9 CFR Part 91

[Docket No. 98–078–2]

#### Ports Designated for Exportation of Horses; New Jersey and New York

**AGENCY:** Animal and Plant Health Inspection Service, USDA.

**ACTION:** Direct final rule; confirmation of effective date.

**SUMMARY:** On June 4, 1999, the Animal and Plant Health Inspection Service published a direct final rule. (See 64 FR 29947–29949, Docket No. 98–078–1.) The direct final rule notified the public of our intention to amend the “Inspection and Handling of Livestock for Exportation” regulations by changing the lists of approved ports of embarkation and export inspection facilities for horses in New Jersey and New York. In New Jersey, we are removing Deep Hollow Farm in Woodstown, NJ, as the export inspection facility for horses exported from the ocean port of Salem, NJ, and adding Mannington Meadows Farm in Woodstown, NJ, in its place. We are adding Elizabeth and Newark International Airport, NJ, as ports of embarkation, and Tolleshunt Horse Farm in Whitehouse, NJ, and the U.S. Equestrian Team’s headquarters in Gladstone, NJ, as export inspection facilities for horses for those ports. We are also adding Tolleshunt Horse Farm and the U.S. Equestrian Team’s headquarters as export inspection facilities for horses for the currently approved port of New York, NY. These actions update the regulations by adding two ports of embarkation and three export inspection facilities through which horses may be processed for export. We did not receive any written adverse comments or written notice of intent to submit adverse comments in response to the direct final rule.

**EFFECTIVE DATE:** The effective date of the direct final rule is confirmed as: August 3, 1999.

**FOR FURTHER INFORMATION CONTACT:** Dr. Michael David, Senior Staff Veterinarian, Animals Program, National Center for Import and Export, VS, APHIS, 4700 River Road, Unit 39, Riverdale, MD 20737–1231; (301) 734–8354.

**Authority:** 21 U.S.C. 105, 112, 113, 114a, 120, 121, 134b, 134f, 136, 136a, 612, 613, 614, and 618; 46 U.S.C. 466a and 466b; 49 U.S.C. 1509(d); 7 CFR 2.22, 2.80, and 371.2(d).

Done in Washington, DC, this 26th day of July 1999.

**Bobby R. Acord,**

*Acting Administrator, Animal and Plant Health Inspection Service.*

[FR Doc. 99–19563 Filed 7–29–99; 8:45 am]

BILLING CODE 3410–34–P

#### FEDERAL ELECTION COMMISSION

#### 11 CFR Parts 100 and 114

[Notice 1999–12]

#### Definition of “Member” of a Membership Organization

**AGENCY:** Federal Election Commission.

**ACTION:** Final rules and transmittal of regulations to Congress.

**SUMMARY:** The Commission has revised its rules governing who qualifies as a “member” of a membership organization. An incorporated membership organization or labor organization can solicit contributions from its members to a separate segregated fund (“SSF”) established by the organization, and can include express electoral advocacy in communications to its members. Unincorporated membership organizations can similarly make internal communications to their members but cannot establish SSF’s. The revisions largely address the internal characteristics of an organization that, when coupled with certain financial or organizational attachments, are sufficient to confer membership status.

**DATES:** Further action, including the publication of a document in the **Federal Register** announcing an effective date, will be taken after these regulations have been before Congress for 30 legislative days pursuant to 2 U.S.C. 438(d).

**FOR FURTHER INFORMATION CONTACT:** Ms. Rosemary C. Smith, Acting Assistant General Counsel, or Ms. Rita A. Reimer, Attorney, 999 E Street N.W., Washington, DC 20463, (202) 694–1650 or (800) 424–9530.

**SUPPLEMENTARY INFORMATION:** Although the Federal Election Campaign Act of 1971 as amended (“FECA” or “Act”), 2 U.S.C. 431 *et seq.*, prohibits direct corporate contributions in connection with federal campaigns, 2 U.S.C. 441b(a), it permits corporations, including incorporated membership organizations, to solicit contributions from their restricted class to a separate segregated fund. In the case of incorporated membership organizations, the restricted class consists of the



members of each association, their executive and administrative personnel, and their families. These contributions can be used for federal political purposes. The Act also allows membership organizations to communicate with their members on any subject, including communications that include express electoral advocacy. 2 U.S.C. 441b(b)(2)(A), 441b(b)(4)(C). The Commission's implementing regulations defining who is a "member" of a membership organization are found at 11 CFR 100.8(b)(4)(iv) and 11 CFR 114.1(e).

The Commission's original "member" rules, which had been adopted in 1977, were the subject of a 1982 United States Supreme Court decision, *FEC v. National Right to Work Committee ("NRWC")*, 459 U.S. 196 (1982). In 1993, following a series of advisory opinions in this area, the Commission revised the text of the rules to reflect that decision. 58 FR 45770 (Aug. 30, 1993), effective Nov. 10, 1993. 58 FR 59640. The revised rules were held to be unduly restrictive by the United States Court of Appeals for the District of Columbia Circuit in *Chamber of Commerce of the United States ("Chamber") v. FEC*, 69 F.3d 600 (D.C. Cir. 1995), amended on denial of rehearing, 76 F.3d 1234 (D.C. Cir. 1996). This rulemaking followed.

### History of the Rulemaking

On February 24, 1997, the Commission received a Petition for Rulemaking from James Bopp, Jr., on behalf of the National Right to Life Committee, Inc. The Petition urged the Commission to revise its member rules to reflect the *Chamber* decision. The Commission published a Notice of Availability ("NOA") in the **Federal Register** on March 29, 1997, 62 F.R. 13355, and received two comments in response.

On July 31, 1997, the Commission published in the **Federal Register** an Advance Notice of Proposed Rulemaking ("ANPRM") addressing these rules. 62 FR 40982. Because the *Chamber* decision, the petition for rulemaking, and the comments received in response to the NOA provided few specific suggestions as to how the rules should be amended to comport with the decision, the Commission did not propose specific amendments to the rules. Rather, it sought general guidance on the factors to be considered in determining the existence of this relationship. The Commission received 14 comments in response to the ANPRM.

On December 22, 1997, the Commission published a Notice of Proposed Rulemaking ("NPRM") on this

matter, 62 FR 66832, and received 22 comments in response. On April 29, 1998, the Commission held a public hearing on this rulemaking at which 10 witnesses testified.

The 1997 NPRM sought comments on three alternative proposals, referenced as Alternatives A, B, and C. None of the alternatives proposed any changes to the three preliminary requirements, or to the provisions in the current rules that recognize as members persons who have a stronger financial interest in an organization than the payment of annual dues, such as those who own or lease seats on stock exchanges or boards of trade. 11 CFR 100.8(b)(4)(iv)(B)(1), 114.1(e)(2)(i), AO 1997-5.

Under Alternative A, all persons who paid \$50 in annual dues or met specified organizational attachments would be considered members. The NPRM suggested such attachments as the voting rights contained in the current rules; the right to serve on policy-making boards of the organization; eligibility to be elected to the governing positions in the organization; and the possibility of disciplinary action against the member by the organization. A lesser dues obligation coupled with weaker organizational attachments would also be sufficient for this purpose.

Alternative B distinguished between the types of organizations addressed by the *Chamber* decision, i.e., those formed to further business or economic interests or to implement a system of self-discipline or self-regulation within a line of commerce; and ideological, social welfare, and political organizations. Persons paying any amount of annual dues would be considered members of the first category of organizations, while annual dues of \$200 or more would be required for membership in the second category, unless the purported members had the same voting rights required by the current rule.

Under Alternative C, an organization that qualified as a membership organization by meeting the three preliminary requirements could consider as members all persons who paid the amount of annual dues set by the organization, regardless of amount.

The 1997 NPRM also proposed that direct membership in any level of a multi-tiered organization be construed as membership in all tiers of the organization for purposes of these rules.

As was the case with the ANPRM, the comments and testimony received in response to the NPRM expressed a wide range of views—there was no consensus on how best to address this situation. After further consideration, the

Commission sought comments on a slightly different approach, one that would address more fully the attributes of membership organizations, in addition to members' required financial or organizational attachments. The Commission accordingly published a second NPRM that focused primarily on characteristics of membership organizations. 63 F.R. 69224 (Dec. 16, 1998).

The Commission received 25 comments in response to the second NPRM. Commenters included the Alliance for Justice; the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"); the American Federation of State, County and Municipal Employees ("AFSCME"); the American Hotel and Motel Association ("AH&MA"); the American Medical Association; the Americans Back in Charge Foundation; the American Society of Association Executives ("ASAE"); Peter A. Bagatelos; Camille Bradford; the Hon. Thomas M. Davis; the Free Speech Coalition; Harmon, Curran, Spielberg & Eisenberg; the Internal Revenue Service; the James Madison Center for Free Speech; the National Association of Business Political Action Committees ("NABPAC"); the National Association of Realtors; the National Citizens Legal Network ("NCLN"); the National Education Association ("NEA"); the National Lumber and Building Material Dealers Association ("NLBMDA"); the National Right to Work Committee; the National Rural Electric Cooperative Association; the National Telephone Cooperative Association; Vigo G. Nielsen, Jr.; Daniel M. Schember; and the United States Chamber of Commerce.

The Commission held a hearing on this NPRM on March 17, 1999, at which 13 witnesses testified. Witnesses included representatives of the Alliance for Justice; the AFL-CIO; AFSCME; AH&MA; the Americans Back in Charge Foundation; ASAE; the Free Speech Coalition; the James Madison Center for Free Speech; NABPAC; NCLN; NEA; Ms. Bradford; and Mr. Schember.

### Explanation and Justification

#### Background

In its *NRWC* decision, the Supreme Court rejected an argument by a nonprofit, noncapital stock corporation, whose articles of incorporation stated that it had no members, that it should be able to treat as members individuals who had at one time responded, not necessarily financially, to an NRWC advertisement, mailing, or personal contact. The Supreme Court rejected

this definition of "member," saying that to accept it "would virtually excise from the statute the restriction of solicitation to 'members.'" 459 U.S. at 203. The Court determined that "members" of nonstock corporations should be defined, at least in part, by analogy to stockholders of business corporations and members of labor unions. Viewing the question from this perspective meant that "some relatively enduring and independently significant financial or organizational attachment is required to be a 'member'" for these purposes. *Id.* at 204. The NRWC's asserted members did not qualify under this standard because they played no part in the operation or administration of the corporation, elected no corporate officials, attended no membership meetings, and exercised no control over the expenditure of their contributions. *Id.* at 206. The 1993 revisions to the Commission's rules were intended to incorporate this standard.

#### *The Current Rules*

The current rules require an organization to meet three preliminary requirements before it can qualify as a membership organization. These requirements are that it (1) expressly provide for "members" in its articles and by-laws; (2) expressly solicit members; and (3) expressly acknowledge the acceptance of membership, such as by sending a membership card or including the member on a membership newsletter list. 11 C.F.R. 100.8(b)(4)(iv)(A), 114.1(e)(1). If these preliminary requirements are met, a person may qualify as a member either by having a significant financial attachment to the membership organization (not merely the payment of dues), or the right to vote directly for all members of the organization's highest governing body. However, in most instances a combination of regularly-assessed dues and the right to vote directly or indirectly for at least one member of the organization's highest governing body is required. The term "membership organization" includes membership organizations, trade organizations, cooperatives, corporations without capital stock, and local, national and international labor organizations that meet the requirements set forth in these rules.

#### *The Chamber of Commerce Decision*

The United States District Court for the District of Columbia held that the current rules were not arbitrary, capricious or manifestly contrary to the statutory language, and therefore deferred to what the court found to be

a valid exercise of the Commission's regulatory authority. *Chamber of Commerce of the United States v. FEC*, Civil Action No. 94-2184 (D.D.C. Oct. 28, 1994) (1994 WL 615786). However, the Court of Appeals for the D.C. Circuit reversed this ruling.

The case was jointly brought by the Chamber of Commerce and the American Medical Association ("AMA"), two organizations that do not provide their asserted "members" with the voting rights necessary to confer this status under the current rules. The appellate court held that the ties between these members and the Chamber and the AMA are nonetheless sufficient to comply with the Supreme Court's NRWC criteria, and therefore concluded that the Commission's rules are invalid because they define the term "member" in an unduly restrictive fashion. 69 F.3d at 604.

The Chamber is a nonprofit corporation whose members include 3,000 state and local chambers of commerce, 1,250 trade and professional groups, and 215,000 "direct business members." The members pay annual dues ranging from \$65 to \$100,000 and may participate on any of 59 policy committees that determine the Chamber's position on various issues. However, the Chamber's Board of Directors is self-perpetuating (that is, Board members elect their successors); so no member entities have either direct or indirect voting rights for any members of the Board.

The AMA challenged the exclusion from the definition of member 44,500 "direct" members, those who do not belong to a state medical association. Direct members pay annual dues ranging from \$20 to \$420; receive various AMA publications; and participate in professional programs put on by the AMA. They are also bound by and subject to discipline under the AMA's Principles of Medical Ethics. However, since state medical associations elect members of the AMA's House of Delegates, that organization's highest governing body, direct members do not satisfy the voting criteria set forth in the current rules.

The *Chamber* court, in an Addendum to the original decision, noted that the Commission "still has a good deal of latitude in interpreting" the term "member." 76 F.3d at 1235. However, in its original decision, the court held the rules to be arbitrary and capricious as applied to the Chamber, since under the current rules even those paying \$100,000 in annual dues cannot qualify as members. As for the AMA, the rule excludes members who pay up to \$420 in annual dues and, among other

organizational attachments, are subject to sanctions under the Principles of Medical Ethics. The court explained that this latter attachment "might be thought, [] for a professional, [to be] the most significant organizational attachment." 69 F.3d at 605 (emphasis in original).

#### *Section 100.8(b)(4) Membership Organizations*

First, the Commission has replaced the term "membership association" wherever it appears in this section with the term "membership organization." The Commission believes it is appropriate to refer to the covered entities as "membership organizations" because that is the term used in the Act. *See*, 2 U.S.C. 431(9)(B)(iii) and 441b(b)(4)(C). "Membership organization" is also referred to in 11 CFR 100.8(b)(4), which describes the entities entitled to the "internal communication" exception to the Act's definition of expenditure.

The NPRM proposed adding unincorporated associations to the definition of membership organizations, for purposes of 11 CFR 100.8 only. The comments on this proposal were mixed. Some supported the idea, while others argued against it, saying that it might exceed the Commission's authority by blurring the statutory distinction between corporations and other entities contained in the FECA.

The Commission is expanding the definition of membership organization to include unincorporated associations because it believes this is consistent with congressional intent. It is clear from the placement of the exception at 2 U.S.C. 431(9)(B)(iii), i.e., in the Act's "definition" section, that Congress intended to allow noncorporate and non-labor union organizations to avail themselves of the internal membership communication exception. By including the internal communications exception in the definition of "expenditure," the statute allows noncorporate and non-union membership organizations to communicate with their members without subjecting them to the normal prohibitions and reporting requirements.

Paragraph (b)(4) lists the types of entities entitled to the expenditure exemption and the types of communications (i.e., express advocacy) that an exempted organization may engage in without those communications being classified as an expenditure. It currently states that entities "organized primarily for the purpose of influencing the nomination for election, or election, of any individual to Federal office" are not

entitled to the membership communications exemption.

The Commission has decided to move this language to new paragraph 11 CFR 100.8(b)(4)(iv)(A)(6), the provision in 11 CFR 100.8 that explicitly defines a "membership organization." This change insures that organizations primarily organized to influence a Federal election cannot, by definition, be classified as membership organizations under the Act.

The NPRM proposed further revising this section to include only communications "subject to the direction and control of [the membership organization] and not any other person." Several commenters expressed concern that this provision could infringe on constitutionally protected free speech rights, and lead to unwarranted Commission intrusion into an organization's internal workings. The Commission is not including this language in the final rule because it has determined that the current language, which encompasses "[a]ny cost incurred for any communication by a membership organization to its members," sufficiently addresses its concern that an organization not be used as a conduit by a candidate or other outside entity seeking to influence unlawfully a Federal election.

#### *Section 100.8(b)(4)(iv)(A) Attributes of Membership Organizations*

Paragraph (b)(4)(iv)(A) of this section addresses the attributes of membership organizations. Since the purpose of the Act's "membership communications" exception is to allow *bona fide* membership organizations to engage in political communications with their members, these rules are intended to prevent individuals from establishing "sham" membership organizations in an effort to circumvent the Act's contribution and expenditure limits. For this reason, the Commission believes it is appropriate to focus on the structure of the membership organization as well as on who qualifies as a member.

Accordingly, revised paragraph (A)(1) states that a membership organization shall be composed of members vested with the power and authority to operate or administer the organization pursuant to the organization's articles, bylaws, constitution or other formal organizational documents. The Commission believes it is axiomatic that membership organizations should be composed of members, and that members should have the power to operate or administer the organization. This language is a combination of that contained in proposed paragraphs (A)(1) and (A)(3) of the December, 1998 NPRM

(63 F.R. 69224). Proposed paragraph (A)(3) of the December, 1998 NPRM required that the organization "be self governing, such that the power and authority to direct and control the organization is vested in some of all members." The phrases "self-governing" and "direct and control" were removed in favor of the revised language noted above. The Commission notes that organizations would be able to delegate administrative and related responsibilities to smaller committees or other groups of members; the new rule does not require that all members approve all organization actions. Additionally, membership organizations with self-perpetuating boards of directors will be considered to have met this requirement if all members of the board are themselves members of the organization, as long as the organization has chosen this structure and it meets all other requirements of these regulations.

With regard to the requirement in paragraph (A)(2) that the qualifications and requirements for membership be expressly stated, the Commission notes that this provision would not preclude the organizational documents from delegating the responsibility to set specific requirements, such as the amount of dues or other qualifications or requirements, to the board of directors or other committees or groups of members.

The term "constitution" was also added to paragraphs (A)(1), (A)(2) and (A)(3) as a "formal organizational document" in response to several comments noting that many membership organizations considered constitutions to be their primary organizing document.

One commenter asked the Commission to drop the requirement that membership organizations "shall be composed of members," arguing that some membership organizations include non-members and might find it difficult to distinguish between the two. Since the FECA specifically refers to "members," and limits communications and solicitations to members, the Commission believes it is appropriate to include this requirement in the rules. Please note, this does not mean that organizations that permit non-members to participate in certain aspects of their operations will lose their status as a membership organization pursuant to the FECA, although they cannot solicit from or send express advocacy communications to such non members.

Some commenters pointed out that covered organizations may have to amend their bylaws to comply with these new requirements; and that this

can be a lengthy process for those organizations which, for example, must approve the proposed changes at consecutive annual meetings. The Commission may consider such organizations to be in compliance with these rules while steps are underway, in accordance with the organization's rules, to come into compliance, assuming that the other requirements of the rules are met, as long as necessary changes are made at the first opportunity available under the organization's rules.

Revised paragraph (A)(3) states that membership organizations shall make their articles, bylaws or other formal organizational documents available to their members. As noted above, the Supreme Court's language in the *NRWC* decision, 459 U.S. at 204, pointed to the need for members of membership organizations to have "relatively enduring and independently significant financial or organizational attachments" to the organization. Those attachments can hardly be meaningful if the members are unaware of their rights and obligations. This requirement is therefore a corollary to that found at revised paragraph (A)(1), that members constitute the organization.

The NPRM proposed that such documents be made "freely" available to members, a term some commenters thought implied that the documents would have to be provided free of charge. They argued that this could prove costly for small organizations with lengthy organizational documents.

The Commission did not intend by its use of the word "freely" to indicate that the documents would have to be made available "free of charge." Rather, organizations may impose reasonable copying and delivery fees for this service. They may also make these documents available at their headquarters or other offices, where members choosing to do so may consult and copy them.

Labor organizations also asserted that the Commission has no authority to impose requirements in addition to those contained in the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA") and other Federal labor laws. The Commission believes that the revised rules largely comport with the LMRDA's requirements. However, the FECA and the Federal labor laws were enacted for different purposes, and the Commission cannot be bound by other statutes that would limit its authority in enforcing and interpreting the FECA.

New paragraphs (A)(4) and (5) contain the two preliminary requirements that formerly appeared in paragraphs (A)(2)

and (3). These paragraphs state that membership organizations shall expressly solicit members, and expressly acknowledge the acceptance of membership, such as by sending a membership card or including the member on a membership newsletter list. New paragraph (A)(4) has been revised slightly to clarify that an organization must expressly solicit persons to become members of the organization.

New paragraph (A)(6) contains the language moved from the introductory text of 11 CFR 100.8(b)(4), *supra*. It states that organizations primarily organized for the purpose of influencing the nomination for election, or election, of any individual for Federal office cannot qualify as membership organizations for purposes of these rules.

*Section 100.8(b)(4)(iv)(B) Definition of "member" of a membership organization*

The Commission interprets the Supreme Court's requirement in the *NRWC* decision that members of membership organizations have a "relatively enduring and independently significant financial or organizational" attachment, *supra*, to mean that members must have a long term and continuous bond with the organization itself. The new rules define this as either a meaningful ownership or investment stake; the payment of dues on a regular basis; or direct participatory rights in the governance of the organization.

The introductory language of paragraph (b)(4)(iv)(B), which states that members must satisfy the requirements for membership in a membership organization and affirmatively accept the organization's invitation to become a member, has not been changed. Nor has paragraph (B)(1), which confers membership on those having some significant financial attachment to the organization, such as a significant investment or ownership stake.

One commenter objected to this provision, saying that it would allow wealthy individuals and other entities to purchase memberships, and that the payment of dues should be sufficient for this purpose. However, this provision addresses the situation where a member may pay several hundred thousand dollars to purchase a seat on a stock exchange, for example, but does not pay dues.

Paragraph (B)(2) requires members to pay membership dues at least annually, of a specific amount predetermined by the organization. Commenters largely agreed with the Commission's proposal

not to set any minimum amount of dues, because this varies so widely from organization to organization. The term "at least" has been added to the language proposed in the NPRM to address situations where dues are paid more frequently, i.e., bi-weekly or monthly, as is true of most labor organizations.

Several commenters expressed concern over the annual dues requirement, noting that, despite an organization's best efforts, not all members renew their memberships within a twelve-month period. These commenters raised the question of whether the annual dues standard would require organizations to exclude, for FECA purposes, any members who are late in paying dues. As long as organizations maintain and enforce an annual (or more frequent) dues requirement, payments within a flexible window or subject to a reasonable grace period would meet this requirement.

Paragraph (B)(3) defines significant organizational attachment to include (i) the affirmation of membership on at least an annual basis, and (ii) direct participatory rights in the governance of the organization. The regulation cites as examples of such rights the right to vote directly or indirectly for at least one individual on the membership organization's highest governing board; the right to vote on policy questions where the highest governing body of the membership organization is obligated to abide by the results; the right to approve the organization's annual budget; or the right to participate directly in similar aspects of the organization's governance.

The Commission notes that these requirements apply only to those members who do not pay annual dues, or whose financial attachment to the organization is not a significant investment or ownership stake. This allays the concern of some commenters that, as the proposal was originally drafted, members might be required to annually affirm their membership in addition to paying annual dues.

As with the annual dues requirement, the Commission intends to give organizations some flexibility in interpreting the phrase "annual affirmation." For example, such activities as attending and signing in at a membership meeting or responding to a membership questionnaire would satisfy this requirement. The organization would not have to send out a mailing form for this purpose unless a member did not pay dues and had no other significant contact with the organization over the period in question.

Several commenters objected to the annual affirmation requirement proposed in the NPRM, and the Commission has substantially loosened this in an effort to address their concerns. It has not eliminated it entirely, however, because the Commission is bound by the Supreme Court's requirement that there be a significant or relatively enduring attachment between the member and the organization.

*Section 100.8(b)(4)(iv)(C) Case-by-case Determinations*

The Commission is revising paragraph (b)(4)(iv)(C) of this section, which provides for case-by-case determinations of membership status through the advisory opinion ("AO") process for those who do not precisely meet the requirements set forth in paragraph (B), to specifically state that it applies to retired members, in addition to the student and lifetime members addressed in the former version.

The NPRM proposed adding new paragraph (b)(4)(iv)(D) to address the status of retired union members who had paid dues for a period of at least ten years. Some unions commented that they could not easily determine which retired members met this criterion. Other commenters urged the Commission to treat all retired members the same, regardless of whether they had retired from a union or from some other organization.

It is apparent from these comments that membership organizations have a wide range of relationships with their retired members. For this reason the Commission has decided that it is best to address this situation through the advisory opinion process, as is true of student, lifetime, honorary and similar member categories. In addition, please note that the Commission has addressed the question of retired members in AOs 1995-14, 1995-13, and 1987-5, which continue to provide guidance to similarly-situated organizations.

For instance, the most permissive advisory opinion, AO 1987-5, approved a life membership policy including members who had paid dues for ten years and reached age 65. That opinion also involved the retention of voting rights, which would not be essential under the new rules. These new rules include separate annual dues and organizational attachment tests as alternatives. Members who possess the requisite voting rights and affirm membership at least annually would qualify as members regardless of whether they ever paid dues.

*Section 100.8(b)(4)(iv)(D) Labor Organizations*

This provision, which has not been revised, states that, notwithstanding the requirements of paragraphs (b)(4)(iv)(B)(1) through (3) of this section, members of a local union are considered to be members of any national or international union of which the local union is a part and of any federation with which the local, national, or international union is affiliated.

The NPRM proposed deleting this language and replacing it with the provision relating to retired union members that has now been incorporated into the case-by-case determination process. At the time the NPRM was published, the Commission believed that unions with several organized levels would fall within the provisions relating to multi-tiered organizations contained in new paragraph 100.8(b)(4)(iv)(E) of this section, *infra*. However, some of the labor organizations that commented pointed out that their particular organizational structure did not precisely fit this model. The Commission is therefore retaining the current language to insure that unions continue to be treated as Congress intended in drafting this portion of the FECA. See *FEC v. Sailors' Union of the Pacific Political Fund*, 824 F. Supp. 492, 495 (N.D. Cal. 1986), *aff'd* 828 F.2d 502 (9th Cir. 1987).

*Section 100.8(b)(4)(iv)(E) Multi-tiered Organizations*

This provision, which was originally proposed in the 1997 NPRM, states that, in the case of a membership organization which has a national federation structure or has several levels, including, for example, national, state and/or local affiliates, a person who qualifies as a member of any entity within the federation or of any affiliate by meeting the requirements of paragraphs (b)(4)(iv)(B) (1), (2), (3), or (4) of this section, shall also qualify as a member of all affiliates for purposes of these rules. It further states that the factors set forth in the Commission's affiliation rules at 11 CFR 100.5(g)(2), (3) and (4) shall be used to determine whether entities are affiliated for purposes of this paragraph.

The commenter who first recommended this approach noted that a person who joins one tier of a multi-tiered organization clearly demonstrates an intention to associate with the entire organization. This new approach will also make enforcement easier and prevent what could otherwise be a large

number of requests for advisory opinions from multi-tiered organizations. No comments were received opposing this change.

*Section 100.8(b)(4)(iv)(F) Inapplicability of State Law*

Paragraph (b)(4)(iv)(F) provides that, for purposes of these rules, the status of a membership organization shall be determined pursuant to paragraph (b)(4)(iv) of this section and not by provisions of State law governing unincorporated associations, trade associations, cooperatives, corporations without capital stock or labor organizations. Several commenters objected to this proposal, arguing that the Commission should defer to State law in this area.

Where an organization does not have "members" under that definition of state law, the right to vote for directors, and to exercise other rights normally given to members, is typically vested in the directors themselves. The board of directors thus elects its own successors, and in that sense is a self-perpetuating, autonomous board.

State law, however, also typically gives an organization that elects not to have "members" as defined by state law the right to have other persons affiliated with the organization under such terms and conditions as the organizational documents or directors provide, and to call those persons "members" if the organization wishes to do so. In that circumstance, if the terms and conditions of membership satisfied these regulations, those persons would be "members" for purposes of the FECA, even if they were not "members" as defined under state law.

The Commission does not believe that the vagaries of state law should determine whether or not an organization has members for purposes of the FECA. Therefore, the regulations make it clear that the determination of whether an organization has members for purposes of the FECA will be determined under these regulations, and not by the definitions of state law that may either include or exclude persons as members of an organization for reasons unrelated to the FECA.

*Section 114.1(e) Definition of Membership Organization for Purposes of Corporate and Labor Organization Activity*

Revised section 114.1(e) is identical to revised section 100.8(b)(4)(iv). Please note, however, that the reference to unincorporated associations which appears in revised 11 CFR 100.8(b)(4) applies only to Part 100 and not to Part 114, since part 114 addresses only

activities by corporations and labor organizations.

*Section 114.8(g) Federations of Trade Associations*

As was the case with rural cooperatives, the 1998 NPRM proposed the repeal of 11 CFR 114.8(g), relating to federations of trade associations, because it believed these provisions would be encompassed by the proposed multi-tier language. While no commenter addressed this change, the Commission notes that parts of this section address additional issues that are beyond the scope of the present rulemaking. For example, there is a difference in the trade association context between the groups that can be solicited for contributions to the trade association's SSF and those who can get other election-influencing messages that are not SSF solicitations. For this reason, the Commission is retaining the current language without revision.

*Other Issues*

*Rural Cooperatives*

The Commission's rules at 11 CFR 114.7(k) allow certain rural cooperatives to, *inter alia*, solicit from and make express advocacy electoral communications to not only their own members, but the members of the cooperative's regional, state or local affiliates. The 1998 NPRM proposed repealing this provision and addressing this situation through 11 CFR 100.8(b)(4)(iv)(E), the general multi-tiered organization provision discussed above. However, one of the rural electric cooperatives that commented stated that the structure of most rural cooperatives does not readily correspond to the multi-tiered model envisioned in that section. The Commission is therefore retaining 11 CFR 114.7(k), to insure continued coverage of rural cooperatives under these rules.

*Advisory Opinions Superseded*

AO 1991-24 addressed the efforts of the Credit Union National Association, Inc. ("CUNA") and the Wisconsin Credit Union League to make partisan communications across multiple tiers of the organization. While the Commission approved the proposed procedures, these rules increase the options available to these and comparably situated multi tiered organizations. In AO 1993-24, the Commission determined that certain persons were not members of the National Rifle Association for purposes of the former rules because they did not have the required voting rights. The new rules supersede that portion of the AO that

requires voting rights to establish membership.

The Regulatory Flexibility Act

One commenter disputed the Commission's certification under the Regulatory Flexibility Act, 5 U.S.C. 605(b), in the NPRM that the proposed rule would not have a significant economic impact on a substantial number of small entities. While the Commission does not concur with that assessment, it nevertheless has taken steps to allay this commenter's concerns by clarifying that (1) organizations may charge reasonable copying and mailing fees for making their organizational documents available to their members; and (2) organizations may follow their usual procedures in revising their bylaws or other documents, if these rules require this action.

Certification of no Effect Pursuant to 5 U.S.C. 605(b) [Regulatory Flexibility Act]

These rules do not have a significant economic impact on a substantial number of small entities. The basis for this certification is that the rules would broaden the current definition of who qualifies as a member of a membership association, thus expanding the opportunity for such associations to send electoral advocacy communications and solicit contributions to their separate segregated funds. The increased costs of such activity, if any, do not qualify as "significant" for purposes of this requirement.

List of Subjects

11 CFR Part 100

Elections.

11 CFR Part 114

Business and industry, Elections, Labor.

For the reasons set out in the preamble, Subchapter A, Chapter I of Title 11 of the Code of Federal Regulations is amended as follows:

PART 100—SCOPE AND DEFINITIONS (2 U.S.C. 431)

1. The authority citation for Part 100 continues to read as follows:

Authority: 2 U.S.C. 431, 438(a)(8).

2. Section 100.8 is amended by revising paragraphs (b)(4) introductory text and (b)(4)(iv) to read as follows:

§ 100.8 Expenditure (2 U.S.C. 431(9)).

\* \* \* \* \*

(b) \* \*

(4) Any cost incurred for any communication by a membership

organization, including a labor organization, to its members, or any cost incurred for any communication by a corporation to its stockholders or executive or administrative personnel, is not an expenditure, except that the costs directly attributable to such a communication that expressly advocates the election or defeat of a clearly identified candidate (other than a communication primarily devoted to subjects other than the express advocacy of the election or defeat of a clearly identified candidate) shall, if those costs exceed \$2,000 per election, be reported to the Commission on FEC Form 7 in accordance with 11 CFR 104.6.

\* \* \* \* \*

(iv) (A) For purposes of paragraph (b)(4) of this section membership organization means an unincorporated association, trade association, cooperative, corporation without capital stock, or a local, national, or international labor organization that:

(1) Is composed of members, some or all of whom are vested with the power and authority to operate or administer the organization, pursuant to the organization's articles, bylaws, constitution or other formal organizational documents;

(2) Expressly states the qualifications and requirements for membership in its articles, bylaws, constitution or other formal organizational documents;

(3) Makes its articles, bylaws, constitution or other formal organizational documents available to its members;

(4) Expressly solicits persons to become members;

(5) Expressly acknowledges the acceptance of membership, such as by sending a membership card or including the member's name on a membership newsletter list; and

(6) Is not organized primarily for the purpose of influencing the nomination for election, or election, of any individual for Federal office.

(B) For purposes of paragraph (b)(4) of this section, the term members includes all persons who are currently satisfying the requirements for membership in a membership organization, affirmatively accept the membership organization's invitation to become a member, and either:

(1) Have some significant financial attachment to the membership organization, such as a significant investment or ownership stake; or

(2) Pay membership dues at least annually, of a specific amount predetermined by the organization; or

(3) Have a significant organizational attachment to the membership

organization which includes: affirmation of membership on at least an annual basis and direct participatory rights in the governance of the organization. For example, such rights could include the right to vote directly or indirectly for at least one individual on the membership organization's highest governing board; the right to vote on policy questions where the highest governing body of the membership organization is obligated to abide by the results; the right to approve the organization's annual budget; or the right to participate directly in similar aspects of the organization's governance.

(C) Notwithstanding the requirements of paragraph (b)(4)(iv)(B) of this section, the Commission may determine, on a case-by-case basis, that persons who do not precisely meet the requirements of the general rule, but have a relatively enduring and independently significant financial or organizational attachment to the organization, may be considered members for purposes of this section. For example, student members who pay a lower amount of dues while in school, long term dues paying members who qualify for lifetime membership status with little or no dues obligation, and retired members may be considered members of the organization.

(D) Notwithstanding the requirements of paragraphs (b)(4)(iv)(B)(1) through (3) of this section, members of a local union are considered to be members of any national or international union of which the local union is a part and of any federation with which the local, national, or international union is affiliated.

(E) In the case of a membership organization which has a national federation structure or has several levels, including, for example, national, state, regional and/or local affiliates, a person who qualifies as a member of any entity within the federation or of any affiliate by meeting the requirements of paragraphs (b)(4)(iv)(B)(1), (2), or (3) of this section shall also qualify as a member of all affiliates for purposes of paragraph (b)(4)(iv) of this section. The factors set forth at 11 CFR 100.5(g)(2), (3) and (4) shall be used to determine whether entities are affiliated for purposes of this paragraph.

(F) The status of a membership organization, and of members, for purposes of paragraph (b)(4) of this section, shall be determined pursuant to paragraph (b)(4)(iv) of this section and not by provisions of state law governing unincorporated associations, trade associations, cooperatives, corporations

acceptable and unacceptable purpose descriptions to be reported by authorized committees. Paragraph (B) requires authorized committees, when itemizing certain disbursements for which reimbursements are required, to provide a brief explanation of the activity for which reimbursement is required. These provisions have been in Title 11 of the **Code of Federal Regulations** since 1980 and 1995, respectively, and were not affected by the recent statutory changes to the election cycle reporting requirements.

#### Need for Correction

As published, the final rules inadvertently omit two paragraphs describing information to be reported by authorized committees of Federal candidates.

All committees must report the purpose of itemized disbursements (i.e., those disbursements aggregating in excess of \$200). Omitted paragraph (A) contains examples of suitably specific purpose descriptions as well as examples of those descriptions that are unacceptably vague. This paragraph is inconsistent with the reporting of rules for unauthorized committees (committees other than candidate committees) in 11 CFR 104.3(b)(3).

Omitted paragraph (B) is used in administering the "personal use" rules in 11 CFR 113.1. Federal candidates are barred from using campaign funds for personal benefit. Paragraph (B) requires authorized committees of Federal candidates itemizing disbursements for which partial or total reimbursement is required under 11 CFR 113.1(g)(1)(iii)(C) or (D) to provide a brief explanation of the activity for which the reimbursement is made.

Section 801 of Title 5 of the United States Code requires Federal agencies to submit regulations to Congress. These regulations were submitted to the Speaker of the House of Representatives and the President of the Senate on November 26, 2001.

#### Certification of No Effect Pursuant to 5 U.S.C. § 605(b) [Regulatory Flexibility Act]

This correction will not have significant economic impact on a substantial number of small entities. The basis of this certification is that this correction only requires political committees to once again add information to the reports they are required to file. These regulations were in 11 CFR since 1980 and 1995, respectively, before being inadvertently omitted in 2000.

#### List of Subjects in 11 CFR Part 104

Campaign funds, Political committees and parties, Reporting and recordkeeping requirements.

Accordingly, 11 CFR part 104 is corrected by making the following correcting amendment:

#### PART 104—REPORTS BY POLITICAL COMMITTEES

1. The authority citation for part 104 continues to read as follows:

**Authority:** 2 U.S.C. 431(1), 431(8), 431(9), 432(i), 434, 438(a)(8), 438(b), 439a.

#### § 104.3 Contents of reports (2 U.S.C. 434(b), 439a).

\* \* \* \* \*

2. In § 104.3 add the following paragraphs (b)(4)(i)(A) and (B):

(b) \* \* \*

(4) \* \* \*

(i) \* \* \*

(A) As used in this paragraph, *purpose* means a brief statement or description of why the disbursement was made. Examples of statements or descriptions which meet the requirements of this paragraph include the following: dinner expenses, media, salary, polling, travel, party fees, phone banks, travel expenses, travel expense reimbursement, and catering costs. However, statements or descriptions such as *advance*, *election day expenses*, *other expenses*, *expenses*, *expense reimbursement*, *miscellaneous*, *outside services*, *get-out-the-vote* and *voter registration* would not meet the requirements of this paragraph for reporting the purpose of an expenditure.

(B) In addition to reporting the purpose described in paragraph (b)(4)(i)(A) of this section, whenever an authorized committee itemizes a disbursement that is partially or entirely a personal use for which reimbursement is required under 11 CFR 113.1(g)(1)(ii)(C) or (D), it shall provide a brief explanation of the activity for which reimbursement is required.

\* \* \* \* \*

Dated: November 26, 2001.

**Danny L. McDonald,**  
Chairman, Federal Election Commission.  
[FR Doc. 01-29679 Filed 11-29-01; 8:45 am]  
**BILLING CODE 6715-01-P**

#### FEDERAL ELECTION COMMISSION

#### 11 CFR Part 111

[Notice 2001-18]

#### Extension to Administrative Fines

**AGENCY:** Federal Election Commission.

**ACTION:** Final rule; revision of the sunset date.

**SUMMARY:** The Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the expiration date in which the Federal Election Commission (hereinafter "the Commission") may assess civil money penalties for violations of the reporting requirements of section 434(a) of the Federal Election Campaign Act (hereinafter "the Act" or "FECA").

**DATES:** Effective on December 31, 2001.

**FOR FURTHER INFORMATION CONTACT:** Ms. Rosemary C. Smith, Assistant General Counsel, or Ms. Mai T. Dinh, Attorney, 999 E Street, NW., Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

#### SUPPLEMENTARY INFORMATION:

#### Explanation and Justification

Section 640 of the Treasury and General Government Appropriations Act, 2000, Pub. L. No. 106-58, 106th Cong., 113 Stat. 430, 476-77 (1999), amended § 309(a)(4) of the FECA, 2 U.S.C. 437g(a)(4), to provide for a modified enforcement process for violations of reporting requirements. Under § 437g(a)(4)(C) of the FECA, the Commission may assess a civil money penalty for violations of the reporting requirements of 2 U.S.C. 434(a). This authority, however, was to sunset on December 31, 2001. Pub. L. No. 106-58, 106th Cong., § 640(c). Recently, § 642 of the Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the sunset date to include all reports that cover activity between January 1, 2000, to December 31, 2003.

The Commission published final rules on May 19, 2000, to implement the amendment contained in the Treasury and General Government Appropriations Act, 2000. Section 111.30 of the regulations reflects the sunset provision of Pub. L. No. 106-58, 106th Cong., § 640(c). Therefore, the Commission is issuing this final rule to amend section 111.30 to extend the application of the administrative fine regulations, 11 CFR part 111, subpart B, to include all violations relating to reports that cover the period between January 1, 2000, to December 31, 2003.

The Commission is promulgating this final rule without notice or opportunity for comment because it falls under the "good cause" exemption of the Administrative Procedures Act, 5 U.S.C. 553(b)(B). The exemption allows



# Rules and Regulations

Federal Register

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Thursday, August 5, 1999

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

## FEDERAL ELECTION COMMISSION

### 11 CFR Parts 110, 9004, and 9034

[Notice 1999-13]

#### Party Committee Coordinated Expenditures; Costs of Media Travel With Publicly Financed Presidential Candidates

**AGENCY:** Federal Election Commission.

**ACTION:** Final Rule and Transmittal of Regulations to Congress.

**SUMMARY:** The Commission is revising two portions of its regulations governing publicly financed Presidential primary and general election candidates. These rules address the costs of transportation and ground services that federally funded Presidential primary and general election campaigns may pass on to the news media covering their campaigns, as well as party committee coordinated expenditures that are made before the date their candidates receive the nomination. Further information is provided in the supplementary information which follows.

**DATES:** Further action, including the publication of a document in the *Federal Register* announcing an effective date, will be taken after these regulations have been before Congress for 30 legislative days pursuant to 2 U.S.C. 438(d) and 26 U.S.C. 9009(c) and 9039(c).

**FOR FURTHER INFORMATION CONTACT:** Ms. Rosemary C. Smith, Acting Assistant General Counsel, 999 E Street, NW., Washington, DC 20463, (202) 694-1650 or toll free (800) 424-9530.

**SUPPLEMENTARY INFORMATION:** The Commission is publishing today the final text of revisions to its regulations governing certain aspects of the public financing of Presidential campaigns. Specifically, the amended rules at 11 CFR 9004.6 and 9034.6 govern transportation and services provided by

federally funded Presidential candidates to the news media covering their campaigns. Also included are amendments to 11 CFR 110.7, regarding coordinated expenditures by political party committees on behalf of their Presidential and Congressional candidates that are made before the date these candidates are nominated by their political parties. These regulations implement section 441a(d) of the Federal Election Campaign Act ("FECA"), section 9004 of the Presidential Election Campaign Fund Act ("Fund Act") and section 9034 of the Presidential Primary Matching Payment Account Act ("Matching Payment Act"). See 2 U.S.C. 441a(d), and 26 U.S.C. 9004 and 9034. The Fund Act and the Matching Payment Act establish eligibility requirements for Presidential candidates seeking public financing, and indicate how funds received under the public financing system may be spent.

On May 5, 1997, the Commission issued a Notice of Proposed Rulemaking ("1997 NPRM") in which it sought comments on proposed revisions to the coordinated expenditure provisions of 11 CFR 110.7. See 62 F.R. 24367 (May 5, 1997). Written comments were received from the Internal Revenue Service (IRS), the Chamber of Commerce, the National Right to Life Committee (NRLC), the Republican National Committee (RNC), the National Republican Senatorial Committee (NRSC), the National Republican Congressional Committee (NRCC), the Democratic National Committee (DNC), a joint comment from the Democratic Senatorial Campaign Committee (DSCC) and the Democratic Congressional Campaign Committee (DCCC), and Common Cause. A public hearing was held on June 18, 1997, at which witnesses testified on behalf of the DNC, the RNC, the NRLC, the NRSC, the DSCC and the DCCC, and Common Cause. The IRS indicated that it found no conflict with the Internal Revenue Code or regulations thereunder. Subsequently, the consideration of final rules was postponed pending the outcome of litigation that could materially affect the policies at issue.

On December 16, 1998, the Commission published a new Notice of Proposed Rulemaking ("1998 NPRM") putting forth proposed amendments to its rules governing publicly financed

Presidential primary and general election candidates. See 63 F.R. 69524 (Dec. 16, 1998). Issues concerning coordination between party committees and their Presidential candidates, which had been raised in the earlier rulemaking, were also included in the public funding rulemaking. In response to the 1998 NPRM, written comments on coordinated expenditures were received from Perot for President '96; James Madison Center for Free Speech; Common Cause and Democracy 21 (joint comment); Brennan Center for Justice; Lyn Utrecht, Eric Kleinfeld, and Patricia Fiori (joint comment); the DNC; and the RNC. Subsequently, the Commission reopened the comment period and held a public hearing on March 24, 1999, at which the following four witnesses presented testimony on the coordination issues: Lyn Utrecht (Ryan, Phillips, Utrecht & MacKinnon), Joseph E. Sandler (DNC), Thomas J. Josefiak (RNC), and James Bopp, Jr. (James Madison Center for Free Speech).

The 1998 NPRM also sought comments on proposed revisions to the regulations at 11 CFR 9004.6 and 9034.6 regarding media travel. Written comments on the media travel issues were received from Lyn Utrecht, Eric Kleinfeld, and Patricia Fiori (joint comment); the DNC; the RNC; and Carl P. Leubsdorf and twenty eight other executives of news organizations (joint comment). At the public hearing on March 24, 1999, the following witnesses presented testimony on the media travel rules: Kim Hume (Fox News), George Condon (Copley News Service), and Thomas J. Josefiak (RNC). The Internal Revenue Service stated that it has reviewed the NPRM and finds no conflict with the Internal Revenue Code or regulations thereunder. The comments and testimony on both topics are discussed in more detail below.

Please note, the Commission published previously final rules modifying the candidate agreement provisions so that federally-financed Presidential committees must electronically file their reports, as well as final rules governing the matchability of contributions made by credit and debit cards, including those transmitted over the Internet. See Explanation and Justification, 63 FR 45679 (August 27, 1998) (electronic filing) and Explanation and Justification, 64 FR 32394 (June 17, 1999) (matchability). The effective



date for the electronic filing regulations is November 13, 1998. *See* Announcement of Effective Date, 63 FR 63388 (November 13, 1998). An effective date for the matching fund rules will be announced once those regulations have been before Congress for thirty legislative days.

Section 438(d) of Title 2 and sections 9009(c) and 9039(c) of Title 26, United States Code, require that any rules or regulations prescribed by the Commission to carry out the provisions of title 2 or 26 of the United States Code be transmitted to the Speaker of the House of Representatives and the President of the Senate 30 legislative days before they are finally promulgated. The final rules that follow were transmitted to Congress on July 30, 1999.

### Explanation and Justification

#### *Section 110.7 Party Committee Coordinated Expenditures and Spending Limits (2 U.S.C. 441a(d))*

Section 441a(d) permits national, state, and local committees of political parties to make limited general election campaign expenditures on behalf of their candidates, which are in addition to the amount they may contribute directly to those candidates. 2 U.S.C. 441a(d). These section 441a(d) expenditures are commonly referred to as "coordinated party expenditures" because such expenditures can be made after extensive consultation with the candidates and their campaign staffs.<sup>1</sup> However, party committees have never had to demonstrate actual "coordination" with their candidates to avail themselves of this additional spending limit.

Section 110.7 of the Commission's regulations implements the statutory exception to the contribution limits set forth at 2 U.S.C. 441a. Former paragraph (b)(4) of this section had presumed that party committees were incapable of making independent expenditures. This regulation was implicated by the Supreme Court's plurality opinion in *Colorado Republican Federal Campaign Committee v. Federal Election Commission*, 518 U.S. 604 (1996) (*Colorado*). In that decision, the Court concluded that political parties are capable of making independent expenditures on behalf of their candidates for federal office, and that it would violate the First Amendment to

subject such independent expenditures to the expenditure limits found in section 441a(d) of the FECA. *Id.* at 613-14.

Following the *Colorado* Supreme Court decision, the Commission promulgated a Final Rule on August 7, 1996 that repealed paragraph (b)(4) of § 110.7 to the extent that this paragraph prohibited national committees of political parties from making independent expenditures for congressional candidates. 61 FR 40961 (Aug. 7, 1996). On the same date, the Commission also published a Notice of Availability seeking comment on other significant issues arising from the *Colorado* decision. 61 FR 41036 (Aug. 7, 1996). These included possible amendments to 11 CFR Part 109 and 11 CFR 110.7 to provide standards for determining when expenditures qualify as "independent" or are considered "coordinated" with Congressional and Presidential candidates. Another issue raised was whether to modify or repeal the rule barring national party committees from making independent expenditures on behalf of Presidential candidates in the general election. *See* 11 CFR 110.7(a)(5). Given that the *Colorado* decision concerned a Senatorial election, the Supreme Court specifically noted in the opinion that it was not addressing issues that might grow out of the public funding of Presidential campaigns. *Colorado*, 518 U.S. at 612.

As explained above, the Commission also issued two Notices of Proposed Rulemaking and held two public hearings on proposed revisions to the coordinated expenditure regulations. *See* 62 F.R. 24367 (May 5, 1997) and 63 F.R. 69524 (Dec. 16, 1998). For example, the 1998 NPRM put forward narrative proposals regarding a content-based standard for coordinated communications made to the general public. It also sought comment on coordination between the national committees of political parties and their Presidential candidates with respect to poll results, media production, consultants, and employees whose services are intended to benefit the parties' eventual Presidential nominees.

At this point, the Commission is continuing to evaluate possible amendments to 11 CFR 110.7 and 109.1 regarding the definitions of "coordinated" and "independent" expenditures, the standards applicable to party committee advertisements directed to the general public, and the possible repeal or modification of 11 CFR 110.7(a)(5), which currently bars national party committees from making independent expenditures in

connection with Presidential general election campaigns. Consequently, revised proposals on these topics may be put out for additional public comment in the future.

However, with respect to pre-nomination coordinated expenditures, the Commission is promulgating new paragraph (d) of section 110.7, which is consistent with its previous policy permitting coordinated expenditures to be made before the date of the primary election. *See, e.g.*, Advisory Opinion 1984-15 ("[N]othing in the Act, its legislative history, Commission regulations, or court decisions indicates that coordinated party expenditures must be restricted to the time period between nomination and the general election."); *see also* AO 1985-14. Please note, however, that other aspects of these advisory opinions may be modified or superseded by subsequent Commission decisions regarding the remaining coordination issues.

With regard to prenomination coordinated expenditures, one of the commenters on the 1998 NPRM indicated that the current state of the law is clear, based on AOs 1984-15 and 1985-14, and there is no need to revise the rules. This party committee also noted that its own rules preclude it from supporting a Presidential candidate until that candidate has sufficient delegates to be nominated. In contrast, other commenters urged the Commission to state explicitly in the regulations that political party committees may make 441a(d) expenditures before the general election campaign period. However, one of these commenters opposed a requirement that all pre-nomination expenditures count against the party's 441a(d) limit. The commenter did not think it would be fair to count party expenditures against the coordinated spending limits if they were for positive communications supporting an anticipated nominee who was later forced to withdraw, for example, due to illness.

The Commission has concluded that it is advisable to include language in 11 CFR 110.7 that specifically sets forth the Commission's past policy of permitting pre-nomination coordinated expenditures for the general election. Accordingly, new language at paragraph (d) of section 110.7 covers all Presidential candidates, whether or not they receive federal funding, as well as Congressional candidates. To issue new rules that only apply to Presidential candidates would create the implication that coordinated expenditures for House and Senate candidates are subject to different standards, thereby generating needless confusion. The Commission

<sup>1</sup> The coordinated spending limits were invalidated on Constitutional grounds by one district court in *Colorado Republican Federal Campaign Committee v. Federal Election Commission*, 41 F. Supp.2d 1197 (D. Co. Co. 1999) on remand from 518 U.S. 604 (1996). This case is being appealed.

does not agree with the commenters who opposed counting "positive" pre-nomination expenditures against the 441a(d) limits if another candidate receives the party's nomination. For one thing, this approach would create a distinction between positive ads supporting the party's candidate and negative ads opposing other candidates. There is no apparent basis in the FECA or its legislative history for this type of distinction. In addition, there may be some situations where a party committee ad contains both positive messages about the party and its candidate as well as negative messages about the opposition.

*Section 9004.6 Expenditures for Transportation and Services Made Available to Media Personnel; Reimbursements*

Section 9004.6 of the Commission's regulations contains provisions governing expenditures by federally financed committees for transportation and other services provided to representatives of the news media covering the Presidential general election campaigns. These rules indicate that expenditures for these purposes will, in most cases, be treated as qualified campaign expenses subject to the overall spending limitations of section 9003.2. Parallel provisions regarding Presidential primary campaigns are located at 11 CFR 9034.6.

However, section 9004.6 also allows committees to accept limited reimbursement for these expenses from the media, and to deduct any reimbursements received from the amount of expenditures subject to the overall expenditure limitation. These rules set limits on the amount of reimbursement that a committee can accept, and require committees to pay a portion of any reimbursement that exceeds those limits to the U.S. Treasury. Section 9004.6(b) limits the reimbursements to 110% of a media representative's *pro rata* share of the actual cost of the transportation and services made available. Please note that the additional 10% generally corresponds to the amount the White House Travel Office bills the press for expenses associated with government employees directly supporting the press. The regulations specify that the *pro rata* share is calculated by dividing the total actual cost of the transportation and services provided by the total number of individuals to whom such transportation and services are made available. Under the revisions to this provision, the total number of individuals has not been changed, and thus continues to include committee

staff, media personnel, Secret Service and others.

During the last Presidential election cycle, a number of disputes arose between the media and certain campaigns regarding charges billed to the press. The disputes concerned the types of expenses that relate to media coverage of campaign events as distinguished from the costs of staging those campaign events. Another issue centered on the ability of the campaigns to charge all press representatives for the use of ground facilities, not just those who travel with the candidate. The third issue concerned the perceived lateness and lack of specificity in the bills received for media costs.

**1. Types of Costs That May Be Charged to the Media**

The 1998 NPRM sought comments on whether the rules should be revised to include lists of allowable and nonallowable expenses that may be charged to the media for ground costs. Disputed items have included security services for the press, sound and lighting equipment, press risers and camera platforms, carpeting, bunting, skirts, railings, flags, and electrical service for the press platforms.

Two witnesses who have represented Presidential campaign committees or a party committee argued that presidential campaigns should be permitted to bill the media for legitimate costs incurred for the benefit of, or at the request of, the media, since these costs would not have been incurred otherwise. These comments stated that all the items listed in the NPRM are reasonable, legitimate costs that should be paid by the media. One of these witnesses specifically opposed an attempt to allocate costs between the press and the campaigns. In contrast, the representatives of 29 major news organizations stated that the informal system they had worked out with presidential campaign committees had broken down in the past two Presidential election campaigns and should be replaced with explicit guidelines. While the news organizations remain willing to pay legitimate travel expenses, they were opposed to being forced to pay what they considered to be the costs the campaign committees incurred in staging campaign events, which includes the sound and lighting systems, bunting and flags. They referred the Commission to the guidelines negotiated by the White House Correspondents' Association and the White House Travel Office for examples of the types of legitimate costs of covering campaign events that the

news media believed it could fairly be asked to pay as well as items that should not be billed to the press unless a particular item is ordered by a news organization and that specific organization is billed. They urged the Commission to incorporate into its regulations similar restrictions on reimbursements from the media.

In light of the increasing numbers of disputes in this area, the Commission has concluded that more regulatory guidance is needed. Accordingly, 11 CFR 9004.6 is being amended by adding new paragraph (a)(3) to specify that publicly funded Presidential campaigns may seek reimbursement from the media only for the items listed in the White House Press Corps Travel Policies and Procedures issued by the White House Travel Office. The Commission has concluded that these guidelines, which were established by an arms length negotiation process, are suitable for incumbent Presidents seeking re-election, incumbent Vice Presidents running for President, as well as non-incumbent challengers in Presidential primary and general elections. Incorporating the White House Travel Office's guidelines into the regulations will also ensure that any future changes that are negotiated by the White House Correspondents' Association and the White House Travel Office will automatically be reflected in the Commission's rules without the need for additional rulemaking.

The Commission notes that the White House Travel Office guidelines currently include, in addition to a list of billable items, a provision providing for billing for any item specifically requested by a media representative. The Commission assumes that this or a similar provision will be retained in any revisions to the White House guidelines. Therefore, the limitation on press billings to items specified in the White House guidelines would not preclude media personnel from requesting items or services not specifically enumerated in those guidelines, and campaigns could bill the requesting media personnel for the requested items.

**2. Ground Services Made Available to Traveling and Non-Traveling Media Representatives**

The 1998 NPRM sought input as to whether further clarifications are needed to convey that Presidential campaign committees may only charge a media representative for his or her own *pro rata* share for meals, chairs on the press platform, seats on buses and vans, and telephone lines in filing centers, and that media representatives must not be expected to pay for services

made available to other members of the press or to campaign staff, volunteers, local elected officials or others. The Notice recognized that at times campaign committees have not sought payment from members of the press who do not travel on the press plane. One witness who has represented federally financed campaigns confirmed that the committees never obtain billing information on many media people. This may be due, sometimes, to the fact that local reporters and other media representatives not traveling with the campaign do not need to provide campaign staff with a credit card number for billing flights. Representatives of the news organizations who filed comments and testified at the hearing suggested that at the time campaigns provide press credentials to media representatives, whether on the plane or on the ground, it would not be a hardship for the campaign staff to obtain billing information. However, these witnesses found it objectionable that the press was sometimes charged for the entire cost of ground services made available to everyone attending the campaign event, or were charged for services that they were not allowed to use.

The current regulations at 11 CFR 9004.6(a)(2) permit, but do not require, campaign committees to obtain reimbursement from media representatives who use ground facilities, such as filing centers, but who do not travel on the press plane. The Commission notes that in practice one straightforward way for campaigns to obtain reimbursement from local media and other members of the press who do not travel with the candidate may be to collect billing information as part of the process of issuing press credentials. However, the Commission has decided that its regulations need not require the collection of billing information because campaign committees may elect to treat media costs as qualified campaign expenses and are not obligated to seek reimbursement.

Under the current regulations at 11 CFR 9004.6(b)(2), campaigns should already be well aware that each media representative may only be charged his or her own *pro rata* share of costs. These rules explain that everyone, which includes campaign staff and media personnel from other news organizations, must be included in this calculation. Thus, Presidential campaign committees may not force the traveling press to absorb the costs of ground services used or consumed by local media, campaign staff, or others. Consequently no additional changes to

the regulations are necessary in this regard.

### 3. Billing and Payment Guidelines

Representatives of the major news organizations presented evidence in their written comments and testimony to the effect that it sometimes took months or even years after a campaign trip for them to receive bills from Presidential campaign committees for travel costs. They also explained that in some cases, they were presented with a bill for a single lump sum, which made it very difficult, if not impossible, to determine what charges were included and whether these amounts were correct. These commenters and witnesses also urged the Commission to place restrictions on what items could be charged to a media representative's credit card. Specifically, they urged the Commission to limit the use of credit cards to advance charter payments and hotel room reservations.

After evaluating the written comments and oral testimony, the Commission has decided that it is necessary to establish guidelines covering the billing and payment of media travel and ground costs. Consequently, new paragraph (b)(3) of section 9004.6 specifies that Presidential campaign committees have sixty (60) days to provide each media representative traveling or attending a campaign event with an itemized bill for each segment of the trip. The bill should specify the amounts charged for each of the following categories: air transportation, ground transportation, housing, meals, telephone services, and other billable items specified in the White House Travel Office's Travel Policies and Procedures. Sixty days is a reasonable, commercial length of time. The White House Travel Office's Travel Policies and Procedures contemplate billing within twenty (20) business days of the return of a trip. Prompt, detailed billing is needed so that the committees may obtain payment or settle disputes expeditiously. The Commission believes that it is reasonable and consistent with commercial business practices to require media representatives to pay for these costs within sixty (60) days from the date of the bill in the absence of a dispute over the charges. It should be noted that while the individual reporters' credit cards may be billed, their news organizations provide reimbursement. Under the new rules, prompt billing and payment may ensure that these payments are made and these billing disputes are resolved by the parties before the Commission begins to audit the committee.

### Section 9034.6 Expenditures for Transportation and Services Made Available to Media Personnel; Reimbursements

The amendments contained in this section follow those made to section 9004.6, as discussed above.

### Certification of No Effect Pursuant to 5 U.S.C. 605(b) [Regulatory Flexibility Act]

The attached final rules will not, if promulgated, have a significant economic impact on a substantial number of small entities. The basis for this certification is that very few small entities will be affected by these proposed rules, and the cost is not expected to be significant. Further, any small entities affected have voluntarily chosen to receive public funding and to comply with the requirements of the Presidential Election Campaign Fund Act or the Presidential Primary Matching Payment Account Act in these areas.

### List of Subjects

#### 11 CFR Part 110

Campaign funds, Political committees and parties.

#### 11 CFR Part 9004

Campaign funds.

#### 11 CFR Part 9034

Campaign funds, Reporting and recordkeeping requirements.

For the reasons set out in the preamble, Subchapters A, E and F of Chapter I of Title 11 of the *Code of Federal Regulations* are amended as follows:

### PART 110—CONTRIBUTION AND EXPENDITURE LIMITATIONS AND PROHIBITIONS

1. The authority citation for Part 110 continues to read as follows:

**Authority:** 2 U.S.C. 431(8), 431(9), 432(c)(2), 437d(a)(8), 441a, 441b, 441d, 441e, 441f, 441g and 441h.

2. Section 110.7 is amended by adding paragraph (d) to read as follows:

#### § 110.7 Party committee expenditure limitations (2 U.S.C. 441a(d)).

\* \* \* \* \*

(d) Timing. Party committees may make coordinated expenditures in connection with the general election campaign before their candidates have been nominated. All pre-nomination coordinated expenditures shall be subject to the coordinated expenditure limitations of this section, whether or not the candidate with whom they are

acceptable and unacceptable purpose descriptions to be reported by authorized committees. Paragraph (B) requires authorized committees, when itemizing certain disbursements for which reimbursements are required, to provide a brief explanation of the activity for which reimbursement is required. These provisions have been in Title 11 of the **Code of Federal Regulations** since 1980 and 1995, respectively, and were not affected by the recent statutory changes to the election cycle reporting requirements.

#### Need for Correction

As published, the final rules inadvertently omit two paragraphs describing information to be reported by authorized committees of Federal candidates.

All committees must report the purpose of itemized disbursements (i.e., those disbursements aggregating in excess of \$200). Omitted paragraph (A) contains examples of suitably specific purpose descriptions as well as examples of those descriptions that are unacceptably vague. This paragraph is inconsistent with the reporting of rules for unauthorized committees (committees other than candidate committees) in 11 CFR 104.3(b)(3).

Omitted paragraph (B) is used in administering the "personal use" rules in 11 CFR 113.1. Federal candidates are barred from using campaign funds for personal benefit. Paragraph (B) requires authorized committees of Federal candidates itemizing disbursements for which partial or total reimbursement is required under 11 CFR 113.1(g)(1)(iii)(C) or (D) to provide a brief explanation of the activity for which the reimbursement is made.

Section 801 of Title 5 of the United States Code requires Federal agencies to submit regulations to Congress. These regulations were submitted to the Speaker of the House of Representatives and the President of the Senate on November 26, 2001.

#### Certification of No Effect Pursuant to 5 U.S.C. § 605(b) [Regulatory Flexibility Act]

This correction will not have significant economic impact on a substantial number of small entities. The basis of this certification is that this correction only requires political committees to once again add information to the reports they are required to file. These regulations were in 11 CFR since 1980 and 1995, respectively, before being inadvertently omitted in 2000.

#### List of Subjects in 11 CFR Part 104

Campaign funds, Political committees and parties, Reporting and recordkeeping requirements.

Accordingly, 11 CFR part 104 is corrected by making the following correcting amendment:

#### PART 104—REPORTS BY POLITICAL COMMITTEES

1. The authority citation for part 104 continues to read as follows:

**Authority:** 2 U.S.C. 431(1), 431(8), 431(9), 432(i), 434, 438(a)(8), 438(b), 439a.

#### § 104.3 Contents of reports (2 U.S.C. 434(b), 439a).

\* \* \* \* \*

2. In § 104.3 add the following paragraphs (b)(4)(i)(A) and (B):

(b) \* \* \*

(4) \* \* \*

(i) \* \* \*

(A) As used in this paragraph, *purpose* means a brief statement or description of why the disbursement was made. Examples of statements or descriptions which meet the requirements of this paragraph include the following: dinner expenses, media, salary, polling, travel, party fees, phone banks, travel expenses, travel expense reimbursement, and catering costs. However, statements or descriptions such as *advance*, *election day expenses*, *other expenses*, *expenses*, *expense reimbursement*, *miscellaneous*, *outside services*, *get-out-the-vote* and *voter registration* would not meet the requirements of this paragraph for reporting the purpose of an expenditure.

(B) In addition to reporting the purpose described in paragraph (b)(4)(i)(A) of this section, whenever an authorized committee itemizes a disbursement that is partially or entirely a personal use for which reimbursement is required under 11 CFR 113.1(g)(1)(ii)(C) or (D), it shall provide a brief explanation of the activity for which reimbursement is required.

\* \* \* \* \*

Dated: November 26, 2001.

**Danny L. McDonald,**  
Chairman, Federal Election Commission.  
[FR Doc. 01-29679 Filed 11-29-01; 8:45 am]  
**BILLING CODE 6715-01-P**

#### FEDERAL ELECTION COMMISSION

#### 11 CFR Part 111

#### [Notice 2001-18]

#### Extension to Administrative Fines

**AGENCY:** Federal Election Commission.

**ACTION:** Final rule; revision of the sunset date.

**SUMMARY:** The Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the expiration date in which the Federal Election Commission (hereinafter "the Commission") may assess civil money penalties for violations of the reporting requirements of section 434(a) of the Federal Election Campaign Act (hereinafter "the Act" or "FECA").

**DATES:** Effective on December 31, 2001.

**FOR FURTHER INFORMATION CONTACT:** Ms. Rosemary C. Smith, Assistant General Counsel, or Ms. Mai T. Dinh, Attorney, 999 E Street, NW., Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

#### SUPPLEMENTARY INFORMATION:

#### Explanation and Justification

Section 640 of the Treasury and General Government Appropriations Act, 2000, Pub. L. No. 106-58, 106th Cong., 113 Stat. 430, 476-77 (1999), amended § 309(a)(4) of the FECA, 2 U.S.C. 437g(a)(4), to provide for a modified enforcement process for violations of reporting requirements. Under § 437g(a)(4)(C) of the FECA, the Commission may assess a civil money penalty for violations of the reporting requirements of 2 U.S.C. 434(a). This authority, however, was to sunset on December 31, 2001. Pub. L. No. 106-58, 106th Cong., § 640(c). Recently, § 642 of the Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the sunset date to include all reports that cover activity between January 1, 2000, to December 31, 2003.

The Commission published final rules on May 19, 2000, to implement the amendment contained in the Treasury and General Government Appropriations Act, 2000. Section 111.30 of the regulations reflects the sunset provision of Pub. L. No. 106-58, 106th Cong., § 640(c). Therefore, the Commission is issuing this final rule to amend section 111.30 to extend the application of the administrative fine regulations, 11 CFR part 111, subpart B, to include all violations relating to reports that cover the period between January 1, 2000, to December 31, 2003.

The Commission is promulgating this final rule without notice or opportunity for comment because it falls under the "good cause" exemption of the Administrative Procedures Act, 5 U.S.C. 553(b)(B). The exemption allows

to subpart D, 10 CFR part 1021. Accordingly, neither an environmental assessment nor an environmental impact statement is required.

*F. Review Under Executive Order 12612*

Executive Order 12612, "Federalism" (52 FR 41685, October 30, 1987) requires that regulations, rules, legislation, and any other policy actions be reviewed for any substantial direct effects on states, on the relationship between the federal government and the states, or in the distribution of power and responsibilities among the various levels of government. If there are substantial effects, the Executive Order requires the preparation of a federalism assessment to be used in all decisions involved in promulgating and implementing the policy action. DOE has analyzed this rulemaking in accordance with the principles and criteria contained in Executive Order 12612, and has determined there are no federalism implications that would warrant the preparation of a federalism assessment. Today's interim final rule deals with administrative procedures regarding retaliation protection for employees of DOE contractors and subcontractors. This rule will not have a substantial direct effect on states, the relationship between the states and federal government, or the distribution of power and responsibilities among various levels of government.

*G. Review Under the Unfunded Mandates Reform Act of 1995*

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4) requires each federal agency to prepare a written assessment of the effects of any federal mandate in a proposed or final rule that may result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million in any one year. The Act also requires a federal agency to develop an effective process to permit timely input by elected officers of state, local, and tribal governments on a proposed "significant intergovernmental mandate," and it requires an agency to develop a plan for giving notice and opportunity for timely input to potentially affected small governments before establishing any requirement that might significantly or uniquely affect them. This interim final rule does not contain any federal mandate, so these requirements do not apply.

*H. Congressional Notification*

As required by 5 U.S.C. 801, DOE will submit to Congress a report regarding the issuance of today's interim final rule

prior to the effective date set forth at the outset of this notice. The report will state that it has been determined that the rule is not a "major rule" as defined by 5 U.S.C. 801(2).

**List of Subjects in 10 CFR Part 708**

Administrative practice and procedure, Energy, Fraud, Government contracts, Occupational Safety and Health, Whistleblowing.

Issued in Washington, on July 6, 1999.

**George B. Breznay,**

*Director, Office of Hearings and Appeals.*

For the reasons set forth in the preamble, Chapter III of title 10 of the Code of Federal Regulations is amended as set forth below:

**PART 708—[AMENDED]**

1. The authority citation for Part 708 continues to read as follows:

**Authority:** 42 U.S.C. 2201(b), 2201(c), 2201(i) and 2201(p); 42 U.S.C. 5814 and 5815; 42 U.S.C. 7251, 7254, 7255, and 7256; and 5 U.S.C. Appendix 3.

2. Part 708 is amended by adding § 708.40 to subpart C to read as follows:

**§ 708.40 Are contractors required to inform their employees about this program?**

Yes. Contractors who are covered by this part must inform their employees about these regulations by posting notices in conspicuous places at the work site. These notices must include the name and address of the DOE office where you can file a complaint under this part.

3. Part 708 is amended by adding § 708.41 to subpart C to read as follows:

**§ 708.41 Will DOE ever refer a complaint filed under this part to another agency for investigation and a decision?**

Notwithstanding the provisions of this part, the Secretary of Energy retains the right to request that a complaint filed under this part be accepted by another Federal agency for investigation and factual determinations.

4. Part 708 is amended by adding § 708.42 to subpart C to read as follows:

**§ 708.42 May the deadlines established by this part be extended by any DOE official?**

Yes. The Secretary of Energy (or the Secretary's designee) may approve the extension of any deadline established by this part, and the OHA Director may approve the extension of any deadline under § 708.22 through § 708.34 of this subpart (relating to the investigation, hearing, and OHA appeal process).

[FR Doc. 99-17658 Filed 7-9-99; 8:45 am]

**BILLING CODE 6415-01-P**

**FEDERAL ELECTION COMMISSION**

**11 CFR Part 110**

[Notice 1999-10]

**Treatment of Limited Liability Companies Under the Federal Election Campaign Act**

**AGENCY:** Federal Election Commission.

**ACTION:** Final rules and transmittal of regulations to Congress.

**SUMMARY:** The Commission has adopted new regulations that address the treatment of limited liability companies ("LLC") for purposes of the Federal Election Campaign Act ("FECA" or the "Act"). The new rules provide that LLCs will be treated as either partnerships or corporations for FECA purposes, consistent with the tax treatment they select under the Internal Revenue Code.

**DATES:** Further action, including the publication of a document in the **Federal Register** announcing an effective date, will be taken after these regulations have been before Congress for 30 legislative days pursuant to 2 U.S.C. 438(d).

**FOR FURTHER INFORMATION CONTACT:** N. Bradley Litchfield, Associate General Counsel, or Rita A. Reimer, Attorney, 999 E Street, NW, Washington, DC 20463, (202) 694-1650 or (800) 424-9530 (toll free).

**SUPPLEMENTARY INFORMATION:** The Commission is publishing today new regulations at 11 CFR 110.1(g) governing the treatment of Limited Liability Companies under the Federal Election Campaign Act, 2 U.S.C. 431 *et seq.* LLCs are non-corporate business entities, created under State law, that have characteristics of both partnerships and corporations. These entities did not exist when the FECA was originally enacted in 1971, and were in their infancy when the pertinent provisions of the FECA were last amended in 1979.

On December 18, 1998, the Commission published a Notice of Proposed Rulemaking ("NPRM") in which it sought comments on this issue. 63 FR 70065 (Dec. 18, 1998). Written comments were received from the American Medical Association, the Internal Revenue Service, and Nicholas G. Karambelas.

Since these rules are not major rules within the meaning of 5 U.S.C. 804(2), the FECA controls the legislative review process. *See* 5 U.S.C. 801(a)(4), Small Business Enforcement Fairness Act, Public Law 104-121, section 251, 110 Stat. 857, 869 (1996). Section 438(d) of Title 2, United States Code, requires that any rules or regulations prescribed by

the Commission to carry out the provisions of Title 2 of the United States Code be transmitted to the Speaker of the House of Representatives and the President of the Senate 30 legislative days before they are finally promulgated. These regulations were transmitted to Congress on Friday, June 25, 1999.

### Explanation and Justification

The Federal Election Campaign Act, as amended, contains various restrictions and prohibitions on the right of "persons" to contribute to Federal campaigns. The Act defines "person" to include an individual, partnership, committee, association, corporation, labor organization, or any other organization or group of persons. 2 U.S.C. 431(11).

The Act prohibits corporations and labor organizations from making any contribution or expenditure in connection with a Federal election, 2 U.S.C. 441b(a), although these entities may establish separate segregated funds ("SSF") and solicit contributions from their restricted class to the SSF. 2 U.S.C. 441b(b)(2)(C). The Act also prohibits contributions by Federal contractors, 2 U.S.C. 441c, and foreign nationals, 2 U.S.C. 441e. Contributions by persons whose contributions are not prohibited by the Act are subject to the limits set out in 2 U.S.C. 441a(a), generally \$1,000 per candidate per election to Federal office; \$20,000 aggregate in any calendar year to national party committees; and \$5,000 aggregate in any calendar year to other political committees. 2 U.S.C. 441a(a)(1). Individual contributions may not aggregate more than \$25,000 in any calendar year. 2 U.S.C. 441a(a)(3).

Contributions by partnerships are permitted, subject to the 2 U.S.C. 441a(a) limits. In addition, partnership contributions are attributed proportionately against each contributing partner's limit for the same candidate and election. 11 CFR 110.1(e).

In recent years the Commission received several advisory opinion requests ("AOR") seeking guidance on the treatment of LLCs for purposes of the Act, and has issued advisory opinions ("AO") in response to these AORs. See AOs 1998-15, 1998-11, 1997-17, 1997-4, 1996-13, and 1995-11. The AOs generally considered how the LLCs were treated under State law to determine their treatment for purposes of the Act. As the number of AORs on this topic increased, the Commission decided that it would be advisable to draft a generally-applicable rule to deal with these entities.

The NPRM sought comments on two alternative approaches. Under

Alternative A, LLCs would be treated as partnerships for FECA purposes. Contributions by an LLC would be attributed to the LLC and to each member of the LLC in direct proportion to member's share of the LLCs profits, as reported to the recipient by the LLC, or by agreement of the members, as long as certain conditions were met.

Under Alternative B, the Commission would defer to the IRS "check the box" rules in classifying LLCs as either partnerships or corporations for FECA purposes. The IRS rules allow certain business entities to opt for corporate tax treatment under federal law without regard to their State law status. See, 26 CFR 301.7701-3. Generally, an eligible entity is one that is not required to be treated as a corporation for federal tax purposes. Under 26 U.S.C. 7704, read in conjunction with 26 CFR 301.7701-3, the IRS considers LLCs eligible entities so long as the LLC is not publicly traded. If an eligible LLC makes no election under these rules, the IRS' "default rule" treats the LLC as a partnership. 26 CFR 301.7701-3(b). Alternatively, if an LLC selects corporate tax status by "checking the box," it is taxed as a corporation for federal tax purposes. 26 CFR 301.7701-3(b)(3).

Like the IRS rules, the Commission would treat all LLCs as partnerships unless an LLC opts for federal corporate tax treatment pursuant to the "check the box" provisions. Both LLCs which "check the corporate box" and those that are publicly traded would be treated as corporations for FECA purposes.

For the reasons set forth below, the Commission is adopting Alternative B and will follow the IRS' "check the box" approach for purposes of these rules. The new rules therefore supersede AOs 1998-15, 1998-11, 1997-17, 1997-4, 1996-13, and 1995-11, in which the Commission determined that LLCs should be treated as "persons" for FECA purposes.

The Commission notes that these rules should be viewed as a narrow exception to its general practice of looking to State law to determine corporate status. The Commission will continue to treat all entities that qualify as corporations under State law as corporations for FECA purposes.

### Section 110.1(g) Contributions by Limited Liability Companies

#### Section 110.1(g)(1) Definition

LLCs are a relatively recent creation of state law. Wyoming enacted the first LLC statute in 1977, but the majority of these laws have been enacted since

1990. Callison and Sullivan, *Limited Liability Companies*, section 1.5 (1994). LLCs are a cross between the traditional corporation and a partnership, sharing both corporate and partnership attributes. Like partnerships, LLC members are generally taxed as partners at the state level, but enjoy the liability protection of corporate shareholders. To varying extents, LLCs possess other corporate attributes, including free transferability of interest, centralized management, and the ability to accumulate capital. This section defines a limited liability company as a business entity recognized as a limited liability company under the laws of the State in which it is established.

### Section 110.1(g)(2) Treatment of Certain LLCs as Partnerships

This section follows the IRS "check the box" rules at 26 CFR 301.7701-3, stating that a contribution by an LLC that elects to be treated as a partnership by the IRS, or does not elect treatment as either a partnership or a corporation, shall be considered a contribution from a partnership pursuant to 11 CFR 110.1(e). Since most LLCs choose this tax classification, or acquire it through default, they will be covered by this paragraph.

One commenter urged the Commission to adopt Alternative A, which would treat all LLCs as partnerships. However, the structure of LLCs that elect corporate tax treatment is such that they would find it impracticable, if not impossible, to comply with such a requirement. As the Tax Court has explained, partnerships, and by analogy partnership-like LLCs, "must maintain a capital account for each member that directly reflects the actual amounts paid in respect to that particular membership interest. There is no such requirement for corporations. A corporation is a separate legal entity, whereas a partnership is an aggregate of its partners. A corporation does not have individual drawing accounts for each of its shareholders." *Board of Trade of Chicago v. Comm. of Internal Revenue*, 106 T.C. 369, 391 n.21 (1996). Therefore, corporate-like LLCs would be hard-pressed to comply with this requirement.

Another commenter requested that the Commission continue the approach set forth in past advisory opinions, i.e., treat LLCs as persons subject to the 2 U.S.C. 441a(a) contribution limits. The Commission is concerned that this approach could lead to possible proliferation problems, since a person who was a member of numerous LLCs could contribute up to the statutory limits through each of them. Also, if any

of the LLC's members were prohibited from contributing, e.g., were foreign nationals or government contractors, the LLC itself would be precluded from making contributions, under this approach.

#### *Section 110.1(g)(3) Treatment of Certain LLCs as Corporations*

This section states that an LLC that elects to be treated as a corporation by the IRS pursuant to 26 CFR 301.7701-3, or an LLC with publicly-traded shares, shall be considered a corporation pursuant to 11 CFR Part 114. Part 114 contains the Commission's rules governing corporate and labor organization activity under the FECA.

The Commission notes that, in order to determine the type of entities subject to corporate treatment under the FECA, it must first identify those business entities that should be defined as corporations. This term is not explicitly defined anywhere in the Act or the regulations. The only reference in the legislative history directs the Commission to look to State law to determine the status of professional corporations, but is silent as to all other types of corporations. See H.R. Rept. 1438 (Conf.), 93d Cong., 2d Sess. 68-69 (1974).

Since Congress did not "directly address the precise question at issue"—whether the definition of *corporation* includes LLCs—the Commission is free to refer to the IRS rules, as long as its interpretation is not "manifestly contrary to the statute." *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 837 U.S. 837, 842-44 (1984). The Chevron analysis is the standard used by Federal courts to determine whether or not an agency has construed the statute permissibly. See also, *Clifton v. FEC*, 114 F.3d 1309, 1318 (1st Cir. 1997); *Bush-Quayle '92 Primary Committee, Inc. v. FEC*, 104 F.3d 448, 452 (D.C.Cir. 1997).

When an LLC elects corporate status for IRS purposes, it is essentially telling the IRS that its organizational structure and functions are more akin to a corporation than a partnership. This allows the LLC to accumulate capital at the corporate level, and to take advantage of favorable tax treatment of corporate losses and dividends received. Rather than attempting to determine whether an LLC more closely resembles a corporation versus a partnership, or simply classifying an LLC as a partnership without any reference to its actual structure or form, the Commission believes it can most effectively carry out FECA's intent by classifying LLCs according to their federal tax status, which most

accurately describes whether an LLC's structure and function are more akin to a "corporation" or a "partnership."

The U.S. Supreme Court has interpreted congressional intent behind the FECA's prohibition of corporate contributions as a legitimate "need to restrict the influence of political war chests funneled through the corporate form" and to "regulate the substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization." *FEC v. National Conservative Political Action Committee*, 470 U.S. 480, 501 (1985), quoting *National Right to Work Committee v. FEC*, 197, 210 (1982). Following the IRS' "check the box" approach carries out this policy.

An LLC electing federal corporate status "checks the box" because it seeks to enjoy the benefits of corporate status. Such corporate advantages include, *inter alia*, flexible merger rules, the avoidance of personal income tax for LLC members, preferential tax treatment on dividends received and deductions for corporate losses, subject to certain rules. LLCs might also elect corporate status in preparation for an upcoming corporate merger.

Election of IRS corporate status confers specific benefits on those LLCs, just as State-chartered corporations enjoy similar advantages. Thus the Commission is fulfilling the purpose behind FECA's corporate prohibitions by regulating these entities as corporations.

As explained above, the Commission's adoption of the IRS treatment is consistent with the underlying policy regarding the ability of corporate-like LLCs to amass capital through the special advantages conferred upon them by the Federal Government. Moreover, the courts have consistently held that, where a corporation does not exist under State law, Federal agencies may appropriately refer to the policies behind Federal statutes in identifying the "corporate-like" activities of non-corporate forms. In *Morrissey v. Commissioner*, 296 U.S. 344 (1935), the Supreme Court held that a trust could be classified as an association, conferring what was, at that time, the equivalent of corporate tax status, for Federal income tax purposes. Instead of looking to State status or "labels," the Court explained that, "[w]hile the use of corporate forms may furnish persuasive evidence of the existence of an association, the absence \* \* \* of the usual terminology of corporations cannot be regarded as decisive. Thus an association may not have 'directors' or 'officers' but the 'trustees' may function 'in much the

same manner as the directors in a corporation' for the purpose of carrying on the enterprise." *Id.* at 358 (internal citations omitted). Similarly, in *U.S. v. McDonald & Eide, Inc.*, 865 F.2d 73, 76 (3d Cir. 1989), the Third Circuit Court of Appeals held that, because there is no Federal common law of corporations, "state law is used where persuasive, but ignored when not in accord with the policies" of the underlying federal statute, in this case the Internal Revenue Code.

The IRS' "check the box" rules, read in conjunction with 26 U.S.C. 7704, which requires publicly-traded partnerships to be taxed as corporations for tax purposes, require publicly-traded LLCs to be taxed as corporations. Paragraph 110.1(g)(3), therefore, further provides that publicly-traded LLCs shall be treated as corporations for FECA purposes.

#### *Section 110.1(g)(4) Contributions by Single Member LLCs*

The IRS in its comment pointed out that single member LLCs are not eligible for treatment as partnerships—that is, they cannot "check the box" to elect partnership treatment. Consistent with this approach, section 110.1(g)(4) states that a contribution by a single-member LLC that does not elect corporate tax treatment shall be attributed only to that member. Because of the unity of the member and the LLC in this situation, it is appropriate for attribution of the contribution to pass through the LLC and attach to the single member under these circumstances.

#### *Section 110.1(g)(5) Information Provided to Recipient Committees*

One commenter pointed out that, if this approach were adopted, a recipient committee might inadvertently accept an illegal contribution, because the committee would have no way of knowing whether the LLC had opted for corporate tax treatment and was therefore prohibited from contributing to Federal campaigns. The Commission further notes that the recipient committee would have no way of knowing how to attribute a contribution made by an eligible multi-member or single member LLC, unless that information was provided. Section 110.1(g)(5) accordingly states that an LLC that makes a contribution pursuant to paragraph (g)(2) or (g)(4) of this section shall, at the time it makes the contribution, provide information to the recipient committee as to how the contribution is to be attributed, and affirm to the recipient committee that the LLC is eligible to make the contribution.



### Subchapter S Corporations

Subchapter S corporations are corporations that, if they meet certain size and other requirements, can choose to be taxed as unincorporated businesses for Federal income tax purposes under Subchapter S of the Internal Revenue Code, 26 U.S.C. 1361–1379. Because there is some general similarity between the Federal income taxation of LLCs and Subchapter S corporations, the NPRM also sought comments as to whether Subchapter S corporations should be allowed to make otherwise lawful contributions in Federal elections. Under that approach, contributions by a Subchapter S corporation would be attributed only to the individual stockholders of the corporation as their personal (noncorporate) contributions and would be subject to their limits under the Act.

Because Subchapter S corporations are considered corporations under the laws of all fifty States, the final rules do not address this issue.

### Certification of No Effect Pursuant to 5 U.S.C. 605(b) (Regulatory Flexibility Act)

These proposed rules would not, if promulgated, have a significant economic impact on a substantial number of small entities. The basis for this certification is that limited liability companies are already covered by the Act, and the proposed revisions would clarify the extent to which they could contribute to Federal campaigns. In some instances this amount would be greater than is presently the case, while in others it would be smaller. In neither case would the amount involved qualify as “significant” for purposes of the Regulatory Flexibility Act.

### List of Subjects in 11 CFR Part 110

Campaign funds, Political candidates, Political committees and parties.

For the reasons set out in the preamble, Subchapter A, Chapter I of Title 11 of the Code of Federal Regulations is amended to read as follows:

### PART 110—CONTRIBUTION AND EXPENDITURE LIMITATIONS AND PROHIBITIONS

1. The authority citation for Part 110 continues to read as follows:

**Authority:** 2 U.S.C. 431(8), 431(9), 432(c)(2), 437d(a)(8), 441a, 441b, 441d, 441e, 441f, 441g and 441h.

2. Section 110.1 is amended by adding new paragraph (g) to read as follows:

### § 110.1 Contributions by persons other than multicandidate political committees (2 U.S.C. 441a(a)(1))

\* \* \* \* \*

(g) *Contributions by limited liability companies (“LLC”).*

(1) *Definition.* A limited liability company is a business entity that is recognized as a limited liability company under the laws of the State in which it is established.

(2) A contribution by an LLC that elects to be treated as a partnership by the Internal Revenue Service pursuant to 26 CFR 301.7701–3, or does not elect treatment as either a partnership or a corporation pursuant to that section, shall be considered a contribution from a partnership pursuant to 11 CFR 110.1(e).

(3) An LLC that elects to be treated as a corporation by the Internal Revenue Service, pursuant to 26 CFR 301.7701–3, or an LLC with publicly-traded shares, shall be considered a corporation pursuant to 11 CFR Part 114.

(4) A contribution by an LLC with a single natural person member that does not elect to be treated as a corporation by the Internal Revenue Service pursuant to 26 CFR 301.7701–3 shall be attributed only to that single member.

(5) An LLC that makes a contribution pursuant to paragraph (g)(2) or (g)(4) of this section shall, at the time it makes the contribution, provide information to the recipient committee as to how the contribution is to be attributed, and affirm to the recipient committee that it is eligible to make the contribution.

\* \* \* \* \*

Dated: June 25, 1999.

**Scott E. Thomas,**

*Chairman, Federal Election Commission.*

[FR Doc. 99–16605 Filed 7–9–99; 8:45 am]

BILLING CODE 6715–01–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

#### 21 CFR Part 524

### Ophthalmic and Topical Dosage Form New Animal Drugs; Selamectin

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Final rule.

**SUMMARY:** The Food and Drug Administration (FDA) is amending the animal drug regulations to reflect approval of a new animal drug application (NADA) filed by Pfizer, Inc. The NADA provides for veterinary

prescription use of selamectin solution as a topical parasiticide for dogs and cats.

**EFFECTIVE DATE:** July 12, 1999.

**FOR FURTHER INFORMATION CONTACT:** Melanie R. Berson, Center for Veterinary Medicine (HFV–110), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 301–827–7540.

**SUPPLEMENTARY INFORMATION:** Pfizer, Inc., 235 East 42d St., New York, NY 10017–5755, filed NADA 141–152 that provides for topical veterinary prescription use of Revolution™ (selamectin) solution. Selamectin kills adult fleas and prevents flea eggs from hatching for 1 month, and it is indicated for the prevention and control of flea infestations (*Ctenocephalides felis*), prevention of heartworm disease caused by *Dirofilaria immitis*, and treatment and control of ear mite (*Otodectes cynotis*) infestations in dogs and cats; in dogs for treatment and control of sarcoptic mange (*Sarcoptes scabiei*); and in cats for treatment of intestinal hookworm (*Ancylostoma tubaeforme*) and roundworm (*Toxocara cati*) infections. The NADA is approved as of May 26, 1999, and the regulations are amended by adding 21 CFR 524.2098 to reflect the approval.

In accordance with the freedom of information provisions of 21 CFR part 20 and 514.11(e)(2)(ii), a summary of safety and effectiveness data and information submitted to support approval of this application may be seen in the Dockets Management Branch (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852, between 9 a.m. and 4 p.m., Monday through Friday.

Under section 512(c)(2)(F)(i) of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 360b(c)(2)(F)(i)), this approval qualifies for 5 years of marketing exclusivity beginning May 26, 1999, because no active ingredient (including any ester or salt of the drug) has been previously approved in any other application filed under section 512(b)(1) of the act.

The agency has determined under 21 CFR 25.33(d)(1) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

This rule does not meet the definition of “rule” in 5 U.S.C. 804(3)(A) because it is a rule of “particular applicability.” Therefore, it is not subject to the congressional review requirements in 5 U.S.C. 801–808.



acceptable and unacceptable purpose descriptions to be reported by authorized committees. Paragraph (B) requires authorized committees, when itemizing certain disbursements for which reimbursements are required, to provide a brief explanation of the activity for which reimbursement is required. These provisions have been in Title 11 of the **Code of Federal Regulations** since 1980 and 1995, respectively, and were not affected by the recent statutory changes to the election cycle reporting requirements.

#### Need for Correction

As published, the final rules inadvertently omit two paragraphs describing information to be reported by authorized committees of Federal candidates.

All committees must report the purpose of itemized disbursements (i.e., those disbursements aggregating in excess of \$200). Omitted paragraph (A) contains examples of suitably specific purpose descriptions as well as examples of those descriptions that are unacceptably vague. This paragraph is inconsistent with the reporting of rules for unauthorized committees (committees other than candidate committees) in 11 CFR 104.3(b)(3).

Omitted paragraph (B) is used in administering the "personal use" rules in 11 CFR 113.1. Federal candidates are barred from using campaign funds for personal benefit. Paragraph (B) requires authorized committees of Federal candidates itemizing disbursements for which partial or total reimbursement is required under 11 CFR 113.1(g)(1)(iii)(C) or (D) to provide a brief explanation of the activity for which the reimbursement is made.

Section 801 of Title 5 of the United States Code requires Federal agencies to submit regulations to Congress. These regulations were submitted to the Speaker of the House of Representatives and the President of the Senate on November 26, 2001.

#### Certification of No Effect Pursuant to 5 U.S.C. § 605(b) [Regulatory Flexibility Act]

This correction will not have significant economic impact on a substantial number of small entities. The basis of this certification is that this correction only requires political committees to once again add information to the reports they are required to file. These regulations were in 11 CFR since 1980 and 1995, respectively, before being inadvertently omitted in 2000.

#### List of Subjects in 11 CFR Part 104

Campaign funds, Political committees and parties, Reporting and recordkeeping requirements.

Accordingly, 11 CFR part 104 is corrected by making the following correcting amendment:

#### PART 104—REPORTS BY POLITICAL COMMITTEES

1. The authority citation for part 104 continues to read as follows:

**Authority:** 2 U.S.C. 431(1), 431(8), 431(9), 432(i), 434, 438(a)(8), 438(b), 439a.

#### § 104.3 Contents of reports (2 U.S.C. 434(b), 439a).

\* \* \* \* \*

2. In § 104.3 add the following paragraphs (b)(4)(i)(A) and (B):

(b) \* \* \*  
(4) \* \* \*  
(i) \* \* \*

(A) As used in this paragraph, *purpose* means a brief statement or description of why the disbursement was made. Examples of statements or descriptions which meet the requirements of this paragraph include the following: dinner expenses, media, salary, polling, travel, party fees, phone banks, travel expenses, travel expense reimbursement, and catering costs. However, statements or descriptions such as *advance*, *election day expenses*, *other expenses*, *expenses*, *expense reimbursement*, *miscellaneous*, *outside services*, *get-out-the-vote* and *voter registration* would not meet the requirements of this paragraph for reporting the purpose of an expenditure.

(B) In addition to reporting the purpose described in paragraph (b)(4)(i)(A) of this section, whenever an authorized committee itemizes a disbursement that is partially or entirely a personal use for which reimbursement is required under 11 CFR 113.1(g)(1)(ii)(C) or (D), it shall provide a brief explanation of the activity for which reimbursement is required.

\* \* \* \* \*

Dated: November 26, 2001.

**Danny L. McDonald,**  
*Chairman, Federal Election Commission.*  
[FR Doc. 01-29679 Filed 11-29-01; 8:45 am]  
**BILLING CODE 6715-01-P**

#### FEDERAL ELECTION COMMISSION

#### 11 CFR Part 111

#### [Notice 2001-18]

#### Extension to Administrative Fines

**AGENCY:** Federal Election Commission.

**ACTION:** Final rule; revision of the sunset date.

**SUMMARY:** The Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the expiration date in which the Federal Election Commission (hereinafter "the Commission") may assess civil money penalties for violations of the reporting requirements of section 434(a) of the Federal Election Campaign Act (hereinafter "the Act" or "FECA").

**DATES:** Effective on December 31, 2001.

**FOR FURTHER INFORMATION CONTACT:** Ms. Rosemary C. Smith, Assistant General Counsel, or Ms. Mai T. Dinh, Attorney, 999 E Street, NW., Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

#### SUPPLEMENTARY INFORMATION:

#### Explanation and Justification

Section 640 of the Treasury and General Government Appropriations Act, 2000, Pub. L. No. 106-58, 106th Cong., 113 Stat. 430, 476-77 (1999), amended § 309(a)(4) of the FECA, 2 U.S.C. 437g(a)(4), to provide for a modified enforcement process for violations of reporting requirements. Under § 437g(a)(4)(C) of the FECA, the Commission may assess a civil money penalty for violations of the reporting requirements of 2 U.S.C. 434(a). This authority, however, was to sunset on December 31, 2001. Pub. L. No. 106-58, 106th Cong., § 640(c). Recently, § 642 of the Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the sunset date to include all reports that cover activity between January 1, 2000, to December 31, 2003.

The Commission published final rules on May 19, 2000, to implement the amendment contained in the Treasury and General Government Appropriations Act, 2000. Section 111.30 of the regulations reflects the sunset provision of Pub. L. No. 106-58, 106th Cong., § 640(c). Therefore, the Commission is issuing this final rule to amend section 111.30 to extend the application of the administrative fine regulations, 11 CFR part 111, subpart B, to include all violations relating to reports that cover the period between January 1, 2000, to December 31, 2003.

The Commission is promulgating this final rule without notice or opportunity for comment because it falls under the "good cause" exemption of the Administrative Procedures Act, 5 U.S.C. 553(b)(B). The exemption allows

decrease in burden because of the elimination of safeguard reporting requirements is estimated to be 167 hours.

The Department has not identified any relevant Federal rules that duplicate, overlap or conflict with this rule. Further, the Committee's meetings were widely publicized throughout the Oregon-California potato industry and all interested persons were invited to attend the meetings and participate in Committee deliberations. Like all Committee meetings, the February 23, 1999, and May 14, 1999, meetings were public meetings and all entities, both large and small, were able to express their views on this issue. The Committee itself is composed of 14 members, of which 5 are handlers and 9 are producers. Finally, interested persons are invited to submit information on the regulatory and informational impacts of this action on small businesses.

An interim final rule concerning this action was published in the **Federal Register** on June 25, 1999. A copy of the rule was mailed to the Committee's administrative office for distribution to producers and handlers. In addition, the rule was made available through the Internet by the Office of the **Federal Register**. That rule provided for a 60-day comment period which ended August 24, 1999. No comments were received.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at the following web site: <http://www.ams.usda.gov/fv/ moab.html>. Any questions about the compliance guide should be sent to Jay Guerber at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

After consideration of all relevant material presented, including the Committee's recommendation, and other information, it is found that finalizing the interim final rule, without change, as published in the **Federal Register** (64 FR 34113, June 25, 1999) will tend to effectuate the declared policy of the Act.

#### List of Subjects in 7 CFR Part 947

Marketing agreements, Potatoes, Reporting and recordkeeping requirements.

#### PART 947—IRISH POTATOES GROWN IN MODOC AND SISKIYOU COUNTIES, CALIFORNIA, AND IN ALL COUNTIES IN OREGON, EXCEPT MALHEUR COUNTY

Accordingly, the interim final rule amending 7 CFR part 947 which was

published at 64 FR 34113 on June 25, 1999, is adopted as a final rule without change.

Dated: September 7, 1999.

**Robert C. Keeney,**

*Deputy Administrator, Fruit and Vegetable Programs.*

[FR Doc. 99-23792 Filed 9-10-99; 8:45 am]

BILLING CODE 3410-02-P

### FEDERAL ELECTION COMMISSION

#### 11 CFR PARTS 9003, 9004, 9008, 9032, 9033, 9034, 9035, and 9036

[Notice 1999-17]

#### Public Financing of Presidential Primary and General Election Candidates

**AGENCY:** Federal Election Commission.

**ACTION:** Final Rule and Transmittal of Regulations to Congress.

**SUMMARY:** The Commission is revising its regulations governing publicly financed Presidential primary and general election candidates. These regulations implement the provisions of the Presidential Election Campaign Fund Act ("Fund Act") and the Presidential Primary Matching Payment Account Act ("Matching Payment Act"), which establish eligibility requirements for Presidential candidates seeking public financing, and indicate how funds received under the public financing system may be spent. They also require the Commission to audit publicly financed campaigns and seek repayment where appropriate. The revised rules reflect the Commission's experience in administering this program during several previous Presidential election cycles and also seek to resolve some questions that may arise during the 2000 Presidential election cycle. Further information is provided in the supplementary information that follows.

**DATES:** Further action, including the publication of a document in the **Federal Register** announcing an effective date, will be taken after these regulations have been before Congress for 30 legislative days pursuant to 26 U.S.C. 9009(c) and 9039(c).

**FOR FURTHER INFORMATION CONTACT:** Ms. Rosemary C. Smith, Acting Assistant General Counsel, 999 E Street, NW, Washington, DC 20463, (202) 694-1650 or toll free (800) 424-9530.

**SUPPLEMENTARY INFORMATION:** The Commission is publishing today the final text of revisions to its regulations governing the public financing of Presidential campaigns, 11 CFR Parts

9001 through 9039, to more effectively administer the public financing program during the year 2000 election cycle. These rules implement 26 U.S.C. 9001 *et. seq.* and 26 U.S.C. 9031 *et. seq.* On December 16, 1998, the Commission issued a Notice of Proposed Rulemaking (NPRM) in which it sought comments on proposed revisions to these regulations. 63 FR 69524 (Dec. 16, 1998).

In response to the NPRM, written comments were received from Aristotle Publishing, Inc.; America Online, Inc.; Philadelphia 2000; Perot for President '96; James Madison Center for Free Speech; Common Cause and Democracy 21 (joint comment); Brennan Center for Justice; Lyn Utrecht, Eric Kleinfeld, and Patricia Fiori (joint comment); Democratic National Committee; Hervey W. Herron (two comments); Republican National Committee; the Internal Revenue Service, and Carl P. Leubsdorf and twenty nine executives of news organizations (joint comment). The Internal Revenue Service stated that it has reviewed the NPRM and finds no conflict with the Internal Revenue Code or regulations thereunder.

Subsequently, the Commission reopened the comment period and held a public hearing on March 24, 1999, at which the following eight witnesses presented testimony on the issues raised in the NPRM: Kim Hume (Fox News), George Condon (Copley News Service), Lyn Utrecht (Ryan, Phillips, Utrecht & MacKinnon), Joseph E. Sandler (Democratic National Committee), Thomas J. Josefiak (Republican National Committee), David Eisner and Trevor Potter (America Online, Inc.), and James Bopp, Jr. (James Madison Center for Free Speech).

Please note that the Commission has already published separately final rules modifying the candidate agreement provisions so that federally-financed Presidential committees must electronically file their reports. See Explanation and Justification of 11 CFR 9003.1 and 9033.1, 63 FR 45679 (August 27, 1998). Those regulations took effect on November 13, 1998. See Announcement of Effective Date, 63 FR 63388 (November 13, 1998). In addition, the Commission has issued final rules governing the matchability of contributions made by credit and debit cards, including those transmitted over the Internet. See Explanation and Justification of 11 CFR 9034.2 and 9034.3, 64 FR 32394 (June 17, 1999). An effective date for the matching fund rules will be announced once those regulations have been before Congress for thirty legislative days. Final rules concerning coordinated party committee

expenditures in the pre-nomination period and reimbursement by the news media for travel expenses are also pending before Congress. See Explanation and Justification of 11 CFR 110.7, 9004.6 and 9034.6, 64 FR 42579 (Aug. 5, 1999).

The NPRM discussed several other topics that are not included in the attached final rules. The Commission expects to address the following areas at a later date: (1) Coordination between candidates and party committees on political ads, polling, media production, consulting services and sharing of employees; (2) Modifications to the audit process; (3) Bases for primary repayment determinations; (4) The "bright line" between primary expenses and general election expenses; and (5) Pre-nomination formation of Vice Presidential committees.

Sections 9009(c) and 9039(c) of Title 26, United States Code, require that any rules or regulations prescribed by the Commission to carry out the provisions of Title 26 of the United States Code be transmitted to the Speaker of the House of Representatives and the President of the Senate 30 legislative days before they are finally promulgated. The final rules that follow were transmitted to Congress on September 7, 1999.

## Explanation and Justification

### Part 9003—Eligibility for Payments

#### Section 9003.3 Allowable Contributions; General Election Legal and Accounting Compliance Fund

##### 1. Pre-nomination Formation of a GELAC

Section 9003.3 contemplates that a nominee of a major political party who accepts public financing for the general election may establish a privately funded General Election Legal and Accounting Compliance Fund ("GELAC") for certain limited purposes. A GELAC may be set up before the candidate is actually nominated for the office of President or Vice President. The Commission sought comments on several changes to this section to address problems that have arisen when primary candidates established GELACs relatively early in the primary campaign but subsequently failed to win their party's nomination. One difficulty is that candidates who do not receive their party's nomination must return all private contributions received by the GELAC. However, if some of those funds have been used to defray overhead expenses or to solicit additional contributions for the GELAC, a total refund has presented difficulties. Another problem has been ensuring that

the GELAC is not improperly used to make primary election expenditures. In particular, this may become an issue when a candidate secures the nomination well in advance of the convention and has almost completely exhausted the spending limits for the primary. To avoid a recurrence of these situations, the NPRM sought comments on the following five alternative amendments to paragraph (a)(1)(i) of section 9003.3:

(1) Bar GELAC fundraising prior to the candidate's nomination at the party's national nominating convention. Under this approach, a candidate may establish a GELAC before the date of nomination, but only for the limited purpose of receiving correctly redesignated contributions that would otherwise have to be refunded as excessive primary contributions.

(2) Bar GELAC fundraising before a specified date, such as April 15 of the Presidential election year. Under this alternative, starting on April 15 of the Presidential election year, candidates may begin soliciting contributions for the GELAC. However, if the candidate does not become the nominee, all contributions accepted for the GELAC, including redesignated contributions, must be refunded within sixty (60) days of the candidate's date of ineligibility.

(3) Allow GELAC fundraising beginning 90 days before each candidate's date of nomination. This approach means that the nominees of the two major parties will begin GELAC fundraising on different dates.

(4) Bar Presidential candidates from establishing a GELAC until the date of the last Presidential primary before the national nominating convention. A variation on this approach is to allow the eventual nominee to form a GELAC at an earlier point, but to prohibit GELAC fundraising before the last Presidential primary.

(5) Allow any Presidential primary candidate to establish and to raise funds for a GELAC at any time. Under this approach, those who do not win their party's nomination do not have to return all the funds they raise. Instead, they could offset their fundraising and administrative expenses, and would only need to refund the amount remaining in their account as of the date their party selects a nominee. The NPRM asked whether all contributors should receive a proportional refund or whether a first-in-first-out method should be used to determine which contributions have been spent, with refunds going to the most recent contributors. The NPRM noted that this alternative is significant departure from the treatment of general election

contributions received by losing primary candidates in Congressional races.

The two witnesses who addressed this topic stressed the importance of implementing policies that encourage candidates to spend money to achieve voluntary compliance with the campaign financing laws. Hence, they both urged the Commission to make no changes that would create a disincentive to spend money on compliance. They urged the Commission to continue to allow candidates to have the discretion to determine when to form a GELAC and begin GELAC solicitations. Thus, they both supported alternative 5, under which losing primary candidates only be required to refund or obtain donor redesignation for funds remaining in the account.

The Commission has decided to adopt a modified version of alternative 2. Under this approach, paragraph (a)(1)(i) continues to permit GELACs to be established at any time. However, new language indicates that before June 1 of the Presidential election year, the GELAC may only be used for the deposit of primary election contributions that exceed the contributors' contribution limits and are properly redesignated under 11 CFR 110.1. Please note that overhead and reporting expenses incurred by the GELAC may be defrayed from interest received on the account. The modifications to these regulations also specify that the GELAC may not solicit contributions before June 1 of the Presidential election year. This date has been selected because, barring unforeseen circumstances, this is the point when a party's prospective nominee can be reasonably assured that he or she will need to raise funds for a GELAC. This time frame also gives the prospective nominee sufficient time to raise the funds that will be needed. Please note that revisions to the rules governing joint fundraising between the primary campaign and the GELAC are discussed below in section 9034.4.

Paragraph (a)(1)(i) of this section is also being revised to state more clearly that a GELAC may be established by an individual who is seeking his or her party's nomination, but who is not yet a general-election candidate as defined in section 9002.2.

The Commission is also amending paragraph (a)(1)(i) of section 9003.3 to indicate that if the candidate does not become the nominee, all contributions accepted for the GELAC, including redesignated contributions, must be refunded within sixty (60) days of the candidate's date of ineligibility. Such refunds are consistent with the Commission's decision in the last

Presidential election cycle to require refunds within 60 days of the date on which the political party of the unsuccessful primary candidate selects its nominee. These refunds are also consistent with the policies applicable to non-publicly funded Congressional candidates who accept designated general election contributions, but who thereafter lose their parties' primaries. See 11 CFR 102.9(e)(2), and Advisory Opinions 1992-15 and 1986-17. Please note that if contributors do not cash the refund checks, the provisions of section 9007.6 governing stale dated checks will apply.

## 2. Transfers from the Primary Campaign Committee to the GELAC

The regulations at 11 CFR 9003.3(a)(1)(i) through (v) place certain restrictions on transferring funds from a Presidential candidate's primary committee to a GELAC. The purpose of these limitations is to ensure that the GELAC is not used as a way to increase a candidate's entitlement to matching funds or to decrease a candidate's repayment obligations. The NPRM sought suggestions as to how these provisions could be strengthened, and whether it is advisable to do so. The sole comment that addressed this issue stated that the current regulations at 11 CFR 9003.3(a)(1) are more than adequate to ensure that the GELAC is not used to increase candidate entitlement or decrease repayments. The Commission has decided not to amend these transfer regulations because it agrees that the current rules adequately fulfill these objectives.

### Section 9003.5 Documentation of Disbursements

Section 9003.5(b)(1) sets forth the documentation publicly financed general election committees must provide for disbursements in excess of \$200. The documentation includes a canceled check that has been negotiated by the payee. However, paragraph (b)(1)(iv) of this section refers back to this canceled check without specifically restating that it must be negotiated by the payee. To avoid possible confusion, the Commission is amending section 9003.5(b)(1)(iv) by adding the words "negotiated by the payee." This change is consistent with the recent judicial decision in *Fulani v. Federal Election Commission*, 147 F.3d 924 (D.C. Cir. 1998). A cross reference is also being added to assist the reader in locating the reporting regulations that list examples of acceptable and unacceptable descriptions of "purpose." See 11 CFR 104.3(b)(3)(i)(B). None of the public

comments or testimony addressed these changes.

## Part 9004—Entitlement of Eligible Candidates to Payments; Use of Payments

### Section 9004.4

#### 1. Winding Down Costs

Two technical changes are being made to the winding down provisions found in paragraph (a)(4) of section 9004.4. First, the "or" at the end of paragraph (a)(4)(i) is being changed to "and," to clarify that the expenses listed in both paragraphs (a)(4)(i) and (a)(4)(ii) are considered winding down costs. Second, paragraph (a)(4)(ii) is being amended to more clearly indicate that the winding down costs described in this paragraph are costs associated with the general election campaign.

#### 2. Lost, Misplaced, or Stolen Items

Paragraph (b)(8) of this section addresses situations where equipment in the possession of general election committees is lost or damaged. As a general matter, the cost of lost or misplaced items may not be defrayed with public funds. However, given that there are varying degrees of responsibility in this area, the rules provide that certain factors should be considered, such as whether the committee demonstrates that it made conscientious efforts to safeguard the missing equipment; whether the committee sought or obtained insurance on the items; the type of equipment involved; and the number and value of items that were lost.

The Commission has decided to modify this paragraph to include stolen items and to add as another factor whether a police report was filed. There were no public comments on this portion of the regulations.

### Section 9004.9 Net Outstanding Qualified Campaign Expenses

The amendments to the provisions governing the disposition of capital assets in section 9004.9(d)(1) are discussed below. See the Explanation and Justification for 11 CFR 9034.5(c)(1).

## Part 9008—Federal Financing of Presidential Nominating Conventions and Host Committees

### Section 9008.7 Use of Funds

New paragraph (c) is being added to section 9008.7 to address situations where equipment in the possession of convention committees is lost, misplaced, or stolen. The rule indicates that as a general matter, the cost of lost, misplaced, or stolen items may not be

defrayed with public funds. However, the Commission recognizes that there are varying degrees of responsibility in this area. Accordingly, the regulation also provides that certain factors should be considered, such as whether the committee demonstrates that it made conscientious efforts to safeguard the missing equipment; whether the committee sought or obtained insurance on the items; whether the committee filed a police report; the type of equipment involved; and the number and value of items that were lost. This approach is consistent with the Commission's treatment of items lost or misplaced by, or stolen from, publicly funded candidates. See 11 CFR 9004.4(b)(8) and 9034.4(b)(8). None of the public comments or testimony specifically addressed this aspect of the convention regulations.

### Section 9008.14 Petitions for Rehearings; Stays of Repayment Determinations

In section 9008.14, the term "final repayment determinations" is being replaced by "repayment determinations." This amendment conforms with the changes in terminology made when the rules setting out audit and repayment procedures were last revised in 1995.

### Section 9008.52 Receipts and Disbursements of Host Committees

#### 1. Local Banks and Local Individuals

The NPRM sought comments on amending section 9008.52(c)(1), which addresses the receipt of donations by host committees. Specifically, the NPRM sought to allow local banks to donate funds and make in-kind donations for the limited purposes described in these rules. The two commenters who addressed this topic supported the proposed amendment. They found no rationale for the long standing distinction in the rules between donations from local corporations and donations from local branches of national banks. One of the commenters argued that local branches of national banks have the same interest as other local businesses in promoting the city and supporting commerce.

The Commission agrees with these comments. Consequently this amendment is being included in the attached final rules that follow. Please note that the revised rules supersede, in part, Advisory Opinion 1995-31 regarding local branches of national banks.

The second changes to section 9008.52(c)(1) concerns the categories of individuals who may donate funds or

make in-kind donations to host committees, government agencies and municipal corporations. The revisions restrict these donations to individuals who either maintain a local residence or who work for a business's local office, or a labor organization's local office, or another organization's local office. This new language is consistent with AO 1995-32 with respect to donations by individuals.

Two commenters opposed restricting donations to "local" individuals on several grounds. They argued that the Commission misinterpreted its own regulation in AO 1995-32. In addition, one commenter stated that the policy concerns regarding corporate aggregation of wealth are not applicable to individuals. This comment appears to overlook the compelling governmental purposes—preventing corruption and the appearance of corruption—that underlie the statutory restrictions on individual contributions. One of the commenters also asserted that this change to the regulation impermissibly infringes upon the First Amendment's guarantee of freedom of speech. Given that the FECA's contribution limitations were upheld in *Buckley v. Valeo*, 424 U.S. 1 (1976), in the face of a First Amendment challenge, this argument is not persuasive. In addition, one commenter also argued that there are compelling reasons why individuals residing outside the metropolitan area of the convention city would want to support the host committee. However, the comment failed to indicate what such reasons might be.

Consequently, the Commission does not find the commenters' arguments persuasive. Therefore, this change is being included in the final rules.

## 2. Permissible Host Committee Expenses

During the audits of the 1996 convention and host committees, a number of questions were raised as to the scope of expenses that may be paid by a host committee instead of a convention committee. Section 9008.52(c)(1) enumerates the types of expenses that host committees may defray with donated funds. Section 9008.7(a) lists the types of convention expenses that may be paid for using public funds. These two sections of the regulations are not mutually exclusive. Nor do they cover every conceivable type of expense that may arise. Consequently, the NPRM sought comments on amending one or both of these provisions to provide greater specificity regarding allowable or nonallowable expenses for convention or host committees. Disputed items have included: (1) Badges, passes or other

types of credentials used to gain entry to the convention hall or specific locations within the hall; (2) electronic vote tabulation systems; and (3) lighting and rigging costs, including paying stagehands, riggers, projectionists, electricians, and producers. The NPRM noted that with respect to lighting and rigging expenses, in particular, it can be difficult to distinguish between the costs associated with improving the infrastructure of the convention hall and the costs of producing and broadcasting the convention proceedings to the general public or to those within the convention hall. Specific changes to these regulations were not included in the NPRM.

One host committee and two national party committees urged the Commission to defer consideration and implementation of any significant changes regarding permissible host committee expenditures until after the year 2000 Presidential elections because the host committees and national party committees have already finalized their contractual arrangements for the year 2000 Presidential nominating conventions. One of these witnesses observed that the purpose and functions of host committees are nonpartisan, namely to maximize the economic benefit to the city. This party committee witness argued that the current rules are adequate and provide the flexibility necessary to accommodate the unique circumstances found in different host cities and in light of swiftly changing technology. Consequently, this witness opposed new restrictions on the goods and services that a host committee may provide. The other party committee witness indicated that it is contemplating selective use of the advisory opinion process to obtain clarification, as needed, of the existing regulations.

Given that the party committees have already entered into contractual agreements with the sites selected, the Commission has decided not to modify the existing regulations at this time with regard to the division of expenses between convention committees and host committees. Please note also that the Commission's decisions regarding the audits of the 1996 convention and host committees serve to provide additional guidance for the 2000 election cycle.

### *Section 9008.53 Receipts and Disbursements of Government Agencies and Municipal Corporations*

The changes being made to 11 CFR 9008.53(b)(1), which governs the receipt of donations by government agencies and municipal corporations, generally

follow the revisions to section 9008.52(c)(1). Consequently, a separate fund or account of a government agency or municipality may accept donations from local banks and individuals who either maintain a local residence or who work for a business's local office, or a labor organization's local office, or another organization's local office.

## Part 9032—Definitions

### *Section 9032.11 State*

The definition of "State" in section 9032.11 is being updated by deleting the Canal Zone and by adding American Samoa, which holds Presidential primaries consisting of caucuses. There is no corresponding provision in the general election rules.

## Part 9033—Eligibility for Payments

### *Section 9033.11 Documentation of Disbursements*

The revisions to section 9033.11 follow the amendments to section 9003.5 discussed above. No public comments were received regarding these changes.

## Part 9034—Entitlements

### *Section 9034.4 Use of Contributions and Matching Payments*

#### 1. Winding Down Costs

The regulations at 11 CFR 9034.4(a)(3) permit candidates to receive contributions and matching funds, and to make disbursements, for the purpose of defraying winding down costs over an extended period after the candidate's date of ineligibility ("DOI"). However, after the implementation of the "bright line" rules in 1995, questions arose as to whether all salary and overhead incurred after the date of the candidate's nomination must be attributed to the general election, including those associated with winding down the primary campaign. See 11 CFR 9034.4(d)(3). Accordingly, the NPRM sought comments on revising section 9034.4(a)(3)(i) and (iii) to indicate that for candidates who win their parties' nominations, no salary and overhead expenses may be treated as winding down costs until after the end of the expenditure report period, which is thirty days after the general election takes place.

The written comments of two witnesses opposed this change. One witness viewed the proposal as a "success penalty" for winning primary candidates. This witness noted that all primary candidates, whether they win or lose the nomination, must incur wind down costs. Similarly, the other witness stated that general election candidates

must incur primary campaign wind down costs during the general election period for such activities as paying debts, filing FEC reports, making matching fund submissions, and responding to FEC auditor requests in preparation for the audit. Consequently, this witness argued that the primary committees of the candidates who win the nomination should be able to pay these expenses. This comment also noted that the proposed rule would lower the amount of matching funds that could be received for these legitimate primary expenses, thereby treating winning primary candidates differently from those who lose their party's nomination.

The Commission has concluded that this area needs to be clarified. During the general election campaign, there are significant distinctions between the winding down activities of candidates who win their parties' nominations and those who do not, particularly with regard to legal and accounting compliance expenses. Accordingly, the revised rules indicate that a publicly funded primary candidate who does not run in the general election may begin to treat 100% of salary and overhead expenses as compliance after the candidate's date of ineligibility. However, federally financed primary candidates who continue on to the general election, as well as non-federally financed primary candidates who accept general election funding, must wait until after the end of the expenditure report period for the general election before they may begin treating all salary and overhead expenses as compliance expenses. Please note that the 100% figure applies to the salaries of those who continue to provide substantial services to the committee after the end of the expenditure report period. Compliance expenses between the date of nomination and the end of the expenditure report period are covered by the revisions to section 9035.1(c)(1), discussed below.

#### 2. Lost, Misplaced, or Stolen Items

The revisions to paragraph (b)(8) of section 9034.4 follow the changes made to section 9004.4(b)(8). None of the public comments or testimony addressed this provision.

#### 3. "Bright Line" Distinction Between Primary and General Election Expenses

Paragraph (e) of section 9034.4 sets forth certain "bright line" distinctions as to which expenses should be attributed to a candidate's primary campaign and which ones should be considered general election expenses.

Revisions are being made to this paragraph to reflect that not all candidates may accept public funding in both the primary and the general election. Nevertheless, candidates accepting federal financing for only the general election will also need guidance in attributing their expenditures between their primary election committees and their general election committees. Accordingly, paragraph (e) is being amended to indicate that it applies to Presidential campaign committees that accept federal funds for either election.

As noted above, the Commission expects to address a variety of other issues involving the bright line in a separate set of final rules to be issued at a later date.

#### 4. Joint Primary/GELAC Solicitations

Paragraph (e)(6)(i) of section 9034.4 addresses situations where a candidate's GELAC and his or her primary committee issue joint solicitations for contributions. Under the revised rules that took effect for the 1996 elections, the costs of such solicitations were divided equally between the two committees, regardless of how much money is actually raised for each. One difficulty with this, however, was that in some situations it enabled the GELAC to absorb a relatively high portion of fundraising costs while receiving a relatively low proportion of the funds raised. Thus, this provision was at odds with the joint fundraising rules applicable to other types of joint fundraising conducted by publicly funded Presidential primary committees under 11 CFR 9034.8. In effect, section 9034.4(e)(6)(i) could permit the GELAC to subsidize fundraising expenses that would otherwise be paid by the primary committee and subject to spending limits. Questions were also raised as to whether the rule should cover only the cost of a solicitation, or whether it would be more appropriate to include other fundraising costs, such as staff salaries, consulting fees, catering, facilities rental, and the candidate's travel to the event site. Consequently, the NPRM suggested the following four alternatives to paragraph (e)(6)(i):

(1) Allocate solicitation expenses and the distribution of net proceeds from a fundraiser in the same manner as described in 11 CFR 9034.8(c)(8) (i) and (iii), which are the provisions that apply to unaffiliated committees.

(2) Prohibit joint fundraising between the primary and the GELAC. If each committee performs its own fundraising, the difficulties inherent in apportioning expenses do not arise. This approach eliminates the problem that

the recipient committees may not know which of several solicitation letters or fundraising events generated a given contribution.

(3) Treat all expenses incurred by the GELAC prior to the candidate's date of ineligibility or date of nomination as qualified campaign expenses for the primary election. This approach avoids GELAC subsidization of the primary campaign, and is easy to work with.

(4) Specify in § 9003.3(a)(2)(i)(E) that the GELAC may only pay for the following solicitation costs: printing invitations and solicitations, mailing, postage and telemarketing expenses. This approach excludes GELAC payment for catering, facilities rental, fundraising consultants, employee salaries, and travel to the event site.

Two witnesses addressed this topic in their written comments. They both supported the current 50/50 rule for its simplicity. One commenter specifically urged that this rule be expanded to cover all types of fundraising costs, including event and travel costs. The other witness indicated that it would also make sense to follow the already-established joint fundraising rules.

The Commission has decided to implement the first alternative, which treats joint primary/GELAC fundraising the same as joint fundraising by unaffiliated committees. The joint fundraising rules in § 9034.8 are well-established and have proved to work well in other contexts. Under the revisions to 9034.4(e)(6)(i), the GELAC and the primary committee must apportion their fundraising costs, including printing invitations and solicitations, mailing, postage, telemarketing expenses, catering, facilities rental, fundraising consultants, and employee salaries, using the percentage of contributions each committee receives from the joint fundraising effort. Given the unique relationship between the primary campaign and the GELAC, and the fact that the candidate's primary committee receives public financing in exchange for voluntary compliance with spending limits, it is important to ensure that costs are correctly apportioned and net proceeds are properly distributed. Under this new provision, for example, if the GELAC receives 25% of the net proceeds, it may only pay 25% of the fundraising expenses, and no more than that amount.

#### *Section 9034.5 Net Outstanding Campaign Obligations*

In determining a Presidential primary committee's net outstanding campaign obligations ("NOCO"), § 9034.5(c)(1) permits candidates to deduct 40% of the

original cost of capital assets for depreciation. Similarly, § 9004.9(d)(1) provides for a straight 40% depreciation figure for capital assets purchased by general election campaign committees for purposes of the general election committee's statement of net outstanding qualified campaign expenses ("NOQCE"). At one time, the Commission had permitted federally financed Presidential campaign committees to demonstrate that a higher depreciation was appropriate for capital assets. In 1995, as part of an effort to streamline the audit process and to establish "bright lines" between primary expenses and general election expenses, the Commission adopted the straight 40% depreciation figure for all assets purchased after the change in the regulations took effect. It was believed that situations where the 40% figure was too low would be counterbalanced by situations where the figure was too high. Experience during the 1996 Presidential audits has shown that the 40% depreciation figure is unrealistically low for capital assets such as vehicles, computer systems, telephone systems, and other equipment that is heavily used during a Presidential primary campaign.

For this reason, the NPRM sought comments on the amending § 9034.5(c)(1) to allow primary candidates to demonstrate a higher depreciation figure through documentation of the fair market value. A similar amendment was proposed for the corresponding general election provision in 11 CFR 9004.9(d). Two comments addressed this proposed change. Both of them agreed that candidates should be allowed to demonstrate a higher depreciation. As the Commission concurs, this amendment is being included in both sections of the final rules.

The NPRM also contemplated the establishment of a minimum fair market value of 60% of the purchase price in situations where a candidate's primary committee transfers or sells capital assets to his or her publicly financed general-election committee. Both comments argued that the price for assets transferred from primary to general election committee should be based on actual fair market value, which may be less, rather than an artificial percentage applicable to all types of capital assets.

The final rules include the "bright line" approach, whereby the value of transferred assets is 60% of original purchase price. The Commission has concluded that it would be too complex to determine the fair market values of every capital asset actually transferred.

The 60% figure is intended to reflect that while some capital assets are worth less, others are worth more. Sixty percent is reasonable in light of the fact that capital assets such as computer systems or telecommunications systems are customized and configured specifically to meet the needs of that particular campaign organization. It may also be of added value to the campaign staff to continue to work with familiar equipment, and to avoid the disruption that would occur if new equipment were obtained, instead. With respect to the sale of non-capital assets from the primary to the general election committee, new language in paragraph (d)(1)(iii) indicates that an inventory must be prepared. This is needed to verify the valuation included on the primary committee's NOCO statement as well as the amount listed on the general election committee's NOQCE statement.

The revised regulations in 11 CFR 9004.9(d) indicate that once the general election campaign is over, the value of assets obtained from the primary campaign committee shall be listed on the NOQCE statement as 20% of the original cost to the primary committee. Please note that campaigns do not have the option of demonstrating that an amount less than 20% is appropriate. Based on past experience, the Commission has concluded that a 20% residual value is a realistic figure for equipment that has been used throughout both the primary and general election campaigns.

The commenters argued that this figure should also be based on actual fair market value, which may be less, rather than an artificial percentage applicable to all types of capital assets. Nevertheless, the Commission has concluded that this is another area where it would be too complex to determine the fair market values of every capital asset on hand. Some capital assets may be worth less, while others may be worth more. Accordingly, the revisions to 11 CFR 9004.9(d) incorporate the 20% residual value figure. Please note that the general election committee may, if it wishes, sell these capital assets to the GELAC for the 20% residual value.

Another revision included in 11 CFR 9004.9 and 9034.5 is a clarification of the term "capital asset." A new sentence is being added to sections 9004.9(d) and 9034.5(c)(1) to indicate that when the components of a system, such as a computer system or a telecommunications system, are used together and the total cost of the components exceeds \$2000, the entire system is considered a capital asset.

This new language conforms to the Commission's previous interpretation of its rules. See Explanation and Justification for 11 CFR 9034.5, 60 FR 31868 (June 16, 1995). The NPRM sought comments on whether computer software should be treated as a capital asset. One commenter argued that software should not be considered to be a capital asset because the vendors' licensing agreements may bar transfer of the software. The Commission notes that some software programs may be sold as a package together with a computer system, thus making it impracticable to list them as separate capital assets on a NOCO statement.

Lastly, please note that an incorrect reference to the date of ineligibility in paragraph (d)(1)(i) of section 9004.9 has been changed to refer to the end of the expenditure report period.

#### **Part 9035—Expenditure Limitations**

##### *Section 9035.1 Campaign Expenditure Limitation; Compliance and Fundraising Exemptions*

The rules at 11 CFR 9035.1(c)(1) set forth an exemption from the overall spending limit for legal and accounting compliance costs incurred by federally financed Presidential primary committees. In the past, to claim this exemption, campaign committees have had to keep detailed records of salary and overhead expenses, including records indicating which duties are considered compliance and the percentage of time each person spends on such activities. The NPRM sought to amend this regulation to provide a simpler and easier method of calculating the compliance exemption. Accordingly, comments were sought on revising this paragraph to state that an amount equal to 10% of all operating expenditures for each reporting period may be treated as compliance expenses not subject to the candidate's spending limit. The NPRM noted that this amount could be readily derived from line 23, Operating Expenses, on the committee's reports.

Several commenters and witnesses stressed the importance of implementing policies that encourage candidates to spend money to achieve voluntary compliance with the campaign financing laws. Consequently, some of these opposed establishing an upper limit of 10% of operating costs that could be spent for compliance costs, arguing that the Commission should not discourage spending more money on compliance. They also pointed out that compliance costs may be unrelated to the overall amount of operating costs, and that committees



having low operating costs could be disadvantaged. One witness urged the Commission to let committees demonstrate that their actual legal and accounting costs are higher than the standard percentage.

The Commission agrees that it is not sound policy to artificially limit or discourage compliance spending. Nevertheless, establishing a "standard deduction" for compliance has the advantage of simplicity and ease of application. Consequently, the Commission has decided to modify the initial proposal so that an amount equal to 15% of the candidate's overall expenditure limit may be excluded as exempt legal and accounting compliance costs under 11 CFR 100.8(b)(15). A review of previous Presidential campaigns indicates that this figure approximates the upper amount publicly funded primary committees have spent in previous election cycles. Unlike the initial proposal, this approach is not tied to monthly operating expenditures. Thus, it allows for greater flexibility in earlier reporting periods when committees may be setting up their legal and accounting systems. A similar approach has worked well with respect to fundraising expenses. See 11 CFR 100.8(b)(21) and 9035.1(c)(2). Note that the final rule does not permit committees to demonstrate that they have actually incurred a higher amount because the Commission is seeking to move away from its previous resource-intensive system that required the creation, maintenance, and review of considerable paperwork to document compliance costs. However, as explained above, in addition to the 15% of the overall spending limits, publicly funded primary candidates may also treat 100% of their overhead and salary expenses as exempt compliance costs after their date of ineligibility or after the end of the expenditure report period. These changes to the regulations are intended to decrease the time it takes for the Commission to verify compliance costs during the audit process. They should also reduce the resources campaign committees must devote to tracking compliance costs.

Please note that the title of section 9035.1 is also being revised and subheadings for each paragraph are being added to assist readers in locating the material in this section more easily.

### **Part 9036—Review of Matching Fund Submissions and Certification of Payments by Commission**

#### *Section 9036.1 Threshold Submission*

During the 1996 Presidential election cycle, the Commission instituted a new program whereby primary campaign committees may submit contributions for matching fund payments through the use of digital imaging technology such as computer CD ROMs, instead of submitting paper photocopies of checks and deposit slips. For the 2000 election cycle, the Commission is expanding this program to permit the use of digital imaging for primary committees' threshold submissions. See new language in paragraph (b)(3) of section 9036.1. Please note that committees wishing to submit paper records and documentation, instead of digital images, may do so. The only written set of comments to address this topic supported the submission of this documentation via CD ROM.

#### *Section 9036.2 Additional Submissions for Matching Fund Payments*

Paragraph (b)(1)(vi) of this section is being revised to enable primary committees to submit digital images of contributor redesignations, reattributions and supporting statements and materials needed to establish the matchability of contributions. The single set of written comments to address this topic indicated that it would be burdensome for committees to maintain paper copies of original documentation other than contributor cards and affidavits. The Commission notes that the amendment to the regulations is only intended to give Presidential primary committees the option, in lieu of paper submissions, of electronically submitting digital images of contributor redesignations, contributor reattributions and the types of supporting statements commonly found on contributor cards. The requirements of 11 CFR 110.1(l) for maintaining the original documents are not being changed. Hence, revised section 9036.2 does not impose additional recordkeeping burdens on Presidential committees.

#### **Additional Issues**

During the course of this rulemaking, the Commission considered other possible changes to the regulations that it did not ultimately incorporate into the final rules. A summary of these proposals follows.

#### *1. Allocation of Presidential Travel Costs*

The Commission's regulations at 11 CFR 9004.7 and 9034.7 govern the allocation of travel expenses when other candidates or elected officials accompany a publicly funded Presidential candidate, or such candidate's staff, on campaign-related trips. One commenter addressed several differences between these rules and the provisions of 11 CFR 106.3 governing travel expenses for Congressional candidates and for Presidential candidates who don't accept federal funds for their campaigns.

The Commission has concluded that these proposals are beyond the scope of this rulemaking. At a later date, however, they may be included in a new rulemaking addressing possible revisions to 11 CFR 106.3. Changes in this area would impact all federal candidates, not just those who have or are running for President and have accepted federal funding for their campaigns. Thus, the Commission would want to have the benefit of obtaining comments from non-Presidential candidates before promulgating new rules that would affect them. In addition, to the extent possible, the Commission would need to closely consider consistency with Congressional guidelines regarding travel.

#### *2. Aircraft Owned by Individuals and Charter Rates*

The Commission's regulations at 11 CFR 114.9(e) create exceptions to the definitions of contribution and expenditure to allow candidates and their campaign staff to travel on aircraft owned by corporations or labor organizations if they provide reimbursement within specified time periods. Similarly, 11 CFR 9004.7 and 9034.7 provide for reimbursement for campaign-related travel on government aircraft such as Air Force One or Air Force Two. However, no comparable provisions cover travel on aircraft owned by individuals, partnerships or other unincorporated entities. One commenter urged the Commission to amend its regulations to apply the same first-class reimbursement requirement to travel on private aircraft regardless of the nature of the owner of the aircraft. With regard to travel between cities not having first class service, the comment urged the Commission to let authorized committees use the "lowest available" charter rate instead of the "usual" charter rate.

For some of the reasons mentioned above, the Commission has concluded



that these proposals are beyond the scope of this rulemaking. They could, however, be included in a new Notice of Proposed Rulemaking at a later date. Changes of this nature would impact all federal candidates, not just those who have are running for President and have accepted federal funding for their campaigns. Thus, the Commission would want to have the benefit of obtaining comments from non-Presidential candidates before promulgating new rules that would affect them. In addition, this complex area is also subject to regulation by the Federal Aviation Administration, and consultation with that agency would be advisable before issuing final rules. Similarly, the Commission would need to carefully consider the consistency of its rules with Congressional guidelines regarding travel.

**Certification of No Effect Pursuant to 5 U.S.C. 605(b) (Regulatory Flexibility Act)**

The attached final rules will not, if promulgated, have a significant economic impact on a substantial number of small entities. The basis for this certification is that very few small entities will be affected by these proposed rules, and the cost is not expected to be significant. Further, any small entities affected have voluntarily chosen to receive public funding and to comply with the requirements of the Presidential Election Campaign Fund Act or the Presidential Primary Matching Payment Account Act in these areas.

**List of Subjects**

11 CFR Part 9003

Campaign funds, Reporting and recordkeeping requirements

11 CFR Part 9004

Campaign funds

11 CFR Part 9008

Campaign funds, Political committees and parties, Reporting and recordkeeping requirements

11 CFR Part 9032.

Campaign funds.

11 CFR Parts 9033—9035

Campaign funds, Reporting and recordkeeping requirements.

11 CFR Part 9036

Administrative practice and procedure, Campaign funds, Reporting and recordkeeping requirements.

For the reasons set out in the preamble, Subchapters E and F of Chapter I of Title 11 of the *Code of Federal Regulations* are amended as follows:

**PART 9003—ELIGIBILITY FOR PAYMENTS**

1. The authority citation for Part 9003 continues to read as follows:

**Authority:** 26 U.S.C. 9003 and 9009(b).

2. In § 9003.3, the headings for paragraphs (a) and (a)(1) are republished, and the section heading, the introductory text of paragraph (a)(1)(i), and paragraph (a)(1)(i)(A) are revised to read as follows:

**§ 9003.3 Allowable contributions; General election legal and accounting compliance fund.**

(a) *Legal and accounting compliance fund—major party candidates.*

(1) *Sources.*

(i) A major party candidate, or an individual who is seeking the nomination of a major party, may accept contributions to a legal and accounting compliance fund if such contributions are received and disbursed in accordance with this section. A general election legal and accounting compliance fund (“GELAC”) may be established by such individual prior to being nominated or selected as the candidate of a political party for the office of President or Vice President of the United States. Before June 1 of the calendar year in which a Presidential general election is held, contributions may only be deposited in the GELAC if they are made for the primary and exceed the contributor’s contribution limits for the primary and are lawfully redesignated by the contributor for the GELAC pursuant to 11 CFR 110.1.

(A) All solicitations for contributions to the GELAC shall clearly state that Federal law prohibits private contributions from being used for the candidate’s election and that contributions will be used solely for legal and accounting services to ensure compliance with Federal law, and shall clearly state how contribution checks should be made payable. Contributions shall not be solicited for the GELAC before June 1 of the calendar year in which a Presidential general election is held. If the candidate does not become the nominee, all contributions accepted for the GELAC, including redesignated contributions, shall be refunded within sixty (60) days after the candidate’s date of ineligibility.

\* \* \* \* \*

3. Section 9003.5 is amended by revising paragraphs (b)(1)(iv) and (b)(3)(ii) to read as follows:

**§ 9003.5 Documentation of disbursements.**

\* \* \* \* \*

(b) \* \* \*

(1) \* \* \*

(iv) If the purpose of the disbursement is not stated in the accompanying documentation, it must be indicated on the canceled check negotiated by the payee.

\* \* \* \* \*

(3) \* \* \*

(ii) *Purpose* means the full name and mailing address of the payee, the date and amount of the disbursement, and a brief description of the goods or services purchased. Examples of acceptable and unacceptable descriptions of goods and services purchased are listed at 11 CFR 104.3(b)(3)(i)(B).

\* \* \* \* \*

**PART 9004—ENTITLEMENT OF ELIGIBLE CANDIDATES TO PAYMENTS; USE OF PAYMENTS**

4. The authority citation for part 9004 continues to read as follows:

**Authority:** 26 U.S.C. 9004 and 9009(b).

5. Section 9004.4 is amended by revising paragraphs (a)(4) and (b)(8) to read as follows:

**§ 9004.4 Use of payments.**

(a) \* \* \*

(4) *Winding down costs.* The following costs shall be considered qualified campaign expenses:

(i) Costs associated with the termination of the candidate’s general election campaign such as complying with the post-election requirements of the Act and other necessary administrative costs associated with winding down the campaign, including office space rental, staff salaries, and office supplies; and

(ii) Costs associated with the candidate’s general election campaign and incurred by the candidate prior to the end of the expenditure report period for which written arrangement or commitment was made on or before the close of the expenditure report period.

\* \* \* \* \*

(b) \* \* \*

(8) *Lost, misplaced, or stolen items.* The cost of lost, misplaced, or stolen items may be considered a nonqualified campaign expense. Factors considered by the Commission in making this determination shall include, but not be limited to, whether the committee demonstrates that it made conscientious efforts to safeguard the missing equipment; whether the committee sought or obtained insurance on the items; whether the committee filed a police report; the type of equipment involved; and the number and value of items that were lost.

6. Section 9004.9 is amended by revising paragraph (d)(1) to read as follows:

acceptable and unacceptable purpose descriptions to be reported by authorized committees. Paragraph (B) requires authorized committees, when itemizing certain disbursements for which reimbursements are required, to provide a brief explanation of the activity for which reimbursement is required. These provisions have been in Title 11 of the **Code of Federal Regulations** since 1980 and 1995, respectively, and were not affected by the recent statutory changes to the election cycle reporting requirements.

#### Need for Correction

As published, the final rules inadvertently omit two paragraphs describing information to be reported by authorized committees of Federal candidates.

All committees must report the purpose of itemized disbursements (i.e., those disbursements aggregating in excess of \$200). Omitted paragraph (A) contains examples of suitably specific purpose descriptions as well as examples of those descriptions that are unacceptably vague. This paragraph is inconsistent with the reporting of rules for unauthorized committees (committees other than candidate committees) in 11 CFR 104.3(b)(3).

Omitted paragraph (B) is used in administering the "personal use" rules in 11 CFR 113.1. Federal candidates are barred from using campaign funds for personal benefit. Paragraph (B) requires authorized committees of Federal candidates itemizing disbursements for which partial or total reimbursement is required under 11 CFR 113.1(g)(1)(iii)(C) or (D) to provide a brief explanation of the activity for which the reimbursement is made.

Section 801 of Title 5 of the United States Code requires Federal agencies to submit regulations to Congress. These regulations were submitted to the Speaker of the House of Representatives and the President of the Senate on November 26, 2001.

#### Certification of No Effect Pursuant to 5 U.S.C. § 605(b) [Regulatory Flexibility Act]

This correction will not have significant economic impact on a substantial number of small entities. The basis of this certification is that this correction only requires political committees to once again add information to the reports they are required to file. These regulations were in 11 CFR since 1980 and 1995, respectively, before being inadvertently omitted in 2000.

#### List of Subjects in 11 CFR Part 104

Campaign funds, Political committees and parties, Reporting and recordkeeping requirements.

Accordingly, 11 CFR part 104 is corrected by making the following correcting amendment:

#### PART 104—REPORTS BY POLITICAL COMMITTEES

1. The authority citation for part 104 continues to read as follows:

**Authority:** 2 U.S.C. 431(1), 431(8), 431(9), 432(i), 434, 438(a)(8), 438(b), 439a.

#### § 104.3 Contents of reports (2 U.S.C. 434(b), 439a).

\* \* \* \* \*

2. In § 104.3 add the following paragraphs (b)(4)(i)(A) and (B):

(b) \* \* \*

(4) \* \* \*

(i) \* \* \*

(A) As used in this paragraph, *purpose* means a brief statement or description of why the disbursement was made. Examples of statements or descriptions which meet the requirements of this paragraph include the following: dinner expenses, media, salary, polling, travel, party fees, phone banks, travel expenses, travel expense reimbursement, and catering costs. However, statements or descriptions such as *advance*, *election day expenses*, *other expenses*, *expenses*, *expense reimbursement*, *miscellaneous*, *outside services*, *get-out-the-vote* and *voter registration* would not meet the requirements of this paragraph for reporting the purpose of an expenditure.

(B) In addition to reporting the purpose described in paragraph (b)(4)(i)(A) of this section, whenever an authorized committee itemizes a disbursement that is partially or entirely a personal use for which reimbursement is required under 11 CFR 113.1(g)(1)(ii)(C) or (D), it shall provide a brief explanation of the activity for which reimbursement is required.

\* \* \* \* \*

Dated: November 26, 2001.

**Danny L. McDonald,**  
Chairman, Federal Election Commission.  
[FR Doc. 01-29679 Filed 11-29-01; 8:45 am]  
**BILLING CODE 6715-01-P**

#### FEDERAL ELECTION COMMISSION

#### 11 CFR Part 111

#### [Notice 2001-18]

#### Extension to Administrative Fines

**AGENCY:** Federal Election Commission.

**ACTION:** Final rule; revision of the sunset date.

**SUMMARY:** The Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the expiration date in which the Federal Election Commission (hereinafter "the Commission") may assess civil money penalties for violations of the reporting requirements of section 434(a) of the Federal Election Campaign Act (hereinafter "the Act" or "FECA").

**DATES:** Effective on December 31, 2001.

**FOR FURTHER INFORMATION CONTACT:** Ms. Rosemary C. Smith, Assistant General Counsel, or Ms. Mai T. Dinh, Attorney, 999 E Street, NW., Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

#### SUPPLEMENTARY INFORMATION:

#### Explanation and Justification

Section 640 of the Treasury and General Government Appropriations Act, 2000, Pub. L. No. 106-58, 106th Cong., 113 Stat. 430, 476-77 (1999), amended § 309(a)(4) of the FECA, 2 U.S.C. 437g(a)(4), to provide for a modified enforcement process for violations of reporting requirements. Under § 437g(a)(4)(C) of the FECA, the Commission may assess a civil money penalty for violations of the reporting requirements of 2 U.S.C. 434(a). This authority, however, was to sunset on December 31, 2001. Pub. L. No. 106-58, 106th Cong., § 640(c). Recently, § 642 of the Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the sunset date to include all reports that cover activity between January 1, 2000, to December 31, 2003.

The Commission published final rules on May 19, 2000, to implement the amendment contained in the Treasury and General Government Appropriations Act, 2000. Section 111.30 of the regulations reflects the sunset provision of Pub. L. No. 106-58, 106th Cong., § 640(c). Therefore, the Commission is issuing this final rule to amend section 111.30 to extend the application of the administrative fine regulations, 11 CFR part 111, subpart B, to include all violations relating to reports that cover the period between January 1, 2000, to December 31, 2003.

The Commission is promulgating this final rule without notice or opportunity for comment because it falls under the "good cause" exemption of the Administrative Procedures Act, 5 U.S.C. 553(b)(B). The exemption allows

# Rules and Regulations

Federal Register

Vol. 65, No. 37

Thursday, February 24, 2000

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

## DEPARTMENT OF ENERGY

### 10 CFR Part 708

RIN 1901-AA78

#### Criteria and Procedures for DOE Contractor Employee Protection Program; Correction

**AGENCY:** Office of Hearing and Appeals, Department of Energy.

**ACTION:** Final rule; correction.

**SUMMARY:** The Department of Energy published a final rule on February 9, 2000, to amend 10 CFR Part 708, the DOE contractor employee protection program ("whistleblower") regulations. DOE previously adopted an interim final rule amending Part 708, which was published on March 15, 1999, and amended on July 12, 1999. This document corrects an error in the final rule.

**DATES:** This final rule is effective on March 10, 2000.

**FOR FURTHER INFORMATION CONTACT:** Roger Klurfeld, or Thomas O. Mann, telephone: (202) 426-1449; e-mail: roger.klurfeld@hq.doe.gov, thomas.mann@hq.doe.gov.

**SUPPLEMENTARY INFORMATION:** This document makes a correction to a final rule that was published in the **Federal Register** on February 9, 2000 (65 FR 6314). In that rulemaking, an error was made in a section heading numbering.

In rule FR document 00-2797, beginning on page 6314, in the issue of Wednesday, February 9, 2000, make the following correction:

#### PART 708—[CORRECTED]

##### § 708.40 [Corrected]

1. On page 6319, in the third column, correct amendatory instruction 5 to read as follows:

5. A new Section 708.43 is added as follows:

##### § 708.43. Does this rule impose an affirmative duty on DOE contractors not to retaliate?

\* \* \* \* \*

Dated: February 16, 2000.

**George B. Breznay,**

*Director, Office of Hearings and Appeals.*

[FR Doc. 00-4346 Filed 2-23-00; 8:45 am]

**BILLING CODE 6450-01-P**

## FEDERAL ELECTION COMMISSION

### 11 CFR Parts 2, 4 and 5

[Notice 2000-3]

#### Electronic Freedom of Information Act Amendments

**AGENCY:** Federal Election Commission.

**ACTION:** Final rules and statement of basis and purpose.

**SUMMARY:** The Electronic Freedom of Information Act Amendments of 1996, which amended the Freedom of Information Act, were designed to make government documents more accessible to the public in electronic form. The amendments also expedite and streamline the process by which agencies disclose information generally. The Commission is revising its Freedom of Information Act regulations both to comply with these new requirements and to address issues that have arisen since the rules were originally adopted.

**DATES:** These rules will become effective on March 27, 2000

**FOR FURTHER INFORMATION CONTACT:** Ms. Rosemary C. Smith, Assistant General Counsel, or Ms. Rita A. Reimer, Attorney, 999 E Street, NW, Washington, DC 20463, (202) 694-1650 or (800) 424-9530 (toll-free).

**SUPPLEMENTARY INFORMATION:** The Freedom of Information Act ("FOIA") provides for public access to all federal agency records except those that are protected from release by specified exemptions. 5 U.S.C. 552. In 1996, Congress enacted the "Electronic Freedom of Information Act Amendments of 1996" ("EFOIA"), Public Law 101-231, 110 Stat. 2422. EFOIA extended coverage of the FOIA to electronic records and made other changes in FOIA procedures that expedite and streamline the process by which agencies disclose information. The revisions to the Commission's FOIA

rules published today in part conform these rules to the new EFOIA requirements and in part reflect issues that have arisen since the rules were originally adopted.

The Commission's FOIA rules are found at 11 CFR Part 4, while access to documents made public by the Commission's Public Disclosure Division is governed by 11 CFR Part 5. The revisions published today affect 11 CFR 4.1, 4.4, 4.5, 4.7, 5.1 and 5.4. In addition, the Commission is making technical amendments to 11 CFR 2.2 and 2.5, sections of its Government in Sunshine regulations.

The Notice of Proposed Rulemaking ("NPRM") on these rules was published in the **Federal Register** on March 4, 1999, 64 FR 10405. The Commission received one joint comment in response to the NPRM, from Public Citizen and the Freedom of Information Clearinghouse. This comment is discussed in more detail below.

#### Statement of Basis and Purpose

EFOIA requires agencies to make covered records available by electronic means. The Commission fully supports this goal and fulfills the bulk of its FOIA requests electronically. For example, during calendar year 1998, of the 462 FOIA requests that the Commission granted in their entirety, 424 were for on-line computer access.<sup>1</sup>

The Commission's home page on the World Wide Web, [www.fec.gov](http://www.fec.gov), contains a wide range of information on Commission policies and procedures, as well as campaign finance data. The material available includes summaries and searchable databases of campaign contributions; the FEC newsletter, the *Record*; candidate and committee Campaign Guides, reporting forms, and other FEC publications; news releases and media advisories; statistics and data on voting and elections; the text of the Commission's regulations; FEC Advisory Opinions extending back to 1977; summaries of court cases to which the Commission was a party; and images of campaign finance reports filed by

<sup>1</sup> Of the 486 FOIA requests received in 1998, only 24 were denied. Ten of these were denied because the Commission did not have records responsive to the requests; thirteen requests were denied because the Commission had already placed the requested records on the public record prior to the filing of the requests, pursuant to 11 CFR 4.4; and one request was denied due to exempt documents, as stipulated under 11 CFR 4.5.

candidates for the House, presidential campaigns, and other political committees, as well as reports filed by the Democratic Senatorial Campaign Committee and the National Republican Senatorial Committee.

The revised site includes a Site Index (alphabetical listing of information on the site), a "What's New" scrolling menu, daily highlights, and publications written in Spanish. The site also includes the Commission's annual FOIA Report, submitted to Congress pursuant to 5 U.S.C. 552(e), detailed information on how to submit a FOIA request, and a publication, *Availability of FEC Information*, which fulfills the agency's responsibilities under 5 U.S.C. 552(g) to "prepare and make publicly available upon request, reference material or a guide for requesting records or information from the agency."

The Commission is continuing to add information to this site. For example, campaign finance reports filed by Senate candidates and committees that support them will be added as soon as copies of those reports, which are filed with the Secretary of the Senate pursuant to 2 U.S.C. 432(g)(1), are made available to the Commission in a form that can be imaged onto the site.

The Commission recently redesigned its web site by reorganizing the available information in a more efficient presentation. It has also implemented Media-Independent Presentation Language, technology designed to allow persons with special needs to access many types of information using a wide variety of hardware and software solutions.

The Commission's 1999 publication, *Availability of FEC Information*, *supra*, provides a detailed listing of the types of documents available from the FEC, including those available under FOIA, as well as directions on how to locate and obtain them. This publication is available from the Public Records Office and also appears on the FEC web site.

The Commission also makes numerous documents available through its electronic FAXLINE, 202-501-3413. Information on documents available through the FAXLINE can be found in a FAXLINE menu (document #411), on the Commission's web site, in the above publication, or by calling the Commission's Public Records Office at 1-800-424-9530, extension #3 (toll free) or 202-694-1120. That Office also responds to E-mail requests at [pubrec@fec.gov](mailto:pubrec@fec.gov). The Commission's Information Division can be reached at 1-800-424-9530, ext. #1 (toll free), or 202-694-1100.

#### Section 2.2 Definitions

The Commission is revising paragraph 2.2(b), a part of its Government in the Sunshine regulations, to delete an obsolete reference to the Secretary of the Senate, the Clerk of the House, or their designees *ex officio* from the definition of "Commissioner." These offices were declared unconstitutional in *FEC v. NRA Political Victory Fund*, 6 F.3d 821 (D.C. Cir. 1993), *cert. dismissed for want of jurisdiction*, 513 U.S. 88 (1994).

#### Section 2.5. Procedures for Closing Meetings

The Commission is also deleting a phrase referring to these *ex officio* members from paragraph (a) of this section.

#### Section 4.1 Definitions

The Commission is revising paragraph 4.1(b) to delete an obsolete reference to congressional officials who no longer serve on the Commission. *See* discussion of 11 CFR 2.2, *supra*.

Consistent with EFOIA, the Commission is revising the definition of *search* found at paragraph 4.1(h) to clarify that this encompasses all time spent reviewing Commission records, whether manually or by automated means. 5 U.S.C. 552(a)(3)(D). The Commission is also adding new paragraph 4.1(o), which states that the term *record* and any other term used in 11 CFR part 4 in reference to information maintained by the Commission includes any pertinent information that is maintained in an electronic format.

#### Section 4.4 Availability of Records

The Commission is a full disclosure agency that routinely places numerous categories of records on the public record, consistent with the rights of individuals to privacy; the rights of persons contracting with the Commission with respect to trade secret and commercial or financial information; and the need for the Commission to promote free internal policy deliberations and to pursue its official activities without undue disruption. Examples of categories of records made publicly available by the Commission that do not require a FOIA request include campaign finance reports, which are placed on the public record within 48 hours of receipt at the Commission, as required by 2 U.S.C. 438(a)(4); investigative files in closed enforcement matters, which are placed on the public record within 30 days of the date of the close-out letter, as required under 2 U.S.C. 437g(a)(4)(B)(ii) and 11 CFR 111.20(a); and requests for advisory opinions pursuant to 2 U.S.C.

437f(d) and 11 CFR 112.2. Because these records are made publicly available pursuant to the Federal Election Campaign Act ("FECA"), requests for them generally are not processed under FOIA—requesting them under FOIA may even cause the requester to lose time in gaining the needed information. Consequently, the Commission has restructured and revised parts of paragraph 4.4(a), which deals with the availability of records under FOIA, to reflect this situation.

Section 4.4(a) as formerly written covered both FOIA sections 5 U.S.C. 552(a)(2) and 552(a)(3). Section 552(a)(2) encompasses final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases; statements of policy and interpretations which have been adopted by the Commission but are not published in the **Federal Register**; and administrative staff manuals and instructions to staff that affect a member of the public. Section 552(a)(3) includes all other documents covered by the FOIA, that is, all documents that are not subject to one or more of the exceptions set forth at 5 U.S.C. 552(b).

Paragraphs 11 CFR 4.4(a)(1)–(3), which are largely unchanged, refer to material covered by 5 U.S.C. 552(a)(2), while former paragraphs 4.4(a)(4)–(15) listed other agency documents. The NPRM noted that this latter listing might not have included all covered documents. It was also overinclusive, since it covered materials that are also available from the Commission's Public Disclosure Division. *See* former 11 CFR 4.4(b). The Commission has therefore replaced the listing of covered documents in former paragraphs 4.4(a)(4)–(15) with a general statement in new paragraph 4.4(b) that, in accordance with 5 U.S.C. 552(a)(3), the Commission will make available, upon proper request, all non-exempt Agency records, or portions of records, that have not previously been made public pursuant to 5 U.S.C. 552(a)(1) and (a)(2). Former paragraph 4.4(b), which noted that public access to the materials listed in former paragraphs 4.4(a)(3) and (a)(10)–(15) are also available under the FECA from the Public Disclosure Division, has been repealed, because some of these provisions are being replaced by language in 11 CFR 5.4, while other provisions duplicate language found elsewhere in the regulations.<sup>2</sup>

<sup>2</sup>Records that an agency has previously made available to the public under section 552(a)(2) need not be released again in response to a FOIA request made pursuant to section 552(a)(3). *Department of Justice v. Tax Analysts*, 492 U.S. 136, 152 (1989).

The Commission is not revising paragraphs (a)(1) or (a)(2) of section 4.4. The Commission is revising paragraph (a)(3), however, to delete language referring to Commission votes to take no further action in an enforcement action, which sometimes but not always occurs in connection with a decision to close a file. For example, if the Commission votes to accept a conciliation agreement, this serves to end the matter—there is no vote as such to take no further action in the case. A further revision clarifies that all respondents must be notified of the Commission's action before this 30-day period for the Commission to make these records public begins to run.

In addition, the material in former paragraphs 4.4(a)(4), dealing with letter requests for guidance<sup>3</sup> and the Commission's responses thereto; 4.4(a)(5), minutes of Commission meetings; 4.4(a)(6), material routinely prepared for public distribution; and 4.4(a)(14), audit reports discussed in public session, has been moved to revised 11 CFR 5.4(a), the appropriate location for information available from the Commission's Public Disclosure Division. Former paragraphs 4.4(a)(7), proposals submitted in response to a request for proposals under Federal Procurement Regulations; 4.4(a)(8), contracts for goods and services entered into by the Commission; and 4.4(a)(13), studies published by the Commission's Office of Election Administration, have been deleted, since this material is covered by the new general language in paragraph 4.4(b). Finally, paragraph 4.4(a)(9), statements and certifications required by the Government in the Sunshine Act, 5 U.S.C. 552b, has been repealed, as these documents are covered by the Commission's Sunshine regulations, 11 CFR part 2.

Consistent with new 5 U.S.C. 552(1)(2)(D) and (E), the Commission is revising paragraphs (a)(4) and (5) of section 4.4 to include new material that will be made available under EFOIA. The new categories include copies of all records that have been released to any person in response to a previous FOIA request and that the Commission determines have become, or are likely to become, the subject of subsequent requests for substantially the same records; and a general index of these records. The Commission is also revising the first sentence of paragraph 4.4(c), to include within the listing of indexes and supplements it makes

available to the general public the additional documents referenced in EFOIA at 5 U.S.C. 552(a)(2)(E). In particular, the Commission's publication, *Availability of FEC Information*, discussed *supra*, which is available on the Commission's web site, was prepared in response to this new EFOIA requirement.

In addition to the above activity, the comment urged the Commission to put in place the Government Information Locator System required by the Paperwork Reduction Act of 1995 at 44 U.S.C. 3511. The Commission declines to do this, because it is statutorily exempt from coverage under that Act. See 44 U.S.C. 3502(1).

As requested by the comment, the Commission is adding new paragraph 4.4(g) to alert the public to the Commission's web site and the wealth of information it contains. However, the Commission is not providing in its regulations a detailed listing of available material, as suggested by the commenters, since new information is added to the web site on an ongoing basis, and because the Commission's 1999 brochure, *Availability of FEC Information*, provides a detailed list of available material—precisely the sort suggested by the commenters.

#### Section 4.5 Categories of Exemptions

##### Estimates of the Volume of Materials Denied

EFOIA at 5 U.S.C. 552(a)(6)(F) requires that agency responses denying exempt information include an estimate of the volume of any responsive documents the agency is withholding. It also requires that when an agency withholds only a portion of a record, the response indicate the amount of information deleted from the released record; and that, where possible, this be noted at the place of the deletion. 5 U.S.C. 552(b)(9). Paragraph 4.5(c) of the Commission's regulations has been revised to implement this new requirement.

The NPRM proposed no changes to the Commission's rules at 11 CFR 4.5(d), which address other agencies' records or subject matter to which a government agency other than the Commission has exclusive or primary jurisdiction. This regulation states that, when a FOIA request seeking such records is received, the request "shall be promptly referred by the Commission to that agency for disposition or guidance as to disposition."

The joint comment cites *McGehee v. CIA*, 697 F.2d 1095, 1119 (D.C. Cir. 1983), *vacated in part, mot. to intervene granted, reh'g granted*, 724 F.2d 201

(D.C. Cir. 1984), and *Paisley v. CIA*, 712 F.2d 686, 691 (D.C. Cir. 1983), in urging the Commission to end its practice of routinely referring such requests to the issuing agency. However, these cases reflect the minority view. The Department of Justice's *Freedom of Information Act Guide & Privacy Act Overview*, Sept. 1998 Edition, at 25–26 and accompanying notes, directs agencies to consult with other agencies whenever a FOIA request implicates those agencies' documents. However, "[w]hen entire records originating with another agency or component are located, those records ordinarily should be referred to their originating agency for its direct response to the requester." See also *Crooker v. United States Parole Commission*, 730 F.2d 1, 4–5 and n. 3 (1st Cir. 1984). Consequently, the Commission concludes that its current practice and regulatory language comply with the pertinent law.

#### Section 4.7 Requests for Records

EFOIA requires covered agencies to provide requested records in any form or format requested, if the record is readily reproducible by the agency in that form or format. Each agency must make reasonable efforts to maintain its records in forms or formats that are reproducible electronically, and to search for requested records in electronic form or format, except when such efforts would significantly interfere with the operation of the agency's automated information system. 5 U.S.C. 552(a)(3)(B), (C).

The Commission is removing and reserving former paragraph 4.7(a), which advises interested parties on how to obtain records from the Commission's Public Records Office, since those records are no longer covered by 11 CFR part 4. Identical information is contained in 11 CFR 5.5, which concerns access to records that may be obtained from the Commission's Public Disclosure Division. That language has not been revised.

The Commission is redesignating former paragraph 4.7(b), addressing what must be contained in a FOIA request, as paragraph 4.7(b)(1) and adding new paragraph 4.7(b)(2) to comply with this new requirement. The new language requires requests for Commission records to specify the preferred form or format, including electronic formats, for the agency's response. The Commission will accommodate requesters as to form or format if the record is readily available in that form. If a requester does not specify the form or format of the response, the Commission will respond in the form or format in which the

<sup>3</sup> Letter requests for guidance are letters that appear to be advisory opinion requests but do not meet the requirements of 2 U.S.C. 437f and 11 CFR Part 112. In appropriate cases Commission staff respond to these requests with information and guidance.

document is most accessible to the Commission.

#### 1. Time Limit for Responding to Requests

EFOIA lengthened the time within which agencies must determine whether to comply with a FOIA request from ten to twenty working days. 5 U.S.C. 552(a)(6)(A)(i). Paragraph 4.7(c) has been revised to conform the Commission's regulations to this new time limit.

In addition, the Commission is revising the first sentence of paragraph 4.7(c) to conform with 5 U.S.C. 552(a)(6)(A). The statutory language provides that each agency shall determine within twenty days after the receipt of a FOIA request whether to comply with the request. However, the former regulation stated that the Commission would provide the requested records within ten days. Given the Commission's workload and the volume of FOIA requests, the Commission believes the statutory timeframe is more realistic than that included in the former rule. Accordingly, the revised regulation states that the Commission will determine within 20 days after receiving a FOIA request whether to comply with that request.

The FOIA at 5 U.S.C. 552(a)(6)(B) permits agencies, upon written notice to the requester, to extend the time limit for responding to a request or deciding an appeal of a denial of a request for not more than ten working days, if "unusual circumstances" exist for the extension. EFOIA did not revise the definition of "unusual circumstances," but it did revise that section to permit agencies to further extend the response time by notifying the requesters and providing them with an opportunity to either limit the scope of the request so that no extension is needed, or to arrange with the agency an alternative time frame for processing the request. 5 U.S.C. 552(a)(6)(B)(ii). New paragraph 4.7(d) implements this statutory procedure.

#### 2. Aggregation of Requests

EFOIA authorizes agencies to promulgate regulations providing for the aggregation of related requests by the same requester or a group of requesters acting in concert when the requests would, if treated as a single request, present "unusual circumstances." 5 U.S.C. 552(a)(6)(B)(iv). Such circumstances include the need to search for and collect the requested records from diverse locations; the need to search for, collect, and examine voluminous separate and distinct records which are demanded in a single

request; and the need to consult with another agency or among two or more Commission offices that each have a substantial subject matter interest in the records. 5 U.S.C. 552(a)(6)(B)(iii) [former section 552(a)(6)(B)].

New paragraph 4.7(e) implements this statutory provision. As EFOIA requires, the regulation provides that requests will be aggregated only when the Commission "reasonably believes that such requests actually constitute a single request" and the requests "involve clearly related matters." 5 U.S.C. 552(a)(6)(B)(iv).

#### 3. Multitrack Processing

EFOIA authorizes agencies to promulgate regulations providing for multitrack processing of requests for records based on the amount of work and/or time involved in processing requests. 5 U.S.C. 552(a)(6)(D)(i). Under this approach, requests for records where little work or time is required will be placed on a faster track, and therefore handled more quickly, than those which entail more work. The statute further permits agencies to include in their regulations a provision granting a FOIA requester whose request does not qualify for the fastest multitrack processing an opportunity to limit the scope of the request in order to qualify for faster processing. 5 U.S.C. 552(a)(6)(D)(ii).

The Commission believes that multitrack processing is the most efficient and fair way to process FOIA requests. If requests are processed on a strict first in, first out basis, easily filled requests will be processed only after earlier received, complex requests for dozens of documents located in offices throughout the Commission. Accordingly, the Commission is adopting new paragraph 4.7(f) to provide for multitracking and to establish a mechanism whereby requesters may seek to have their requests processed more rapidly.

The commenters urged the Commission to not only adopt a multitrack processing system, but also to specify the guidelines it will follow in placing requests on the various tracks. Contrary to the commenters' assertion, the adoption of a multitrack system itself is discretionary, as is the inclusion of specific standards in the regulatory text. The Commission rarely encounters difficulties in meeting FOIA deadlines and believes a flexible approach is the best way to address this situation.

#### 4. Expedited Processing

EFOIA requires each agency to promulgate regulations providing for the

expedited processing of FOIA requests in cases of "compelling need" and in other cases, if any, determined by the agency. 5 U.S.C. 552(a)(6)(E)(i). The statute specifies two categories of "compelling need." The first is where a failure to obtain requested records on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of an individual. The second involves a request made by a person primarily engaged in disseminating information who shows there is an urgent need to inform the public concerning actual or alleged federal government activity. 5 U.S.C. 552(a)(6)(E)(v). The statute also sets out procedures for handling requests for expedited processing and for the judicial review of agency denials of such requests. 5 U.S.C. 552(a)(6)(E)(ii)-(iv).

New paragraph 4.7(g) implements EFOIA's expedited processing requirements. The Commission emphasizes that, in keeping with Congress' express intent that the specified criteria for compelling need "be narrowly applied," expedited processing will be granted only in those truly extraordinary cases that meet the specific statutory requirements. H.R. Rep. No. 795, 104th Cong., 2d Sess. 26 (1996) ("House Report"). The legislative history makes it clear that "the expedited process procedure is intended to be limited to circumstances in which a delay in obtaining information can reasonably be foreseen to cause a significant adverse consequence to a recognized interest." *Id.*

A requester seeking expedited processing under the "imminent threat" category of the "compelling need" definition will have to show that the failure to obtain expeditiously the requested information threatens the life or safety of an individual, and that the threat is "imminent." The fact that an individual or his or her attorney needs information for an approaching litigation deadline is not a "compelling need" under this provision.

A requester seeking expedited processing under the second, "urgency to inform," category will have to show that he or she is "primarily engaged in disseminating information;" there is an "urgency to inform the public" about the information requested; and the information relates to an "actual or alleged federal government activity."

To meet the first "urgency to inform" criterion, the requester must show that his or her principal occupation is disseminating information to the public. As the legislative history makes clear, "[a] requester who only incidentally engages in information dissemination,

besides other activities, would not satisfy this requirement." *Id.*

To meet the second "urgency to inform" criterion, the requester must show more than a general interest in the "public's right to know." *See id.* As explained in the legislative history, a requester must show that a delay in the release of the requested information will "compromise a significant *recognized* interest," and that the requested information "pertain(s) to a matter of *current* exigency to the American public." *Id.* (emphasis added). It will, therefore, be insufficient to base a showing of "compelling need" on a reporter's desire to inform the public of something he or she believes might be of public concern if it were publicized. Rather, a reporter must show that the information pertains to a subject currently of significant interest to the public and that delaying the release of the information would harm the public's ability to assess the subject governmental activity.

The final "urgency to inform" criterion makes it clear that the information must relate to the activities of the Commission and Commission staff. A request for expedited processing can thus be considered for information relating, for example, to a Commission decision. The Commission generally will not, however, grant a request for expedited processing of information that the Commission has collected regarding specific candidates, campaigns or political committees.

EFOIA also authorizes agencies to expand the categories of requests qualifying for expedited processing beyond the two specified in the statute. 5 U.S.C. 552(a)(6)(E)(i)(II). The joint comment urged the Commission to provide expedited service whenever it receives five or more requests for substantially the same records, and gave the hypothetical of fifty or more requesters waiting their turn to receive identical or nearly-identical information.

It is clear from the legislative history that Congress intended to narrowly limit the "compelling need" standard. The House Report gives as an example of such need Department of Justice procedures that permit expedited access "if a delay would result in the loss of substantial due process rights and the information sought is not otherwise available in a timely manner." House Report at 26, n. 39. As that Report further explains, "Given the finite resources generally available for fulfilling FOIA requests, unduly generous use of the expedited processing procedure would unfairly disadvantage other requesters who do

not qualify for its treatment." House Report at 26. Consequently, the Commission does not believe the receipt of five similar requests is sufficient to trigger this process.

The Commission notes that it rarely receives more than a single request for the same records. It has never received five, much less 50, requests for the same material. Should that occur in the future, this may be a factor used to advance processing of such requests under the multitrack system.

As required by EFOIA at 5 U.S.C. 552(a)(6)(E)(iii), the Commission's rules at 11 CFR 4.7(g)(5) state that the Commission will process requests to grant expedited processing "as soon as practicable." The Commission will also give priority to these requests.

#### 5. Redesignations

The Commission is redesignating former section 4.7(d) as new section 4.7(h) and former section 4.7(e) as new section 4.7(i). The paragraphs set forth appeal rights of persons denied access to records, and the date of receipt of a request, which is the date on which the Commission's FOIA officer actually receives the request, respectively. The text of these paragraphs has not been changed.

#### Section 5.1 Definitions

The Commission is revising paragraph (b) of section 5.1 to delete an obsolete reference to congressional officials who no longer serve as *ex officio* members of the Commission. *See* discussion of 11 CFR 2.2, *supra*.

#### Section 5.4 Availability of Records

This section lists the types of records that are available from the Commission's Public Records Office. Paragraph (a)(4) has been revised to clarify that Opinions of Commissioners rendered in enforcement cases, as well as non-exempt General Counsel's Reports, and investigatory materials will be placed on the public record no later than 30 days from the date on which all respondents are notified that the Commission has voted to close the file. The term "Opinions of Commissioners rendered in enforcement cases" includes not only Statements of Reasons but any other document a Commissioner might author in this regard. The revision deletes language referring to Commission votes to take no further action, which, as explained above, does not always occur in connection with a decision to close a file. It also clarifies that all respondents must be notified of the Commission's action before this 30-day period begins to run.

The remainder of the section has been revised to mirror the changes made to 11 CFR 4.4, *supra*, addressing records that are available from the Public Disclosure Division and thus are not made available in response to a FOIA request. Former 11 CFR 4.4(a)(4), which pertains to letter requests for guidance and responses thereto, has been moved to new paragraph 5.4(a)(5); former 11 CFR 4.4(a)(5), minutes of Commission meetings, has been moved to new paragraph 5.4(a)(6); former 11 CFR 4.4(a)(6), material routinely prepared for public distribution, *e.g.*, campaign guidelines, the FEC Record, press releases, speeches, [and] notices to candidates and committees, has been moved to new paragraph 5.4(a)(7); former 11 CFR 4.4(a)(14), audit reports, if discussed in open session, has been moved to new paragraph 5.4(a)(8); and former 11 CFR 4.4(a)(15), agendas for Commission meetings, has been moved to new paragraph 5.4(a)(9).

Please note that, in keeping with its status as a full disclosure agency, the Commission defines these terms broadly, to grant the widest possible access to Commission materials. For example, the term "campaign guidelines" includes not only those publications called "Campaign Guides," but also other publications that contain useful information to those involved or interested in federal campaigns. These include such publications as the Commission's *Guideline for Presentation in Good Order*, which explains how campaigns seeking matching funds under the Presidential Primary Matching Payment Account Act, 26 U.S.C. 9035 *et seq.*, and other publications to assist publicly-financed campaigns. The term also includes brochures addressing a wide range of campaign-related topics, including, for example, which communications require a disclaimer, and how partnerships are treated under the FECA.

#### Certification of No Effect Pursuant to 5 U.S.C. 605(b) (Regulatory Flexibility Act)

The attached final rules will not have a significant economic impact on a substantial number of small entities. Most of the changes conform to statutory amendments that expand the options available to covered entities seeking to obtain records from the Commission under the Freedom of Information Act, while others clarify the Commission's current rules in this area. Therefore the rules will not have a significant economic effect on a substantial number of small entities.



acceptable and unacceptable purpose descriptions to be reported by authorized committees. Paragraph (B) requires authorized committees, when itemizing certain disbursements for which reimbursements are required, to provide a brief explanation of the activity for which reimbursement is required. These provisions have been in Title 11 of the **Code of Federal Regulations** since 1980 and 1995, respectively, and were not affected by the recent statutory changes to the election cycle reporting requirements.

#### Need for Correction

As published, the final rules inadvertently omit two paragraphs describing information to be reported by authorized committees of Federal candidates.

All committees must report the purpose of itemized disbursements (i.e., those disbursements aggregating in excess of \$200). Omitted paragraph (A) contains examples of suitably specific purpose descriptions as well as examples of those descriptions that are unacceptably vague. This paragraph is inconsistent with the reporting of rules for unauthorized committees (committees other than candidate committees) in 11 CFR 104.3(b)(3).

Omitted paragraph (B) is used in administering the "personal use" rules in 11 CFR 113.1. Federal candidates are barred from using campaign funds for personal benefit. Paragraph (B) requires authorized committees of Federal candidates itemizing disbursements for which partial or total reimbursement is required under 11 CFR 113.1(g)(1)(iii)(C) or (D) to provide a brief explanation of the activity for which the reimbursement is made.

Section 801 of Title 5 of the United States Code requires Federal agencies to submit regulations to Congress. These regulations were submitted to the Speaker of the House of Representatives and the President of the Senate on November 26, 2001.

#### Certification of No Effect Pursuant to 5 U.S.C. § 605(b) [Regulatory Flexibility Act]

This correction will not have significant economic impact on a substantial number of small entities. The basis of this certification is that this correction only requires political committees to once again add information to the reports they are required to file. These regulations were in 11 CFR since 1980 and 1995, respectively, before being inadvertently omitted in 2000.

#### List of Subjects in 11 CFR Part 104

Campaign funds, Political committees and parties, Reporting and recordkeeping requirements.

Accordingly, 11 CFR part 104 is corrected by making the following correcting amendment:

#### PART 104—REPORTS BY POLITICAL COMMITTEES

1. The authority citation for part 104 continues to read as follows:

**Authority:** 2 U.S.C. 431(1), 431(8), 431(9), 432(i), 434, 438(a)(8), 438(b), 439a.

#### § 104.3 Contents of reports (2 U.S.C. 434(b), 439a).

\* \* \* \* \*

2. In § 104.3 add the following paragraphs (b)(4)(i)(A) and (B):

(b) \* \* \*  
(4) \* \* \*  
(i) \* \* \*

(A) As used in this paragraph, *purpose* means a brief statement or description of why the disbursement was made. Examples of statements or descriptions which meet the requirements of this paragraph include the following: dinner expenses, media, salary, polling, travel, party fees, phone banks, travel expenses, travel expense reimbursement, and catering costs. However, statements or descriptions such as *advance*, *election day expenses*, *other expenses*, *expenses*, *expense reimbursement*, *miscellaneous*, *outside services*, *get-out-the-vote* and *voter registration* would not meet the requirements of this paragraph for reporting the purpose of an expenditure.

(B) In addition to reporting the purpose described in paragraph (b)(4)(i)(A) of this section, whenever an authorized committee itemizes a disbursement that is partially or entirely a personal use for which reimbursement is required under 11 CFR 113.1(g)(1)(ii)(C) or (D), it shall provide a brief explanation of the activity for which reimbursement is required.

\* \* \* \* \*

Dated: November 26, 2001.

**Danny L. McDonald,**  
*Chairman, Federal Election Commission.*  
[FR Doc. 01-29679 Filed 11-29-01; 8:45 am]  
**BILLING CODE 6715-01-P**

#### FEDERAL ELECTION COMMISSION

#### 11 CFR Part 111

#### [Notice 2001-18]

#### Extension to Administrative Fines

**AGENCY:** Federal Election Commission.

**ACTION:** Final rule; revision of the sunset date.

**SUMMARY:** The Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the expiration date in which the Federal Election Commission (hereinafter "the Commission") may assess civil money penalties for violations of the reporting requirements of section 434(a) of the Federal Election Campaign Act (hereinafter "the Act" or "FECA").

**DATES:** Effective on December 31, 2001.

**FOR FURTHER INFORMATION CONTACT:** Ms. Rosemary C. Smith, Assistant General Counsel, or Ms. Mai T. Dinh, Attorney, 999 E Street, NW., Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

#### SUPPLEMENTARY INFORMATION:

#### Explanation and Justification

Section 640 of the Treasury and General Government Appropriations Act, 2000, Pub. L. No. 106-58, 106th Cong., 113 Stat. 430, 476-77 (1999), amended § 309(a)(4) of the FECA, 2 U.S.C. 437g(a)(4), to provide for a modified enforcement process for violations of reporting requirements. Under § 437g(a)(4)(C) of the FECA, the Commission may assess a civil money penalty for violations of the reporting requirements of 2 U.S.C. 434(a). This authority, however, was to sunset on December 31, 2001. Pub. L. No. 106-58, 106th Cong., § 640(c). Recently, § 642 of the Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the sunset date to include all reports that cover activity between January 1, 2000, to December 31, 2003.

The Commission published final rules on May 19, 2000, to implement the amendment contained in the Treasury and General Government Appropriations Act, 2000. Section 111.30 of the regulations reflects the sunset provision of Pub. L. No. 106-58, 106th Cong., § 640(c). Therefore, the Commission is issuing this final rule to amend section 111.30 to extend the application of the administrative fine regulations, 11 CFR part 111, subpart B, to include all violations relating to reports that cover the period between January 1, 2000, to December 31, 2003.

The Commission is promulgating this final rule without notice or opportunity for comment because it falls under the "good cause" exemption of the Administrative Procedures Act, 5 U.S.C. 553(b)(B). The exemption allows



**Authority:** 7 U.S.C. 601-674.

Dated: November 9, 1999.

**Richard M. McKee,**

*Deputy Administrator, Dairy Programs.*

[FR Doc. 99-29725 Filed 11-12-99; 8:45 am]

**BILLING CODE 3410-02-P**

## FEDERAL ELECTION COMMISSION

### 11 CFR Parts 9007, 9034, 9035 and 9038

[Notice 1999-26]

#### Public Financing of Presidential Primary and General Election Candidates

**AGENCY:** Federal Election Commission.

**ACTION:** Final rule and transmittal of regulations to Congress.

**SUMMARY:** The Commission is revising several portions of its regulations governing the public financing of Presidential primary and general election campaigns. These regulations implement the provisions of the Presidential Election Campaign Fund Act ("Fund Act") and the Presidential Primary Matching Payment Account Act ("Matching Payment Act"), which indicate how funds received under the public financing system may be spent. In addition, these statutes require the Commission to audit publicly financed campaigns and seek repayment where appropriate. The revised rules modify the Commission's audit procedures. They also address the "bright line" between primary and general election expenses, and the formation of Vice Presidential committees prior to nomination. Further information is provided in the supplementary information that follows.

**DATES:** Further action, including the publication of a document in the **Federal Register** announcing an effective date, will be taken after these regulations have been before Congress for 30 legislative days pursuant to 26 U.S.C. 9009(c) and 9039(c).

**FOR FURTHER INFORMATION CONTACT:** Ms. Rosemary C. Smith, Assistant General Counsel, 999 E Street, NW., Washington, DC. 20463, (202) 694-1650 or toll free (800) 424-9530.

**SUPPLEMENTARY INFORMATION:** The Commission is publishing today the final text of revisions to its regulations governing audits of public financing of Presidential campaigns, 11 CFR 9007.1 and 9038.1. In addition, the final rules at 11 CFR 9034.4(e)(1) and (3) govern the division of expenditures between primary and general election campaign committees. New rules set out in 11 CFR

9035.3 address situations where a Vice Presidential campaign committee is formed prior to the date on which that candidate's political party selects its Presidential and Vice Presidential nominees. The new and revised regulations implement 26 U.S.C. 9007, 9034, 9035, and 9038.

On December 16, 1998, the Commission issued a Notice of Proposed Rulemaking (NPRM) in which it sought comments on proposed revisions to these regulations and on a number of other aspects of the Commission's public funding regulations. 63 FR 69524 (Dec. 16, 1998). In response to the NPRM, written comments addressing these topics were received from Perot for President '96; Common Cause and Democracy 21 (joint comment); Lyn Utrecht, Eric Kleinfeld, and Patricia Fiori (joint comment); the Democratic National Committee; and the Republican National Committee. The Internal Revenue Service stated that it has reviewed the NPRM and finds no conflict with the Internal Revenue Code or regulations thereunder. Subsequently, the Commission reopened the comment period and held a public hearing on March 24, 1999, at which the following witnesses presented testimony on these issues: Lyn Utrecht (Ryan, Phillips, Utrecht & MacKinnon), Joseph E. Sandler (Democratic National Committee), and Thomas J. Josefiak (Republican National Committee).

Please note that the Commission has already published separately final rules regarding other aspects of the public funding system. For example, revised candidate agreement regulations require federally financed Presidential committees to file their reports electronically. See Explanation and Justification of 11 CFR 9003.1 and 9033.1, 63 FR 45679 (August 27, 1998). Those regulations took effect on November 13, 1998. See Announcement of Effective Date, 63 FR 63388 (November 13, 1998). In addition, the Commission has issued two sets of final rules governing the matchability of contributions made by credit and debit cards, including those transmitted over the Internet. See Explanation and Justification of 11 CFR 9034.2 and 9034.3, 64 FR 32394 (June 17, 1999); Explanation and Justification of 11 CFR 9036.1 and 9036.2, 64 FR 42584 (Aug. 5, 1999). The effective date for the new matching fund rules was January 1, 1999. See Announcements of Effective Date, 64 FR 51422 (Sept. 23, 1999) and 64 FR 59607, (Nov. 3, 1999). Final rules concerning coordinated party committee expenditures in the pre-nomination period and reimbursement by the news

media for travel expenses have also been issued. See Explanation and Justification of 11 CFR 110.7, 9004.6 and 9034.6, 64 FR 42579 (Aug. 5, 1999) and Announcement of Effective Date, 64 FR 59606 (Nov. 3, 1999). In addition, final rules concerning GELAC funds, capital assets, primary compliance and winding down costs, documentation of disbursements, digital images of matching fund documentation, convention committees and host committees have also been issued. See Explanation and Justification, 64 FR 49355 (Sept. 13, 1999).

Sections 9009(c) and 9039(c) of Title 26, United States Code, require that any rules or regulations prescribed by the Commission to carry out the provisions of Title 26 of the United States Code be transmitted to the Speaker of the House of Representatives and the President of the Senate 30 legislative days before they are finally promulgated. The final rules that follow were transmitted to Congress on Nov. 9, 1999.

#### Explanation and Justification

##### Section 9007.1 Audits

In 1995, the Commission amended 11 CFR 9007.1, 9007.2, 9038.1, and 9038.2 to reduce the amount of time it takes to audit publicly funded Presidential committees, to make repayment determinations, and to complete the enforcement process for these committees. One change was the elimination of a Commission-approved Interim Audit Report, which was replaced by a staff-produced Exit Conference Memorandum that is provided to the audited committee at the exit conference. These steps were taken to ensure adherence to the three year time period specified in 26 U.S.C. 9007(c) and 9038(c) for notifying publicly funded committees of the Commission's repayment determinations. After operating under the streamlined procedures during the 1996 election cycle, the Commission began to consider further changes to ensure the audit and repayment processes are completed as fairly and expeditiously as possible.

The narrative portion of the 1998 NPRM presented two alternatives to the current audit procedures. The first approach is to return to the audit procedures used for the 1992 Presidential candidates who received primary or general election funding. Under the previous system, the Commission's Audit Division conducted an exit conference at the close of audit fieldwork to discuss its preliminary findings and recommendations. However, no written Exit Conference

Memorandum was prepared or presented to the committee during the exit conference. Instead, an Interim Audit Report containing a preliminary calculation of future repayment obligations was subsequently prepared for consideration and approval by the Commission in executive session. After that, the audited committee had an opportunity to submit materials disputing or commenting on matters contained in the Interim Audit Report. Next, the Audit Division prepared a Final Audit Report containing initial repayment determinations. The Final Audit Report was considered by the Commission in an open session. Twenty-four hours before the Final Audit Report was released to the public, copies were provided to the candidate and the committee.

The second alternative set out in the NPRM is to retain many of the current audit procedures, with the exception that the Exit Conference Memorandum would be approved by a majority vote of four Commissioners before it is presented to the candidate's committee during the exit conference. In addition to these alternatives, the NPRM sought comments on making no changes to the audit procedures used for the 1996 Presidential campaign committees.

Several written comments and witnesses at the public hearing addressed the Commission's audit procedures. Three written comments urged the Commission to retain the current procedures for conducting post-election audits. One of these stated that the interest of the public in a rapid resolution of each audit is paramount, particularly given that the public funds for the program come from voluntary tax check-offs by individual taxpayers. This commenter praised the streamlined process put in place for the 1996 audits for enabling the agency's audit staff to work efficiently, with no waste of time. The commenter believed that the experience with certain well-publicized 1996 audits showed that both the press and the American public understand that audit reports are staff documents until expressly approved by the Commission. Two commenters opposed any change that would cloak more of the audit process in secrecy as contrary to the spirit of the Government in the Sunshine Act. They felt there was great public benefit in seeing the staff recommendations and the Commission's disposition of them.

In contrast, two of the witnesses at the hearing urged the Commission to return to the previous system or to find a way to produce greater interaction between the Commissioners and the audited committees earlier in the process. It was

suggested that at a minimum, the Commission should change the procedure so that the Exit Conference Memorandum is approved by the Commission in closed session. These witnesses indicated that the goal of the new system, which was to expedite the audit process, has not been achieved. One of them argued that it is harmful to the regulated community and the credibility of the Commission when staff exit conference findings are publicly disclosed without prior input from the Commissioners, and are later substantially modified by the Commission. Another concern expressed is that the current system forces committees to devote substantial resources to responding to Audit Division conclusions and legal theories that are not necessarily supported by the Commission. One of these witnesses also maintained that the current system does not adequately protect confidentiality, and does not produce a fair and balanced presentation of a committee's financial picture.

After carefully considering the comments and testimony on the various alternatives, the Commission has decided to retain certain elements of the current procedures, such as the exit conference, while also returning to some of the previous procedures. Thus, the Exit Conference Memorandum is being dropped in favor of a Preliminary Audit Report that will be approved by the Commission before it is provided to the audited committee after the exit conference. The Commission anticipates that a written legal analysis will be prepared to assist the Commission in its consideration of the Preliminary Audit Report. This step will ensure that before audited committees are asked for a response to the Audit staff's findings, they are apprised of the Commission's preliminary views on various financial aspects of their campaign operations as well as the legal issues raised by those activities. These changes are incorporated into revised paragraphs (b)(2)(iii), (c) and (d)(1) of section 9007.1. These portions of the regulations have also been reorganized so that the Preliminary Audit Report is addressed in paragraph (c).

Please note that Commission consideration of draft Preliminary Audit Reports will usually be done either by using its tally voting procedures or in executive session. Closure of these discussions to the general public is generally appropriate under the Government in the Sunshine Act because the premature disclosure of this information would be likely to have a considerable adverse effect on future Commission actions. See 5 U.S.C.

552b(c) and 11 CFR 2.4(b). Closing the discussion is also appropriate for those situations where the Commission reasonably contemplates that the discussion may lead to an enforcement action, the issuance of a subpoena, or litigation.

The new procedure has the advantage that when the staff-prepared final Audit Report is subsequently released, the public and the press may be assured that this document reflects the views expressed by the Commission at the time the Preliminary Audit Report was approved, as well as the committee's response to the Preliminary Audit Report.

A significant consideration in changing these procedures is the length of time it takes to complete the entire process in light of the statutory requirement that any notification of a repayment be made no later than three years after the end of the matching payment period or after the date of the general election. 26 U.S.C. 9007(c) and 9038(c). In *Dukakis v. Federal Election Commission*, 53 F.3d 361 (D.C. Cir. 1995) and *Simon v. Federal Election Commission*, 53 F.3d 356 (D.C. Cir. 1995), the court determined that the preliminary calculation contained in the Interim Audit Report did not constitute sufficient notification of repayment obligations. Thus, the court concluded that the Commission's previous regulation at 11 CFR 9038.2(a)(2), which stated that the Interim Audit Report constituted notification, was inconsistent with the statute. *Simon* at 360.

The Commission notes that the time involved in obtaining Commission approval of the Preliminary Audit Report may, in some instances, make it more difficult to notify committees of their repayment requirements within the three year time frame established by 26 U.S.C. 9007(c) and 9038(c). Nevertheless, this initial investment of time may be balanced by significant time savings during the later stages of the process if a number of issues have been resolved earlier.

Please note that the amendments to section 9007.1 of the regulations also apply to the audits of the federally financed convention committees under 11 CFR 9008.11.

#### *Section 9034.4 Use of Contributions and Matching Payments*

The Fund Act, the Matching Payment Act, and the Commission's regulations require that publicly financed Presidential candidates use primary election funds only for expenses incurred in connection with primary elections, and that they use general

election funds only for general election expenses. 26 U.S.C. 9002(11), 9032(9); 11 CFR 9002.11 and 9032.9. These requirements are necessary to effectuate the spending limits for both the primary and the general election, as set forth at 2 U.S.C. 441a(b) and 26 U.S.C. 9035(a). See also 11 CFR 110.8(a) and 9035.1(a)(1).

In 1995, the Commission sought to provide more specific guidance as to which expenses should be attributed to a candidate's primary campaign and which ones should be considered general election expenses. Consequently, paragraph (e)(1) of section 9034.4 was promulgated at that time to specify that the costs of goods or services used exclusively for the primary must be attributed to the primary. Similarly, any expenditures for goods or services used exclusively for the general election had to be attributed to the general election. Paragraphs (e)(2) through (e)(7) established a number of specific attribution rules for polling expenses, campaign offices, staff costs, campaign materials, media production and distribution costs, campaign communications and travel costs, which were largely based on the timing of the expenditure. One of the purposes of these rules was to eliminate much of the time- and labor-intensive work of examining thousands of individual expenditures, thereby helping to streamline the audit process.

During the last Presidential election cycle, several questions were raised regarding the application of the "bright line" rules, including the application of the specific provisions in paragraphs (e)(2) through (e)(7) instead of the general rule set out in former paragraph (e)(1). The NPRM proposed adding an additional sentence to paragraph (e)(1) to indicate that the specific rules were intended to apply to "mixed" expenditures that are used in both the primary and the general election campaigns. One witness opposed what was perceived to be a new "benefit derived" standard. This witness argued for preserving the original bright line standard in the 1995 regulations in lieu of any of the changes proposed. Please note, the NPRM did not intend to suggest that the bright line rules were to be replaced by a new "benefit derived" standard. However, given the confusion generated by the proposed amendatory language, it is not being included in the final rules that follow. Instead, paragraph (e)(1) is being modified to more clearly state that the general rule applies only to goods or services not covered by the more specific provisions of paragraphs (e)(2) through (e)(7) of section 9034.4.

The Commission has also decided, that certain additional revisions to these rules are warranted. For example, paragraph (e)(3) of section 9034.4 is being amended to resolve questions that have come up regarding payroll and overhead costs for the use of campaign offices prior to the candidate's nomination. The previous rules had specified that such expenses must be attributed to the primary election unless the office is used by persons working exclusively on general election preparations. "Exclusive use" was not defined in the rules, and questions arose as to whether the term meant several hours, or days, or weeks. The NPRM suggested changing this exception to apply to periods when the campaign office is used only by persons working "full time" on general election campaign preparation, or in the alternative, dropping the exclusive use exception with regard to overhead and salary expenses. The public comments indicated that a "full time" standard would not be clearer than "exclusive use."

To resolve these difficulties, the Commission has decided to remove the "exclusive use" exception from paragraph (e)(3) governing office overhead and salaries, and also from the general rule in paragraph (e)(1). Instead, under the revised rule, salary and overhead costs incurred between June 1 of the Presidential election year and the date of the nomination are treated as primary expenses. However, Presidential campaign committees have the option of attributing to the general election an amount of salary and overhead expenses incurred during this period up to 15% of the primary election spending limit, which is set forth at 11 CFR 110.8(a)(1). This approach recognizes that during this period, some campaign staff and a portion of the committee's state and national office space must necessarily be devoted to general election activities. The 15% figure has the advantage of simplicity and ease of application. It is intended to give campaigns a reasonable amount of flexibility, and is based on an estimate of the highest amount that similarly situated campaigns have spent on salary and overhead costs during a comparable three-month period in the 1996 election cycle. The revised regulation does not permit committees to demonstrate that they have actually incurred a higher amount because the "bright line" rules are intended to avoid a resource-intensive system that requires the creation, maintenance, and review of considerable paperwork to document these types of costs.

Please note that other revisions have already been made to paragraph (e) of section 9034.4 to reflect that not all candidates may accept public funding in both the primary and the general election. See final rules at 64 FR 49355 (Sept. 13, 1999). At that time paragraph (e) was amended to indicate that it applies to Presidential campaign committees that accept federal funds for either election. Thus, the 15% limitation specified in paragraph (e)(3) applies to those committees that accept federal funding for the general election but not the primary. In addition, a new sentence is also being added to paragraph (e)(3) to clarify that overhead and payroll expenses for winding down and compliance activities are covered by paragraph (a)(3) of section 9034.4.

Another concern expressed by the commenters is the manner in which the 1995 bright line rules were interpreted and applied during the audits of the 1996 campaigns. Some comments opposed extending the bright line rules for candidate committees to party committees. The Commission notes that a variety of issues involving party committee coordinated expenditures may be addressed in a new rulemaking.

#### *Section 9035.3 Contributions to and Expenditures by Vice Presidential Committees*

The NPRM sought comments on a possible new rule to clarify the status of expenditures made by political committees formed by Vice Presidential candidates prior to their official nomination at their parties' conventions. It has been the Commission's policy in the past to permit such committees to raise contributions and make expenditures for the purpose of defraying the travel, lodging and subsistence expenses of the eventual Vice Presidential nominee and his or her entourage during the nominating convention. However, during the 1996 Presidential election cycle, concerns were raised that these committees have the ability to raise and spend substantially more money than what is needed to cover convention costs. Consequently, this situation presented an opportunity for Vice Presidential committees to be used prior to the date of nomination to supplement the limited amounts that publicly funded Presidential candidates may spend on their primary campaigns. Another concern is that some who have made the maximum contribution permitted by the FECA to a Presidential primary candidate may seek to evade these statutory limits by making additional contributions to the campaign committee of the person

chosen to be that candidate's Vice Presidential running mate.

For these reasons, the Commission is adding new section 9035.3 to specify when contributions to, and expenditures by, Vice Presidential committees shall be aggregated with contributions to and expenditures by the primary campaign of that party's eventual Presidential nominee for purposes of the contribution and expenditure limitations. Paragraph (a) of this new section provides for such aggregation beginning on the date that either the future Presidential or Vice Presidential nominee publicly indicates that the two candidates intend to run on the same ticket. Aggregation of contributions and expenditures will also begin when the Vice Presidential candidate accepts an offer to be the running mate, or when the committees of these two candidates become affiliated under 11 CFR 100.5(g)(4). Please note that with regard to expenditures, paragraph (b) limits the application of new section 9035.3 to the campaign expenditures made by a candidate who becomes the Vice Presidential nominee of his or her party, thus excluding others who lose the Vice Presidential nomination.

Both of the comments addressing new section 9035.3 opposed certain aspects of the proposed rule. One comment argued that Vice Presidential committees are entirely separate from any Presidential committee until the Vice Presidential candidate is nominated at the convention. This commenter also expressed concerns that by aggregating expenses, the presidential campaign committee could inadvertently exceed the spending limits. The Commission agrees that Presidential committees must monitor this spending, just as state party committees must track expenditures by subordinate party committees to ensure compliance with the coordinated spending limits of 2 U.S.C. 441a(d). The commenter also noted that those who contribute to both the Presidential candidate and the Vice Presidential candidate risk exceeding the primary contribution limits. The Commission agrees that the recipient committees need to aggregate contributions from the same contributor to prevent the making or acceptance of excessive contributions. This is no different than the requirement to aggregate contributions made to affiliated committees.

Paragraph (b) of the new section also contains an exception permitting a Vice Presidential candidate and his or her family and staff to attend the party's nominating convention without having

the cost of their transportation, lodging, and subsistence attributed to the party's Presidential candidate. One commenter agreed that Vice Presidential candidates should be able to raise money to pay these expenses. It was also suggested that the Vice Presidential committee should be able to pay legal and accounting expenses incurred during the background checks of the prospective Vice Presidential nominee. The Commission agrees with this suggestion and is promulgating new language to cover these legal and accounting costs. In addition, the costs of raising funds for these limited travel, subsistence, legal and accounting expenses also do not need to be treated as expenditures of the Presidential primary candidate. Please note, if a Vice Presidential committee has excess funds after the nomination, 11 CFR 113.2 governs the use of these funds.

A commenter questioned the Commission's statutory authority for the new regulation and noted that 2 U.S.C. 441a(b)(2) treats expenditures made on behalf of a Vice Presidential nominee as expenditures on behalf of the party's Presidential nominee. *See also* 11 CFR 110.8(f). This provision of the FECA, however, is not applicable prior to the nomination of the Vice Presidential candidate. The Commission notes that at the time section 441a(b)(2) of the FECA was enacted, Congress may not have anticipated that both the Presidential candidates and their running mates may be known well before the actual date of nomination. Nevertheless, the Commission disagrees with the commenter's assumption that attribution under any other situation is contrary to the statute. In recent years, the primaries in many states have been moved to earlier dates in the election year. This means that Presidential candidates may reach their primary spending limits earlier in the election year, which may encourage the creation of Vice Presidential campaign committees at an earlier stage of the process than Congress anticipated when enacting the FECA. The Commission's new regulations merely make explicit that once a Vice Presidential running mate is chosen, the authorized committees of the two candidates would ordinarily be considered affiliated. *See* 2 U.S.C. 441a(a)(5) and 11 CFR 100.5(g)(4) and 110.3. Moreover, nothing in the FECA or the Matching Payment Act specifically bars pre-nomination aggregation of contributions or expenditures under these circumstances.

#### Section 9038.1 Audit

This section sets forth procedures for auditing the campaign committees of primary election candidates who receive federal funds. The changes to paragraphs (b)(2)(iii), (c) and (d)(1) of this section follow the revisions to 11 CFR 9007.1(b)(2)(iii), (c) and (d)(1), as discussed above.

#### Certification of No Effect Pursuant to 5 U.S.C. 605(b) [Regulatory Flexibility Act]

The attached final rules will not, if promulgated, have a significant economic impact on a substantial number of small entities. The basis for this certification is that very few small entities will be affected by these rules, and the cost is not expected to be significant. Further, any small entities affected have voluntarily chosen to receive public funding and to comply with the requirements of the Presidential Election Campaign Fund Act or the Presidential Primary Matching Payment Account Act in these areas.

#### List of Subjects

##### 11 CFR Part 9007

Administrative practice and procedure, Campaign funds.

##### 11 CFR Parts 9034 and 9035

Campaign funds, Reporting and recordkeeping requirements.

##### 11 CFR Part 9038

Administrative practice and procedure, Campaign funds.

For the reasons set out in the preamble, Subchapters E and F of Chapter I of Title 11 of the Code of Federal Regulations are amended as follows:

#### PART 9007—EXAMINATIONS AND AUDITS; REPAYMENTS

1. The authority citation for part 9007 continues to read as follows:

**Authority:** 26 U.S.C. 9007 and 9009(b).

2. In § 9007.1, paragraphs (b)(2)(iii) and (c) and the second sentence of paragraph (d)(1) are revised to read as follows:

##### § 9007.1 Audits.

\* \* \* \* \*

(b) \* \* \*

(2) \* \* \*

(iii) *Exit conference.* At the conclusion of the fieldwork, Commission staff will hold an exit conference to discuss with committee representatives the staff's preliminary findings and recommendations that the

acceptable and unacceptable purpose descriptions to be reported by authorized committees. Paragraph (B) requires authorized committees, when itemizing certain disbursements for which reimbursements are required, to provide a brief explanation of the activity for which reimbursement is required. These provisions have been in Title 11 of the **Code of Federal Regulations** since 1980 and 1995, respectively, and were not affected by the recent statutory changes to the election cycle reporting requirements.

#### Need for Correction

As published, the final rules inadvertently omit two paragraphs describing information to be reported by authorized committees of Federal candidates.

All committees must report the purpose of itemized disbursements (i.e., those disbursements aggregating in excess of \$200). Omitted paragraph (A) contains examples of suitably specific purpose descriptions as well as examples of those descriptions that are unacceptably vague. This paragraph is inconsistent with the reporting of rules for unauthorized committees (committees other than candidate committees) in 11 CFR 104.3(b)(3).

Omitted paragraph (B) is used in administering the "personal use" rules in 11 CFR 113.1. Federal candidates are barred from using campaign funds for personal benefit. Paragraph (B) requires authorized committees of Federal candidates itemizing disbursements for which partial or total reimbursement is required under 11 CFR 113.1(g)(1)(iii)(C) or (D) to provide a brief explanation of the activity for which the reimbursement is made.

Section 801 of Title 5 of the United States Code requires Federal agencies to submit regulations to Congress. These regulations were submitted to the Speaker of the House of Representatives and the President of the Senate on November 26, 2001.

#### Certification of No Effect Pursuant to 5 U.S.C. § 605(b) [Regulatory Flexibility Act]

This correction will not have significant economic impact on a substantial number of small entities. The basis of this certification is that this correction only requires political committees to once again add information to the reports they are required to file. These regulations were in 11 CFR since 1980 and 1995, respectively, before being inadvertently omitted in 2000.

#### List of Subjects in 11 CFR Part 104

Campaign funds, Political committees and parties, Reporting and recordkeeping requirements.

Accordingly, 11 CFR part 104 is corrected by making the following correcting amendment:

#### PART 104—REPORTS BY POLITICAL COMMITTEES

1. The authority citation for part 104 continues to read as follows:

**Authority:** 2 U.S.C. 431(1), 431(8), 431(9), 432(i), 434, 438(a)(8), 438(b), 439a.

#### § 104.3 Contents of reports (2 U.S.C. 434(b), 439a).

\* \* \* \* \*

2. In § 104.3 add the following paragraphs (b)(4)(i)(A) and (B):

(b) \* \* \*

(4) \* \* \*

(i) \* \* \*

(A) As used in this paragraph, *purpose* means a brief statement or description of why the disbursement was made. Examples of statements or descriptions which meet the requirements of this paragraph include the following: dinner expenses, media, salary, polling, travel, party fees, phone banks, travel expenses, travel expense reimbursement, and catering costs. However, statements or descriptions such as *advance*, *election day expenses*, *other expenses*, *expenses*, *expense reimbursement*, *miscellaneous*, *outside services*, *get-out-the-vote* and *voter registration* would not meet the requirements of this paragraph for reporting the purpose of an expenditure.

(B) In addition to reporting the purpose described in paragraph (b)(4)(i)(A) of this section, whenever an authorized committee itemizes a disbursement that is partially or entirely a personal use for which reimbursement is required under 11 CFR 113.1(g)(1)(ii)(C) or (D), it shall provide a brief explanation of the activity for which reimbursement is required.

\* \* \* \* \*

Dated: November 26, 2001.

**Danny L. McDonald,**  
Chairman, Federal Election Commission.  
[FR Doc. 01-29679 Filed 11-29-01; 8:45 am]  
**BILLING CODE 6715-01-P**

#### FEDERAL ELECTION COMMISSION

#### 11 CFR Part 111

#### [Notice 2001-18]

#### Extension to Administrative Fines

**AGENCY:** Federal Election Commission.

**ACTION:** Final rule; revision of the sunset date.

**SUMMARY:** The Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the expiration date in which the Federal Election Commission (hereinafter "the Commission") may assess civil money penalties for violations of the reporting requirements of section 434(a) of the Federal Election Campaign Act (hereinafter "the Act" or "FECA").

**DATES:** Effective on December 31, 2001.

**FOR FURTHER INFORMATION CONTACT:** Ms. Rosemary C. Smith, Assistant General Counsel, or Ms. Mai T. Dinh, Attorney, 999 E Street, NW., Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

#### SUPPLEMENTARY INFORMATION:

#### Explanation and Justification

Section 640 of the Treasury and General Government Appropriations Act, 2000, Pub. L. No. 106-58, 106th Cong., 113 Stat. 430, 476-77 (1999), amended § 309(a)(4) of the FECA, 2 U.S.C. 437g(a)(4), to provide for a modified enforcement process for violations of reporting requirements. Under § 437g(a)(4)(C) of the FECA, the Commission may assess a civil money penalty for violations of the reporting requirements of 2 U.S.C. 434(a). This authority, however, was to sunset on December 31, 2001. Pub. L. No. 106-58, 106th Cong., § 640(c). Recently, § 642 of the Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the sunset date to include all reports that cover activity between January 1, 2000, to December 31, 2003.

The Commission published final rules on May 19, 2000, to implement the amendment contained in the Treasury and General Government Appropriations Act, 2000. Section 111.30 of the regulations reflects the sunset provision of Pub. L. No. 106-58, 106th Cong., § 640(c). Therefore, the Commission is issuing this final rule to amend section 111.30 to extend the application of the administrative fine regulations, 11 CFR part 111, subpart B, to include all violations relating to reports that cover the period between January 1, 2000, to December 31, 2003.

The Commission is promulgating this final rule without notice or opportunity for comment because it falls under the "good cause" exemption of the Administrative Procedures Act, 5 U.S.C. 553(b)(B). The exemption allows

Enforcement (Director) to support issuance of a Preliminary Notice of Violation (PNOV), a Final Notice of Violation (FNOV), and assessment of civil penalties. 10 CFR 820.24–820.25.

c. When an employee files a complaint with DOL under sec. 211 and DOL collects information relating to allegations of DOE contractor retaliation against a contractor employee for actions taken concerning nuclear safety, the Director may use this information as a basis for initiating enforcement action by issuing a PNOV. 10 CFR 820.24. DOE may consider information collected in the DOL proceedings to determine whether the retaliation may be related to a contractor employee's action concerning a DOE nuclear activity.

d. The Director may also use DOL information to support the determination that a contractor has violated or is continuing to violate the nuclear safety requirements against contractor retaliation and to issue civil penalties or other appropriate remedy in a FNOV. 10 CFR 820.25.

e. The Director will have discretion to give appropriate weight to information collected in DOL and OHA investigations and proceedings. In deciding whether additional investigation or information is needed, the Director will consider the extent to which the facts in the proceedings have been adjudicated as well as any information presented by the contractor. In general, the Director may initiate an enforcement action without additional investigation or information.

f. Normally, the Director will await the completion of a Part 708 proceeding before OHA or a sec. 211 proceeding at DOL before deciding whether to take any action, including an investigation under Part 820 with respect to alleged retaliation. A Part 708 or sec. 211 proceeding would be considered completed when there is either a final decision or a settlement of the retaliation complaint, or no additional administrative action is available.

g. DOE encourages its contractors to cooperate in resolving whistleblower complaints raised by contractor employees in a prompt and equitable manner. Accordingly, in deciding whether to initiate an enforcement action, the Director will take into account the extent to which a contractor cooperated in a Part 708 or sec. 211 proceeding, and, in particular, whether the contractor resolved the matter promptly without the need for an adjudication hearing.

h. In considering whether to initiate an enforcement action and, if so, what remedy is appropriate, the Director will also consider the egregiousness of the particular case including the level of management involved in the alleged retaliation and the specificity of the acts of retaliation.

i. In egregious cases, the Director has the discretion to proceed with an enforcement action, including an investigation with respect to alleged retaliation irrespective of the completion status of the Part 708 or sec. 211 proceeding. Egregious cases would include: (1) Cases involving credible allegations for willful or intentional violations of DOE rules, regulations, orders or Federal statutes which, if proven, would

warrant criminal referrals to the U.S. Department of Justice for prosecutorial review; and (2) cases where an alleged retaliation suggests widespread, high-level managerial involvement and raises significant public health and safety concerns.

j. When the Director undertakes an investigation of an allegation of DOE contractor retaliation against an employee under Part 820, the Director will apprise persons interviewed and interested parties that the investigative activity is being taken pursuant to the nuclear safety procedures of Part 820 and not pursuant to the procedures of Part 708.

k. At any time, the Director may begin an investigation of a noncompliance of the substantive nuclear safety rules based on the underlying nuclear safety concerns raised by the employee regardless of the status of completion of any related whistleblower retaliation proceedings. The nuclear safety rules include: 10 CFR part 830 (nuclear safety management); 10 CFR part 835 (occupational radiation protection); and 10 CFR part 820.11 (information accuracy requirements).

[FR Doc. 00–6916 Filed 3–21–00; 8:45 am]

**BILLING CODE 6450–01–P**

## FEDERAL ELECTION COMMISSION

### 11 CFR Part 108

[Notice 2000–4]

#### Filing Copies of Campaign Finance Reports and Statements With State Officers

**AGENCY:** Federal Election Commission.  
**ACTION:** Final rules; transmittal of regulations to Congress.

**SUMMARY:** The Federal Election Commission is revising its regulations that govern filing of campaign finance reports with State officers and the duties of State officers concerning the reports. The revisions implement amendments to the Federal Election Campaign Act that exempt States meeting certain criteria from these requirements.

**DATES:** Further action, including the announcement of an effective date, will be taken after these regulations have been before Congress for 30 legislative days pursuant to 2 U.S.C. 438(d). A document announcing the effective date will be published in the **Federal Register**.

**FOR FURTHER INFORMATION CONTACT:** Ms. Rosemary C. Smith, Assistant General Counsel, or Ms. Rita A. Reimer, Attorney, 999 E Street, N.W., Washington, D.C. 20463, (202) 694–1650 or toll free (800) 424–9530.

**SUPPLEMENTARY INFORMATION:** The Federal Election Campaign Act (“FECA” or the “Act”), 2 U.S.C. 431 *et seq.*, at 2 U.S.C. 439(a) requires all persons who

file campaign finance reports and statements under the Act to file copies of these documents with the Secretary of State, or the officer charged by state law with maintaining state election campaign reports, in each State where contributions were received or expenditures made on behalf of a Federal candidate or candidates appearing on that State's ballot. Under 2 U.S.C. 439(b), these officers must receive and maintain the documents for two years after their date of receipt, and must make them available for public inspection and copying during regular business hours.

In 1995, Congress enacted 2 U.S.C. 439(c), which exempts from these receipt and maintenance requirements any State that the Commission determines to have in place a system that permits electronic access to and duplication of reports and statements that are filed with the Commission. Pub. L. 104–79, 109 Stat. 791, section 2. If the Commission does not make this determination, the State remains obligated to maintain copies of the statements and disclosure reports that have been filed with it. These new rules revise the Commission's regulations at 11 CFR Part 108 to reflect this statutory change.

In September 1997, the Commission published a Notice of Proposed Rulemaking (“NPRM”) that proposed a number of revisions to the Commission's recordkeeping and reporting requirements, including those addressed in this document, and corresponding changes to the relevant disclosure forms. 62 FR 50708 (Sept. 26, 1997). The Commission received three written comments in response to the NPRM, two of which addressed the state filing issues: one from the Secretary of State of South Dakota, and one from David S. Addington, Esq. In addition, the Internal Revenue Service submitted a comment in which it said that the proposed rules were not inconsistent with their regulations or the Internal Revenue Code. On February 11, 1998, the Commission held a public hearing on the NPRM at which one witness testified but did not discuss waivers of state filing requirements. One further comment was submitted in response to the announcement of the hearing.

The Commission has decided to proceed separately with this portion of the rulemaking, both because these issues are more straightforward than those addressed in other parts of the NPRM, and because the Commission is in the process of granting waivers pursuant to section 439(c) to States that meet certain requirements.

Section 438(d) of Title 2, United States Code, requires that any rules or regulations prescribed by the Commission to carry out the provisions of Title 2 of the United States Code be transmitted to the Speaker of the House of Representatives and the President of the Senate 30 legislative days before they are finally promulgated. These regulations were transmitted to Congress on March 17, 2000.

### Explanation and Justification

#### Part 108—Filing Copies of Reports and Statements with State Officers

##### Section 108.1 Filing Requirements

Section 11 CFR 108.1, which sets out the general filing requirements for statements and reports, is being divided into two paragraphs. Paragraph (a) generally follows the previous rule setting out the requirement for filing with the appropriate State offices, and references the new statutory exception. New paragraph (b) tracks the language of 2 U.S.C. 439(c), stating that the filing requirements and duties of State officers under 11 CFR part 108 shall not apply to a State if the Commission has determined that the State maintains a system that can electronically receive and duplicate reports and statements that are filed with the Commission. In addition, the Commission is exempting from these requirements reports and statements that are not filed with the Commission, but which can nevertheless be accessed electronically from the Commission's site on the World Wide Web, [www.fec.gov](http://www.fec.gov).

On October 14, 1999, the Commission approved a State filing waiver program to implement this provision of the Act. In order to qualify for the waiver, a State must certify that it has a system in place that ensures public Internet access to the FEC's web site, where visitors can view and copy reports and statements. The system must include at least one computer terminal that can electronically access the Commission's web page, with at least one printer, connected either directly or through a network. The State must also certify that it will, to the greatest extent possible, allow anyone requesting Federal campaign finance data to use the computer terminal at any time during regular business hours.

Each State that wishes to obtain a waiver of the section 439 receipt and maintenance requirements must submit a written certification to the Commission that describes its system for electronically receiving and duplicating reports from the Commission, and the extent to which that system is available to the public. If

the system satisfies the above criteria, the Commission will so notify the State. It will also publish this information in the *FEC Record*, and place it on the Commission's web site. If a State fails to submit a such a certification, the Commission will be unable to make the requisite determination, and the State will remain subject to the section 439(a) and (b) receipt and maintenance requirements. A number of States have already obtained waivers through this process, and further requests are pending.

Both commenters who addressed this issue objected to this portion of the proposed rule. They specifically questioned the NPRM's proposal to continue the obligation of a State to maintain duplicate reports if the Commission does not make the determination described above and, thus, the State does not meet the statutory requirements to be released from these duties. These commenters asserted that the provision is unconstitutional because the Federal Government cannot impose duties on State officers to execute Federal laws. *Printz v. United States*, 117 S. Ct. 2365, 2384 (1997) (invalidating the Brady Handgun Violence Prevention Act's requirement at 18 U.S.C. 922(s)(2) that the States' chief law enforcement officers conduct background checks on prospective handgun purchasers as an unconstitutional obligation on State officers to execute Federal laws); see also *United States v. New York*, 505 U.S. 144 (1992) (invalidating provisions of the Low-Level Radioactive Waste Policy Act that required States to accept ownership of waste or to regulate it according to congressional instructions). They suggested that the Commission change the proposed rule to request, but not require, State offices to discharge the filing and maintenance duties set out in the statute and in the NPRM.

While the Supreme Court has invalidated a number of Federal statutes imposing burdens on the States, the Commission believes that 2 U.S.C. 439 would pass constitutional muster under Congress' authority to regulate the time, place and manner of holding Federal elections. U.S. Const., Art. I, sec. 4, cl. 1. See *Foster v. Love*, 118 S.Ct. 464 (1997) (holding Louisiana's open primary system to violate 2 U.S.C. 1, 7 (which imposes a uniform national election day), which was enacted pursuant to the Elections Clause); *Smiley v. Holm*, 285 U.S. 335, 366–67 (1932) (Elections Clause encompasses congressional power to prevent "corrupt practices"); *Ex Parte Siebold*, 100 U.S. 371, 392 (1879) ("(T)he (Elections Clause) contemplates such co-operation

(between the States and the Federal government) whenever Congress deems it expedient to alter or add to existing regulations of the State" (emphasis added)); *Condon v. Reno*, 913 F.Supp. 946 (D. S.C. 1995) (holding as valid under the Elections Clause imposition upon States of National Voter Registration Act).

As explained above, the Commission is not planning to force unwilling States to seek exemptions from the records receipt and maintenance requirements. Rather, the Commission is granting waivers from these requirements only to those States that request them. Moreover, the Commission has actively worked with the States to insure that the procedures to obtain a waiver are reasonable and not unduly burdensome.

The Commission also considered whether the new regulations would trigger the requirements of the Unfunded Mandates Reform Act of 1995, Pub. L. 104–4, 109 Stat. 48. See 2 U.S.C. 658(1). That Act prohibits federal agencies from imposing costly new burdens on State governments unless certain procedures are followed. These include consulting State and local governments that would be affected by the new rules, and checking to determine whether Federal funds might be available to help with the cost of their implementation.

The Commission believes the new rules do not trigger that Act, since the cost of implementation should fall far short of the \$100,000,000 figure cited as the threshold for coverage. See 2 U.S.C. 1532(a). Also, as part of the waiver program, the Commission is offering to provide participating offices with free computer equipment and free Internet access for the remainder of the 2000 election cycle, provided that the State agrees to provide the access effective March 1, 2001, at its own expense. The Commission is also providing staff training and assistance with state efforts to publicize this program, to those States that request this.

The final rules at part 108 are also consistent with Executive Order ("E.O.") 13132, "Federalism," which was issued on August 4, 1999 and took effect on November 2, 1999. 64 FR 43255 (Aug. 10, 1999). The Commission is not subject to this Executive Order, which at section 1(c) incorporates the definition of agency found in the Paperwork Reduction Act at 44 U.S.C. 3502(1). That definition specifically excludes the Commission, at 44 U.S.C. 3502(1)(B). However, the procedures the Commission has adopted to implement the waiver program are consistent with the Executive Order's emphasis on cooperation between the States and the



Federal Government in addressing matters of mutual concern.

Please note that certain candidates and political committees do not file their reports directly with the Commission. Candidates for nomination for election or election to the office of United States Senator; authorized committees supporting such candidates; other political committees that support only Senate candidates; and the National Republican Senatorial Committee ("NRSC") and the Democratic Senatorial Campaign Committees ("DSCC") file their reports with the Secretary of the Senate, who in turn provides copies to the Commission. 2 U.S.C. 432(g)(1); 11 CFR 105.2.

At its current level of technology, the Secretary of the Senate is unable to provide to the Commission copies of reports from Senate candidates and most unauthorized committees supporting Senate candidates in a form that can be reproduced on the Internet. Thus, these reports cannot currently be accessed electronically by State offices. Therefore, for the time being, copies of these reports must continue to be filed with the appropriate State office(s), and those offices must continue to maintain them and make them available to the public.

However, the Commission now receives copies of reports filed by the NRSC and the DSCC in a format that can be reproduced over the Internet, so these reports are available on the Commission's web site. The Commission anticipates that, over time, reports filed by Senate candidates and other committees that support them will also become available on the web site. As this occurs, and as more States are certified to be eligible for a waiver, the responsibility of State offices to receive and maintain paper copies of these reports will diminish.

**Section 108.2 Filing Copies of Reports and Statements in Connection with the Campaign of any Candidate Seeking Nomination for Election to the Office of President or Vice-President**

The Commission is adding a cross reference to new 11 CFR 108.1(b), the records receipt and maintenance exception, to the first sentence of this section.

**Section 108.3 Filing Copies of Reports and Statements in Connection With the Campaign of any Congressional Candidate**

This section has been restructured to reflect the potential exemption. New paragraph (a) addresses Senate candidates, their authorized committees, committees that support

only Senate candidates, and the NRSC and the DSCC, who must continue to file duplicate copies of reports with State officers, unless such reports are available on the Commission's web site, and the State has received a waiver pursuant to these rules. Paragraph (b) notes that other candidates and committees need not file duplicate reports in those States that have obtained a waiver pursuant to 2 U.S.C. 439(c). New paragraph (c) retains the language in the current rule stating that, for committees other than authorized committees, where reports cover activity in more than one State, the committees need file, and State offices retain, only those portions of reports that are applicable to candidates seeking election in that State. Please note that this applies only to States that have not obtained a waiver.

**Section 108.4 Filing Copies of Reports by Committees Other Than Principal Campaign Committees**

The Commission has added a cross reference to new paragraph 11 CFR 108.1(b) to this section, which requires unauthorized committees that file reports and statements in connection with Presidential elections to file copies with the State officer(s) of the State(s) in which both the recipient and the contributing committees have their headquarters. The Commission has also slightly reworded this section for clarity.

**Section 108.6 Duties of State Officers**

The Commission has added a cross reference to new paragraph 11 CFR 108.1(b) to this section, which provides guidance to State officers on how to organize, preserve and make available for public copying and inspection the reports and statements filed with those offices. It is also revising paragraph (b) to provide that paper or microfilm copies of documents that are available electronically from the Commission need not be kept for two years. This is consistent with the language at 2 U.S.C. 439(b)(2), which states that covered documents must be kept for two years "either in original filed form or in facsimile copy by microfilm or otherwise" (emphasis added). The Commission interprets this to cover reports that it makes available through its web site, and its practice is to make electronic copies available for more than two years.

The Commission is also adding a new paragraph (e) to this section, which allows States that obtain waivers to charge reasonable fees to those who access and copy campaign finance documents electronically. The new

paragraph is consistent with paragraph (c) of this section, which allows States to charge reasonable fees to those making copies of paper or microfilm documents.

The Commission is also correcting the reference in the introductory material to read "108.6(a) through (e)".

**Certification of No Effect Pursuant to 5 U.S.C. 605(b) (Regulatory Flexibility Act)**

The attached rules will not have a significant economic impact on a substantial number of small entities. The new rules conform to statutory amendments, and also reduce the reporting burden of affected entities. Therefore, these rules will not have a significant economic effect on a substantial number of small entities.

**List of Subjects in 11 CFR Part 108**

Elections, Reporting and recordkeeping requirements.

For the reasons set out in the preamble, Subchapter A of Chapter I, Title 11 of the *Code of Federal Regulations* is amended to read as follows:

**PART 108—FILING COPIES OF REPORTS AND STATEMENTS WITH STATE OFFICERS (2 U.S.C. 439)**

1. The authority citation for Part 108 continues to read as follows:

**Authority:** 2 U.S.C. 434(a)(2), 438(a)(8), 439, 453.

2. Section 108.1 is amended by redesignating the text as paragraph (a), revising the first sentence of newly redesignated paragraph (a), and adding new paragraph (b) to read as follows:

**§ 108.1 Filing Requirements (2 U.S.C. 439(a)(1)).**

(a) Except as provided in paragraph (b) of this section, a copy of each report and statement required to be filed by any person under the Act shall be filed either with the Secretary of State of the appropriate State or with the State officer who is charged by State law with maintaining state election campaign reports. \* \* \*

(b) The filing requirements and duties of State officers under this part 108 shall not apply to a State if the Commission has determined that the State maintains a system that can electronically receive and duplicate reports and statements filed with the Commission. Once a State has obtained a waiver pursuant to this paragraph, the waiver shall apply to all reports that can be electronically accessed and duplicated from the Commission, regardless of whether the



acceptable and unacceptable purpose descriptions to be reported by authorized committees. Paragraph (B) requires authorized committees, when itemizing certain disbursements for which reimbursements are required, to provide a brief explanation of the activity for which reimbursement is required. These provisions have been in Title 11 of the **Code of Federal Regulations** since 1980 and 1995, respectively, and were not affected by the recent statutory changes to the election cycle reporting requirements.

#### Need for Correction

As published, the final rules inadvertently omit two paragraphs describing information to be reported by authorized committees of Federal candidates.

All committees must report the purpose of itemized disbursements (i.e., those disbursements aggregating in excess of \$200). Omitted paragraph (A) contains examples of suitably specific purpose descriptions as well as examples of those descriptions that are unacceptably vague. This paragraph is inconsistent with the reporting of rules for unauthorized committees (committees other than candidate committees) in 11 CFR 104.3(b)(3).

Omitted paragraph (B) is used in administering the "personal use" rules in 11 CFR 113.1. Federal candidates are barred from using campaign funds for personal benefit. Paragraph (B) requires authorized committees of Federal candidates itemizing disbursements for which partial or total reimbursement is required under 11 CFR 113.1(g)(1)(iii)(C) or (D) to provide a brief explanation of the activity for which the reimbursement is made.

Section 801 of Title 5 of the United States Code requires Federal agencies to submit regulations to Congress. These regulations were submitted to the Speaker of the House of Representatives and the President of the Senate on November 26, 2001.

#### Certification of No Effect Pursuant to 5 U.S.C. § 605(b) [Regulatory Flexibility Act]

This correction will not have significant economic impact on a substantial number of small entities. The basis of this certification is that this correction only requires political committees to once again add information to the reports they are required to file. These regulations were in 11 CFR since 1980 and 1995, respectively, before being inadvertently omitted in 2000.

#### List of Subjects in 11 CFR Part 104

Campaign funds, Political committees and parties, Reporting and recordkeeping requirements.

Accordingly, 11 CFR part 104 is corrected by making the following correcting amendment:

#### PART 104—REPORTS BY POLITICAL COMMITTEES

1. The authority citation for part 104 continues to read as follows:

**Authority:** 2 U.S.C. 431(1), 431(8), 431(9), 432(i), 434, 438(a)(8), 438(b), 439a.

#### § 104.3 Contents of reports (2 U.S.C. 434(b), 439a).

\* \* \* \* \*

2. In § 104.3 add the following paragraphs (b)(4)(i)(A) and (B):

(b) \* \* \*

(4) \* \* \*

(i) \* \* \*

(A) As used in this paragraph, *purpose* means a brief statement or description of why the disbursement was made. Examples of statements or descriptions which meet the requirements of this paragraph include the following: dinner expenses, media, salary, polling, travel, party fees, phone banks, travel expenses, travel expense reimbursement, and catering costs. However, statements or descriptions such as *advance*, *election day expenses*, *other expenses*, *expenses*, *expense reimbursement*, *miscellaneous*, *outside services*, *get-out-the-vote* and *voter registration* would not meet the requirements of this paragraph for reporting the purpose of an expenditure.

(B) In addition to reporting the purpose described in paragraph (b)(4)(i)(A) of this section, whenever an authorized committee itemizes a disbursement that is partially or entirely a personal use for which reimbursement is required under 11 CFR 113.1(g)(1)(ii)(C) or (D), it shall provide a brief explanation of the activity for which reimbursement is required.

\* \* \* \* \*

Dated: November 26, 2001.

**Danny L. McDonald,**  
Chairman, Federal Election Commission.  
[FR Doc. 01-29679 Filed 11-29-01; 8:45 am]  
**BILLING CODE 6715-01-P**

#### FEDERAL ELECTION COMMISSION

#### 11 CFR Part 111

[Notice 2001-18]

#### Extension to Administrative Fines

**AGENCY:** Federal Election Commission.

**ACTION:** Final rule; revision of the sunset date.

**SUMMARY:** The Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the expiration date in which the Federal Election Commission (hereinafter "the Commission") may assess civil money penalties for violations of the reporting requirements of section 434(a) of the Federal Election Campaign Act (hereinafter "the Act" or "FECA").

**DATES:** Effective on December 31, 2001.

**FOR FURTHER INFORMATION CONTACT:** Ms. Rosemary C. Smith, Assistant General Counsel, or Ms. Mai T. Dinh, Attorney, 999 E Street, NW., Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

#### SUPPLEMENTARY INFORMATION:

#### Explanation and Justification

Section 640 of the Treasury and General Government Appropriations Act, 2000, Pub. L. No. 106-58, 106th Cong., 113 Stat. 430, 476-77 (1999), amended § 309(a)(4) of the FECA, 2 U.S.C. 437g(a)(4), to provide for a modified enforcement process for violations of reporting requirements. Under § 437g(a)(4)(C) of the FECA, the Commission may assess a civil money penalty for violations of the reporting requirements of 2 U.S.C. 434(a). This authority, however, was to sunset on December 31, 2001. Pub. L. No. 106-58, 106th Cong., § 640(c). Recently, § 642 of the Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the sunset date to include all reports that cover activity between January 1, 2000, to December 31, 2003.

The Commission published final rules on May 19, 2000, to implement the amendment contained in the Treasury and General Government Appropriations Act, 2000. Section 111.30 of the regulations reflects the sunset provision of Pub. L. No. 106-58, 106th Cong., § 640(c). Therefore, the Commission is issuing this final rule to amend section 111.30 to extend the application of the administrative fine regulations, 11 CFR part 111, subpart B, to include all violations relating to reports that cover the period between January 1, 2000, to December 31, 2003.

The Commission is promulgating this final rule without notice or opportunity for comment because it falls under the "good cause" exemption of the Administrative Procedures Act, 5 U.S.C. 553(b)(B). The exemption allows

# Rules and Regulations

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## FEDERAL ELECTION COMMISSION

### 11 CFR Parts 104 and 111

[Notice 2000–10]

#### Administrative Fines

**AGENCY:** Federal Election Commission.

**ACTION:** Final Rule; transmittal of regulations to Congress.

**SUMMARY:** The Treasury and General Government Appropriations Act, 2000, amended the Federal Election Campaign Act of 1971 (hereinafter “the Act” or “FECA”) to permit the Federal Election Commission to impose civil money penalties for violations of the reporting requirements of the FECA that occur between January 1, 2000, and December 31, 2001. The amendments are intended to expedite and streamline the Commission’s enforcement procedures. The Commission is promulgating amendments to its compliance procedure regulations to implement the new program. Further information is provided in the supplementary information that follows.

**EFFECTIVE DATE:** July 14, 2000. The Commission transmitted the final rules and the Explanation and Justification to Congress pursuant to 2 U.S.C. 438(d) on May 12, 2000. The Commission anticipates that 30 legislative days will elapse by the effective date.

**FOR FURTHER INFORMATION CONTACT:** Ms. Rosemary C. Smith, Assistant General Counsel, or Ms. Mai T. Dinh, Staff Attorney, 999 E. Street, N.W., Washington, D.C. 20463, (202) 694–1650 or (800) 424–9530.

**SUPPLEMENTARY INFORMATION:** The Commission is issuing final rules to establish the administrative fines program that Congress authorized in amendments to section 309(a)(4) of the FECA, 2 U.S.C. 437g(a)(4). These amendments were enacted as part of the Treasury and General Government

Appropriations Act, 2000, Public Law 106–58, 106th Cong., Section 640, 113 Stat. 430, 476–77 (1999). Under 2 U.S.C. 434, treasurers of political committees are required to file reports periodically to the Commission by a certain deadline. Prior to enactment of the amendment to the FECA, the Commission handled failures to file the reports in a timely manner under the enforcement procedures in 11 CFR part 111. The purpose of the administrative fines program is to institute streamlined procedures, while preserving the respondents’ due process rights, to process violations of the reporting requirements of 2 U.S.C. 434(a) and assess a civil money penalty based on the schedules of penalties for such violations. The final rules include new subpart B of 11 CFR part 111, and technical amendments to 11 CFR 104.5, 111.8, 111.20, and 111.24 to implement the administrative fines program.

Section 438(d) of Title 2, United States Code, requires that any rule or regulation prescribed by the Commission to carry out the provisions of Title 2 of the United States Code be transmitted to the Speaker of the House of Representatives and the President of the Senate 30 legislative days before they are finally promulgated. These regulations were transmitted to Congress on May 12, 2000.

#### Explanation and Justification

The Commission initiated this rulemaking by issuing a Notice of Proposed Rulemaking (NPRM) on March 29, 2000, in which it sought comments to the proposed rule. 65 FR 16534 (March 29, 2000). The comment period ended on April 28, 2000. The Commission received one comment in response to the NPRM from Akin, Gump, Strauss, Hauer & Feld. The comment included a request for a public hearing. Because Congress intended for this new program to apply to violations that occur in 2000 and 2001, the final rules need to be issued in a timely manner so that the program will be applicable to the reports that are due in 2000. Holding a public hearing would postpone publication of the final rules and delay the effective date, possibly until February or March, 2001. This late effective date would allow the Commission to apply the administrative fines procedure to only one major reporting period—the 2001 Mid-Year

Report. This would not give the Commission a sufficient basis to determine whether to recommend that Congress make the program permanent. Also, the Commission received only one request for a public hearing and that requester did submit extensive comments. Therefore, the Commission will not hold a public hearing on this final rule.

#### General Comments

The commenter’s overriding concern was that the proposed procedures do not afford adequate procedural due process and therefore, violate the Fifth Amendment’s Due Process Clause of the U.S. Constitution. The commenter argued that the procedures do not meet the balancing test in *Mathews v. Eldridge*, 424 U.S. 319 (1976), by failing to recognize the respondents’ private interests, by minimizing the potential risk of erroneous result, and by placing undue emphasis on administrative expediency. The commenter claimed that the potential risk of erroneous result is high because the civil money penalty calculation includes three factors that could be misapplied and because the advent of mandatory electronic filing could flood the Commission’s computers and lead to a breakdown that would unfairly penalize the respondents.

The Commission disagrees with this assessment. The Commission does recognize that the respondents have a property interest at stake. Except for political committees with low levels of financial activity during the reporting period, the civil money penalty will not exceed fifteen percent of the level of activity in the report for respondents who have no previous violations. For committees whose financial activity is less than \$25,000 and who do not have a previous violation, the civil money penalty will not exceed \$1000 or the level of activity, whichever is less. Thus, the cost of additional procedures such as a hearing for the respondent as well as the Commission will exceed the benefit of having them. Also, the *Mathews* balancing test considers whether additional procedures will provide greater protection against deprivation of a property interest or error. Within the administrative fines program, additional procedures in most cases will not afford the respondents greater protection against either. As

stated in the NPRM, the factual and legal issues involved in violations of the reporting requirements of 2 U.S.C. 434(a) are relatively straightforward. The Commission will carefully review the facts and its records before it will even proceed with a reason to believe finding. For the most part, the factual disputes surrounding this type of violation are whether the respondent filed the report and when the report was filed. If the respondent disagrees with the facts in the notification of the reason to believe finding, he or she can send proof of the filing and the date of the filing. The Commission expects that the reviewing officer will be able to resolve these types of factual disputes based on the written submissions.

The Commission also disagrees with the commenter's assertion that the procedures set forth in the NPRM pose a large potential risk of erroneous result. The civil money penalty calculation is a simple arithmetic formula whereby an error can be readily corrected by the Commission or the reviewing officer when it is brought to their attention. It is premature to predict the impact of mandatory electronic filing on administrative fines. It will have no real effect on the administrative fines program during the year 2000 because mandatory electronic filing is not scheduled to begin until January, 2001. Given that most committees will file only two reports during 2001 (2000 Year End and 2001 Mid-Year reports) before the administrative fines program sunsets on December 31, 2001, the impact is likely to be minimal, if any. The Commission's electronic filing system has been designed to accommodate filings by all committees that will be mandated to file electronically in 2001. As a result, there is no expectation that the system will have an adverse impact on the ability of committees to file their reports in a timely manner. In fact, committees may find that electronic filing is easier, faster, and more convenient than paper filing. Nevertheless, any failure of the Commission's system that prevents committees from filing their reports when due would be recognized by the Commission as a circumstance beyond the control of the filer and would be taken into account when considering reason to believe findings or the final determination.

The Commission recognizes that the need to avoid administrative burdens is one of the stated purposes for the amendment to the FECA. Congressman William Thomas, Chairman of the Committee of House Administration, stated the following on the floor of the

House of Representatives on September 15, 1999:

Allowing the FEC to impose administrative fines for reporting violations without the lengthy procedural steps required in a normal enforcement case will free critical FEC resources for more important disclosure and enforcement efforts. The rights of those under these regulations are protected by preserving the option of appeal to a U.S. District Court for those who believe the FEC erred.

The Commission, however, disagrees with the commenter that the proposed rule sacrifices the respondents' rights and procedural due process in the interest of administrative efficiency. The Commission applied the *Mathews* balancing test in developing the administrative fines procedures, taking into consideration the private interests involved and the nature of the violation. The Commission believes that the procedures in the final rules more than adequately meet the *Mathews* test in providing the respondents with procedural due process.

#### *Section 104.5 Filing Dates*

Paragraph (i) is being added to section 104.5 to encourage political committees to keep proof that they filed their reports and the dates on which the reports were filed. Retaining this evidence will allow a respondent to demonstrate timely filing if the respondent disagrees with the Commission on whether the report was filed and if so, the date of the filing. No substantive comments were made concerning this proposed section.

#### *Section 111.8 Internally Generated Matters; Referrals*

Paragraph (d) is being added to section 111.8 to permit the Commission to process complaint-generated matters that allege violations of the reporting requirements of 2 U.S.C. 434(a) under the administrative fines program. The Commission received no substantive comment on this section.

#### *Section 111.20 Public Disclosure of Commission Action*

New paragraph (c) in section 111.20 is being added to provide for the public disclosure of the enforcement file once the matter is completely resolved. The Commission did not receive any substantive comments to this section.

#### *Section 111.24 Civil Penalties*

Revised paragraph (a) of section 111.24 allows for the imposition of civil money penalties so as to make section 111.24 consistent with 11 CFR part 111, subpart B. The Commission did not

receive any substantive comments on this section.

#### *Section 111.30 When Will Subpart B Apply?*

The amendment to FECA authorizes the administrative fines procedures for violations of the reporting requirements of 2 U.S.C. 434(a) that occur between January 1, 2000 and December 31, 2001. Therefore, this section provides that subpart B only applies to violations that occur during that time frame and subpart B sunsets as of January 1, 2002. The Commission did not receive any substantive comments on this section.

#### *Section 111.31 Does This Subpart Replace Subpart A of This Part for Violations of the Reporting Requirements of 2 U.S.C. 434(a)?*

Under the amendment to FECA, the Commission has discretion to apply either the administrative fines procedures or the current enforcement procedures set forth in §§ 111.9 through 111.19 to violations of the reporting requirements of 2 U.S.C. 434(a). The amendment, however, still requires the Commission to find reason to believe that a violation has occurred prior to making a final determination. Thus, §§ 111.1 through 111.8, which include the Commission's reason to believe procedures, will apply to violations processed through the administrative fines procedures. Please note that under 2 U.S.C. 437g(b), the Commission will continue to publish the names of political committees that fail to file their reports when due in the calendar quarter preceding an election including pre-election reports if the committees do not respond within four business days of being notified by the Commission of their failure to file. Sections 111.20 through 111.24, which pertain to public disclosure, confidentiality, *ex parte* communications, representation by counsel, and civil penalties, will also apply to violations processed under subpart B. In addition, while the Commission anticipates that it will process most of these violations under the administrative fines procedures, § 111.31 makes clear that the Commission has the discretion to use the enforcement procedures in §§ 111.9 through 111.19 to handle these violations in circumstances the Commission deems appropriate.

Proposed § 111.31(b) is being modified to include complaint-generated matters that allege violations of the reporting requirements of 2 U.S.C. 434(a) along with violations of other provisions of the FECA in the administrative fines program. The alleged violations of the reporting

requirements will be processed through subpart B while the other alleged violations will be handled through the enforcement process of subpart A. The Commission made this modification to maintain consistency in its prosecution of alleged violations of the reporting requirement of 2 U.S.C. 434(a). The Commission did not receive any substantive comments on this section.

*Section 111.32 How Will the Commission Notify Respondents of a Reason To Believe Finding and a Proposed Civil Money Penalty?*

The Commission will follow its current procedures in finding reason to believe and in notifying the respondents of its finding. If the Commission, by an affirmative vote of at least four of its members, finds reason to believe that a violation has occurred, the Chairman or the Vice-Chairman will notify the respondent of the finding. The notification will include the legal and factual basis for the finding as well as the proposed civil money penalty in accordance with the schedules of penalties and an explanation of the respondent's right to challenge the finding and/or the proposed civil money penalty.

As stated in the NPRM, the Commission will also continue to follow its current procedure of notifying the political committees of their duty to file their reports and the dates on which the reports are due prior to the filing deadline. Thus, political committees will continue to be on notice of their legal obligation to file their reports in a timely manner.

The commenter urged that the Commission include a regulation stating when a report filed electronically is considered "filed." The Commission agrees that the regulations should include such a provision but has decided that this topic is better addressed in the Commission's rulemaking regarding mandatory electronic filing.

*Section 111.33 What Are the Respondent's Choices Upon Receiving the Reason To Believe Finding and the Proposed Civil Money Penalty?*

Upon receipt of the notification of the reason to believe finding and the proposed civil money penalty, the respondents will have two options. They may pay the civil money penalties pursuant to § 111.34. The Commission will process the payment and then close the matter. Respondents may also challenge the reason to believe finding and/or the proposed civil money penalty by following the procedures set forth in § 111.35. The Commission did

not receive any substantive comments on this section.

*Section 111.34 If the Respondent Decides To Pay the Civil Money Penalty and Not To Challenge the Reason To Believe Finding, What Should the Respondent Do?*

A respondent who does not wish to challenge the reason to believe finding and the proposed civil money penalty must submit a check or money order equal to the amount of the proposed civil money penalty to the Commission within 40 days of the reason to believe determination. Once the Commission receives payment, it will send the respondent a final determination that the respondent has violated 2 U.S.C. 434(a) and acknowledgment of the respondent's payment of the civil money penalty. The matter would then be closed and the file would be placed on the public record pursuant to 11 CFR 111.20 and new 11 CFR 111.42. The Commission did not receive any substantive comments on this section.

*Section 111.35 If the Respondent Decides To Challenge the Alleged Violation or Proposed Civil Money Penalty, What Should the Respondent Do?*

Proposed § 111.35 in the NPRM set forth the requirements that respondents must meet to challenge a reason to believe finding and/or proposed civil money penalty. The requirements included filing a notice of intent to challenge within twenty days of the date of the Commission finding reason to believe and filing a written response with supporting documentation within forty days of that date. This proposed section also provided for circumstances the Commission will consider in determining whether to levy a civil money penalty and defenses that the Commission will not accept.

The commenter had several criticisms of this aspect of the administrative fines procedures. First, the commenter objected to the requirement of the notice of intent to challenge the reason to believe finding and/or proposed civil money penalty, stating that the requirement is "contrary to the plain language of the statute, which forbids the Commission from making an adverse determination 'until the person has been given notice and an opportunity to be heard before the Commission'" (citation omitted). While the Commission disagrees with the commenter's legal analysis on this issue, the Commission agrees that a notice of intent to challenge is not necessary. Consequently, that step has been eliminated from the final rules.

The commenter also objected to the use of the date of the Commission's reason to believe determination to trigger the time that the respondent has to file a notice of intent and the written response. The commenter suggested that the time to file the notice of intent and the written response should not begin until receipt of the notification of the Commission's reason to believe finding.

In determining when the time to appeal begins to toll, some federal agencies chose the date on which the decision was made, not the date of receipt, often providing thirty days from the date of the initial decision. *See e.g.*, Coast Guards Regulations on Suspension, Revocation, and Appeals, 33 CFR 158.190 (2000); Department of the Interior Regulations on Public Lands, 43 CFR 4.356 (2000). The Commission also notes that several agencies that begin to toll the time for appeal upon service of an initial adverse decision provide thirty days for a party to file the appeal. *See* Federal Retirement Thrift Investment Board Privacy Act Regulations, 5 CFR 1630.13 (2000); National Indian Gaming Commission Regulations on Appeals, 25 CFR parts 524 and 539 (2000); Postal Service Regulations on Suspension and Revocation of Appeal, 39 CFR 501.12 (2000). Seen in this context, the Commission believes that forty days is an ample and fair amount of time for respondents to file a written response. The Commission has extended the traditional thirty day appeal period an additional ten days to take into account the time it takes for Commission staff to prepare the mailing as well as for the Postal Service to deliver the notification, with a few additional days as a margin for error.

The commenter strongly disagrees with the list of defenses in proposed § 111.35 that the Commission will and will not consider, suggesting that the Commission has failed to balance the respondent's rights with "administrative expediency" for the Commission. The commenter recommends that the Commission eliminate proposed § 111.35(c)(1)(iii) and (c)(4) because the Commission has no rationale for limiting defenses to "48-hour extraordinary circumstance" and errors on the part of the Commission. In addition, the commenter believes that the Commission should allow "good faith" defenses.

The Commission has sound policy reasons for limiting the respondents' defenses beyond streamlining the administrative process. A key cornerstone of campaign finance law is the full and timely disclosure of the political committee's financial activity.

Such disclosure is essential to providing the public with accurate and complete information regarding the financing of federal candidates and political campaigns. Thus, violations of the reporting requirements of 2 U.S.C. 434(a) are strict liability offenses. Political committees are aware or should be aware of their legal duty to file the required reports in a timely manner, and the Commission makes ongoing efforts to remind committees of their duty. Committees are given ample time from the end of the reporting period to the filing deadline to prepare and file their reports. Absent extraordinary circumstances beyond the committees' control, the Commission sees no reason why committees cannot file their reports by the deadline. The rationale behind the "48-hour extraordinary circumstances" exception is that the Commission recognizes there may be instances such as natural disasters where a committee's office is located in the disaster area and the committee cannot timely file a report because of lack of electricity or flooding or destruction of committee records. The Commission, however, expects the committee to file its report as soon as it can reasonably do so.

The commenter argues that under proposed § 111.35(c)(4)(iv) respondents may be held liable for the failure of the Commission's computers. Any failure of the Commission's system that prevents committees from filing their reports when due would be recognized as an extraordinary circumstance beyond the respondents' control. Therefore, § 111.35(c)(4)(iv) has been revised to exclude Commission computer failures from the list of circumstances that the Commission will not consider as extraordinary circumstances.

The commenter states that, under the Due Process Clause of the U.S. Constitution, the Commission bears the burden of proving the factual allegations, not the respondent. In its notification to the respondent of its reason to believe finding, the Commission does include the factual and legal basis for its finding based on the information available to it. Only the respondents can answer the Commission's allegations, devise their defenses, and provide the documents that would support their defenses. Supporting documentation will permit the reviewing officer to evaluate the respondents' factual allegations and defenses. Administrative procedures under other federal agencies also require respondents to provide the factual and legal basis for seeking relief or appealing a decision of the agency. *See e.g.*, 18 CFR 1312.12(d) (2000) (Tennessee

Valley Authority's regulations requiring the petition for relief from an assessment of a civil penalty to "set forth in full the legal and factual basis for the requested relief."); 25 CFR 577.3 (2000) (The National Indian Gaming Commission's hearing regulations state that "\* \* \* the respondent shall file with the Commission a supplemental statement that states with particularity the relief desired and the grounds therefor and that includes, when available, supporting evidence in the form of affidavits."). Therefore, requiring a respondent to include reasons for challenging the reason to believe finding and/or proposed civil money penalty and the factual basis for those reasons does not violate a respondent's rights under the Due Process Clause.

#### *Section 111.36 Who Will Review the Respondent's Written Response?*

Proposed § 111.36 in the NPRM provided for an impartial reviewing officer to review the reason to believe finding, the proposed civil money penalty, the Commission's documentation, and the respondent's written response and to make a recommendation to the Commission. The reviewing officer may request that the respondent and/or the Commission staff submit supplemental information. Paragraph (b) is being revised to clarify the consequence of failure by the respondent to file the supplemental information. Such failure will entitle the reviewing officer to draw an adverse inference.

The commenter expressed concern that the procedures described in proposed § 111.36 fail to meet the statutory requirements of Administrative Procedure Act (APA), 5 U.S.C. 551, *et. seq.*, and the Due Process Clause of the U.S. Constitution. The commenter states that the proposed rule does not include provisions that incorporate 5 U.S.C. 555(b) and (c), which entitle a party to appear in person, to be represented by counsel, and to have access to documents that are the basis of the reviewing officer's recommendation to the Commission. The commenter argues that oral hearings will fulfill the requirements of 5 U.S.C. 555(b) and the *Mathews* balancing test to determine whether an agency's procedures afford respondents adequate procedural due process. The commenter contends that oral hearings would give greater meaning to the respondents' right to an "opportunity to be heard"; would settle disputes without need for litigation, thereby conserving resources; and would develop a full administrative record for

the purposes of judicial review. The Commission disagrees with some of these contentions and believes that these objectives can be achieved in all cases without need for an oral hearing.

With regard to the respondents' right to be represented by counsel, new § 111.31 explicitly incorporates § 111.23, which allows for respondents to be represented by counsel in any matter before the Commission. The commenter cited to 5 U.S.C. 555(c) as the basis for requiring the Commission to give respondents access to documents used by the reviewing officer in formulating his or her recommendation. The Commission disagrees with this reading of this section of the APA. Section 555(c) states that a "person compelled to submit data or evidence is entitled to retain or \* \* \* procure a copy or transcript thereof." Thus, respondents are entitled to keep a copy of their written submissions or ask the Commission to send them a copy of their written submissions. It does not grant the respondents the right to obtain or review other documents that the reviewing officer relied upon to make his or her recommendation. The Commission, however, recognizes that a respondent should be given copies of any additional documents that the reviewing officer examines after the respondent has filed a challenge to the reason to believe finding and/or proposed civil money penalty. For example, Commission staff might possibly provide additional materials regarding receipt of an electronically filed report. Therefore, paragraph (d) is being added to revised § 111.36 to provide for that procedure. Revised § 111.36 also adds new paragraph (f) to require the reviewing officer to send the respondent a copy of the recommendation to the Commission and allows the respondent to file with the Commission Secretary a written response to the recommendation within ten days of the transmittal of the recommendation. However, the respondent will not be able to make any new arguments, that is, the respondent may not make arguments that the respondent did not make in its original written response or that are not in direct response to the arguments made by the reviewing officer in his or her recommendation to the Commission.

The commenter interprets the second sentence of 5 U.S.C. 555(b) as creating an independent right to appear in person with counsel whenever there is an agency proceeding. The Commission disagrees with this interpretation. In reading 5 U.S.C. 555(b) as a whole, it is apparent that the entitlement described in the second sentence is triggered only

if the person is compelled to appear in person in an agency proceeding. Thus, if a person is compelled to appear in person, the person may choose to appear by himself or herself, to appear with counsel, or send counsel or a duly qualified representative in his or her stead. The right to appear under 5 U.S.C. 555(b) "is not blindly absolute, without regard to the status or nature of the proceedings and concern for the orderly conduct of public business." *DeVyver v. Warden*, 388 F.Supp. 1213, 1222 (M.D. Pa. 1974) (citing *Easton Utilities Commission v. Atomic Energy Commission*, 424 F.2d 847, 852 (D.C. Cir. 1970)).

Moreover, 5 U.S.C. 555(b) does not afford the respondents a right to a hearing. The Supreme Court has held that even where a statute requires an "opportunity for hearing," it "cannot impute to Congress the design requiring, nor does due process demand, a hearing when it appears conclusively from the applicant's 'pleadings' that the applicant cannot succeed." *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 621 (1973) (involving the Federal Drug Administration's procedure for withdrawing approval of a new drug application). Similarly, lower courts have held that agencies may make a decision solely on the written submission, much like summary judgment, where there are no disputed issues of material fact that cannot be resolved by the written submissions. *State of Pennsylvania v. Riley*, 84 F.3d 125, 130 (3rd Cir. 1996) (citing *Moreau v. F.E.R.C.*, 982 F.2d 556, 568 (D.C. Cir.1993); *Altenheim German Home v. Turnock*, 902 F.2d 582, 584 (7th Cir. 1990); *California v. Bennett*, 843 F.2d, 333, 340 (9th Cir. 1988); *Bell Telephone Co. of Pennsylvania v. FCC*, 503 F.2d 1250, 1267-68 (3rd Cir. 1974); *Puerto Rico Aqueduct & Sewer Auth. v. E.P.A.*, 35 F.3d 600, 606 (1st Cir. 1994); *Louisiana Ass'n of Indep. Producers and Royalty Owners v. FERC*, 958 F.2d 1101, 1113-15 (D.C. Cir. 1992); *City of St. Louis v. Department of Transp.*, 936 F.2d 1528, 1534 n. 1 (8th Cir. 1991)).

The court in *Puerto Rico Aqueduct & Sewer* recognized the need for administrative summary judgment. It stated that:

The choice between summary judgment and full adjudication—in virtually any context—reflects a balancing of the value of efficiency against the values of accuracy and fairness. Seen in that light, summary judgment often makes especially good sense in an administrative forum, for, given the volume of matters coursing through an agency's hallways, efficiency is perhaps more central to an agency than to a court. . . . Administrative summary judgment is not

only widely accepted, but also intrinsically valid. An agency's choice of such a procedural device is deserving of deference under "the very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure." *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 544, 98 S.Ct. 1197, 1212, 55 L.Ed.2d 460 (1978).

35 F. 3d at 606.

The balancing of accuracy and fairness with the need for efficiency in an agency contains two of the three prongs of the *Mathews* test. Unlike other types of violations that may involve complex factual and legal issues requiring extensive fact finding and analysis and witness testimony, the legal and factual issues pertaining to violations of the reporting requirements of 2 U.S.C. 434(a), are elementary and readily ascertainable by review of written submissions. Because of this, a hearing will not significantly increase accuracy and fairness but will drain the Commission's resources and hinder its efficiency. Therefore, the Commission does not believe that a hearing is legally required especially in light of the additional procedures that are being added to the final rules. *See supra*.

Paragraph (c) is being added to revised § 111.36 to strongly encourage respondents to submit documents to the reviewing officer under §§ 111.35 and 111.36 that are sworn to in the form of affidavits or declarations. More weight and credibility are generally given to statements and documents that are given under oath or are subject to the penalty of perjury.

The commenter had several additional comments with regard to the reviewing officer. First, the commenter stated that the reviewing officer could not be viewed as impartial if he or she is within the Reports Analysis Division (RAD) or the Office of General Counsel (OGC) and suggested an independent position be created to ensure objectivity and to shield the reviewing officer from the supervision of the General Counsel or the Assistant Staff Director of RAD. The Commission agrees that "[i]mpartiality does not require total independence from the government agency or the presence of an administrative law judge \* \* \* [but] only decisionmaker independence \* \* \* from the individual action to be decided." P. Verkuil, *A Study of Informal Adjudication*, 43 U. Chi. L. Rev. 739, 750 n.45 (1976) (citing *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970)). The Commission recognizes the need to separate its prosecutorial functions from its role as the decider of facts. Consequently, at this time, the Commission anticipates that the

reviewing officer most likely will not be an employee within OGC or RAD.

The commenter also suggested that the civil money penalties in the schedules of penalties in § 111.43 should be considered the maximum civil money penalty and that the reviewing officer should have the authority to reduce the civil money penalty after considering mitigating factors and the totality of the circumstances to create "more flexibility in applying the new rules." The Commission disagrees. Allowing the reviewing officer to reduce the civil money penalty would vest in the reviewing officer the authority to make final decisions, contrary to the FECA and long standing practice. *See* 2 U.S.C. 437c(c). Final agency decisions must be made by an affirmative vote of four members of the Commission. Also, if the reviewing officer is granted the discretion to reduce the civil money penalties, different civil money penalty amounts may be levied against political committees that commit identical violations, resulting in lack of uniformity and certainty and giving rise to the perception of unfairness.

Finally with respect to the reviewing officer, the commenter advocated that this person should be subject to the Commission's ethics regulation. Further, the person "should not be a member of the enforcement staff who previously served as counsel in a matter where the current respondent was either a witness or a respondent" because it will create a conflict of interest and an appearance of impropriety. As an employee of the Commission and the federal government, the reviewing officer will be subject to the Commission's Standards of Conduct set forth at 11 CFR part 7, and the Standards of Ethical Conduct for Employees of the Executive Branch. The conflict of interest standard in 11 CFR 7.2(c) is designed to address instances where the employee's private interests are inconsistent with the efficient and impartial conduct of his or her official duties and responsibilities. Nothing in the rules bars an employee from serving in different capacities at different times such as employees in the Office of General Counsel subsequently filling positions in Commissioners' offices.

Section 111.37 What Will the Commission Do Once It Receives the Respondent's Written Response and the Reviewing Officer's Recommendation?

The Commission will make a final determination, by an affirmative vote of at least four of its members, as to whether the respondent has violated the reporting requirements of 2 U.S.C. 434(a) and the amount of the civil

money penalty, if any. The Commission will then authorize the reviewing officer to notify the respondent of its decision. The Commission did not receive any substantive comments on this section.

*Section 111.38 Can the Respondent Appeal the Commission's Final Determination?*

This section follows the amendment to the FECA by specifying that respondents may appeal a final adverse determination by the Commission to a federal district court where the respondents reside or conduct business by filing a written petition within thirty days of receipt of the Commission's final determination. Respondents, however, may not raise any issue that they did not timely raise in the administrative proceeding. The Commission received no substantive comments on this section.

*Section 111.39 When Must the Respondent Transmit Payment of the Civil Money Penalty?*

Unless the respondent appeals the Commission's final determination, the respondent must send a check or money order to the Commission within thirty days of receipt of the final determination. Once there is a final determination of the civil money penalty amount, the civil money penalty will be a debt owed to the United States. If the respondent does not submit full payment, the Commission may forward the debt to the U.S. Department of the Treasury for collection under the Debt Collection Improvement Act of 1996 within 180 days of the date after the final determination. 31 U.S.C. 3711(g); 31 U.S.C. 3716(c)(6). In the alternative, the Commission may initiate a civil suit pursuant to 2 U.S.C. 437g(a)(6)(A). The Commission did not receive any substantive comments on this section.

*Section 111.40 What Happens If the Respondent Does Not Pay the Civil Money Penalty Pursuant to 11 CFR 111.34 and Does Not Submit a Written Response to the Reason To Believe Finding Pursuant to 11 CFR 111.35?*

The Commission will make a final determination and assess a civil money penalty, if any. The respondents will be notified by letter of the final determination. The respondent must pay any assessed civil money penalty within thirty days of receipt of the final determination. Unpaid civil money penalties are debts owed to the United States and may be transferred to the U.S. Department of the Treasury for collection. 31 U.S.C. 3711(g); 31 U.S.C. 3716(c)(6). In the alternative, the Commission may initiate a civil suit

pursuant to 2 U.S.C. 437g(a)(6)(A). There were no substantive comments on this section.

*Section 111.41 To Whom Should the Civil Money Penalty Payment Be Made Payable?*

Respondents must pay the civil money penalties by check or money order and make the check or money order payable to the Federal Election Commission. The Commission did not receive any substantive comments on this section.

*Section 111.42 Will the Enforcement File Be Made Available to the Public?*

Once the enforcement matter is closed, the file will be made available to the public subject to the provisions of 11 CFR 4.4(a)(3). A matter is considered closed when neither the Commission nor the respondent files a civil action in federal court or when there is a final disposition of the civil action pursuant to 11 CFR 111.20(c). The Commission received no substantive comments on this section.

*Section 111.43 What Are the Schedules of Penalties?*

Proposed § 111.43 contained two schedules of penalties—one for election sensitive reports and one for all other reports. The Commission took into account the level of activity in the report, the number of days late, the election sensitivity of the reports, and the existence of previous violations in developing the schedules. Two of these factors—the level of activity and the existence of previous violations—are mandated by the FECA. The Commission included the number of days as a factor because fairness demands that a report that is only a few days late should not be treated in the same manner as one that is many days late or not filed. Similarly, several state agencies responsible for overseeing state campaign finance laws levy fines on a per day basis for violations of their reporting requirements. *See e.g.*, Fla. Stat. Ann. § 106.04(8) (West 2000); Haw. Rev. Stat. § 11-193(a)(5) (1999); N.M. Stat. Ann. § 1-19-35A (Michie 1999). Because of the need to disseminate campaign finance information prior to an election for it to have a meaningful impact, the Commission concluded that it is especially important for reports due prior to an election to be filed in a timely manner and before the election. Thus, the Commission developed a different schedule of penalties for election sensitive reports that imposes a higher civil money penalty for these reports than other types of reports. In addition, the schedule of penalties for

election sensitive reports uses an earlier cut-off date in considering a report not to be filed than the date used for reports that are not election sensitive.

The commenter made several comments and suggestions regarding the schedules of penalties. First, the commenter urged the Commission to calculate the level of activity based on contributions and expenditures less overhead and administrative costs, rather than receipts and disbursements, arguing that a calculation based on receipts and disbursements does not further the goals of FECA and discriminates against political action committees. This argument implicitly assumes that disclosure of some types of receipts and disbursements is of lesser importance than disclosure of other types. The Commission disagrees with this assumption. The amendment to the FECA clearly states that the Commission must take into account the "amount of the violation involved," which is not limited to contributions and expenditures. Under section 434 of the Act, political committees are required to disclose all receipts and disbursements in their reports, not just contributions and expenditures. Moreover, Congress could have drafted the amendment to include just contributions and expenditures, as it did for mandatory electronic filing in Section 639 within the same amendment, but it did not. This difference in terms used in these two sections is strong evidence that Congress intended these two provisions to reach different types of financial activity. Thus, the Commission concludes that the "amount of the violation involved" is equal to receipts and disbursements.

The commenter suggested that the final rules should state that committees with no receipts or disbursements will not be subject to the administrative fines, and urged the Commission to allow committees to send an affidavit attesting to the fact that they did not have any receipts or disbursements in lieu of filing a report. The Commission cannot do so because it does not have the authority to waive reporting requirements in this situation. While the Commission theoretically could make a final determination that a committee with no receipts and disbursements is in violation of 2 U.S.C. 434(a), the Commission could not assess a civil money penalty against the committee because the schedules of penalties only provides for civil money penalties if the level of activity is \$1.00 or more. However, committees with no financial activity should file their reports; otherwise, the Commission will calculate an estimated level of activity



based on the average level of activity over the current or previous two-year election cycle. Unless the committees file their reports disclosing no financial activity, the Commission will assess civil money penalties based on these estimated levels of activity or \$5500 if the Commission cannot calculate the estimated levels of activity.

The commenter advocates the creation of a "safe harbor" for committees that do not have any contributions or expenditures in the given reporting period because these committees have not engaged in any political activity in that period. As discussed above, one of the mandated factors in determining the civil money penalty is the amount of the violation, which is not limited to just contributions and expenditures. Committees are required to file reports even if the committees did not have any contributions or expenditures. To create such a "safe harbor" would be to implicitly allow committees to ignore their affirmative and legal duty to file the required reports.

The commenter characterized the schedules of penalties in the NPRM as lacking a rational basis and as discriminating against small committees. The commenter suggested that the Commission break down the level of activity by \$5,000 increments. The basis for the schedules of penalties is discussed above. The Commission believes the breakdowns in the schedules of penalties using the levels of activity fairly and equitably assess civil money penalties that reflect the nature and scope of the violation. The Commission notes, however, that the commenter was correct in stating that small committees that fall within the first range, \$1–\$24,999.99, could potentially pay a civil money penalty that exceeds their total financial activity for a given reporting period. Therefore, the two schedules in § 111.43 are being amended to include a provision stating that respondents with no previous violations will not be assessed a civil money penalty that exceeds the levels of activity in the report.

The preamble to the NPRM included an alternative method for calculating the schedule of penalties for the election sensitive reports. Instead of a fifty percent increase in the base amounts, the NPRM sought comment on adding a flat amount of \$1000 to the base amounts for all levels of activity. No comments directly addressing this issue were received. However, the commenter expressed concern that the schedules of penalties discriminated against committees with low levels of financial activity. The Commission has

determined that a flat \$1000 addition to the base amounts would impose on committees with low levels of financial activity a significantly higher civil money penalty relative to their level of activity than committees with higher levels of financial activity. Consequently, the Commission has decided to adopt a schedule of penalties that increases the base amounts by fifty percent for election sensitive reports instead of adding a flat \$1000 to the base amounts.

The commenter suggested that the civil money penalties in the schedules of penalties may be too high in some instances. The Commission agrees that the civil money penalties it initially proposed for non-filers were too high. Therefore, the civil money penalties for non-filers are being reduced in the schedules of penalties in § 111.43 (a) and (b). With respect to both election sensitive reports and non-election sensitive reports, the resulting civil money penalties for non-filers are higher than the civil money penalties for reports filed 30 days late, but are not as high as the civil money penalties proposed in the NPRM.

Finally, paragraphs (d) and (e) are being revised to clarify that election sensitive reports include reports due before special elections.

#### *Examples of Civil Money Penalties*

*Example 1:* The respondent files an October quarterly report 20 days late. The level of activity on the report is \$105,000. The civil money penalty is calculated as follows. The base amount is \$900. The per day amount is \$125 multiplied by 20 days, which equals \$2500. The civil money penalty is the sum of these two amounts, which is \$3400.

*Example 2:* The respondent in the above example has one prior violation in the current two-year election cycle. The premium for the one prior violation is 25% of the civil money penalty calculated in example 1, which equals \$850. The civil money penalty is the sum of this premium and the civil money penalty from example 1, which is \$4250.

*Example 3:* The respondent files a July quarterly report on September 1. The report contains \$500 in receipts and disbursements. The respondent is a non-filer because the report was more than thirty days late. The civil money penalty is \$500 because it is the lesser of the level of activity in the report and \$900, which is the civil money penalty for a non-filer whose level of activity is less than \$25,000.

*Example 4:* The respondent in the example 3 had one prior violation in the current two-year election cycle. Because this is not the respondent's first violation, the civil money penalty is not capped by the respondent's level of activity. The civil money penalty is the \$900 assessed against non-filers whose level of activity is less than \$25,000 plus a

25% premium equaling \$225 for the one prior violation. Therefore, the civil money penalty for this respondent is \$1125.

#### *Section 111.44 What Is the Schedule of Penalties for 48-Hour Notices?*

Committees are required to report within 48 hours of receipt of those contributions of \$1000 or more that are received after the 20th day but more than 48 hours before an election. 2 U.S.C. 434(a)(6). The Commission developed a different schedule of penalties for failure to file these notices on time because of the nature and timing of these notices and the need to have them filed on time. The schedule proposed in the NPRM did not distinguish between notices that are filed late and those that are not filed at all, and would have imposed a civil money penalty equal to fifteen percent of the amount of the contribution(s) not reported on time plus \$100. In the final rules that follow, this schedule of penalties is also being reduced because the resulting civil money penalties may be too high. The amount in the final schedule of penalties is being reduced to 10% of the amount of the contribution(s) not timely reported plus \$100.

#### *Section 111.45 What Actions Will Be Taken To Collect Unpaid Civil Money Penalties?*

The Commission may take any and all appropriate actions authorized and required by the Debt Collection Act of 1982, as amended by the Debt Collection Improvement Act of 1996 (31 U.S.C. 3701 *et. seq.*). This section adopts the Federal Claims Collection Standards issued jointly by the Department of Justice and the General Accounting Office, 4 CFR parts 101–105, to provide procedures for the collection of the debt. This section also adopts by cross-reference the regulations issued by U.S. Department of the Treasury at 31 CFR 285.2, 285.4, and 285.7. Changes are being made to this section in the final rules for clarification purposes. The Commission did not receive any substantive comments on this section.

#### **Certification of No Effect Pursuant to 5 U.S.C. 605(b) (Regulatory Flexibility Act)**

The attached final rule will not have a significant economic impact on a substantial number of small entities. The basis for this certification is that the final rule will impose penalties which are scaled to take into account the size of the financial activity of the political committees. Thus, committees with less financial activity will be subject to lower fines than committees with more



financial activity. Also, the Commission anticipates that there will not be a large number of small committees that would be subject to the process in the proposed rules. Therefore, the final rules will not have a significant economic impact on a substantial number of small entities.

#### List of Subjects

##### 11 CFR Part 104

Campaign funds, Political committees and parties, Reporting and recordkeeping requirements.

##### 11 CFR Part 111

Administrative practice and procedures, Elections, Law enforcement.

For reasons set out in the preamble, subchapter A, Chapter I of Title 11 of the Code of Federal Regulations is amended as follows:

#### PART 104—REPORTS BY POLITICAL COMMITTEES (2 U.S.C. 434)

1. The authority for part 104 continues to read as follows:

**Authority:** 2 U.S.C. 431(1), 431(8), 431(9), 432(i), 434, 438(a)(8), 438(b), 439a.

2. 11 CFR 104.5 is amended by adding new paragraph (i) to read as follows:

##### § 104.5 Filing dates (2 U.S.C. 434(a)(2)).

\* \* \* \* \*

(i) Committees should retain proof of mailing or other means of transmittal of the reports to the Commission.

#### PART 111—COMPLIANCE PROCEDURES (2 U.S.C. 437g, 437d(a))

3. The authority for part 111 continues to read as follows:

**Authority:** 2 U.S.C. 437g, 437d(a), 438(a)(8).

4. 11 CFR 111.8 is amended by adding new paragraph (d) to read as follows:

##### § 111.8 Internally generated matters; referrals (2 U.S.C. 437g(a)(2)).

\* \* \* \* \*

(d) Notwithstanding §§ 111.9 through 111.19, for violations of 2 U.S.C. 434(a), the Commission, when appropriate, may review internally generated matters under subpart B of this part.

5. 11 CFR 111.20 is amended by adding new paragraph (c) to read as follows:

##### § 111.20 Public disclosure of Commission action (2 U.S.C. 437g(a)(4)).

\* \* \* \* \*

(c) For any compliance matter in which a civil action is commenced, the Commission will make public the non-exempt 2 U.S.C. 437g investigatory materials in the enforcement and

litigation files no later than thirty (30) days from the date on which the Commission sends the complainant and the respondent(s) the required notification of the final disposition of the civil action. The final disposition may consist of a judicial decision which is not reviewed by a higher court.

6. 11 CFR 111.24(a) is revised to read as follows:

##### § 111.24 Civil Penalties (2 U.S.C. 437g(a)(5), (6), (12), 28 U.S.C. 2461 nt.).

(a) Except as provided in 11 CFR part 111, subpart B and in paragraph (b) of this section, a civil penalty negotiated by the Commission or imposed by a court for a violation of the Act or chapters 95 or 96 of title 26 (26 U.S.C.) shall not exceed the greater of \$5,500 or an amount equal to any contribution or expenditure involved in the violation. In the case of a knowing and willful violation, the civil penalty shall not exceed the greater of \$11,000 or an amount equal to 200% of any contribution or expenditure involved in the violation.

\* \* \* \* \*

7. Part 111 is amended by designating 11 CFR 111.1 through 111.24 as subpart A—Enforcement—and by adding new subpart B to read as follows:

#### Subpart B—Administrative Fines

Sec.

111.30 When will subpart B apply?

111.31 Does this subpart replace subpart A of this part for violations of the reporting requirements of 2 U.S.C. 434(a)?

111.32 How will the Commission notify respondents of a reason to believe finding and a proposed civil money penalty?

111.33 What are the respondent's choices upon receiving the reason to believe finding and the proposed civil money penalty?

111.34 If the respondent decides to pay the civil money penalty and not to challenge the reason to believe finding, what should the respondent do?

111.35 If the respondent decides to challenge the alleged violation or proposed civil money penalty, what should the respondent do?

111.36 Who will review the respondent's written response?

111.37 What will the Commission do once it receives the respondent's written response and the reviewing officer's recommendation?

111.38 Can the respondent appeal the Commission's final determination?

111.39 When must the respondent pay the civil money penalty?

111.40 What happens if the respondent does not pay the civil money penalty pursuant to 11 CFR 111.34 and does not submit a written response to the reason to believe finding pursuant to 11 CFR 111.35?

111.41 To whom should the civil money penalty payment be made payable?

111.42 Will the enforcement file be made available to the public?

111.43 What are the schedules of penalties?

111.44 What is the schedule of penalties for 48-hour notices that are not filed or filed late?

111.45 What actions will be taken to collect unpaid civil money penalties?

#### § 111.30 When will subpart B apply?

Subpart B applies to violations of the reporting requirements of 2 U.S.C. 434(a) committed by political committees and their treasurers on or after July 14, 2000, and on or before December 31, 2001.

#### § 111.31 Does this subpart replace subpart A of this part for violations of the reporting requirements of 2 U.S.C. 434(a)?

(a) No; §§ 111.1 through 111.8 and 111.20 through 111.24 shall apply to all compliance matters. This subpart will apply, rather than §§ 111.9 through 111.19, when the Commission, on the basis of information ascertained by the Commission in the normal course of carrying out its supervisory responsibilities, and when appropriate, determines that the compliance matter should be subject to this subpart. If the Commission determines that the violation should not be subject to this subpart, then the violation will be subject to all sections of subpart A of this part.

(b) Subpart B will apply to compliance matters resulting from a complaint filed pursuant to 11 CFR 111.4 through 111.7 if the complaint alleges a violation of 2 U.S.C. 434(a). If the complaint alleges violations of any other provision of any statute or regulation over which the Commission has jurisdiction, subpart A will apply to the alleged violations of these other provisions.

#### § 111.32 How will the Commission notify respondents of a reason to believe finding and a proposed civil money penalty?

If the Commission determines, by an affirmative vote of at least four (4) of its members, that it has reason to believe that a respondent has violated 2 U.S.C. 434(a), the Chairman or Vice-Chairman shall notify such respondent of the Commission's finding. The written notification shall set forth the following:

(a) The alleged factual and legal basis supporting the finding including the type of report that was due, the filing deadline, the actual date filed (if filed), and the number of days the report was late (if filed);

(b) The applicable schedule of penalties;

(c) The number of times the respondent has been assessed a civil

acceptable and unacceptable purpose descriptions to be reported by authorized committees. Paragraph (B) requires authorized committees, when itemizing certain disbursements for which reimbursements are required, to provide a brief explanation of the activity for which reimbursement is required. These provisions have been in Title 11 of the **Code of Federal Regulations** since 1980 and 1995, respectively, and were not affected by the recent statutory changes to the election cycle reporting requirements.

#### Need for Correction

As published, the final rules inadvertently omit two paragraphs describing information to be reported by authorized committees of Federal candidates.

All committees must report the purpose of itemized disbursements (i.e., those disbursements aggregating in excess of \$200). Omitted paragraph (A) contains examples of suitably specific purpose descriptions as well as examples of those descriptions that are unacceptably vague. This paragraph is inconsistent with the reporting of rules for unauthorized committees (committees other than candidate committees) in 11 CFR 104.3(b)(3).

Omitted paragraph (B) is used in administering the "personal use" rules in 11 CFR 113.1. Federal candidates are barred from using campaign funds for personal benefit. Paragraph (B) requires authorized committees of Federal candidates itemizing disbursements for which partial or total reimbursement is required under 11 CFR 113.1(g)(1)(iii)(C) or (D) to provide a brief explanation of the activity for which the reimbursement is made.

Section 801 of Title 5 of the United States Code requires Federal agencies to submit regulations to Congress. These regulations were submitted to the Speaker of the House of Representatives and the President of the Senate on November 26, 2001.

#### Certification of No Effect Pursuant to 5 U.S.C. § 605(b) [Regulatory Flexibility Act]

This correction will not have significant economic impact on a substantial number of small entities. The basis of this certification is that this correction only requires political committees to once again add information to the reports they are required to file. These regulations were in 11 CFR since 1980 and 1995, respectively, before being inadvertently omitted in 2000.

#### List of Subjects in 11 CFR Part 104

Campaign funds, Political committees and parties, Reporting and recordkeeping requirements.

Accordingly, 11 CFR part 104 is corrected by making the following correcting amendment:

#### PART 104—REPORTS BY POLITICAL COMMITTEES

1. The authority citation for part 104 continues to read as follows:

**Authority:** 2 U.S.C. 431(1), 431(8), 431(9), 432(i), 434, 438(a)(8), 438(b), 439a.

#### § 104.3 Contents of reports (2 U.S.C. 434(b), 439a).

\* \* \* \* \*

2. In § 104.3 add the following paragraphs (b)(4)(i)(A) and (B):

(b) \* \* \*  
(4) \* \* \*  
(i) \* \* \*

(A) As used in this paragraph, *purpose* means a brief statement or description of why the disbursement was made. Examples of statements or descriptions which meet the requirements of this paragraph include the following: dinner expenses, media, salary, polling, travel, party fees, phone banks, travel expenses, travel expense reimbursement, and catering costs. However, statements or descriptions such as *advance*, *election day expenses*, *other expenses*, *expenses*, *expense reimbursement*, *miscellaneous*, *outside services*, *get-out-the-vote* and *voter registration* would not meet the requirements of this paragraph for reporting the purpose of an expenditure.

(B) In addition to reporting the purpose described in paragraph (b)(4)(i)(A) of this section, whenever an authorized committee itemizes a disbursement that is partially or entirely a personal use for which reimbursement is required under 11 CFR 113.1(g)(1)(ii)(C) or (D), it shall provide a brief explanation of the activity for which reimbursement is required.

\* \* \* \* \*

Dated: November 26, 2001.

**Danny L. McDonald,**  
*Chairman, Federal Election Commission.*  
[FR Doc. 01-29679 Filed 11-29-01; 8:45 am]  
**BILLING CODE 6715-01-P**

#### FEDERAL ELECTION COMMISSION

#### 11 CFR Part 111

#### [Notice 2001-18]

#### Extension to Administrative Fines

**AGENCY:** Federal Election Commission.

**ACTION:** Final rule; revision of the sunset date.

**SUMMARY:** The Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the expiration date in which the Federal Election Commission (hereinafter "the Commission") may assess civil money penalties for violations of the reporting requirements of section 434(a) of the Federal Election Campaign Act (hereinafter "the Act" or "FECA").

**DATES:** Effective on December 31, 2001.

**FOR FURTHER INFORMATION CONTACT:** Ms. Rosemary C. Smith, Assistant General Counsel, or Ms. Mai T. Dinh, Attorney, 999 E Street, NW., Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

#### SUPPLEMENTARY INFORMATION:

#### Explanation and Justification

Section 640 of the Treasury and General Government Appropriations Act, 2000, Pub. L. No. 106-58, 106th Cong., 113 Stat. 430, 476-77 (1999), amended § 309(a)(4) of the FECA, 2 U.S.C. 437g(a)(4), to provide for a modified enforcement process for violations of reporting requirements. Under § 437g(a)(4)(C) of the FECA, the Commission may assess a civil money penalty for violations of the reporting requirements of 2 U.S.C. 434(a). This authority, however, was to sunset on December 31, 2001. Pub. L. No. 106-58, 106th Cong., § 640(c). Recently, § 642 of the Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the sunset date to include all reports that cover activity between January 1, 2000, to December 31, 2003.

The Commission published final rules on May 19, 2000, to implement the amendment contained in the Treasury and General Government Appropriations Act, 2000. Section 111.30 of the regulations reflects the sunset provision of Pub. L. No. 106-58, 106th Cong., § 640(c). Therefore, the Commission is issuing this final rule to amend section 111.30 to extend the application of the administrative fine regulations, 11 CFR part 111, subpart B, to include all violations relating to reports that cover the period between January 1, 2000, to December 31, 2003.

The Commission is promulgating this final rule without notice or opportunity for comment because it falls under the "good cause" exemption of the Administrative Procedures Act, 5 U.S.C. 553(b)(B). The exemption allows

**§ 784.14 Death, incompetency, or disappearance.**

In the case of death, incompetency, disappearance or dissolution of a person that is eligible to receive benefits in accordance with this part, such person or persons specified in part 707 of this chapter may receive such benefits, as determined appropriate by FSA.

**§ 784.15 Maintaining records.**

Persons making application for benefits under this program must maintain accurate records and accounts that will document that they meet all eligibility requirements specified herein. Such records and accounts must be retained for 3 years after the date of payment to the sheep and lamb operations under this program. Destruction of the records after such date shall be the risk of the party undertaking the destruction.

**§ 784.16 Refunds; joint and several liability.**

(a) In the event there is a failure to comply with any term, requirement, or condition for payment arising under the application, or this part, and if any refund of a payment to FSA shall otherwise become due in connection with the application, or this part, all payments made under this part to any sheep and lamb operation shall be refunded to FSA together with interest as determined in accordance with paragraph (c) of this section and late payment charges as provided in part 1403 of this title.

(b) All persons signing a sheep and lamb operation's application for payment as having an interest in the operation shall be jointly and severally liable for any refund, including related charges, which is determined to be due for any reason under the terms and conditions of the application or this part with respect to such operation.

(c) Interest shall be applicable to refunds required of any person under this part if FSA determines that payments or other assistance was provided to a person who was not eligible for such assistance. Such interest shall be charged at the rate of interest which the United States Treasury charges the Commodity Credit Corporation (CCC) for funds, from the date FSA made such benefits available to the date of repayment or the date interest increases as determined in accordance with applicable regulations. FSA may waive the accrual of interest if FSA determines that the cause of the erroneous determination was not due to any action of the person.

(d) Interest determined in accordance with paragraph (c) of this section may

be waived at the discretion of FSA alone for refunds resulting from those violations determined by FSA to have been beyond the control of the person committing the violation.

(e) Late payment interest shall be assessed on all refunds in accordance with the provisions of, and subject to the rates prescribed in 7 CFR part 792.

(f) Any excess payments made by FSA with respect to any application under this part must be refunded.

(g) In the event that a benefit under this subpart was provided as the result of erroneous information provided by any person, the benefit must be repaid with any applicable interest.

Signed at Washington, DC, on June 16, 2000.

**George Arredondo,**

*Acting Administrator, Farm Service Agency.*

[FR Doc. 00-15724 Filed 6-19-00; 11:19 am]

**BILLING CODE 3410-05-P**

**FEDERAL ELECTION COMMISSION****11 CFR Parts 100, 101, 102, 104, 109, 114, 9003, and 9033**

[Notice 2000-13]

**Electronic Filing of Reports by Political Committees**

**AGENCY:** Federal Election Commission.

**ACTION:** Final Rules and Transmittal of Regulations to Congress.

**SUMMARY:** The Federal Election Commission is revising its regulations to implement a mandatory electronic filing system for reports of campaign finance activity filed with the agency. Beginning with reporting periods that start on or after January 1, 2001, all political committees (except the authorized committees of candidates for U.S. Senate) and other persons will be required to file electronically when either their total contributions or total expenditures within a calendar year exceed, or are expected to exceed, \$50,000. The Commission has had a voluntary electronic filing system in place since 1996. Voluntary electronic filing will still be an option for political committees and persons who do not exceed the \$50,000 threshold. This mandatory system is designed to reflect recent changes to the Federal Election Campaign Act of 1971. Further information is provided in the supplementary information that follows.

**DATES:** Further action, including the publication of a document in the **Federal Register** announcing an effective date, will be taken after these regulations have been before Congress

for 30 legislative days pursuant to 2 U.S.C. 438(d) and 26 U.S.C. 9009(c) and 9039(c).

**FOR FURTHER INFORMATION CONTACT:** Ms. Rosemary Smith, Assistant General Counsel, or Cheryl Fowle, Attorney, 999 E Street, NW, Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

**SUPPLEMENTARY INFORMATION:** The Commission is publishing today the final text of new regulations to be added to 11 CFR 100.19 and 11 CFR 104.18 and revisions to the regulations at 11 CFR 101.1, 102.2, 104.5, 109.2, 114.10, 9003.1 and 9033.1 making electronic filing mandatory for certain political committees and other persons. These rules implement provisions of Public Law 106-58, (Pub. L. No. 106-58, 106th Cong., § 639, 113 Stat. 430, 476-477 (1999)) which amended the Federal Election Campaign Act of 1971, 2 U.S.C. 431 *et seq.* ("FECA" or "the Act"), to require, *inter alia*, that the Commission make electronic filing mandatory for political committees and other persons required to file with the Commission who, in a calendar year, have, or have reason to expect to have, total contributions or total expenditures exceeding a threshold amount to be set by the Commission. The final rules announced today set the threshold at \$50,000 per calendar year.

The 1999 amendment to the FECA and the regulations (11 CFR 104.18) maintain the voluntary electronic filing system for political committees or persons who do not exceed, or who do not have reason to expect to exceed, the \$50,000 threshold of financial activity. The Commission encourages committees below these thresholds to voluntarily file their reports electronically.

Public Law 106-58 requires the mandatory system to be in place for reports covering periods after December 31, 2000.

Section 438(d) of Title 2, United States Code and sections 9009(c) and 9039(c) of Title 26, United States Code require that any rules or regulations prescribed by the Commission to carry out the provisions of Titles 2 and 26 of the United States Code be transmitted to the Speaker of the House of Representatives and the President of the Senate 30 legislative days before they are finally promulgated. These regulations were transmitted to Congress on June 16, 2000.

**Explanation and Justification**

The Commission initiated this rulemaking by publishing a Notice of Proposed Rulemaking ("NPRM") in the **Federal Register** on April 11, 2000, 65

FR 19339 (April 11, 2000). The NPRM contained proposed rules covering, *inter alia*, the threshold amount, what reports are covered and the requirement for publicly funded candidates to agree to file electronically.

The comment period ended on May 11, 2000. The Commission received three comments, one from U. S. Public Interest Research Group, and one from National Association of Business Political Action Committees. In addition, the Internal Revenue Service ("IRS") submitted a comment in which it said that the proposed rules are not inconsistent with IRS regulations or the Internal Revenue Code.

The goals of the electronic filing system include more complete and rapid on-line access to reports on file with the Commission, reduced paper filing and manual processing, and more efficient and cost-effective methods of operation for filers and for the Commission. The 1999 amendment to the FECA requires that the Commission make electronically filed reports, designations or statements available on its web site not later than 24 hours after the Commission receives them. Pub. L. No. 106-58, 106th Cong., § 639(a), 113 Stat. 430, 476 (1999). Currently, reports that are filed under the voluntary system of electronic filing are posted in viewable form on the Commission's web site within five minutes and detailed data are available in the Commission's databases within 24 to 48 hours (depending on the time of receipt). In contrast, under the current paper filing system, the time between receipt of a report and its appearance in viewable form on the Commission's web site is 48 hours. Additionally, while some summary data is available in the Commission's indexes within 48 hours, it can take as long as 30 days before the detailed data filed on paper is available in those databases. Thus, the greater the number of pages that are filed electronically, the greater the volume of data that is almost instantly available. Additionally, decreasing the volume of paper filed will decrease the processing time of the reports that are filed on paper, making them more rapidly available in the Commission's databases.

*Section 100.19 File, filed or filing (2 U.S.C. 434(a)).*

The Commission's regulations at 11 CFR 100.19 define *file*, *filed*, or *filing* with respect to reports filed on paper. New paragraph (c) is being added to section 100.19 to define these terms with respect to electronically filed reports. In order to be timely filed, the report must be received and validated

by the Commission's computer system on or before 11:59 p.m. Eastern Standard Time (or Eastern Daylight Time, as appropriate) on the prescribed filing date. The computer validation program ensures that all required information is disclosed. Additionally the validation program is being updated to require that the figures disclosed within the report add up to the figures reported on the Detailed Summary Page and that committees correctly indicate the type of report being filed. Incomplete or incorrect reports that do not pass validation will not be accepted and will not be considered filed. Please note, however, that using the Commission's FECFile software will ensure that all numbers in the report add up to the correct total. The Commission received one comment on this issue in response to its NPRM on its new administrative fine program. (See 65 FR 16534, March 29, 2000.) The commenter, Akin, Gump, Strauss, Hauer & Feld, L.L.P., argued that the Commission's rules should clarify the date and time when an electronic report is considered "filed." Thus, paragraph (c) is being added to this section.

*Section 101.1 Candidate designations (2 U.S.C. 432(e)(1)).*

The Commission is revising paragraph (a) of section 101.1 to clarify that if a candidate exceeds, or has reason to expect to exceed the \$50,000 threshold, he or she must file his or her Statement of Candidacy electronically on FEC Form 2. The Commission anticipates that its free FECFile software will generate FEC Form 2 by January 1, 2001, when these regulations take effect. The Commission received no comments on this provision.

*Section 102.2 Statement of organization: Forms and committee identification number (2 U.S.C. 433(b)(c)).*

Commission regulations at 11 CFR 102.2(a)(1)(i) through (vi) require a political committee to provide certain identifying information on its Statement of Organization (FEC Form 1). New paragraph (a)(1)(vii) requires any political committee that has an Internet web site to provide the address of its web site as part of its address on FEC Form 1. Additionally, it requires any committee that is required to file electronically, and that has an electronic mail address, to include its electronic mail address as part of its address on FEC Form 1. The Commission received no comments on these changes.

Revisions to paragraph (a)(2) clarify that if a committee is required to file electronically, it must file amendments

to its Statement of Organization (FEC Form 1) electronically. The Commission anticipates that its free FECFile software will generate FEC Form 1 by January 1, 2001, when these regulations take effect. The Commission received one comment on the issue of filing amendments by electronic letter. For the reasons explained at "F. Amending Reports," *infra*, the Commission is not allowing filers to amend electronic reports by electronic letter, rather than using the appropriate electronic FEC form.

*Section 104.5 Filing dates (2 U.S.C. 434(a)(2)).*

The Commission's regulations at 11 CFR 104.5(e) define when a paper report is considered filed with respect to when and how it is mailed. A new sentence is being added to paragraph (e) to provide that, in order to be timely filed electronically, the report, designation or statement must be received and validated by the Commission's computer system on or before 11:59 p.m. Eastern Standard Time (or Eastern Daylight Time, as appropriate) on the prescribed filing date. Incomplete or incorrect reports that do not pass validation will not be accepted and will not be considered filed. The Commission is adding the new sentence to paragraph (e) of this section to follow the changes in 11 CFR 101.1.

*Section 104.18 Electronic filing of reports (2 U.S.C. 432(d) and 434(a)(11)).*

Section 104.18 is being reorganized. New paragraph (a) sets forth the thresholds and rules for mandatory electronic filing. Former paragraph (a) "General" is redesignated as paragraph (b) "Voluntary" and sets forth the rules with regard to who may voluntarily file electronically. New paragraph (c) has been added to define which reports under the 1999 amendment to the FECA must be filed electronically. Former paragraphs (b) through (g) are being redesignated as paragraphs (d) through (i). These provisions apply to both mandatory and voluntary electronic filing. Paragraph (d) continues to state the format requirements for the electronic filing system (both mandatory and voluntary). Paragraph (e) sets forth the rules on the acceptance and validation of electronically filed reports. Paragraph (f) addresses amending electronic reports. Paragraph (g) sets forth signature requirements. Rules for schedules and forms requiring third party signatures are in paragraph (h), and paragraph (i) addresses the preservation of reports.

### A. Who Must File Electronically

The mandatory electronic filing provisions of Public Law 106-58 and new paragraph (a) of 11 CFR 104.18 apply to those political committees and other persons who are required to file reports, statements and designations with the FEC. This includes House and Presidential candidates and their authorized committees, party committees, nonconnected committees, and separate segregated funds required to file with the Commission. Mandatory electronic filing does not apply to candidates for United States Senate and their authorized committees because Senate candidates and their committees must file with the Secretary of the Senate. Senate candidates are, however, encouraged to electronically file an unofficial copy of their reports, designations and statements with the FEC for the purposes of faster disclosure.

The Commission received one comment requesting clarification that the threshold applies to each individual committee and not to the total activity of all affiliated committees. While affiliated unauthorized committees share contribution limits, they do not file consolidated reports. Thus, the Commission has concluded that it would be overly burdensome to require all affiliated unauthorized committees to file electronically if, in the aggregate they exceed, or have reason to expect to exceed, the threshold. Therefore, the threshold applies to each individual unauthorized committee whether or not it is affiliated with other committees.

In contrast, authorized committees of a candidate are affiliated and share contribution limits, but the principal campaign committee files one consolidated report incorporating all reports from all other authorized committees (except joint fundraising committees, see *infra*) for that candidate for that election. The principal campaign committee also forwards to the Commission, along with its own, the reports of the other authorized committees. Therefore, all authorized committees of a candidate must file electronically if the total of all contributions and expenditures from all authorized committees for that election exceeds, or the committees have reason to expect the totals to exceed, the threshold.

Joint fundraising representatives (see 11 CFR 102.17) must file electronically if they have, or have reason to expect to have, total contributions or total expenditures exceeding the \$50,000 threshold. Thus, if for example, a joint fundraiser raises total contributions of

\$65,000 that it divides equally between the three participating committees, including itself, the joint fundraising representative must file electronically.

Other persons, including individuals and qualified nonprofit corporations, must file electronically if they make independent expenditures exceeding \$50,000 in a calendar year.<sup>1</sup> Please note, however, that the provision in the NPRM that would have applied the new electronic filing rules to corporations or labor organizations making communications in excess of \$50,000 to their restricted classes has been deleted from the final rules because these disbursements are not expenditures. 2 U.S.C. 431(9)(B)(iii) and (v) and 441b(b)(2) and 11 CFR 100.8(b)(4). The Commission received no comments on this issue.

### B. Threshold

The Commission has set \$50,000 as the appropriate threshold for all political committees and other persons because, as discussed below, data from the 1996 and 1998 election cycles indicate that at that threshold, the goals of the statutory amendment are maximized and the effect on the political committees and other persons is minimized.

#### 1. Nonfederal Funds; Cash on Hand; Debts

The Commission received one comment requesting clarification that, since the purpose of the FECA is the disclosure of federal activity, the new rule applies only when a committee makes \$50,000 in expenditures or receives \$50,000 in contributions as defined in 2 U.S.C. 431(8) and (9) and 11 CFR 100.7 and 100.8. The commenter is correct that for purposes of determining if a filer has exceeded, or has reason to expect to exceed, the \$50,000 filing threshold, nonfederal funds should be excluded from the calculation.

In addition, please note that cash on hand and debt that is outstanding at the beginning of the calendar year are not included in the threshold calculation. Thus, the calculation of the threshold takes into account only those contributions received or expenditures made, or expected to be received or made, within the calendar year.

<sup>1</sup> Note that under 11 CFR 104.4(c) and 105.4, independent expenditures in favor of, or opposition to, candidates for the U.S. Senate must be filed with the Secretary of the Senate and, therefore are not subject to this regulation.

To calculate whether the committee has exceeded the threshold, use the following formulas:<sup>2</sup>

Unauthorized committees other than political party committees (FEC Form 3X).

*Contributions:* Total contributions (from individuals and other persons, political party committees and other political committees) minus refunds of contributions (to individuals and other persons, political party committees and other political committees) plus transfers from affiliated federal committees.

*Expenditures:* Total federal operating expenditures plus transfers to affiliated federal committees plus contributions to federal candidates/committees and other political committees plus independent expenditures.

Political Party Committees (FEC Form 3X).

*Contributions:* Total contributions (from individuals and other persons, political party committees and other political committees) minus refunds of contributions (to individuals and other persons, political party committees and other political committees) plus transfers from affiliated federal political party committees.

*Expenditures:* Total federal operating expenditures plus transfers to affiliated federal political party committees plus contributions to federal candidates/committees and other political committees plus independent expenditures plus coordinated expenditures.

Authorized committees (FEC Form 3, or FEC Form 3P (Presidential candidates only)).

*Contributions:* Total contributions (from individuals and other persons, political party committees, other political committees and the candidate, including the outstanding balance of any loans made, guaranteed or endorsed by the candidate or other person) minus any refunds of contributions (to individuals and other persons, political party committees or other political committees).

*Expenditures:* Total operating expenditures plus total contributions to other federal candidates, political party committees or other federal political party committees.

#### 2. Candidates and Authorized Committees

Data from the 1996 and 1998 election cycles show that this threshold would

<sup>2</sup> These calculations can be estimated by using the Detailed Summary Page of the appropriate FEC Form for filing receipts and disbursements.

make 96% to 98%<sup>3</sup> of all financial activity reported by House and Presidential campaign committees almost immediately available on both the FEC's web site and in the agency's on-line databases. The historical information shows that of the 1,837 to 2,231 authorized committees filing with the Commission between 1995 and 1998, 31% to 44% of the committees (599 to 982 committees) had aggregate contributions or expenditures exceeding \$50,000. These authorized committees filed 43% to 73% of the reports (2,162 to 12,646 reports), and 73% to 88% (66,569 to 282,339 pages) of the total number of pages filed by authorized committees. If 73% to 88% of the total number of pages filed by authorized committees is filed electronically, the Commission can manually process the remaining 12% to 29% of the pages more quickly to substantially reduce the amount of time before the information is available in Commission databases.

The effect of a \$50,000 threshold on candidates and authorized committees will be minimal since, based on the 1996 and 1998 election cycle data, only the largest 30% to 40% of registered authorized committees would be required to file electronically.

### 3. Party Committees

At the \$50,000 level, historical data from the 1996 and 1998 election cycles show that of the 373 to 451 party committees filing with the Commission, 36% to 41% of them (142 to 182 committees) consistently disclosed over 99% (between \$213 million and \$459 million) of party activity. Of the total number of pages filed by party committees, 93% to 96% (71,598 to 210,242 pages) would have been filed electronically, thereby greatly decreasing the amount of paper processing by the committees and the FEC and considerably increasing the amount of data that would be almost immediately available.

Based on the 1996 and 1998 election cycle data, the impact on party committees will be relatively small since only 36% to 41% of all party committees registered with the Commission during those election cycles would have been required to file

electronically. Thus, the smallest 59% to 64% of party committees could continue to file paper reports.

### 4. Nonconnected Committees

At the \$50,000 level, in the 1996 and 1998 election cycles, of the 840 to 933 nonconnected committees filing with the Commission, 15% to 22% of them (128 to 202 committees) disclosed 88% to 93% of the activity by nonconnected committees (representing approximately \$29 million to \$65 million of the total \$33 million to \$70 million disclosed by nonconnected committees). Additionally at that level, 59% to 68% (16,794 to 44,907 pages) of the total number of pages filed by nonconnected committees would have been filed electronically, causing a significant decrease in paper processing and a corresponding increase in the amount of data more rapidly disclosed.

The number of nonconnected committees affected will be relatively small since the historical data from the 1996 and 1998 election cycles show that only the largest 15% to 22% of the nonconnected committees registered with the Commission would have been required to file electronically.

### 5. Separate Segregated Funds

At the \$50,000 level, in the 1996 and 1998 election cycles, of the 2,938 to 2,976 SSFs registered with the Commission, 22% to 28% of them (632 to 825 committees) disclosed 85% to 89% (\$138 million to \$211 million) of the total SSF financial activity. This represents 63% to 68% (between 94,670 and 110,864 pages) of the total number of pages filed by SSFs. Based on historical data, the decrease in the amount of paper filed would represent approximately 100,000 pages of data and hundreds of millions of dollars available almost instantly on the Commission's web site and in the agency's databases.

The impact on SSFs will be small considering that, in the 1996 and 1998 election cycles, only 22% to 28% of all SSFs registered with the Commission would have been required to file electronically. Thus, the smallest 72% to 78% (approximately 2,300 committees) of SSFs will continue to have the option of filing paper reports.

The NPRM requested comments on whether SSFs should have a lower threshold than other filers because their administrative costs can be paid by their connected organizations. One commenter opposed setting a different threshold because that would lead to confusion and burden SSFs with higher administrative costs than those of other types of committees. The Commission

has concluded that it is not appropriate to treat SSFs differently than other types of committees. Therefore it is establishing a uniform \$50,000 threshold for all filers.

### 6. Other Persons Making Independent Expenditures

The 1999 amendment to the FECA requires that "a person" who is required to file under the Act must file electronically if that person exceeds, or has reason to expect to exceed, the threshold. Therefore, in addition to the committees discussed above, new paragraph (a) of section 104.18 also applies the \$50,000 threshold to any other persons defined in 11 CFR 100.10 who are required to file a "designation, statement or report" with the Commission. This applies only to individuals or qualified non-profit corporations ("QNCs") making independent expenditures. 11 CFR 109.2. Thus, under the new rules, individuals and QNCs will be required to file electronically if they make independent expenditures in excess, or that are expected to be in excess, of \$50,000 in a calendar year.

Data from the 1996 and 1998 election cycles show that the between 7% and 19% (between 2 and 24 persons) of other persons filing with the Commission had aggregate contributions or aggregate expenditures exceeding \$50,000 in a calendar year. During that four year period, those persons who exceeded the threshold accounted for 33% and 50% of all activity by other persons in the non-election years, and as high as 94% of all activity by other persons in the Presidential election year and 91% in the midterm election year.

The effect of the final rules in section 104.18(a) on this category of filer will be small because historical data show that the number of these other filings is very small. For example, in 1995 and 1997 (the non-election years), only two of 28 and 23 filers (less than 10% in each case), respectively, would have been required to file electronically under the proposed rules. In 1996 and 1998 (1996 being a Presidential election year), the total numbers of filers who would have been affected were 24 of 128 filers (19%) and 13 of 75 filers (17%), respectively.

### 7. All Committees

The historical data for the 1996 and 1998 election cycles show that if a \$50,000 mandatory electronic filing threshold had been in place at that time, hundreds of thousands of pages would have been filed electronically, dramatically decreasing the amount of paper processed by both committees

<sup>3</sup> Because the data was taken over a period of two election cycles that included a Presidential-election year (1996), a midterm-election year (1998) and two non-election years (1995 and 1997), the number of committees, reports and pages filed and financial figures vary—increasing in election years, decreasing in non-election years. The percentages and numbers used in this document are the high and low figures of the four year span. Please note that the high or low percentage may have come from one year and the high or low actual number may have come from a different year.

and the Commission. Additionally, the amount of financial data that would have been almost instantly disclosed by electronic filing would have been between \$544 million and \$1.2 billion.

#### 8. Comments on Threshold Amount

The Commission received two comments on the \$50,000 threshold. While one commenter strongly favored electronic filing to improve disclosure, it urged the Commission to adopt a much lower threshold of \$5,000 because that is the level at which candidates are required to register and begin filing with the Commission. The Commission has determined that a \$5,000 threshold is not practical. The 1999 amendment to the FECA requires persons to file electronically if they "have reason to expect to" exceed the threshold. Under 2 U.S.C. 431(2) and 11 CFR 100.3, an individual is not a candidate and is not required to register and report financial activity until he or she actually exceeds \$5,000 in contributions or expenditures. Therefore, to set the electronic filing threshold at \$5,000 would require individuals to report electronically before they become candidates under the FECA. Additionally, setting the threshold at \$5,000 might be overly burdensome to smaller political committees and other persons who do not have access to the computer hardware required to file electronically.

The second commenter stated that its membership was split over the \$50,000 proposed threshold. The commenter recommended raising the threshold to \$100,000 per calendar year. The Commission believes that setting the threshold at \$100,000 for all committees and other persons would vastly increase the amount of paper to be filed and processed, thus greatly decreasing the amount of information immediately available to the public. For example, according to historical data from the 1996 and 1998 election cycles, by raising the threshold from \$50,000 to \$100,000 an additional 512–610 committees would be allowed to file paper reports numbering between 2,906 and 6,406. Those reports represented 35,341 to 61,275 pages and between \$34 million and \$41 million in financial activity. The Commission estimates that processing the increased number of reports and pages at a \$100,000 threshold would take a minimum of thirty days to complete. If those additional reports are filed electronically, the information will be on the Commission's web site within a few minutes and in the Commission's indexes within twenty-four to forty-eight hours of receipt.

The second commenter also stated that the \$50,000 threshold might be too burdensome on some committees that just slightly exceed the threshold. The Commission notes that some states have laws requiring electronic filing at much lower thresholds. For example, a recent Georgia statute<sup>4</sup> sets the threshold for candidates at \$25,000 beginning January 1, 2001. On January 1, 2003, the threshold for candidates drops to \$10,000 and the threshold for independent committees (e.g., clubs, associations and political action committees) will be \$5,000. In New York, any committee that raises or spends, or has reason to expect to raise or spend, more than \$1,000 in a calendar year must file electronically.<sup>5</sup> Given the lower levels set by some states, the Commission has concluded that the \$50,000 will not be overly burdensome on political committees.

#### 9. Threshold Per Calendar Year

The 1999 amendment to the Act requires that persons who are required to file with the Commission must "maintain and file a designation, statement or report for *any calendar year* in electronic form accessible by computers if the person has, or has reason to expect to have, aggregate contributions or expenditures in excess of a threshold amount determined by the Commission \* \* \*" [emphasis added] 113 Stat. 430, 476 (1999). The NPRM proposed calculating the threshold on a calendar year basis but sought comments on whether the threshold should be calculated on an "election cycle basis" instead. The NPRM asked whether an election cycle threshold should be used for authorized committees only or for all committees and other persons.

The Commission received one comment on this issue. The commenter stated that SSFs typically operate on a calendar year basis, and therefore there is no basis for calculating the threshold on an election cycle basis.

The Commission has concluded that the threshold must be determined on the calendar year basis for the following reasons. First, the Commission notes that Congress specifically provided for an election-cycle approach regarding reporting of receipts and disbursements by authorized committees in the same legislation that specified a calendar-year approach to the electronic filing thresholds. (Election cycle reporting by authorized committees is being addressed in a separate rulemaking. See NPRM 65 FR 25672 (May 3, 2000)). In

contrast, the legislative language regarding electronic filing refers to the calendar year and not the election cycle. Thus, the Commission concludes that Congress intended the threshold for mandatory electronic filing to be set on a calendar year basis. Second, there is no mention of treating authorized committees differently than any other committee in either the plain language of the statutory amendment requiring mandatory electronic filing or in its legislative history. Nor is there support for an election cycle approach in the underlying FEC legislative recommendation. Third, since the voluntary electronic filing system requires that once committees start filing electronically they must do so for the remainder of the calendar year, and since the statute requires the voluntary system to be left in place, the Commission believes the intent of the underlying legislative recommendation and of Congress was to maintain the "for the calendar year" requirement.

#### C. Filing for the Calendar Year

New paragraph (a)(2) of 11 CFR 104.18 requires that once a filer exceeds, or has reason to expect to exceed, the threshold, the filer must begin filing electronically with his or her next regularly scheduled report and continue filing electronically for the remainder of the calendar year. Paragraph (a)(2) does not require persons to electronically refile any reports, statements or designations that were properly filed on paper earlier in the calendar year or earlier in the election cycle. For example, if an authorized committee files its April quarterly report on paper because it has not exceeded and does not expect to exceed the appropriate threshold and, if in June it exceeds the \$50,000 threshold, the committee must electronically file its July quarterly report, but is not expected to go back and electronically refile the April report.

The Commission received one comment on when a committee must begin filing electronically upon exceeding, or having reason to expect to exceed, the threshold. The commenter recommended allowing monthly filers a 90-day grace period between the time they are required to begin filing electronically and their first electronically filed report. The commenter argued that monthly filers would not have time to convert to the electronic filing system if they unexpectedly exceeded the threshold. The commenter noted that quarterly filers who exceed the threshold in the early part of the quarter have a period of time before the first electronic report

<sup>4</sup> 1999 GAH. B. 1630.

<sup>5</sup> NY ELEC § 14–102.



must be filed at the end of the quarter. The Commission cannot adopt this approach for several reasons. First, the 1999 amendment to the FECA requires political committees to file electronically upon exceeding, or having reason to expect to exceed, the threshold. The Commission finds no Congressional intent to allow a grace period. The Commission notes that other sections of the FECA allow a specific number of days before filing is required. For example, an individual has 15 days upon becoming a candidate to designate a principal campaign committee, and a principal campaign committee has 10 days upon being so designated to register with the Commission. 2 U.S.C. 432(e)(1) and 433(a). Had Congress intended to allow electronic filers a similar period of time, it would have so stated. Second, unauthorized committees that file monthly have the option to file quarterly instead. Since the new regulations take effect on January 1, 2001—a non-election year—monthly filers could opt to file under the non-election year quarterly filer schedule. In non-election years, quarterly filers file only mid-year and year-end reports.<sup>6</sup> Thus, the monthly filers will have sufficient time to convert to electronic filing.

Under electronic filing regulations at 11 CFR 104.18(b), voluntary electronic filers must continue filing electronically for the remainder of the calendar year unless the Commission determines that an extraordinary and unforeseen circumstance makes electronic filing impracticable. The Commission sought comments on whether a similar provision allowing a committee or other person to stop filing electronically within the calendar year due to extraordinary and unforeseen circumstances should be included in the proposed rules for mandatory electronic filers. The Commission received no comments on this issue. Because the Commission does not have statutory authority to waive reporting requirements under these circumstances and because it is the intention of the new regulations that persons who are required to file electronically but who file on paper be treated as non-filers (*see* “4. Non-filers,” *infra*) the Commission has determined that no such waiver can be established for mandatory electronic filers.

#### D. Have Reason to Expect to Have

The NPRM, in paragraph (a)(3) of 11 CFR 104.18 proposed two tests to determine when a filer has reason to

expect to exceed the threshold. (1) A filer should expect to have financial activity above the \$50,000 threshold if it exceeded this amount during the comparable year of the previous election cycle; or (2) A filer should expect to have financial activity exceeding the threshold if the committee's aggregate contributions or expenditures exceeded the threshold during the previous calendar year. In addition, comments were sought on three other possible approaches that were not included in the proposed rules—(1) Should the Commission base the expectation solely on the committee's or person's own projections during the year? If so, at what point during the year will political committees and other persons be expected to make the projection? Should it be a one-time forecast at the beginning of the year or a rolling projection that changes as necessary throughout the calendar year? (2) Should new filers having no historical data on which to base a projection, base their expectations of aggregate contributions and expenditures on historical data for similarly situated committees in the previous election cycle; or should such new committees be presumed to have no reason to expect to exceed the threshold until such time as they actually do so? (3) Should a filer have reason to expect to exceed the threshold if it raises or spends more than one quarter of the proposed yearly threshold in the first calendar quarter, or if it raises or spends more than half the threshold in the first half of the calendar year? For example, should a committee be required to file electronically if it raises \$30,000 in the first calendar quarter on the grounds that it has reason to expect to exceed the \$50,000 threshold within the calendar year?

The Commission received one comment on this issue. The commenter stated that under the first proposed test (the “comparable year” test), its members would be able to make a determination of whether they have reason to expect to exceed the threshold. The commenter pointed out, however, that many committees' non-election year receipts are much lower than the previous, election-year receipts. Therefore, the commenter believed that the second proposed test (the “previous year” test) would not provide an accurate expectation of contributions or expenditures for many committees.

New paragraph (a)(3)(i) contains a combination of the “comparable year” and the “previous year” tests proposed in the NPRM. While the Commission understands the commenter's concern

with the “previous year” test, the Commission believes that the administrative inconvenience of going from electronic to paper filing for filers fluctuating above and below the threshold in election and non-election years, respectively, will be overly burdensome on the filers, as well as on the Commission. Therefore, the Commission is combining the two tests proposed in the NPRM to require that once a committee or other person actually exceeds the threshold, that committee or other person has reason to expect to exceed the threshold in the following two calendar years. For example, if a committee exceeds the threshold in May of 2001, it must electronically file its mid-year report due on July 31, and its year end report due on January 31 of the following year. Furthermore, under new paragraph (a)(3)(i), such a committee has reason to expect to exceed the threshold in 2002 and 2003, and must electronically file its reports for those years.

However, the new rules also contain an exception to electronic filing for certain candidates who do not intend to run in the next federal election. To qualify for this exception, an authorized committee must have \$50,000 or less in net debts outstanding on January 1 of the year following the election and must anticipate terminating prior to the next election year. In addition, under this exception, the candidate must not have qualified as a candidate for the next election and must not intend to become a candidate for federal office in the next election. The Commission anticipates that this exception is likely to apply to the campaign committees of many candidates who have lost the election. Candidate's committees meeting these conditions are not likely to have financial activity in excess of the \$50,000 threshold after the election because their only financial activity is likely to relate to raising funds to pay off their debts, which total less than \$50,000.

The commenter also noted that the third alternative proffered in the NPRM, the “calendar quarter” test, would require a committee to extrapolate annual estimates based on first quarter or first half year receipts. The Commission understands the commenter's objection with regard to the “calendar quarter” test, however, the Commission concluded that this test will provide a limited means by which filers without any historical data would have reason to expect to exceed the threshold, thus requiring them to file electronically before they actually meet the threshold, more rapidly disclosing their financial activity. Therefore, the

<sup>6</sup> 11 CFR 104.5(c).



“calendar quarter” test is being added to the final rules as a test only for those filers who have no historical data.

### E. Definition of Reports

New paragraph (c) adds a definition of *reports*. The 1999 amendment to the FECA defines *report* as “. . . a report, designation, or statement required by this Act to be filed with the Commission.” Thus, for purposes of 11 CFR 104.18, *report* means any statement required by the FECA and filed with the Commission. Therefore, reports, designations and statements that are required by the regulations but not the FECA, or that are required to be filed with the Secretary of the Senate, are not subject to the mandatory electronic filing regulations. The Commission received no comments on this provision.

### F. Amending Reports

The Commission received one comment on paragraph (f) (former paragraph (d)) of section 104.18 regarding amending electronic reports. The commenter urged the Commission to develop a system whereby electronic filers can file letter amendments electronically, rather than filing amended forms electronically. The commenter argued that letter amendments are easier to file and provide greater opportunity for explanation. The Commission’s voluntary electronic filing system has required amendments to electronic reports to be filed electronically since the system’s inception in 1996. This process has worked well and has provided sufficient information in amendments. Further, since electronic filing should decrease the number of errors in reports, the number and complexity of amendments may decrease as well.

The Commission is deleting the requirement from paragraph (f) that amended reports contain electronic flags or markings that point to the portions of the report that are being amended. The Commission now requires only that amendments comply with the formatting specifications contained in the Electronic Filing Specification Requirements document.

#### *Section 109.2 Reporting of independent expenditures by persons other than political committees (2 U.S.C. 434(c))*

Previously, under 11 CFR 109.2(a), persons had the option of disclosing independent expenditures by filing either FEC Form 5 or a signed statement. Paragraph (a) is being revised to clarify that electronic filers do not have the

option of reporting independent expenditures via signed statement. Beginning with reporting periods after December 31, 2000, anyone who exceeds, or has reason to expect to exceed, the \$50,000 threshold, must disclose these independent expenditures electronically on FEC Form 5. Please note that FEC Form 5 must be notarized. Therefore, under paragraph (h) of 11 CFR 104.18, the filer must submit the notary seal and signature either by submitting a paper copy of FEC Form 5 in addition to the electronic form, or by including a digitized version of the notary seal and signature as a separate file in the electronic submission. The Commission anticipates that its free FECFile software will generate FEC Form 5 in the near future. The Commission received no comments on this section.

#### *Section 114.10 Nonprofit corporations exempt from the prohibition on independent expenditures (2 U.S.C. 434(c)).*

Previously, qualified nonprofit corporations (“QNCs”) could disclose independent expenditures by either filing FEC Form 5 or by filing a signed statement. Revised paragraph (e)(1)(ii) of 11 CFR 114.10 clarifies that if a QNC exceeds, or has reason to expect to exceed, the \$50,000 threshold, it must disclose its independent expenditures electronically on FEC Form 5. Please note that FEC Form 5 must be notarized. Therefore, under paragraph (h) of 11 CFR 104.18, the filer may submit the notary seal and signature either by filing a paper copy of FEC Form 5 in addition to the electronic form or by including a digitized version of the notary seal and signature as a separate file in the electronic submission. The Commission anticipates that its free FECFile software will generate FEC Form 5 in the near future. The Commission received no comments on this section.

#### *Section 9003.1 Candidate and committee agreements (2 U.S.C. 9003(a)).*

Former paragraph (b)(11) of 11 CFR 9003.1 stated that, as a condition of receiving public funding, Presidential candidates are required to agree to file electronically if their data is computerized. The Commission is removing electronic filing as a condition for receiving public funding because these federally financed Presidential candidates will have reason to expect to exceed and, in fact, will exceed the \$50,000 threshold and, therefore, are required to file electronically. The Commission received no comments on this section.

#### *Section 9003.1 Candidate and committee agreements (2 U.S.C. 9003(a)).*

Previously, under paragraph (b)(13) of this section, as a condition of receiving public funding Presidential candidates in the primary elections were required to agree to file electronically if their data is computerized. This requirement is being deleted for the reasons explained above. The Commission received no comments on this section.

### Other Issues

#### *1. Computerization of Data and FECFile Software*

The Commission’s computer systems are currently capable of receiving all reports that are required under the new regulations. However, the Commission’s FECFile software, which is available from the agency at no cost, does not currently generate all required forms. For example, the FECFile software does not currently generate FEC Form 1 and 2 (Statement of Organization and Statement of Candidacy, respectively), FEC Form 3P for Presidential candidates, FEC Form 4 for Convention and Host Committees to report their receipts and disbursements, or FEC Form 5 for persons other than political committees reporting independent expenditures. The Commission plans to update the FECFile software to generate FEC Forms 1 and 2 by January 1, 2001, and anticipates that FECFile will generate FEC Forms 3P, 4 and 5 in the near future. The Commission received one comment suggesting that the Commission’s software should be updated to allow committees to import data from the software they currently use for reporting to FECFile. The Commission notes that committees are not required to use the Commission’s filing software. The Commission’s computer system is designed to accept properly formatted reports using other software packages. The Commission’s Data Systems Development Division is working with the software vendor community to assist the vendors in updating their programs to comply with these mandatory electronic filing regulations. The comment was forwarded to the FEC Data Systems Development Division.

#### *2. Formatting and Standardization Requirements*

The NPRM proposed maintaining the standardization requirements that are present in the current voluntary electronic filing system. When the voluntary electronic filing system was designed, the Commission created “The Federal Election Commission’s

Electronic Filing Specifications Requirements" (EFSR) document and invited comment on that document at that time. The EFSR is available at no charge on the Commission's web site. The Commission is updating the EFSR and intends to use specifications embodied in the updated EFSR for this mandatory electronic filing program. The Commission uses several means of communication to relay changes in the EFSR or other system changes to electronic filers, including special notices, the FEC's web site, the Record newsletter, and electronic mail.

Please note that the validation program that checks incoming reports is also being updated. For example, upon completion of this update, the program will no longer accept forms on which the figures disclosed within the report do not add up to the figures reported on the detailed summary page and forms indicating the incorrect type of report.

The Commission received no comments on the EFSR or the validation program.

### 3. Means of Filing

The Commission currently accepts properly formatted electronic reports on diskettes (either hand delivered or sent by other delivery means such as U.S. Postal Service). Although the Commission has no plans at this time to cease accepting electronic reports on disk, most electronic filers find it more convenient to file via electronic upload through an Internet connection.

### 4. Non-filers

The FECA and the new regulations at 11 CFR 104.18 make electronic filing mandatory for those political committees, candidates, and other persons who exceed or who have reason to expect to exceed the threshold set by the Commission. Consequently, political committees, candidates, and other persons who are required to file electronically, but who fail to do so, may be subject to the Commission's enforcement process for non-filers and may have their names published as non-filers under 2 U.S.C. 437g(b) and 438(a)(7). This includes those who are required to file electronically but who file paper reports instead. Additionally, in 1999, Congress amended 2 U.S.C. 437g(a)(4) and (6)(A) to authorize the Commission to impose an administrative fine on late and non-filers pursuant to a schedule of civil money penalties. The Commission recently promulgated final rules and penalty schedules. See 65 FR 31787 (May 19, 2000). The Commission received no comments on this issue.

### Certification of No Effect Pursuant to 5 U.S.C. 605(b) (Regulatory Flexibility Act)

These final rules will not have a significant economic impact on a substantial number of small entities. The basis of this certification is that the Commission's thresholds are set at a sufficiently high level that most, if not all, small political committees are not required to file electronically, although they could continue to do so voluntarily. In the event that any small committees do exceed the proposed threshold, the economic impact is not significant because the committees may obtain the FECFile software from the Commission at no cost, and the Commission anticipates this software will generate all required forms.

### List of Subjects

#### 11 CFR Part 100

Elections.

#### 11 CFR Part 101

Political candidates, Reporting and recordkeeping requirements.

#### 11 CFR Part 102

Political committees and parties, Reporting and recordkeeping requirements.

#### 11 CFR Part 104

Campaign funds, Political committees and parties, Reporting and recordkeeping requirements.

#### 11 CFR Part 109

Elections, Reporting and recordkeeping requirements.

#### 11 CFR Part 114

Business and industry, Elections, Labor.

#### 11 CFR Part 9003

Campaign funds, Reporting and recordkeeping requirements.

#### 11 CFR Part 9033

Campaign funds, Reporting and recordkeeping requirements.

For the reasons set out in the preamble, subchapters A, E and F of chapter I of title 11 of the Code of Federal Regulations are amended as follows:

### PART 100—SCOPE AND DEFINITIONS (2 U.S.C. 431)

1. The authority for part 100 is revised to read as follows:

**Authority:** 2 U.S.C. 431, 434(a)(11), 438(a)(8).

2. Section 100.19 is amended by adding paragraph (c) to read as follows:

### § 100.19 File, filed or filing (2 U.S.C. 434(a)).

\* \* \* \* \*

(c) For electronic filing purposes, a document is timely filed when it is received and validated by the Federal Election Commission at or before 11:59 p.m., Eastern Standard/Daylight Time, on the filing date.

### PART 101—CANDIDATE STATUS AND DESIGNATIONS (2 U.S.C. 432(e))

3. The authority citation for part 101 is revised to read as follows:

**Authority:** 2 U.S.C. 432(e), 434(a)(11), 438(a)(f).

4. Section 101.1 is amended by revising paragraph (a) to read as follows:

#### § 101.1 Candidate designations (2 U.S.C. 432(e)(1)).

(a) *Principal Campaign Committee.* Within 15 days after becoming a candidate under 11 CFR 100.3, each candidate, other than a nominee for the office of Vice President, shall designate in writing a principal campaign committee in accordance with 11 CFR 102.12. A candidate shall designate his or her principal campaign committee by filing a Statement of Candidacy on FEC Form 2, or, if the candidate is not required to file electronically under 11 CFR 104.18, by filing a letter containing the same information (that is, the individual's name and address, party affiliation and office sought, the District and State in which Federal office is sought, and the name and address of his or her principal campaign committee) at the place of filing specified at 11 CFR part 105. Each principal campaign committee shall register, designate a depository and report in accordance with 11 CFR Parts 102, 103 and 104.

\* \* \* \* \*

### PART 102—REGISTRATION, ORGANIZATION AND RECORDKEEPING BY POLITICAL COMMITTEES (2 U.S.C. 433).

5. The authority citation for part 102 is revised to read as follows:

**Authority:** 2 U.S.C. 432, 433, 434(a)(11), 438(a)(8), 441d.

6. Section 102.2 is amended by revising paragraphs (a)(1)(vi) and (a)(2), and adding (a)(1)(vii) to read as follows:

#### § 102.2 Statement of organization: Forms and committee identification number (2 U.S.C. 433(b), (c)).

(a) \* \* \*  
(1) \* \* \*

(vi) A listing of all banks, safe deposit boxes, or other depositories used by the committee; and

acceptable and unacceptable purpose descriptions to be reported by authorized committees. Paragraph (B) requires authorized committees, when itemizing certain disbursements for which reimbursements are required, to provide a brief explanation of the activity for which reimbursement is required. These provisions have been in Title 11 of the **Code of Federal Regulations** since 1980 and 1995, respectively, and were not affected by the recent statutory changes to the election cycle reporting requirements.

#### Need for Correction

As published, the final rules inadvertently omit two paragraphs describing information to be reported by authorized committees of Federal candidates.

All committees must report the purpose of itemized disbursements (i.e., those disbursements aggregating in excess of \$200). Omitted paragraph (A) contains examples of suitably specific purpose descriptions as well as examples of those descriptions that are unacceptably vague. This paragraph is inconsistent with the reporting of rules for unauthorized committees (committees other than candidate committees) in 11 CFR 104.3(b)(3).

Omitted paragraph (B) is used in administering the "personal use" rules in 11 CFR 113.1. Federal candidates are barred from using campaign funds for personal benefit. Paragraph (B) requires authorized committees of Federal candidates itemizing disbursements for which partial or total reimbursement is required under 11 CFR 113.1(g)(1)(iii)(C) or (D) to provide a brief explanation of the activity for which the reimbursement is made.

Section 801 of Title 5 of the United States Code requires Federal agencies to submit regulations to Congress. These regulations were submitted to the Speaker of the House of Representatives and the President of the Senate on November 26, 2001.

#### Certification of No Effect Pursuant to 5 U.S.C. § 605(b) [Regulatory Flexibility Act]

This correction will not have significant economic impact on a substantial number of small entities. The basis of this certification is that this correction only requires political committees to once again add information to the reports they are required to file. These regulations were in 11 CFR since 1980 and 1995, respectively, before being inadvertently omitted in 2000.

#### List of Subjects in 11 CFR Part 104

Campaign funds, Political committees and parties, Reporting and recordkeeping requirements.

Accordingly, 11 CFR part 104 is corrected by making the following correcting amendment:

#### PART 104—REPORTS BY POLITICAL COMMITTEES

1. The authority citation for part 104 continues to read as follows:

**Authority:** 2 U.S.C. 431(1), 431(8), 431(9), 432(i), 434, 438(a)(8), 438(b), 439a.

#### § 104.3 Contents of reports (2 U.S.C. 434(b), 439a).

\* \* \* \* \*

2. In § 104.3 add the following paragraphs (b)(4)(i)(A) and (B):

(b) \* \* \*  
(4) \* \* \*  
(i) \* \* \*

(A) As used in this paragraph, *purpose* means a brief statement or description of why the disbursement was made. Examples of statements or descriptions which meet the requirements of this paragraph include the following: dinner expenses, media, salary, polling, travel, party fees, phone banks, travel expenses, travel expense reimbursement, and catering costs. However, statements or descriptions such as *advance*, *election day expenses*, *other expenses*, *expenses*, *expense reimbursement*, *miscellaneous*, *outside services*, *get-out-the-vote* and *voter registration* would not meet the requirements of this paragraph for reporting the purpose of an expenditure.

(B) In addition to reporting the purpose described in paragraph (b)(4)(i)(A) of this section, whenever an authorized committee itemizes a disbursement that is partially or entirely a personal use for which reimbursement is required under 11 CFR 113.1(g)(1)(ii)(C) or (D), it shall provide a brief explanation of the activity for which reimbursement is required.

\* \* \* \* \*

Dated: November 26, 2001.

**Danny L. McDonald,**  
*Chairman, Federal Election Commission.*  
[FR Doc. 01-29679 Filed 11-29-01; 8:45 am]  
**BILLING CODE 6715-01-P**

#### FEDERAL ELECTION COMMISSION

#### 11 CFR Part 111

#### [Notice 2001-18]

#### Extension to Administrative Fines

**AGENCY:** Federal Election Commission.

**ACTION:** Final rule; revision of the sunset date.

**SUMMARY:** The Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the expiration date in which the Federal Election Commission (hereinafter "the Commission") may assess civil money penalties for violations of the reporting requirements of section 434(a) of the Federal Election Campaign Act (hereinafter "the Act" or "FECA").

**DATES:** Effective on December 31, 2001.

**FOR FURTHER INFORMATION CONTACT:** Ms. Rosemary C. Smith, Assistant General Counsel, or Ms. Mai T. Dinh, Attorney, 999 E Street, NW., Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

#### SUPPLEMENTARY INFORMATION:

#### Explanation and Justification

Section 640 of the Treasury and General Government Appropriations Act, 2000, Pub. L. No. 106-58, 106th Cong., 113 Stat. 430, 476-77 (1999), amended § 309(a)(4) of the FECA, 2 U.S.C. 437g(a)(4), to provide for a modified enforcement process for violations of reporting requirements. Under § 437g(a)(4)(C) of the FECA, the Commission may assess a civil money penalty for violations of the reporting requirements of 2 U.S.C. 434(a). This authority, however, was to sunset on December 31, 2001. Pub. L. No. 106-58, 106th Cong., § 640(c). Recently, § 642 of the Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the sunset date to include all reports that cover activity between January 1, 2000, to December 31, 2003.

The Commission published final rules on May 19, 2000, to implement the amendment contained in the Treasury and General Government Appropriations Act, 2000. Section 111.30 of the regulations reflects the sunset provision of Pub. L. No. 106-58, 106th Cong., § 640(c). Therefore, the Commission is issuing this final rule to amend section 111.30 to extend the application of the administrative fine regulations, 11 CFR part 111, subpart B, to include all violations relating to reports that cover the period between January 1, 2000, to December 31, 2003.

The Commission is promulgating this final rule without notice or opportunity for comment because it falls under the "good cause" exemption of the Administrative Procedures Act, 5 U.S.C. 553(b)(B). The exemption allows

2. In § 1735.2, the following definitions are added in alphabetical order to read as follows:

**§ 1735.2 Definitions.**

\* \* \* \* \*

*Mobile telecommunications service* means the transmission of a radio communication voice service between mobile and land or fixed stations, or between mobile stations.

\* \* \* \* \*

*Public switched network* means any common carrier switched network, whether by wire or radio, including local exchange carriers, interexchange carriers, and mobile telecommunications service providers, that use the North American Numbering Plan in connection with the provision of switched services.

*RUS* means the Rural Utilities Service, an agency of the United States Department of Agriculture, successor to the Rural Electrification Administration.

\* \* \* \* \*

3. Amend § 1735.10 by:

A. Revising paragraph (b);  
B. Redesignating paragraphs (c), (d), and (e) as (d), (e), and (f), respectively; and

C. Adding a new paragraph (c).  
This revision and addition read as follows:

**§ 1735.10 General.**

\* \* \* \* \*

(b) RUS will not make hardship loans, RUS cost-of-money loans, or RTB loans for any wireline local exchange service or similar fixed-station voice service that, in RUS' opinion, is inconsistent with the borrower achieving the requirements stated in the State's telecommunication modernization plan within the time frame stated in the plan (see 7 CFR part 1751, subpart B), unless RUS has determined that achieving the requirements as stated in such plan is not technically or economically feasible.

(c) A borrower applying for a loan to finance mobile telecommunication services shall be considered to be a participant in the State's telecommunication modernization plan so long as the loan funds are not used in a manner that, in the opinion of the Administrator, is inconsistent with the borrower achieving the goals set forth in the plan.

\* \* \* \* \*

4. Amend § 1735.12 by:

A. Revising paragraph (c) introductory text; and

B. Adding new paragraphs (d) and (e).  
The revision reads as follows:

**§ 1735.12 Nonduplication.**

\* \* \* \* \*

(c) RUS shall consider the following criteria for any wireline local exchange service or similar fixed-station voice service in determining whether such service is reasonably adequate:

\* \* \* \* \*

(d) RUS shall consider the following criteria for any of mobile telecommunications service in determining whether such service is reasonably adequate:

(1) The extent to which area coverage is being provided as described in 7 CFR 1735.11.

(2) Clear and reliable call transmission is provided with sufficient channel availability.

(3) The mobile telecommunications service signal strength is at least -85dBm (decibels expressed in milliwatts).

(4) The mobile telecommunications service is interconnected with the public switched network.

(5) Mobile 911 service is available to all subscribers, when requested by the local government entity responsible for this service.

(6) No Federal or State regulatory commission having jurisdiction has determined that the quality, availability, or reliability of the service provided is inadequate.

(7) Mobile telecommunications service is not provided at rates which render the service unaffordable to a significant number of rural persons.

(8) Any other criteria the Administrator determines to be applicable to the particular case.

(e) RUS does not consider mobile telecommunications service a duplication of existing wireline local exchange service or similar fixed-station voice service. RUS may finance mobile telecommunications systems designed to provide eligible services in rural areas under the Rural Electrification Act even though the services provided by the system may incidentally overlap services of existing mobile telecommunications providers.

**§ 1735.14 [Amended]**

5. Amend § 1735.14 by:

A. Removing paragraph (c)(1); and  
B. Redesignating paragraphs (c)(2) and (c)(3) as (c)(1) and (c)(2) respectively.

6. Amend § 1735.17 by:

A. Removing paragraph (c)(3);  
B. Redesignating paragraphs (c)(4) and (c)(5) as (c)(3) and (c)(4), respectively, redesignating paragraph (d) as paragraph (e); and

C. Adding new paragraph (d);  
The addition reads as follows:

**§ 1735.17 Facilities Financed.**

\* \* \* \* \*

(d) Generally, RUS will not make a loan to another entity to provide the same telecommunications service in an area served by an incumbent RUS telecommunications borrower providing such service. RUS may, however, consider an application for a loan to provide the same type of service being provided by an incumbent RUS borrower if the Administrator determines that the incumbent borrower is unable to meet its obligations to the government, including the obligation to provide service set forth in its loan documents and to repay its loans.

Dated: July 5, 2000.

**Jill Long Thompson,**

*Under Secretary, Rural Development.*

[FR Doc. 00-17474 Filed 7-10-00; 8:45 am]

BILLING CODE 3410-15-P

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**FEDERAL ELECTION COMMISSION**

**11 CFR Part 104**

[Notice 2000-15]

**Election Cycle Reporting by Authorized Committees**

**AGENCY:** Federal Election Commission.

**ACTION:** Final rules and transmittal of regulations to Congress.

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**SUMMARY:** The Federal Election Commission is revising its regulations to require authorized committees of Federal candidates to aggregate, itemize and report all receipts and disbursements on an election-cycle basis rather than on a calendar-year-to-date basis. Beginning with reporting periods that start on or after January 1, 2001, authorized committees must report their receipts and disbursements on an election-cycle basis. Please note that this change affects only authorized committees of Federal candidates and does not affect unauthorized committees or other persons. This requirement reflects recent changes in the Federal Election Campaign Act of 1971. The intent of these rules is to simplify recordkeeping and reporting requirements for authorized committees of Federal candidates and to better disclose receipts and disbursements that occur during an election cycle. Further information is provided in the supplementary information that follows.

**DATES:** Further action, including the publication of a document in the **Federal Register** announcing an effective date, will be taken after these regulations have been before Congress for 30 legislative days pursuant to 2 U.S.C. 438(d).

**FOR FURTHER INFORMATION CONTACT:** Ms. Rosemary Smith, Assistant General Counsel, or Cheryl Fowle, Attorney, 999 E Street, NW, Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

**SUPPLEMENTARY INFORMATION:** The Commission is publishing today the final text of revisions to the regulations at 11 CFR 104.3, 104.7, 104.8 and 104.9. These rules implement section 641 of Public Law 106-58 (Pub. L. No. 106-58, 106th Cong. 1st Sess., § 641, 113 Stat. 430, 477 (1999)), which amended section 434(b) of the Federal Election Campaign Act of 1971, 2 U.S.C. 431 *et seq.* ("FECA" or "the Act"), to require, *inter alia*, that the Commission require the authorized committees of Federal candidates to aggregate and report their receipts and disbursements on an election-cycle-to-date basis, rather than a calendar-year-to-date basis, as was previously required. The goals of the 1999 amendment to the FECA and the new rules are to simplify recordkeeping and reporting for authorized committees by itemizing contributions, other receipts, and disbursements on the same election-cycle-to-date basis, and to provide the public with more relevant information for the current election cycle. 145 Cong. Rec. E1896-02, September 17, 1999 (statement of Hon. William M. Thomas). The 1999 amendment to the FECA requires these rules to be effective for reports covering periods after December 31, 2000.

Section 438(d) of Title 2, United States Code requires that any rules or regulations prescribed by the Commission to carry out the provisions of Title 2 of the United States Code be transmitted to the Speaker of the House of Representatives and the President of the Senate 30 legislative days before they are finally promulgated. These regulations were transmitted to Congress on July 6, 2000.

### Explanation and Justification

The Commission initiated this rulemaking by publishing a Notice of Proposed Rulemaking ("NPRM") in the **Federal Register** on May 3, 2000, 65 FR 25672 (May 3, 2000). The NPRM contained proposed rules at 11 CFR 104.3, 104.8 and 104.9 requiring authorized committees of Federal candidates to itemize and report their receipts and disbursements on an election cycle basis. The proposed rules used the definition of election cycle at 11 CFR 100.3(b), under which the election cycle begins the day after the general election for a seat or office and ends on the day of the next general election for that seat or office. The NPRM also contained two alternative

approaches to the definition of election cycle. Under alternative one, the election cycle, for reporting purposes, would begin on January 1 of the year following the general election and end on December 31 of the year of the next general election. Under alternative two, the election cycle would begin twenty-one days after the general election for a seat or office and would end twenty days after the next general election for that seat or office. Additionally, under the second alternative, the contribution limit regulations at 11 CFR 110.1 and 110.2 would have been revised to require that undesignated contributions made up until the twentieth day after the election would aggregate to the contributor's contribution limit for the election that was just held.<sup>1</sup>

The comment period ended on June 2, 2000. The Commission received two comments from the Project On Government Oversight and Eliza Newlin Carney, a staff correspondent for the National Journal. One commenter stated that it has studied the problems with reviewing and searching FEC records and has found it very difficult to determine the amounts of individual contributions reported for a specific election. The commenter stated that the proposed rules directly correct the problem and that it fully supports their implementation. The second commenter was concerned that the rulemaking would eliminate year-end reports. The revised rules do not change the filing of year-end reports, or the filing frequency of any other reports, which are mandated by § 434 of the FECA. The rules simply alter the manner in which authorized committees aggregate and disclose their receipts and disbursements within the required reports. In addition, a comment from the Internal Revenue Service ("IRS") stated that the proposed rules are not inconsistent with IRS regulations or the Internal Revenue Code.

The final rules are identical to the rules proposed in the NPRM. Revisions to 11 CFR 104.3 state that the specified contents of authorized committee's reports must be disclosed for the reporting period and the election-cycle-to-date. Section 104.7 is being amended to change references to authorized committee's itemizations of contributions aggregating in excess of \$200 per calendar year to \$200 per election cycle and to provide authorized committees with examples of clear statements requesting contributor information, which are required on written solicitations. Sections 104.8 and

<sup>1</sup> Issues concerning election cycle are discussed below.

104.9 are being revised to require authorized committees to provide identifying information for contributors whose contributions total over \$200 within the election cycle and for persons to whom expenditures and other disbursements exceed \$200 within the election cycle.

### Section 104.3 Contents of Reports (2 U.S.C. 434(b), 439a)

The Commission's regulations at 11 CFR 104.3 set forth the required contents of reports of receipts and disbursements. Section 104.3 is being revised to state that the specified contents of authorized committee's reports must be disclosed for the reporting period and for the election cycle-to-date rather than for the reporting period and calendar year-to-date. Please note that this amendment to the FECA does not affect unauthorized committees and the Commission is not issuing new rules modifying the calendar year reporting system they currently use, or changing the forms they file at this time.<sup>2</sup>

The introductory language of paragraph (a) is being revised to state that authorized committees must disclose their receipts for the reporting period and for the election cycle.

Paragraph (a)(3) is being revised to state that authorized committees must report the amount of each category of receipt listed in that paragraph for the reporting period and the election cycle.

A parenthetical statement is being added to paragraphs (a)(4)(i) to require authorized committees to identify each contributor whose election cycle-to-date total contributions exceeds \$200.<sup>3</sup> Parenthetical statements are also being added to paragraphs (a)(4)(v) and (vi) to require authorized committees to identify each person whose election-cycle-to-date total rebates, refunds or other offsets to operating expenditures, or total dividends, interest or other

<sup>2</sup> On March 10, 2000, the Commission sent a legislative recommendation to Congress recommending a clarifying amendment that would remove the election cycle language from 2 U.S.C. 434(b)(6)(B)(iii) and (v) because 2 U.S.C. 434(b)(6)(B) applies solely to unauthorized committees.

<sup>3</sup> The Commission notes that publicly funded Presidential candidates are required to provide in their matching fund submissions, contributor information for contributors whose aggregate contributions exceed \$200 per calendar year. 11 CFR 9036.1(b)(1)(ii). Since the statutory amendments did not alter the matching fund submission process, no changes are being made to the Commission's matching fund regulations applicable to the 2000 election or future elections.

receipts provided to the authorized committee exceeds \$200.

Similarly, paragraph (b) is being revised to state that authorized committees must disclose their disbursements for the reporting period and for the election cycle.

Paragraph (b)(2) is being amended to state that authorized committees must report the amount of each category of disbursement listed in this paragraph for the reporting period and the election cycle.

Paragraph (b)(4)(i) is being revised to require authorized committees to identify each person to whom expenditures in an aggregate amount exceeding \$200 within the election cycle are made to meet the authorized committee's operating expenditures.<sup>4</sup>

Paragraph (b)(4)(vi) is being reworded to require authorized committees to identify each person who has received any disbursements not otherwise itemized under paragraph (b)(4)(i), (ii), (iii), (iv) or (v) aggregating in excess of \$200 within the election cycle.

Paragraph (i) is being revised to require that all reports filed by authorized committees under section 104.5 be cumulative for the election cycle rather than for the calendar year.

New paragraph (k) is being added to ensure the accurate reporting of election cycle-to-date activity for those candidates who are in mid-election cycle on January 1, 2001, when these regulations take effect. While receipts and disbursements made between November 8, 2000 (the day after the general election) and December 31, 2000, will be reported in the year-to-date totals for 2000 in the post-general election report and the year-end report, under new paragraph (k) of 11 CFR 104.3, these amounts must also be included in the election cycle-to-date aggregation totals that are reported beginning in 2001. Similarly, some candidates for the U. S. Senate in 2002 and 2004 and possibly some Presidential candidates for the 2004 election may have two, three, four or

more years of previously reported receipts and disbursements. These amounts must also be included in the election-cycle-to-date figures reported on the first report covering financial activity occurring in 2001.

On the Detailed Summary Page of each report filed for the first election cycle in which these rules are in effect, election-cycle-to-date totals should be reported for each category of receipts (except itemized and unitemized contributions from individuals) and each category of disbursements. Please note that the Commission is creating a one-time worksheet to assist authorized committees in aggregating election-cycle-to-date data because this might require some authorized committees to aggregate several years of previously reported receipts and disbursements. However, the Commission is not making any changes to either the Detailed Summary Page, or the schedules of contributions or expenditures, that would necessitate the filing of amendments to reports covering pre-2001 financial activity.

The Commission received no comments on the proposed amendments to 11 CFR 104.3.

#### *Section 104.7 Best Efforts (2 U.S.C. 432(i))*

Under 11 CFR 104.7, treasurers are required to exercise best efforts to obtain, maintain and report certain identifying information for contributors whose total contributions exceed \$200 in a calendar year. An amendment to paragraph (b) of 11 CFR 104.7 revises the references to \$200 in a calendar year to \$200 in an election cycle with regard to contributions itemized by authorized committees. This revision is consistent with the changes to the regulations at 11 CFR 104.3 requiring authorized committees to itemize contributions from any contributor aggregating in excess of \$200 per election cycle. Paragraph (b) of 11 CFR 104.7 requires written solicitations to contain a clear statement requesting contributor information. The previous regulations gave two examples of clear statements. The Commission is adding two new examples at 11 CFR 104.7(b)(1)(i)(B) for authorized committees.

Paragraph (b)(3) of 11 CFR 104.7 requires political committees to disclose contributor information not supplied by the contributor if the political committees have the information in their records or reports filed within the same "two-year election cycle." Paragraph (b)(4)(ii) of 11 CFR 104.7 requires that if political committees file an amendment containing contributor information received after contributions

are disclosed, they must amend every report containing itemized contributions from those contributors for the "two-year election cycle." The Commission sought comments on possibly revising paragraphs (b)(3) and (b)(4)(ii) to require authorized committees to supply information found in reports filed within the entire election cycle and to amend all reports disclosing itemized contributions from the contributor during the election cycle. Such a revision would require authorized committees to maintain copies of records and reports for the entire cycle (two, four or six years for House, Presidential and Senate candidates, respectively). Since the FECA requires political committees to maintain records and reports for a period of three years (2 U.S.C. 432(d)), the Commission has decided not to revise paragraph (b)(3) and (b)(4)(ii). For purposes of further clarification, "two-year election cycle" means the most recent two years in the current election cycle.

The Commission received no comments on this section.

#### *Section 104.8 Uniform Reporting of Receipts*

Section 104.8(a) requires a political committee, if it knows an individual contributor's name has changed since an earlier contribution reported during the calendar year, to note the exact name or address previously used with the first reported contribution from that contributor subsequent to the name changes. A parenthetical is being added to note that an authorized committee is required to provide such information if it knows a contributor's name has changed within the election cycle.

A new parenthetical is being added to paragraph (b) of 11 CFR 104.8 to require authorized committees to aggregate contributions from an individual on an election cycle basis rather than on the calendar year basis.

The Commission received no comments on this section.

#### *Section 104.9 Uniform Reporting of Disbursements*

Paragraph (a) of 11 CFR 104.9 is being revised to require authorized committees to report certain identifying information for each person to whom disbursements totaling over \$200 are made within the election cycle, rather than within the calendar year, as previously required.

Revised paragraph (b) of 11 CFR 104.9 requires authorized committees to disclose certain identifying information about any recipient to whom an expenditures totaling over \$200 are made within the election cycle, rather

<sup>4</sup> While the amendment requires all disbursements including operating expenditures to be aggregated and reported on an election-cycle basis, it does not require that operating expenditures be itemized on an election-cycle basis. Thus, the effect of the amendment is that operating expenditures would be reported on the summary pages on an election-cycle basis and itemized on Schedule B on a calendar-year basis. On March 10, 2000, the Commission submitted to Congress a legislative recommendation that Congress amend the FECA by requiring operating expenditures to be itemized on an election cycle basis rather than on a per calendar year basis. The final rules proceed on the assumption that Congress will pass an amendment to the Act to correct this inconsistency prior to the January 1, 2001, effective date required by Public Law 106-58.

than for the calendar year, as was previously required.

The Commission received no comments on this section.

### Definition of Election Cycle

Under 11 CFR 100.3(b), an election cycle begins on the day after the general election for the office or seat that the candidate seeks and ends on the day of the next general election for that seat or office.<sup>5</sup> For example, for many candidates for the House of Representatives, the 2004 election cycle begins the day after the general election in 2002 and ends on the day of the general election in 2004. Please note that the length of the election cycle varies depending on the office sought. The election cycle is two years for candidates for the House of Representatives, six years for Senate candidates and four years for Presidential candidates.

For purposes of the contribution limits of 2 U.S.C. 441a and 11 CFR 110.1 and 110.2, contributions to candidates and their authorized committees are aggregated on per election basis. Contribution aggregation regulations at 11 CFR 110.1 and 110.2 state that post-election contributions can only be made to the extent the recipient political committee has net debts outstanding, and these contributions must be properly designated for the previous election. 11 CFR 110.1(b)(3)(i) and 110.2(b)(3)(i). Those regulations further require that any undesignated post-election contributions be applied to the donor's contribution limit for the next election in which the recipient will be a candidate. In *FEC v. Haley*,<sup>6</sup> the Ninth Circuit Court of Appeals upheld the Commission's aggregation regulations at 11 CFR 110.1, ruling that post-election loan guarantees for a loan used to retire general-election debt were contributions subject to the limits and aggregation rules in Part 110 of 11 CFR.<sup>7</sup>

In addition to the proposed rules, the NPRM also offered two alternatives approaches to defining *election cycle*, neither of which was included in the proposed rules.

<sup>5</sup> Please note that in the case of a runoff election after the general election, the election cycle would end on the day of the runoff election. Advisory Opinions 1993-2 and 1983-16.

<sup>6</sup> 852 F.2d 1111 (1988).

<sup>7</sup> At the time of the *Haley* loan guarantees in 1983, 11 CFR 110.1 stated that properly designated post-primary contributions were allowed only to the extent that the recipient committee had net debts outstanding. AO 1977-24 interpreted these rules to apply also to post-general election contributions. The regulations were clarified in a 1987 rulemaking. See Explanation and Justification for Rules on Contributions by persons other than multicandidate committees, 52 FR 761 (January 9, 1987).

*Alternative 1.* The first alternative was to add a new paragraph (c) to 11 CFR 104.1 stating that for reporting purposes only, authorized committees shall begin the "election cycle" on January 1 of the year following the general election for a seat or office and shall end the election cycle on December 31 of the calendar year in which the next general election for that seat or office is held (e.g., January 1, 2003, to December 31, 2004, for House candidates). This approach has the advantage of causing less change to reporting practices and avoiding the need to include election-cycle-to-date figures for two different election cycles in post-general election reports (or year-end reports where no post-general report is filed). While the Commission recognizes that advantage, it is not adopting this alternative because it creates a greater discrepancy in the contribution totals reported for the election cycle and the contribution totals that actually accrue to the election just held. Under this alternative, undesignated contributions received after the general election but before January 1 of the following year are reported in the election cycle to date totals for the general election that was just held, even though these contributions count toward the contribution limits for the next election. Additionally, this approach introduces a definition of election cycle into the regulations that is different than the one in 11 CFR 100.3(b), which relates to determining whether an individual is a candidate. The Commission received no comments on this alternative.

*Alternative 2.* Under the second alternative approach, for both reporting and contribution limit purposes, authorized committees would begin the election cycle on the twenty-first day after the general election for the seat or office the candidate is seeking (the day after the end of the post-general election reporting period) and end the election cycle on the twentieth day after the next general election for the seat or office the candidate is seeking (the day the post-general reporting period ends for that election). Under this alternative, both 11 CFR 100.3(b) (election cycle definition) and 11 CFR 104.3 (reporting) would need to be amended. In addition, the contribution limit regulations at 11 CFR 110.1 and 110.2 would need to be changed to modify the attribution date of undesignated contributions for a general election from election day to the twentieth day after the election.

Under this approach, the post-general election report covers only one election cycle. Nevertheless, for candidates who do not participate in the general election (and therefore who do not file a post-

general election report), the year-end report covers activity occurring both before the twentieth day after the election and after the twentieth day, and thus, spans two election cycles.

The Commission did not adopt Alternative 2 because it believes Congress did not intend to amend the contribution aggregation rules. Section 641 of Public Law 106-58 amended only 2 U.S.C. 434(b), "Contents or Reports." There is no evidence, either on the face of the statute or in its legislative history, indicating Congressional intent to alter the current regulations upheld in *Haley* (see discussion, *supra*) that contributions aggregate as of the date of the election. The Commission has concluded that the legislative intent was simply to change the basis for the contents of reports by authorized committees to provide better disclosure of financial activity from the beginning of the campaign to date. While neither *Haley* nor the lack of Congressional direction would prohibit the Commission from revising its contribution aggregation rules, the Commission has concluded that it is unnecessary and undesirable to alter those settled rules in this rulemaking. The Commission received no comments on this alternative.

### Changes to FEC Forms 3 and 3P

The Commission recognizes that the 1999 amendment to the FECA and the new regulations will necessitate several changes to both the paper and electronic FEC Form 3 (used by House and Senate candidates' authorized committees to report receipts and disbursements) and FEC Form 3P (used by Presidential candidates' authorized committees to report receipts and disbursements). While most of the changes to the forms will consist of renaming headings and redrafting certain instructions, Forms 3 and 3P for the post-general election report (and the year-end report, if no post-general election report was filed) will have to be substantively changed. Section 434(a)(2)(A)(ii) of the FECA and 11 CFR 104.5 require that political committees file post-general election reports covering the period from the 19th day before the general election to the twentieth day after the general election. Thus, the post-general election covers two election cycles. Similarly, two election cycles will be covered in the year-end report for candidates who did not participate in the most recent general election (and therefore did not file a post-general election report). The Commission sought comments as to the simplest and easiest way for political committees to report separately the financial activity for each cycle, given



that the activity occurred within the time period covered by the post-general election report or year-end report. The Commission received no comments on this issue. The Commission expects to transmit revised forms to Congress later this year.

#### **Certification of No Effect Pursuant to 5 U.S.C. 605(b) (Regulatory Flexibility Act)**

These final rules will not have a significant economic impact on a substantial number of small entities. The only small entities subject to these regulations are candidates for Federal office and their authorized committees. The rules implement statutory reporting requirements that Congress enacted to reduce inadvertent violations of the contribution limits. Therefore, there will be no significant economic impact on a substantial number of small entities.

#### **List of Subjects in 11 CFR Part 104**

Campaign funds, Political committees and parties, Reporting and recordkeeping requirements.

For the reasons set out in the preamble, subchapter A, chapter I of title 11 of the Code of Federal Regulations is amended as follows:

#### **PART 104—REPORTS BY POLITICAL COMMITTEES**

1. The authority citation for part 104 continues to read as follows:

**Authority:** 2 U.S.C. 431(1), 431(8), 431(9), 432(i), 434, 438(a)(8), 438(b), 439a.

2. Section 104.3 is amended by revising paragraph (a) introductory text, paragraph (a)(3) introductory text, paragraph (a)(4) introductory text, paragraphs (a)(4)(i), (v) and (vi), paragraph (b) introductory text, paragraph (b)(2) introductory text, paragraphs (b)(4)(i) and (vi), paragraph (c) introductory text, and paragraph (i), and by adding paragraph (k) to read as follows:

#### **§ 104.3 Contents of reports (2 U.S.C. 434(b), 439a).**

(a) *Reporting of Receipts.* Each report filed under § 104.1 shall disclose the total amount of receipts for the reporting period and for the calendar year (or for the election cycle, in the case of an authorized committee) and shall disclose the information set forth at paragraphs (a)(1) through (a)(4) of this section. The first report filed by a political committee shall also include all amounts received prior to becoming a political committee under § 100.5 of this chapter, even if such amounts were

not received during the current reporting period.

\* \* \* \* \*

(3) *Categories of receipts for authorized committees.* An authorized committee of a candidate for Federal office shall report the total amount of receipts received during the reporting period and, except for itemized and unitemized breakdowns, during the election cycle in each of the following categories:

\* \* \* \* \*

(4) *Itemization of receipts for all political committees including authorized and unauthorized committees.* The identification (as defined at § 100.12 of this chapter) of each contributor and the aggregate year-to-date (or aggregate election-cycle-to-date, in the case of an authorized committee) total for such contributor in each of the following categories shall be reported.

(i) Each person, other than any political committee, who makes a contribution to the reporting political committee during the reporting period, whose contribution or contributions aggregate in excess of \$200 per calendar year (or per election cycle in the case of an authorized committee), together with the date of receipt and amount of any such contributions, except that the reporting political committee may elect to report such information for contributors of lesser amount(s) on a separate schedule;

\* \* \* \* \*

(v) Each person who provides a rebate, refund or other offset to operating expenditures to the reporting political committee in an aggregate amount or value in excess of \$200 within the calendar year (or within the election cycle, in the case of an authorized committee), together with the date and amount of any such receipt; and

(vi) Each person who provides any dividend, interest, or other receipt to the reporting political committee in an aggregate value or amount in excess of \$200 within the calendar year (or within the election cycle, in the case of an authorized committee), together with the date and amount of any such receipt.

(b) *Reporting of disbursements.* Each report filed under § 104.1 shall disclose the total amount of all disbursements for the reporting period and for the calendar year (or for the election cycle, in the case of an authorized committee) and shall disclose the information set forth at paragraphs (b)(1) through (b)(4) of this section. The first report filed by a political committee shall also include

all amounts disbursed prior to becoming a political committee under § 100.5 of this chapter, even if such amounts were not disbursed during the current reporting period.

\* \* \* \* \*

(2) *Categories of disbursements for authorized committees.* An authorized committee of a candidate for Federal office shall report the total amount of disbursements made during the reporting period and, except for itemized and unitemized breakdowns, during the election cycle in each of the following categories:

\* \* \* \* \*

(4) \* \* \*

(i) Each person to whom an expenditure in an aggregate amount or value in excess of \$200 within the election cycle is made by the reporting authorized committee to meet the authorized committee's operating expenses, together with the date, amount and purpose of each expenditure.

\* \* \* \* \*

(vi) Each person who has received any disbursement(s) not otherwise disclosed under paragraph (b)(4) of this section to whom the aggregate amount or value of such disbursements exceeds \$200 within the election cycle, together with the date, amount, and purpose of any such disbursement.

(c) *Summary of contributions and operating expenditures.* Each report filed pursuant to § 104.1 shall disclose for both the reporting period and the calendar year (or the election cycle, in the case of the authorized committee):

\* \* \* \* \*

(i) *Cumulative reports.* The reports required to be filed under § 104.5 shall be cumulative for the calendar year (or for the election cycle, in the case of an authorized committee) to which they relate, but if there has been no change in a category reported in a previous report during that year (or during that election cycle, in the case of an authorized committee), only the amount thereof need be carried forward.

\* \* \* \* \*

(k) *Reporting Election Cycle Activity Occurring Prior to January 1, 2001.* The aggregate of each category of receipt listed in paragraph (a)(3) of this section, except those in paragraphs (a)(3)(i)(A) and (B) of this section, and for each category of disbursement listed in paragraph (b)(2) of this section shall include amounts received or disbursed on or after the day after the last general election for the seat or office for which the candidate is running through December 31, 2000.



acceptable and unacceptable purpose descriptions to be reported by authorized committees. Paragraph (B) requires authorized committees, when itemizing certain disbursements for which reimbursements are required, to provide a brief explanation of the activity for which reimbursement is required. These provisions have been in Title 11 of the **Code of Federal Regulations** since 1980 and 1995, respectively, and were not affected by the recent statutory changes to the election cycle reporting requirements.

#### Need for Correction

As published, the final rules inadvertently omit two paragraphs describing information to be reported by authorized committees of Federal candidates.

All committees must report the purpose of itemized disbursements (i.e., those disbursements aggregating in excess of \$200). Omitted paragraph (A) contains examples of suitably specific purpose descriptions as well as examples of those descriptions that are unacceptably vague. This paragraph is inconsistent with the reporting of rules for unauthorized committees (committees other than candidate committees) in 11 CFR 104.3(b)(3).

Omitted paragraph (B) is used in administering the "personal use" rules in 11 CFR 113.1. Federal candidates are barred from using campaign funds for personal benefit. Paragraph (B) requires authorized committees of Federal candidates itemizing disbursements for which partial or total reimbursement is required under 11 CFR 113.1(g)(1)(iii)(C) or (D) to provide a brief explanation of the activity for which the reimbursement is made.

Section 801 of Title 5 of the United States Code requires Federal agencies to submit regulations to Congress. These regulations were submitted to the Speaker of the House of Representatives and the President of the Senate on November 26, 2001.

#### Certification of No Effect Pursuant to 5 U.S.C. § 605(b) [Regulatory Flexibility Act]

This correction will not have significant economic impact on a substantial number of small entities. The basis of this certification is that this correction only requires political committees to once again add information to the reports they are required to file. These regulations were in 11 CFR since 1980 and 1995, respectively, before being inadvertently omitted in 2000.

#### List of Subjects in 11 CFR Part 104

Campaign funds, Political committees and parties, Reporting and recordkeeping requirements.

Accordingly, 11 CFR part 104 is corrected by making the following correcting amendment:

#### PART 104—REPORTS BY POLITICAL COMMITTEES

1. The authority citation for part 104 continues to read as follows:

**Authority:** 2 U.S.C. 431(1), 431(8), 431(9), 432(i), 434, 438(a)(8), 438(b), 439a.

#### § 104.3 Contents of reports (2 U.S.C. 434(b), 439a).

\* \* \* \* \*

2. In § 104.3 add the following paragraphs (b)(4)(i)(A) and (B):

(b) \* \* \*

(4) \* \* \*

(i) \* \* \*

(A) As used in this paragraph, *purpose* means a brief statement or description of why the disbursement was made. Examples of statements or descriptions which meet the requirements of this paragraph include the following: dinner expenses, media, salary, polling, travel, party fees, phone banks, travel expenses, travel expense reimbursement, and catering costs. However, statements or descriptions such as *advance*, *election day expenses*, *other expenses*, *expenses*, *expense reimbursement*, *miscellaneous*, *outside services*, *get-out-the-vote* and *voter registration* would not meet the requirements of this paragraph for reporting the purpose of an expenditure.

(B) In addition to reporting the purpose described in paragraph (b)(4)(i)(A) of this section, whenever an authorized committee itemizes a disbursement that is partially or entirely a personal use for which reimbursement is required under 11 CFR 113.1(g)(1)(ii)(C) or (D), it shall provide a brief explanation of the activity for which reimbursement is required.

\* \* \* \* \*

Dated: November 26, 2001.

**Danny L. McDonald,**  
Chairman, Federal Election Commission.  
[FR Doc. 01-29679 Filed 11-29-01; 8:45 am]  
**BILLING CODE 6715-01-P**

#### FEDERAL ELECTION COMMISSION

#### 11 CFR Part 111

#### [Notice 2001-18]

#### Extension to Administrative Fines

**AGENCY:** Federal Election Commission.

**ACTION:** Final rule; revision of the sunset date.

**SUMMARY:** The Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the expiration date in which the Federal Election Commission (hereinafter "the Commission") may assess civil money penalties for violations of the reporting requirements of section 434(a) of the Federal Election Campaign Act (hereinafter "the Act" or "FECA").

**DATES:** Effective on December 31, 2001.

**FOR FURTHER INFORMATION CONTACT:** Ms. Rosemary C. Smith, Assistant General Counsel, or Ms. Mai T. Dinh, Attorney, 999 E Street, NW., Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

#### SUPPLEMENTARY INFORMATION:

#### Explanation and Justification

Section 640 of the Treasury and General Government Appropriations Act, 2000, Pub. L. No. 106-58, 106th Cong., 113 Stat. 430, 476-77 (1999), amended § 309(a)(4) of the FECA, 2 U.S.C. 437g(a)(4), to provide for a modified enforcement process for violations of reporting requirements. Under § 437g(a)(4)(C) of the FECA, the Commission may assess a civil money penalty for violations of the reporting requirements of 2 U.S.C. 434(a). This authority, however, was to sunset on December 31, 2001. Pub. L. No. 106-58, 106th Cong., § 640(c). Recently, § 642 of the Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the sunset date to include all reports that cover activity between January 1, 2000, to December 31, 2003.

The Commission published final rules on May 19, 2000, to implement the amendment contained in the Treasury and General Government Appropriations Act, 2000. Section 111.30 of the regulations reflects the sunset provision of Pub. L. No. 106-58, 106th Cong., § 640(c). Therefore, the Commission is issuing this final rule to amend section 111.30 to extend the application of the administrative fine regulations, 11 CFR part 111, subpart B, to include all violations relating to reports that cover the period between January 1, 2000, to December 31, 2003.

The Commission is promulgating this final rule without notice or opportunity for comment because it falls under the "good cause" exemption of the Administrative Procedures Act, 5 U.S.C. 553(b)(B). The exemption allows

application as provided in that section. Such decision may be appealed by either the stowaway or the Service to the Board of Immigration Appeals. If a denial of the application for asylum and for withholding of removal becomes final, the alien shall be removed from the United States in accordance with section 235(a)(2) of the Act. If an approval of the application for asylum or for withholding of removal becomes final, the Service shall terminate removal proceedings under section 235(a)(2) of the Act.

Dated: November 27, 2000.

**Janet Reno,**

*Attorney General.*

[FR Doc. 00-30601 Filed 12-5-00; 8:45 am]

BILLING CODE 4410-10-P

## FEDERAL ELECTION COMMISSION

### 11 CFR Parts 100, 109 and 110

[Notice 2000-21]

#### General Public Political Communications Coordinated With Candidates and Party Committees; Independent Expenditures

**AGENCY:** Federal Election Commission.

**ACTION:** Final rule; transmittal of regulations to Congress.

**SUMMARY:** The Federal Election Commission is adopting new rules to address expenditures for coordinated communications that include clearly identified candidates, and that are paid for by persons other than candidates, candidates' authorized committees, and party committees. The rules address expenditures for communications made at the request or suggestion of a candidate, authorized committee or party committee; as well as those where any such person has exercised control or decision-making authority over the communication, or has engaged in substantial discussion or negotiation with those involved in creating, producing, distributing or paying for the communication. The Commission is also revising the definition of "independent expenditure," to conform with this new definition. Further changes to the rules on coordination between political party committees and their candidates are awaiting the outcome of a pending Supreme Court case. Additional information is provided in the supplementary information that follows.

**DATES:** Further action, including the announcement of an effective date, will be taken after these regulations have been before Congress for 30 legislative

days pursuant to 2 U.S.C. 438(d). A document announcing the effective date will be published in the **Federal Register**.

**FOR FURTHER INFORMATION CONTACT:** Ms. Rosemary C. Smith, Assistant General Counsel, or Ms. Rita A. Reimer, Attorney, 999 E Street, NW., Washington, D.C. 20463, (202) 694-1650 or (800) 424-9530 (toll free).

**SUPPLEMENTARY INFORMATION:** The Commission is issuing final rules at 11 CFR 100.23 that address coordinated communications that include clearly identified candidates, that are paid for by persons other than candidates, candidates' authorized committees, and party committees. The rules address communications made at the request or suggestion of a candidate, authorized committee or party committee; as well as those where a candidate, authorized committee, or party committee has exercised control or decision-making authority over the communication, or has engaged in substantial discussion or negotiation with those involved in creating, producing, distributing or paying for the communication. Other than the requirement that covered communications include a clearly identified candidate, the new rules contain no content standard. The Commission is also revising its rules at 11 CFR 100.16 and 109.1, which define "independent expenditure," to conform with this new definition; and making conforming amendments to 11 CFR 110.14, the section of the Commission's rules that deals with contributions to and expenditures by delegates and delegate committees.

Section 438(d) of Title 2, United States Code, requires that any rules or regulations prescribed by the Commission to carry out the provisions of Title 2 of the United States Code be transmitted to the Speaker of the House of Representatives and the President of the Senate 30 legislative days before they are finally promulgated. Because these rules were approved by the Commission on November 30, 2000, which is less than 30 legislative days before the adjournment of the 106th Congress, the Commission plans to transmit them to Congress on the first day of the 107th Congress, which will occur in January 2001. A Notice announcing the effective date of these rules will be published in the **Federal Register**.

#### Explanation and Justification

The Federal Election Campaign Act, 2 U.S.C. 431 *et seq.* ("FECA" or the "Act") prohibits corporations and labor organizations from using general

treasury funds to make contributions to a candidate for federal office. 2 U.S.C. 441b(a). It also imposes limits on the amount of money or in-kind contributions that other persons may contribute to federal campaigns. 2 U.S.C. 441a(a). Individuals and persons other than corporations, labor organizations, government contractors and foreign nationals can make independent expenditures in connection with federal campaigns. 11 CFR 110.4(a) and 115.2. Independent expenditures must be made without cooperation or consultation with any candidate, or any authorized committee or agent of a candidate; and they shall not be made in concert with, or at the request or suggestion of, any candidate, or any authorized committee or agent of a candidate. 2 U.S.C. 431(17).

Expenditures that are coordinated with a candidate or campaign are considered in-kind contributions. *Buckley v. Valeo*, 424 U.S. 1, 46-47 (1976) (footnote omitted) ("*Buckley*"); *Federal Election Commission v. The Christian Coalition*, 52 F.Supp.2d 45, 85 (D.D.C. 1999) ("*Christian Coalition*"). As such, they are subject to the limits and prohibitions set out in the Act. The Act defines "contribution" at 2 U.S.C. 431(8) 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.

The Commission is promulgating new rules at 11 CFR 100.23 that define the term *coordinated general public political communication*. They generally follow the standard articulated by the United States District Court for the District of Columbia in the *Christian Coalition* decision, *supra*. This decision sets out at length the standards to be used to determine whether expenditures for communications by unauthorized committees, advocacy groups and individuals are coordinated with candidates or qualify as independent expenditures.

#### A. History of the Rulemaking

This rulemaking was originally initiated to implement the Supreme Court's plurality opinion in *Colorado Republican Federal Campaign Committee v. Federal Election Commission*, 518 U.S. 604 (1996) (*Colorado I*) concerning the application of section 441a(d) of the FECA. In that decision, the Court concluded that political parties are capable of making independent expenditures on behalf of their candidates for federal office, and that it would violate the First Amendment to subject such

independent expenditures to the section 441a(d) expenditure limits. *Id.* at 2315.

Section 441a(d) permits national, state, and local committees of political parties to make limited general election campaign expenditures on behalf of their candidates, which are in addition to the amount they may contribute directly to those candidates. 2 U.S.C. 441a(d). These section 441a(d) expenditures are commonly referred to as "coordinated party expenditures." Prior to the *Colorado* case, it was presumed that party committees could not make expenditures independent of their candidates.

The Commission notes that not all coordinated expenditures constitute communications. In fact, party committees may use their coordinated expenditure limits to pay for many other types of expenses incurred by candidates, including staff costs, polling and other services.

Following the *Colorado I* Supreme Court decision, the Democratic Senatorial Campaign Committee and the Democratic Congressional Campaign Committee filed a Petition for Rulemaking urging the Commission to (1) repeal or amend 11 CFR 110.7(b)(4) to the extent that that paragraph prohibited national committees of political parties from making independent expenditures for congressional candidates; (2) repeal or amend 11 CFR Part 109 with respect to which expenditures qualify as "independent"; and (3) issue new rules to provide meaningful guidance regarding independent expenditures by the national committees of political parties. Although the Petition for Rulemaking urged changes only in the rules applicable to national committees of political parties, the Commission's rulemaking also sought comment on proposed changes to the provisions governing state and local party committees, as well as coordination by outside groups with either candidates or party committees.

In response to the *Colorado I* decision, the Commission promulgated a Final Rule on August 7, 1996 which repealed paragraph (b)(4) of section 110.7. *See* 61 F.R. 40961 (Aug. 7, 1996). That paragraph had provided that party committees could not make independent expenditures in connection with federal campaigns. On the same date, the Commission also published a Notice of Availability ("NOA") seeking comment on the remainder of the Petitioners' requests. *See* 61 F.R. 41036 (Aug. 7, 1996). No statements supporting or opposing the petition were received by the close of the comment period.

On May 5, 1997 the Commission published an NPRM in which it sought comments on proposed revisions to these regulations. 62 FR 24367 (May 5, 1997). Comments in response to this NPRM were received from Common Cause; the Democratic National Committee ("DNC"); the Democratic Senatorial Campaign Committee ("DSCC") and the Democratic Congressional Campaign Committee ("DCCC") (joint comment); the Internal Revenue Service ("IRS"); the National Republican Congressional Committee ("NRCC"); the National Republican Senatorial Committee ("NRSC"); the National Right to Life Committee; the Republican National Committee ("RNC"); and the United States Chamber of Commerce. On June 18, 1997, the Commission held a public hearing on this Notice, at which witnesses testified on behalf of Common Cause, the DNC, the DSCC and the DCCC, the National Right to Life Committee, the NRSC, and the RNC.

The IRS found no conflict with the Internal Revenue Code or that agency's regulations with regard to any Notice considered in the course of this rulemaking. All other comments received in connection with this rulemaking will be discussed *infra*.

The Commission subsequently decided to hold the 1997 rulemaking in abeyance until it received further direction from the courts. The coordinated spending limits were invalidated on constitutional grounds by the district court in *Colorado Republican Federal Campaign Committee v. Federal Election Commission*, 41 F. Supp. 2d 1197 (D. Colo. 1999) (*Colorado II*), on remand from the *Colorado I* Supreme Court decision. In May 2000, that decision was affirmed by the Court of Appeals for the Tenth Circuit. 213 F.3d 1221 (10th Cir. 2000). The Supreme Court has now agreed to review this decision. 2000 WL 1201886 (U.S. Oct. 10, 2000) (No. 00-191).

On December 16, 1998, the Commission published a new NPRM putting forth proposed amendments to its rules governing publicly financed presidential primary and general election candidates. 63 FR 69524 (Dec. 16, 1998). Issues concerning coordination between party committees and their presidential candidates, which had been raised in the earlier NPRM, were addressed in the public funding rulemaking. For example, the 1998 NPRM put forward narrative proposals regarding a content-based standard for coordinated communications made to the general public. It also sought comment on coordination between the

national committees of political parties and their presidential candidates with respect to poll results, media production, consultants, and employees whose services are intended to benefit the parties' eventual presidential nominees.

The Commission received seven written comments on coordinated expenditures in response to the 1998 NPRM. Commenters included the Brennan Center for Justice at New York University School of Law ("Brennan Center"); Common Cause and Democracy 21 (joint comment); the DNC; the James Madison Center for Free Speech; Perot '96; the RNC; and the law firm of Ryan, Phillips, Utrecht, & MacKinnon, and Patricia Fiori, Esq. (joint comment). The Commission subsequently reopened the comment period and held a public hearing on March 24, 1999, at which witnesses representing the DNC; the James Madison Center for Free Speech; the RNC; and Ryan, Phillips, Utrecht & MacKinnon presented testimony on coordination issues.

On November 3, 1999, the Commission promulgated new paragraph (d) of section 110.7, addressing pre-nomination coordinated expenditures. 64 FR 59606 (Nov. 3, 1999). The new paragraph states that party committees may make coordinated expenditures in connection with the general election campaign before their candidates have been nominated. It further states that all pre-nomination coordinated expenditures are subject to the section 441a(d) coordinated expenditure limitations, whether or not the candidate with whom they are coordinated receives the party's nomination. Please note that new § 110.7(d) applies to all federal elections. For additional information, see *Explanation and Justification for Section 110.7, Party Committee Coordinated Expenditures and Spending Limits (2 U.S.C. 441a(d))*, 64 FR 42579, 42580-81 (Aug. 5, 1999).

The Commission published the document that serves as the primary basis for these final rules, a Supplemental Notice of Proposed Rulemaking ("SNPRM") addressing general public political communications coordinated with candidates, on December 9, 1999. 64 FR 68951 (Dec. 9, 1999). The Commission received 15 comments in response to the SNPRM, from the Alliance for Justice; the American Federation of Labor-Congress of Industrial Organizations ("AFL-CIO"); the Brennan Center; The Coalition; Common Cause and Democracy 21 (joint comment); the DNC; the DSCC and DCCC (joint

comment); the First Amendment Project of the Americans Back in Charge Foundation; the IRS; the James Madison Center for Free Speech; J. B. Mixon, Jr.; the National Education Association; the NRSC; the RNC; and United States Senators Russell D. Feingold, John McCain, Carl Levin and Richard J. Durbin (joint comment). In addition, the Commission held a public hearing on the SNPRM on February 16, 2000, at which nine witnesses testified on behalf of the Alliance for Justice, the AFL-CIO, the Americans Back in Charge Foundation, the Brennan Center, The Coalition, the DNC, the DSCC and DCCC, the James Madison Center for Free Speech, and the RNC.

#### B. The Christian Coalition Decision

The *Christian Coalition* case arose out of an FEC enforcement action alleging coordination between the Christian Coalition and various federal campaigns in connection with the 1990, 1992, and 1994 elections, resulting in disbursements from the Coalition's general corporate treasury for voter guides, "get out the vote" activities, direct mailings and payments to speakers. The Christian Coalition characterized these activities as independent corporate speech; while the FEC alleged that, because of the varying degrees of interaction between the Christian Coalition and those candidates and their campaigns, the activities must be treated as in-kind contributions that violated the Act's contribution limits and/or prohibitions.

In setting out a working definition of "coordination," the *Christian Coalition* court explained that "the standard for coordination must be restrictive, limiting the universe of cases triggering potential enforcement actions to those situations in which the coordination is extensive enough to make the potential for corruption through legislative *quid pro quo* palpable without chilling protected contact between candidates and corporations and unions." 52 F.Supp.2d at 88-89. The court continued, "First Amendment clarity demands a definition of 'coordination' that provides the clearest possible guidance to candidates and constituents, while balancing the Government's compelling interest in preventing corruption of the electoral process with fundamental First Amendment rights to engage in political speech and political association." *Id.* at 91. In its opinion the district court referred to "expressive expenditures," as opposed to expenditures for other types of campaign support, and defined a "coordinated expressive expenditure" as "one for a communication made for

the purpose of influencing a federal election in which the spender is responsible for a substantial portion of the speech and for which the spender's choice of speech has been arrived at after coordination with the campaign." *Id.* at 85, n. 45.

The court went on to explain that "an expressive expenditure becomes 'coordinated,' where the candidate or her agents can exercise control over, or where there has been substantial discussion or negotiation between the campaign and the spender over a communication's: (1) Contents; (2) timing; (3) location, mode, or intended audience (e.g., choice between newspaper or radio advertisement); or (4) 'volume' (e.g., number of copies of printed materials or frequency of media spots). 'Substantial discussion or negotiation' is such that the candidate and spender emerge as partners or joint venturers in the expressive expenditure, but the candidate and spender need not be equal partners." *Id.* at 92. The court acknowledged that "a standard that requires 'substantial' anything leaves room for factual dispute," but reasoned that the standard reflects a reasonable balance between possibly chilling some protected speech and the need to protect against the "real dangers to the integrity of the electoral process" expressive expenditures may present. *Id.*

The district court then applied this standard to the challenged campaign activities. In most instances the court did not find coordination. For example, the court found no coordination between the Christian Coalition and the Bush-Quayle campaign in the preparation of voter guides in connection with the 1992 presidential campaign, explaining that, while the campaign was generally aware President Bush would compare favorably in the eyes of the target audience with the other candidates profiled in the guides, the campaign staff did not seek to discuss the issues that would be profiled or how they would be worded. Nor did they seek to influence the Coalition's decisions as to how many guides would be produced, and when and where they would be distributed. *Id.* at 93-95. Similarly, the fact that a Coalition official served as a volunteer in a 1994 House campaign and also made decisions as to where the Coalition's voter guides would be distributed in connection with that campaign did not amount to coordination where the official did not make his decisions based on any discussions or negotiations with the campaign for which he volunteered. *Id.* at 95-96. In contrast, the court found coordination where the Coalition

provided a Senate campaign consultant with a commercially valuable mailing list. *Id.* at 96. The Commission subsequently decided not to appeal the district court's decision.

#### C. Other Court Decisions

In *Clifton v. Federal Election Commission*, 114 F.3d 1309 (1st Cir. 1997), cert. denied, 118 S.Ct. 1036 (1998) ("*Clifton*"), the United States Court of Appeals for the First Circuit ruled that coordination in the context of voter guides "implied(s) some measure of collaboration beyond a mere inquiry as to the position taken by a candidate on an issue." 114 F.3d at 1311, citing *Buckley*, 424 U.S. at 46-47 and n. 53 (1976). The court invalidated those portions of the Commission's voter guide regulations at 11 CFR 114.4(c)(5)(i) and (ii)(C) that limit any contact with candidates to written inquiries and replies, and generally require all candidates for the same office to receive equal space and prominence in the guide. *Id.* at 1317. The court also invalidated the Commission's voting record rules at 11 CFR 114.4(c)(4) to the extent they could be read to prohibit mere inquiries to candidates. *Id.*<sup>1</sup> In *Federal Election Commission v. Public Citizen, Inc.*, 64 F.Supp.2d 1327 (N.D. Ga. 1999), a federal district court followed the *Clifton* "collaboration" language in holding that contacts between a public interest group and a candidate made in connection with an advertising campaign to defeat a candidate for the House of Representatives were not coordinated for FECA purposes. The Commission did not appeal that portion of the *Public Citizen* decision that addresses the coordination standard.

#### D. General Concerns Raised by Commenters

The commenters and witnesses raised several general points in connection with the SNPRM. Several noted that the FECA does not use the terms "coordinated" or "coordination" in discussing campaign contributions and expenditures. This regulation uses the single term "coordination" to encompass those expenditures described in 2 U.S.C. 441a(a)(7)(B)(i) as made "in cooperation, consultation, or

<sup>1</sup> On July 20, 1999, the Commission received a Petition for Rulemaking from the James Madison Center for Free Speech, on behalf of the Iowa Right to Life Committee, seeking repeal of the rules at 11 CFR 114.4(c)(4) and (c)(5) to reflect the *Clifton* decision. The Commission published an NOA on this petition on Aug. 25, 1999. 64 FR 46319 (Aug. 25, 1999). Further action on that petition, which is related to the issues addressed in this rulemaking, will be taken by the Commission after this rulemaking has been concluded.

concert with, or at the request or suggestion of, a candidate.” The statutory terms are not inherently clear, nor does the Act’s legislative history provide much guidance. Thus, these rules will fill what is largely a vacuum in this area. All of the commenters, regardless of the positions they espoused, asked the Commission to issue clear rules that provide the regulated community with sufficient guidance to easily understand which communications come within the definition.

One commenter, citing *Buckley*, 424 U.S. at 48 (1976), argued that the Commission was powerless to act in this area, because it had not shown that covered communications involved actual corruption between those making the communications in question and the recipient candidates. However, after the SNPRM was published, the Supreme Court’s decision in *Nixon v. Shrink Missouri Government PAC*, 120 S.Ct. 897 (2000) (*Shrink Missouri*) upheld the constitutionality of State contribution limits, which the Court said could be based, *inter alia*, on newspaper accounts that inferred the impropriety of large contributions. *Id.* at 907. While some commenters argued that the holding in *Shrink Missouri* is limited to non-federal contributions, others stated that, in their view, this decision vitiates the need for the Commission to find *quid pro quo* corruption in a particular case before taking action in this area. The Commission agrees with this latter view, that the holding in *Shrink Missouri* is applicable to federal contribution limits.

#### E. Content of Covered Communications

Several commenters urged the Commission to limit the definition of general public political communications to communications that contain “express advocacy” of the election or defeat of a clearly identified candidate, *i.e.*, those covered by the Commission’s definition of “express advocacy” as defined at 11 CFR 100.22(a). That paragraph requires the use of individual words or phrases that, in context, can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s). They argued that express advocacy is constitutionally required even for communications specifically requested by a candidate to benefit the candidate’s campaign. Other commenters, citing the definition of “independent expenditure” at 2 U.S.C. 431(17), *supra*, argued that any contact with a candidate or campaign should result in coordination.

Several commenters urged the Commission to limit the definition of

general public political communications to communications that refer to clearly identified candidates in their status as candidates, or otherwise refer to an election. They noted, for example, that Members of Congress run for office virtually full-time, and argued that communications that referred to them in passing should not be subject to this standard.

The *Buckley* Court emphasized the necessity of avoiding vague or overbroad regulation of political speech. 424 U.S. at 42–44, 77–80. In light of these constitutional concerns, the Commission’s goal in adopting § 100.23 is to establish a test that (1) provides reasonable certainty as to which communications between a person and a candidate or a party committee rise to the level of coordination; and (2) properly balances the Commission’s “interest in unearthing disguised contributions,” *Clifton*, 114 F.3d at 1315, with the right of the citizenry to engage in discussions about public issues with candidates. *Buckley*, 424 U.S. at 14.

The Commission is addressing the constitutional concerns raised in *Buckley* by creating a safe harbor for issue discussion. Section 100.23(d) makes it clear that a candidate’s or political party’s response to an inquiry regarding the candidate’s or party’s position on legislative or public policy issues will not suffice to establish coordination. In addition, the Commission’s new rules establish a “buffer zone” for protected speech by requiring that discussions or negotiations regarding certain aspects of a communication must be “substantial” and result in “collaboration or agreement” in order to rise to the level of coordination. See § 100.23(c)(2)(iii). At a minimum, this new rule is more protective of First Amendment rights than the standard it is replacing.

The Commission is not adopting any content standard as a part of these rules at this time. There were significant disagreements among commenters over what content standard, if any, should be adopted. There is a substantial argument that any of the content standards suggested could be under-inclusive in the context of coordination. Some advertising by campaigns, for instance, does not include express advocacy and does not refer specifically to candidates as candidates or state that they are running for election. Allowing candidates, campaigns and political parties to ask corporations, labor unions or other persons to sponsor that kind of advertising without limit or disclosure could “give short shrift to the government’s compelling interest in

preventing real and perceived corruption that can flow from large campaign contributions.” *Christian Coalition*, 52 F.Supp.2d at 88.

The argument that a communication must constitute express advocacy in order to fall within the definition of “expenditure,” 2 U.S.C. 431(9), in all circumstances (and thus be controlling for purposes of defining a “coordinated expenditure”) is not being addressed in this rulemaking. See *Republican National Committee v. Federal Election Commission*, 1:98CV1207 (June 25, 1998 D. D.C.) (slip op.), *aff’d*, No. 98–5263 (D.C. Cir. Nov. 6, 1998). The term “expenditure” includes any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office. Exceptions to this definition are set forth at section 431(9)(B).

A content element in the definition of coordination may be more useful in the context of political party communications coordinated with candidates, a topic which will be addressed in a subsequent phase of this rulemaking. In the party-candidate context the principal question could become how an expenditure is reported rather than how it is financed or whether it is reported at all. The Commission may revisit the issue of a content standard for all coordinated communications when it considers candidate-party coordination.

#### Section 100.16 Definition of “independent expenditure”

The Commission is amending the definition of independent expenditure in this section to track more closely the statutory definition of independent expenditure. See 2 U.S.C. 431(17). It is also adding a conforming amendment, to indicate that the meaning of the phrase “made with the cooperation of, or in consultation with, or in concert with, or at the request or suggestion of, a candidate or any agent or authorized committee of such candidate,” is now governed by 11 CFR 100.23, discussed *infra*, instead of former 11 CFR 109.1(b)(4), which has been repealed. Finally, a new cross reference to 11 CFR 109.1 alerts readers to the additional information on independent expenditures contained in that section.

#### Section 100.23 Coordinated General Public Political Communications

The Commission is adding a new section, 11 CFR 100.23, to its rules, to address expenditures for coordinated communications made for the purpose of influencing federal elections that are

paid for by persons other than candidates, candidates' authorized committees, and party committees. The Commission believes it is appropriate to place this language in a separate section of the rules to properly alert the regulated community of this standard.

New § 100.23 generally follows the language of the *Christian Coalition* decision, discussed above. The Commission is, however, using the phrase "expenditures for general public political communications" in place of "expressive expenditure," the term used by the *Christian Coalition* court, because these rules do not address the content standard analysis in *Christian Coalition*, and "expenditures for general public political communications" more precisely describes the types of communications covered by these rules. See discussion of § 100.23(c)(1), *infra*.

There was no consensus among the comments and witnesses as to whether the Commission should follow the approach set forth in *Christian Coalition*. Some favored this overall approach although they urged the Commission to limit coverage to communications that contained express advocacy. As explained above, the rules do not address this further limitation. Others opposed this approach, urging retention of a broad definition of coordination.

Although the final rules have been modified somewhat from those proposed in the SNPRM, the Commission continues to believe that the *Christian Coalition* court correctly decided which communications are "coordinated" in this context. While the court recognized that it was establishing a difficult standard to meet, the Commission believes the court correctly concluded that a high standard is required to safeguard protected core First Amendment rights.

#### *Section 100.23(a) Scope*

Paragraph (a)(1) of this section states that these new rules apply to expenditures for general public political communications paid for by separate segregated funds, nonconnected committees, individuals, or any other person except candidates, authorized committees, and party committees. Paragraph (a)(2) notes that coordinated party expenditures made on behalf of a candidate pursuant to 2 U.S.C. 441a(d) are governed by 11 CFR 110.7.

In the SNPRM, the Commission sought comments on whether the standard for coordination proposed in that document should be applied to political party expenditures for general public political communications that are coordinated with particular

candidates. All party committees that commented on the SNPRM argued that they should not be covered by these rules. They urged the Commission to wait until *Colorado II* has been decided before acting in that area, since that decision could have major ramifications for any rules that might have been adopted in the meantime.

In light of *Colorado II*, the Commission is not amending the rules in 11 CFR 110.7 governing coordinated expenditures between party committees and candidates at this point. The Commission expects that additional guidance will be forthcoming in that decision, at which time it will re-examine this aspect of the rulemaking.

#### *Section 100.23(b) Treatment of General Public Political Communications as Expenditures and Contributions*

As explained above, for purposes of the FECA, a coordinated expenditure is considered both an expenditure by the person making the expenditure and an in-kind contribution to the recipient candidate or political committee. Consistent with such treatment, paragraph (b) of § 100.23 states that any expenditure covered by these rules shall be treated as both an expenditure under 11 CFR 100.8(a) and an in-kind contribution under 11 CFR 100.7(a)(1)(iii). As such, it is subject to the contribution limits of 2 U.S.C. 441a and must be reported as both a contribution and an expenditure as required at 2 U.S.C. 434. Please note that the new rules apply not only to situations in which separate segregated funds and nonconnected committees coordinate their expenditures with candidates, but also where they coordinate with party committees, thus clarifying that party committees can themselves receive coordinated contributions.

#### *Section 100.23(c) Coordination With Candidates and Party Committees*

This paragraph contains the text of the coordination standard: it addresses what contact between a campaign and a person paying for a communication made in connection with that campaign is sufficient to bring that communication within the purview of these rules. Please note that the standards set forth in paragraphs (2)(i), (2)(ii) and (2)(iii) are alternatives. Communications that meet the standard established by any one of these paragraphs are considered coordinated general public political communications for purposes of these rules.

The SNPRM proposed alternative language for the introductory text of this paragraph. Both Alternatives,

designated Alternative 1-A and Alternative 1-B, stated that general public political communications would be considered coordinated if paid for by any person other than a candidate, the candidate's authorized committee, or a party committee, provided that the requirements set forth in paragraphs (c)(2)(i), (c)(2)(ii), or (c)(2)(iii) of this section, *infra*, were met. Alternative 1-B would have added an additional requirement before a communication be considered coordinated, namely that it be distributed primarily in the geographic area in which the candidate was running. Alternative 1-A omitted this geographical restriction.

The SNPRM explained that Alternative 1-B was intended to ensure that costs of national legislative campaigns that refer to clearly-identified candidates, and may be designed or endorsed by one or more of the named candidates, not be considered expenditures on behalf of those candidates' campaigns. The Commission noted, however, two concerns with Alternative 1-B: (1) The definition of "coordination" would exclude media broadcasts to several adjacent states; and (2) the definition of "coordination" would exclude communications disseminated in one state that solicit funds on behalf of a candidate running in another state, if contributors are asked to send their contributions directly to the candidate on whose behalf they are made.

One commenter pointed out that a geographic limit has nothing to do with the concept of coordination. No one addressed the Commission's concern that Alternative 1-B would allow persons to solicit contributions to be sent directly to candidates in another state, without these contributions being considered coordinated. The Commission is adopting Alternative 1-A, because the geographic restriction does not get at the question of whether the parties coordinated a communication.

Please note that, in the SNPRM, the requirement at paragraph (1) of this section that covered communications be paid for by any person other than the candidate, the candidate's authorized committee, or a party committee, was included as part of the introductory text. For clarity, the Commission has decided to place this language in a separate paragraph.

#### *Section 100.23(c)(2)(i) The "Request or Suggestion" Standard*

The Commission also sought comment on two alternatives of a provision, to be located in paragraph (c)(2)(i), which addressed

communications made at the request or suggestion of the candidate or campaign, and those authorized by a candidate or campaign. Alternative 2-A stated that coordination would occur when a communication is created, produced or distributed at the request or suggestion of, or when authorized by, a candidate, candidate's authorized committee, a party committee, or an agent of any of the foregoing. Alternative 2-B would have limited such coordination to those instances where the parties also discuss the content, timing, location, mode, intended audience, volume of distribution or frequency of placement of that communication, the result of which is collaboration or agreement.

One commenter urged the Commission to adopt Alternative 2-A, because it is consistent with the statutory language. Another found even Alternative 2-B to be overly broad. A party committee argued that the definition was overly broad as applied to party committees; however, as discussed above, that portion of the rulemaking has been held in abeyance pending the Supreme Court's decision in *Colorado II*.

The Commission is adopting an amended version of Alternative 2-A because it is more consistent with the FECA than Alternative 2-B. Section 441a(a)(7)(B)(i) states that "expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, \* \* \* shall be considered to be a contribution to such candidate." The new rule also reflects the following language in the *Christian Coalition* decision: "The fact that the candidate has requested or suggested that a spender engage in certain speech indicates that the speech is valuable to the candidate, giving such expenditures sufficient contribution-like qualities to fall within the Act's prohibition on contributions." 52 F.Supp.2d at 91. The Commission has accordingly decided to adopt an amended version of Alternative 2-A, so that a communication made at the request or suggestion of a candidate will be considered to be coordinated with that candidate, regardless of whether any of the further contacts that would have been required by Alternative 2-B took place. The Commission emphasizes that this regulation encompasses only requests or suggestions for communications to the general public. Thus, a general appeal for support would clearly not fall within the scope of this regulation.

The proposed rules indicated that general public political communications

authorized by candidates or party committees would be considered to be coordinated. The final coordination rules do not cover authorized communications, because these expenditures are already in-kind contributions to the candidates or party committees under 11 CFR 100.7(a)(1)(iii), and thus are not mentioned in the statutory definition of "independent expenditure" at 2 U.S.C. 431(17). Thus, if these communications contain express advocacy or solicit contributions, they must state who paid for them, and if applicable, that they are authorized by the candidate or the candidate's committee. See 11 CFR 110.11(a)(1).

The SNPRM sought comments on a hypothetical in which, shortly before an election, a candidate complained to a supporter that no one had publicized various problems in the personal life of his opponent. The supporter then ran such advertisements. Most of those who commented on this hypothetical thought this hypothetical should fall within the "request or suggestion" language. However, some witnesses said that it would not be considered coordinated under either Alternative 2-A or 2-B, and urged the Commission to revise the proposed regulation to ensure that such communications would in fact be considered coordinated. The Commission notes that this hypothetical turns on the precise language used, which would be needed to determine if in fact the candidate requested or suggested that the supporter run the advertisements in question. If the candidate made no request or suggestion, the communication would not be coordinated for purposes of these rules.

In determining whether a particular statement by a candidate or committee constitutes an appeal for an in-kind contribution in the form of a general public political communication, the Commission will consider both whether the requested action appears to be for the purpose of influencing a Federal election and the specificity of the request or suggestion. Such determinations would turn on the same factors addressed specifically in the "substantial discussion" standard, *infra*, with the principal difference being that a request or suggestion could be made by a candidate, authorized committee or party committee without any negotiation or immediate response from an outside group. If such a request or suggestion indicated that a communication with specified content would be valuable or important to a candidate or committee, then payments

for the communication would constitute in-kind contributions.

One commenter proposed an additional hypothetical, in which a candidate's campaign committee chose to target only urban areas with campaign advertisements because it could not afford to cover the entire State. The director of a rural Political Action Committee ("PAC") later met the campaign manager and asked whether the campaign would be running ads in rural areas. Told that it would not be, due to lack of money, the rural PAC paid for and distributed the ads. The Commission notes that this mailing would be covered by 11 CFR 109.1(d)(1), part of the Commission's definition of independent expenditures, which states that the financing or dissemination, distribution, or republication of any campaign materials prepared by a candidate, campaign committee or their authorized agent is a contribution by the person making the expenditure, but not an expenditure by the candidate or committee unless coordination is present. See also 11 CFR 100.7(a)(1)(iii).

#### *Section 100.23(c)(2)(ii) The "Control or Decision-Making" Standard*

Paragraph (c)(2)(ii) states that communications are coordinated if the candidate or the candidate's agent, or a party committee or its agent, has exercised control or decision-making authority over the content, timing, location, mode, intended audience, volume of distribution, or frequency of placement of the communication. This standard is based on the *Christian Coalition* definition, 52 F.Supp.2d at 92; and it, too, would turn on the specific actions involved in each case. The commenters did not focus extensively on this portion of the proposed definition.

#### *Section 100.23(c)(2)(iii) The "Substantial Discussion or Negotiation" Standard*

Under 11 CFR 100.23, a general public political communication is considered coordinated if it is made after substantial discussion or negotiation between the creator, producer or distributor of the communication, or person paying for the communication, and a candidate, candidate's authorized committee or a party committee, regarding the content, timing, location, mode, intended audience, volume of distribution or frequency of placement of that communication, the result of which is collaboration or agreement. The paragraph further provides that substantial discussion or negotiation



can be evidenced by one or more meetings, conversations or conferences regarding the value or importance of that communication for a particular election.

Some commenters expressed uncertainty about the scope of "substantial," which admittedly "leaves room for factual dispute." *Christian Coalition*, 52 F.Supp.2d at 92. By including the word "substantial," the Commission intends to make clear that whether or not "discussions or negotiations" satisfy the requirements of § 100.23(c)(2)(iii) will depend not on their frequency but on their substance. The "substance" must go beyond protected issue discussion to specific information about how to communicate an issue in a way that is valuable or important for the campaign. The Commission has concluded that when the topic of discussion turns from the candidate's views on a political issue to the candidate's views on how to communicate that issue, there is far greater likelihood of collaboration. Thus, numerous discussions with a campaign about a complex or controversial public issue would not be considered "substantial" for the purposes of paragraph (c)(2)(iii), but a brief discussion as to how to phrase an issue, or as to which issues to emphasize, could be considered "substantial."

The word "substantial" applies not only to discussions about the content of a communication, but also to discussions about the timing, location, mode, intended audience, volume of distribution or frequency of placement of a communication. In those circumstances, "substantial" is meant to exclude discussions that do not include enough specific information for collaboration or agreement to occur. For example, if a person states that he is planning to pay for a communication "soon," or to run the ad "on TV," without further probing from the campaign, this would not be considered "substantial."

The Commission recognizes, as did the *Christian Coalition* court, that use of the term "substantial" means that determinations involving this standard will likely be fact-specific. 52 F.Supp.2d at 92. Those seeking additional guidance as to the application of this standard to specific facts and circumstances are encouraged to make use of the Commission's advisory opinion process. See 2 U.S.C. 437f and 11 CFR Part 112.

#### Section 100.23(d) Exception

Consistent with *Buckley*, *Christian Coalition*, and *Clifton*, paragraph (d) of

new section 100.23 provides that a candidate's or political party's response to an inquiry regarding the candidate's or the party's position on legislative or public policy issues does not alone make the communication coordinated.

Several commenters urged the Commission to broaden this exception to include, for example, public policy announcements or communications disseminated as part of a public policy debate; and legislative lobbying campaigns, including grass roots lobbying. While the Commission is generally sympathetic to these concerns, it can be difficult to distinguish between lobbying activities and electoral campaigning. As the *Buckley* Court explained, "(T)he distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application." 424 U.S. at 42. Further, some of these communications may have components that could trigger application of these rules. Thus the Commission is not enacting the blanket exception recommended by these commenters. However, the Commission stresses that such contacts, while not receiving a blanket exception, do not necessarily result in coordination. The test of 11 CFR 100.23 (c) must still be met.

#### Section 100.23(e) Definitions

This paragraph defines the terms "general public political communications," "clearly identified," and "agent" for purposes of these rules. The term "general public political communications" includes those made through a broadcasting station, including a cable television operator; newspaper; magazine; outdoor advertising facility; mailing or any electronic medium, including over the Internet or on a web site. Including cable television broadcasts is consistent with the Commission's candidate debate regulations at 11 CFR 110.13(a)(2), while including communications made over the Internet reflects the expanding role of that medium in federal campaigns.

The definition is limited to those communications having an intended audience of over one hundred people. The exclusion of communications with an intended audience of one hundred people or fewer mirrors the Commission's disclaimer rules at 11 CFR 110.11(a)(3), which exempt from the disclaimer requirements direct mailings of one hundred pieces or less.

The term "general public political communication" is similar to the term "general public political advertising," which appears in three places in the Act

and in several sections of the regulations. The latter term has similar and generally consistent meanings in the Act and the Commission's rules. For example, the definitions of "contribution" and "expenditure" at 2 U.S.C. 431(8)(B)(v) and 431(9)(B)(iv) respectively refer to "broadcasting stations, newspapers, magazines, or similar types of general public political advertising." Section 441d(a) of the Act, which addresses communications that require a disclaimer, includes the same list and adds outdoor advertising facilities and direct mailings. The corresponding rules are found at 11 CFR 100.7(b)(9) (definition of "contribution"), 100.8(b)(10) (definition of "expenditure"), and 110.11(a)(1) (communications requiring disclaimers). The Commission therefore believes this term is preferable to "expressive communications," the term used in the *Christian Coalition* decision.

The Commission sought comments on a hypothetical in which a Savings and Loan League runs public service announcements intended to reinforce the public's confidence in the safety of deposits in savings and loan institutions. The announcements, which are run in January of an election year, feature a U.S. Senator who is a candidate for reelection. The commenters who discussed this hypothetical argued that the announcements should not be considered coordinated general public political communications, both because of the timing of the announcements, early in an election year, and because they had no electoral content. Although the Commission is not including a specific time period prior to an election in the text of the new rules, timing is an element of coordination in 11 CFR 100.23(c)(2)(ii) and (iii). The *Christian Coalition* decision supports the idea that the timing of a communication is one aspect of whether it is coordinated with a campaign. *Christian Coalition*, 52 F.Supp. 3d at 92. However, as discussed above, the Commission does not believe that the lack of electoral content is controlling.

This is another situation that would turn on the specific facts. See discussion of the first hypothetical discussed in connection with paragraph (c)(2)(i), *supra*.

#### Section 100.23(e)(2) Definition of "Clearly Identified"

The new rules at 11 CFR 100.23(b) limit their coverage to communications that include a "clearly identified candidate." Paragraph (e)(2) of § 100.23 explains that the term "clearly identified candidate" has the same



meaning as that in 11 CFR 100.17, which is based on 2 U.S.C. 431(18). Thus, it includes communications where the candidate's name, nickname, photograph, or drawing appears, or the identity of the candidate is otherwise apparent through an unambiguous reference such as "the President," "your Congressman," or "the incumbent," or through an unambiguous reference to his or her status as a candidate such as "the Democratic Presidential nominee" or "the Republican candidate for Senate in the State of Georgia."

*Section 100.23(e)(3) Definition of "Agent"*

This paragraph notes that the definition of "agent" for purposes of these new rules is identical to that found at 11 CFR 109.1(b)(5), part of the rules defining independent expenditures. The term "agent" in this context means any person who has actual oral or written authority, either express or implied, to make or to authorize the making of expenditures on behalf of a candidate; or any person who has been placed in a position within the campaign organization where it would reasonably appear that in the ordinary course of campaign-related activities he or she may authorize expenditures. The Commission is including this cross reference in 11 CFR 100.23 to clarify that the term has the same meaning in the context of coordinated general public political communications.

*Section 109.1 Independent Expenditures*

In its 1997 NPRM, the Commission sought comment on several proposed revisions to this section, which defines the term "independent expenditure." The commenters and witnesses who addressed this issue at the Commission's 1997 public hearing had equally wide-ranging views this issue. However, those events took place prior to the *Christian Coalition* decision, which the Commission has determined should serve as the basis for this definition.

The Commission is amending the definition of "independent expenditure" in paragraph (a) to track more closely the statutory definition of independent expenditure. See 2 U.S.C. 431(17). In addition, the § 109.1(a) Commission has included a cross-reference 11 CFR 100.23, to indicate that the meaning of the phrase "made with the cooperation of, or in consultation with, or in concert with, or at the request or suggestion of, a candidate or any agent of authorized committee of such candidate," is now clarified by § 100.23, instead of by former paragraph (b)(4) of § 109.1. The Commission is

deleting paragraph (b)(4) because the standards for coordination set forth in that section were overbroad. See *Christian Coalition*, 52 F.Supp. at 90.

Former § 109.1(b)(4) explained what was meant by the phrase, "made with the cooperation or with the prior consent of, or in consultation with, or at the request or suggestion of, a candidate, or any agent, or authorized committee of the candidate." It indicated that this covered "any arrangement, coordination, or direction by the candidate or his or her agent prior to the publication, distribution, display, or broadcast of the communication." This phrase has been clarified, consistent with the *Christian Coalition* decision, and moved to new 11 CFR 100.23(c)(2).

Former paragraph (b)(4) also addressed contacts between the campaign and the person making the expenditure. For example, it included, at former paragraph (b)(4)(i)(A), a presumption that coordination applied to expenditures "based on information about the candidate's plans, projects, or needs provided to the expending person by the candidate, or by the candidate's agents, with a view toward having an expenditure made." The *Christian Coalition* court, likening this regulation to an "insider trading" standard, held it to be overbroad. 52 F.Supp. 2d at 89–91. The Commission is accordingly revising this paragraph to explain that a communication is "made with the cooperation of, or in consultation with, or at the request or suggestion of, a candidate or any agent or authorized committee of such candidate" if it is a coordinated general public political communication under 11 CFR 100.23.

*Section 110.14 Contributions To and Expenditures By Delegates and Delegate Committees*

This section of the Commission's rules sets forth the prohibitions, limitations and reporting requirements under the Act applicable to all levels of a delegate selection process. Paragraphs (f)(2)(i), (f)(2)(ii), (f)(3)(iii), (j)(2)(i), (j)(2)(ii), and (j)(3)(iii) address independent expenditures and in-kind contributions. The Commission is making conforming amendments to these paragraphs to reflect new 11 CFR 100.23 and revised 11 CFR 109.1.

*Advisory Opinions Superseded*

The Commission has in the past issued Advisory Opinions ("AO") that employed a broader definition of "coordination" than is contained in these new rules. Many of these AOs addressed the "insider trading" situation in which a campaign employee later became involved, or sought to

become involved, with an entity that wished to make independent expenditures. This prohibition was found to be overly broad by the *Christian Coalition* court. See discussion of revised 11 CFR 109.1(b)(4), *supra*, which has been rewritten to reflect that aspect of the decision. The following AOs are superseded, to the extent they conflict with these new rules: AOs 1999–17, 1998–22, 1996–1, 1993–18, 1982–20, 1980–116, 1979–80.

**Certification of No Effect Pursuant to 5 U.S.C. 605(b) [Regulatory Flexibility Act]**

The Commission certifies that these rules will not have a significant economic impact on a substantial number of small entities. The basis for this certification is that the rules follow court decisions that expand the definition of certain coordinated communications made in support of or in opposition to clearly identified federal candidates. The rules also permit, but do not require, small entities to make independent expenditures. Therefore, there will be no significant economic impact on a substantial number of small entities.

**List of Subjects**

*11 CFR Part 100*

Elections.

*11 CFR Part 109*

Elections, Reporting and recordkeeping requirements.

*11 CFR Part 110*

Campaign funds, Political committees and parties.

For the reasons set out in the preamble, Subchapter A, Chapter I of title 11 of the *Code of Federal Regulations* is amended to read as follows:

**PART 100—SCOPE AND DEFINITIONS (2 U.S.C. 431)**

1. The authority citation for Part 100 continues to read as follows:

**Authority:** 2 U.S.C. 431, 434(a)(11), and 438(a)(8).

2. Section 100.16 is revised to read as follows:

**§ 100.16 Independent expenditure (2 U.S.C. 431(17)).**

The term *independent expenditure* means an expenditure by a person for a communication expressly advocating the election or defeat of a clearly identified candidate that is not made with the cooperation of or in consultation with, or in concert with, or

acceptable and unacceptable purpose descriptions to be reported by authorized committees. Paragraph (B) requires authorized committees, when itemizing certain disbursements for which reimbursements are required, to provide a brief explanation of the activity for which reimbursement is required. These provisions have been in Title 11 of the **Code of Federal Regulations** since 1980 and 1995, respectively, and were not affected by the recent statutory changes to the election cycle reporting requirements.

#### Need for Correction

As published, the final rules inadvertently omit two paragraphs describing information to be reported by authorized committees of Federal candidates.

All committees must report the purpose of itemized disbursements (i.e., those disbursements aggregating in excess of \$200). Omitted paragraph (A) contains examples of suitably specific purpose descriptions as well as examples of those descriptions that are unacceptably vague. This paragraph is inconsistent with the reporting of rules for unauthorized committees (committees other than candidate committees) in 11 CFR 104.3(b)(3).

Omitted paragraph (B) is used in administering the "personal use" rules in 11 CFR 113.1. Federal candidates are barred from using campaign funds for personal benefit. Paragraph (B) requires authorized committees of Federal candidates itemizing disbursements for which partial or total reimbursement is required under 11 CFR 113.1(g)(1)(iii)(C) or (D) to provide a brief explanation of the activity for which the reimbursement is made.

Section 801 of Title 5 of the United States Code requires Federal agencies to submit regulations to Congress. These regulations were submitted to the Speaker of the House of Representatives and the President of the Senate on November 26, 2001.

#### Certification of No Effect Pursuant to 5 U.S.C. § 605(b) [Regulatory Flexibility Act]

This correction will not have significant economic impact on a substantial number of small entities. The basis of this certification is that this correction only requires political committees to once again add information to the reports they are required to file. These regulations were in 11 CFR since 1980 and 1995, respectively, before being inadvertently omitted in 2000.

#### List of Subjects in 11 CFR Part 104

Campaign funds, Political committees and parties, Reporting and recordkeeping requirements.

Accordingly, 11 CFR part 104 is corrected by making the following correcting amendment:

#### PART 104—REPORTS BY POLITICAL COMMITTEES

1. The authority citation for part 104 continues to read as follows:

**Authority:** 2 U.S.C. 431(1), 431(8), 431(9), 432(i), 434, 438(a)(8), 438(b), 439a.

#### § 104.3 Contents of reports (2 U.S.C. 434(b), 439a).

\* \* \* \* \*

2. In § 104.3 add the following paragraphs (b)(4)(i)(A) and (B):

(b) \* \* \*

(4) \* \* \*

(i) \* \* \*

(A) As used in this paragraph, *purpose* means a brief statement or description of why the disbursement was made. Examples of statements or descriptions which meet the requirements of this paragraph include the following: dinner expenses, media, salary, polling, travel, party fees, phone banks, travel expenses, travel expense reimbursement, and catering costs. However, statements or descriptions such as *advance*, *election day expenses*, *other expenses*, *expenses*, *expense reimbursement*, *miscellaneous*, *outside services*, *get-out-the-vote* and *voter registration* would not meet the requirements of this paragraph for reporting the purpose of an expenditure.

(B) In addition to reporting the purpose described in paragraph (b)(4)(i)(A) of this section, whenever an authorized committee itemizes a disbursement that is partially or entirely a personal use for which reimbursement is required under 11 CFR 113.1(g)(1)(ii)(C) or (D), it shall provide a brief explanation of the activity for which reimbursement is required.

\* \* \* \* \*

Dated: November 26, 2001.

**Danny L. McDonald,**  
Chairman, Federal Election Commission.  
[FR Doc. 01-29679 Filed 11-29-01; 8:45 am]  
**BILLING CODE 6715-01-P**

#### FEDERAL ELECTION COMMISSION

#### 11 CFR Part 111

#### [Notice 2001-18]

#### Extension to Administrative Fines

**AGENCY:** Federal Election Commission.

**ACTION:** Final rule; revision of the sunset date.

**SUMMARY:** The Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the expiration date in which the Federal Election Commission (hereinafter "the Commission") may assess civil money penalties for violations of the reporting requirements of section 434(a) of the Federal Election Campaign Act (hereinafter "the Act" or "FECA").

**DATES:** Effective on December 31, 2001.

**FOR FURTHER INFORMATION CONTACT:** Ms. Rosemary C. Smith, Assistant General Counsel, or Ms. Mai T. Dinh, Attorney, 999 E Street, NW., Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

#### SUPPLEMENTARY INFORMATION:

#### Explanation and Justification

Section 640 of the Treasury and General Government Appropriations Act, 2000, Pub. L. No. 106-58, 106th Cong., 113 Stat. 430, 476-77 (1999), amended § 309(a)(4) of the FECA, 2 U.S.C. 437g(a)(4), to provide for a modified enforcement process for violations of reporting requirements. Under § 437g(a)(4)(C) of the FECA, the Commission may assess a civil money penalty for violations of the reporting requirements of 2 U.S.C. 434(a). This authority, however, was to sunset on December 31, 2001. Pub. L. No. 106-58, 106th Cong., § 640(c). Recently, § 642 of the Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the sunset date to include all reports that cover activity between January 1, 2000, to December 31, 2003.

The Commission published final rules on May 19, 2000, to implement the amendment contained in the Treasury and General Government Appropriations Act, 2000. Section 111.30 of the regulations reflects the sunset provision of Pub. L. No. 106-58, 106th Cong., § 640(c). Therefore, the Commission is issuing this final rule to amend section 111.30 to extend the application of the administrative fine regulations, 11 CFR part 111, subpart B, to include all violations relating to reports that cover the period between January 1, 2000, to December 31, 2003.

The Commission is promulgating this final rule without notice or opportunity for comment because it falls under the "good cause" exemption of the Administrative Procedures Act, 5 U.S.C. 553(b)(B). The exemption allows

The Committee developed the \$0.025 assessment rate recommendation by considering the 2001–2002 budget and crop estimate, as well as the relatively small size of its monetary reserve.

Assessment income for the fiscal period should approximate \$79,700 based on estimated fresh Bartlett pear shipments of 3,188,000 standard boxes, which is adequate to cover budgeted expenses. Funds in the reserve (approximately \$18,443) will be kept within the maximum permitted by the order of approximately one fiscal period's operational expenses (§ 931.42).

The Committee considered alternative levels of assessment but, considering the current relatively low level of funding in the monetary reserve, determined that increasing the assessment rate to \$0.025 per standard box to be appropriate. The Committee believes that an assessment rate of more than \$0.025 per standard box would have generated income in excess of that needed to adequately administer the program, and if left at the \$0.02 rate, or reduced, would have been inadequate to administer the program.

A review of historical information and preliminary information pertaining to the upcoming crop indicates that the producer price for the 2001–2002 marketing season could average about \$11.61 per standard box of fresh Bartlett pears handled. Therefore, the Committee's estimated assessment revenue for the 2001–2002 fiscal period as a percentage of total producer revenue should be approximately 0.215 percent.

This action increases the assessment obligation imposed on handlers. While assessments impose some additional costs on handlers, the costs are minimal and uniform on all handlers. Some of the additional costs may be passed on to producers. However, these costs are offset by the benefits derived by the operation of the order. In addition, the Committee's meeting was widely publicized throughout the fresh Bartlett pear industry and all interested persons were invited to attend the meeting and participate in Committee deliberations on all issues. Like all Committee meetings, the May 31, 2001, meeting was a public meeting and all entities, both large and small, were able to express views on this issue. Furthermore, interested persons were invited to submit information on the regulatory and informational impacts of this action on small businesses.

This rule imposes no additional reporting or recordkeeping requirements on either small or large fresh Bartlett pear handlers. As with all Federal marketing order programs, reports and

forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies.

The USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this rule.

A proposed rule concerning this action was published in the **Federal Register** on September 21, 2001 (66 FR 48628). A copy of the proposed rule was provided to the Committee office which in turn made copies available to producers and handlers. Furthermore, the Office of the Federal Register and the USDA made a copy available on the Internet. A 30-day comment period ending October 22, 2001, was provided for interested persons to respond to the proposal. No comments were received.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: <http://www.ams.usda.gov/fv/moab.html>. Any questions about the compliance guide should be sent to Jay Guerber at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

After consideration of all relevant material presented, including the information and recommendation submitted by the Committee and other available information, it is hereby found that this rule, as hereinafter set forth, will tend to effectuate the declared policy of the Act.

Pursuant to 5 U.S.C. 553, it is also found and determined that good cause exists for not postponing the effective date of this rule until 30 days after publication in the **Federal Register** because: (1) Handlers are already receiving 2001–2002 fiscal period pears from producers; (2) the 2001–2002 fiscal period began on July 1, 2001, and the order requires that the rate of assessment for each fiscal period apply to all assessable Bartlett pears handled during such period; and (3) handlers are aware of this action which was unanimously recommended by the Committee at a public meeting. Furthermore, a 30-day comment period was provided for in the proposed rule and no comments were received.

#### List of Subjects in 7 CFR Part 931

Marketing agreements, Pears, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR part 931 is amended as follows:

#### PART 931—FRESH BARTLETT PEARS GROWN IN OREGON AND WASHINGTON

1. The authority citation for 7 CFR part 931 continues to read as follows:

**Authority:** 7 U.S.C. 601–674.

2. Section 931.231 is revised to read as follows:

#### § 931.231 Assessment rate.

On and after July 1, 2001, an assessment rate of \$0.025 per western standard pear box is established for the Northwest Fresh Bartlett Pear Marketing Committee.

Dated: November 26, 2001.

**A.J. Yates,**

*Administrator, Agricultural Marketing Service.*

[FR Doc. 01–29704 Filed 11–29–01; 8:45 am]

**BILLING CODE 3410–02–P**

#### FEDERAL ELECTION COMMISSION

#### 11 CFR Part 104

[Notice 2001–17]

#### Technical Amendments to Election Cycle Reporting

**AGENCY:** Federal Election Commission.

**ACTION:** Correcting amendments.

**SUMMARY:** This document contains corrections to the final regulations regarding election cycle reporting by the authorized committees of candidates for Federal office, which were published in the **Federal Register** of Tuesday, July 11, 2000, (65 FR 42619). The corrections reinstate two paragraphs of 11 CFR 104.3(b)(4)(i) that were inadvertently omitted when the election cycle reporting regulations were published. The two omitted paragraphs contain instructions for authorized committees when reporting expenditures.

**DATES:** Effective on December 31, 2001.

**FOR FURTHER INFORMATION CONTACT:** Ms. Rosemary C. Smith, Assistant General Counsel, or Cheryl Fowle, Attorney, 999 E Street, NW., Washington, DC 20463, (202) 694–1650 or (800) 424–9530.

#### SUPPLEMENTARY INFORMATION:

#### Background

The final regulations that are the subject of these corrections superseded 11 CFR 104.3(b)(4)(i) as of January 1, 2001, and applied to authorized committees of Federal candidates. In those final regulations, paragraphs (A) and (B) of 11 CFR 104.3(b)(4)(i) were inadvertently deleted. Paragraph (A) defines “purpose” of disbursement as it is reported and states examples of

acceptable and unacceptable purpose descriptions to be reported by authorized committees. Paragraph (B) requires authorized committees, when itemizing certain disbursements for which reimbursements are required, to provide a brief explanation of the activity for which reimbursement is required. These provisions have been in Title 11 of the **Code of Federal Regulations** since 1980 and 1995, respectively, and were not affected by the recent statutory changes to the election cycle reporting requirements.

#### Need for Correction

As published, the final rules inadvertently omit two paragraphs describing information to be reported by authorized committees of Federal candidates.

All committees must report the purpose of itemized disbursements (i.e., those disbursements aggregating in excess of \$200). Omitted paragraph (A) contains examples of suitably specific purpose descriptions as well as examples of those descriptions that are unacceptably vague. This paragraph is inconsistent with the reporting of rules for unauthorized committees (committees other than candidate committees) in 11 CFR 104.3(b)(3).

Omitted paragraph (B) is used in administering the "personal use" rules in 11 CFR 113.1. Federal candidates are barred from using campaign funds for personal benefit. Paragraph (B) requires authorized committees of Federal candidates itemizing disbursements for which partial or total reimbursement is required under 11 CFR 113.1(g)(1)(iii)(C) or (D) to provide a brief explanation of the activity for which the reimbursement is made.

Section 801 of Title 5 of the United States Code requires Federal agencies to submit regulations to Congress. These regulations were submitted to the Speaker of the House of Representatives and the President of the Senate on November 26, 2001.

#### Certification of No Effect Pursuant to 5 U.S.C. § 605(b) [Regulatory Flexibility Act]

This correction will not have significant economic impact on a substantial number of small entities. The basis of this certification is that this correction only requires political committees to once again add information to the reports they are required to file. These regulations were in 11 CFR since 1980 and 1995, respectively, before being inadvertently omitted in 2000.

#### List of Subjects in 11 CFR Part 104

Campaign funds, Political committees and parties, Reporting and recordkeeping requirements.

Accordingly, 11 CFR part 104 is corrected by making the following correcting amendment:

#### PART 104—REPORTS BY POLITICAL COMMITTEES

1. The authority citation for part 104 continues to read as follows:

**Authority:** 2 U.S.C. 431(1), 431(8), 431(9), 432(i), 434, 438(a)(8), 438(b), 439a.

#### § 104.3 Contents of reports (2 U.S.C. 434(b), 439a).

\* \* \* \* \*

2. In § 104.3 add the following paragraphs (b)(4)(i)(A) and (B):

(b) \* \* \*

(4) \* \* \*

(i) \* \* \*

(A) As used in this paragraph, *purpose* means a brief statement or description of why the disbursement was made. Examples of statements or descriptions which meet the requirements of this paragraph include the following: dinner expenses, media, salary, polling, travel, party fees, phone banks, travel expenses, travel expense reimbursement, and catering costs. However, statements or descriptions such as *advance*, *election day expenses*, *other expenses*, *expenses*, *expense reimbursement*, *miscellaneous*, *outside services*, *get-out-the-vote* and *voter registration* would not meet the requirements of this paragraph for reporting the purpose of an expenditure.

(B) In addition to reporting the purpose described in paragraph (b)(4)(i)(A) of this section, whenever an authorized committee itemizes a disbursement that is partially or entirely a personal use for which reimbursement is required under 11 CFR 113.1(g)(1)(ii)(C) or (D), it shall provide a brief explanation of the activity for which reimbursement is required.

\* \* \* \* \*

Dated: November 26, 2001.

**Danny L. McDonald,**  
Chairman, Federal Election Commission.  
[FR Doc. 01-29679 Filed 11-29-01; 8:45 am]  
**BILLING CODE 6715-01-P**

#### FEDERAL ELECTION COMMISSION

#### 11 CFR Part 111

[Notice 2001-18]

#### Extension to Administrative Fines

**AGENCY:** Federal Election Commission.

**ACTION:** Final rule; revision of the sunset date.

**SUMMARY:** The Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the expiration date in which the Federal Election Commission (hereinafter "the Commission") may assess civil money penalties for violations of the reporting requirements of section 434(a) of the Federal Election Campaign Act (hereinafter "the Act" or "FECA").

**DATES:** Effective on December 31, 2001.

**FOR FURTHER INFORMATION CONTACT:** Ms. Rosemary C. Smith, Assistant General Counsel, or Ms. Mai T. Dinh, Attorney, 999 E Street, NW., Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

#### SUPPLEMENTARY INFORMATION:

#### Explanation and Justification

Section 640 of the Treasury and General Government Appropriations Act, 2000, Pub. L. No. 106-58, 106th Cong., 113 Stat. 430, 476-77 (1999), amended § 309(a)(4) of the FECA, 2 U.S.C. 437g(a)(4), to provide for a modified enforcement process for violations of reporting requirements. Under § 437g(a)(4)(C) of the FECA, the Commission may assess a civil money penalty for violations of the reporting requirements of 2 U.S.C. 434(a). This authority, however, was to sunset on December 31, 2001. Pub. L. No. 106-58, 106th Cong., § 640(c). Recently, § 642 of the Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the sunset date to include all reports that cover activity between January 1, 2000, to December 31, 2003.

The Commission published final rules on May 19, 2000, to implement the amendment contained in the Treasury and General Government Appropriations Act, 2000. Section 111.30 of the regulations reflects the sunset provision of Pub. L. No. 106-58, 106th Cong., § 640(c). Therefore, the Commission is issuing this final rule to amend section 111.30 to extend the application of the administrative fine regulations, 11 CFR part 111, subpart B, to include all violations relating to reports that cover the period between January 1, 2000, to December 31, 2003.

The Commission is promulgating this final rule without notice or opportunity for comment because it falls under the "good cause" exemption of the Administrative Procedures Act, 5 U.S.C. 553(b)(B). The exemption allows

acceptable and unacceptable purpose descriptions to be reported by authorized committees. Paragraph (B) requires authorized committees, when itemizing certain disbursements for which reimbursements are required, to provide a brief explanation of the activity for which reimbursement is required. These provisions have been in Title 11 of the **Code of Federal Regulations** since 1980 and 1995, respectively, and were not affected by the recent statutory changes to the election cycle reporting requirements.

#### Need for Correction

As published, the final rules inadvertently omit two paragraphs describing information to be reported by authorized committees of Federal candidates.

All committees must report the purpose of itemized disbursements (i.e., those disbursements aggregating in excess of \$200). Omitted paragraph (A) contains examples of suitably specific purpose descriptions as well as examples of those descriptions that are unacceptably vague. This paragraph is inconsistent with the reporting of rules for unauthorized committees (committees other than candidate committees) in 11 CFR 104.3(b)(3).

Omitted paragraph (B) is used in administering the "personal use" rules in 11 CFR 113.1. Federal candidates are barred from using campaign funds for personal benefit. Paragraph (B) requires authorized committees of Federal candidates itemizing disbursements for which partial or total reimbursement is required under 11 CFR 113.1(g)(1)(iii)(C) or (D) to provide a brief explanation of the activity for which the reimbursement is made.

Section 801 of Title 5 of the United States Code requires Federal agencies to submit regulations to Congress. These regulations were submitted to the Speaker of the House of Representatives and the President of the Senate on November 26, 2001.

#### Certification of No Effect Pursuant to 5 U.S.C. § 605(b) [Regulatory Flexibility Act]

This correction will not have significant economic impact on a substantial number of small entities. The basis of this certification is that this correction only requires political committees to once again add information to the reports they are required to file. These regulations were in 11 CFR since 1980 and 1995, respectively, before being inadvertently omitted in 2000.

#### List of Subjects in 11 CFR Part 104

Campaign funds, Political committees and parties, Reporting and recordkeeping requirements.

Accordingly, 11 CFR part 104 is corrected by making the following correcting amendment:

#### PART 104—REPORTS BY POLITICAL COMMITTEES

1. The authority citation for part 104 continues to read as follows:

**Authority:** 2 U.S.C. 431(1), 431(8), 431(9), 432(i), 434, 438(a)(8), 438(b), 439a.

#### § 104.3 Contents of reports (2 U.S.C. 434(b), 439a).

\* \* \* \* \*

2. In § 104.3 add the following paragraphs (b)(4)(i)(A) and (B):

(b) \* \* \*

(4) \* \* \*

(i) \* \* \*

(A) As used in this paragraph, *purpose* means a brief statement or description of why the disbursement was made. Examples of statements or descriptions which meet the requirements of this paragraph include the following: dinner expenses, media, salary, polling, travel, party fees, phone banks, travel expenses, travel expense reimbursement, and catering costs. However, statements or descriptions such as *advance*, *election day expenses*, *other expenses*, *expenses*, *expense reimbursement*, *miscellaneous*, *outside services*, *get-out-the-vote* and *voter registration* would not meet the requirements of this paragraph for reporting the purpose of an expenditure.

(B) In addition to reporting the purpose described in paragraph (b)(4)(i)(A) of this section, whenever an authorized committee itemizes a disbursement that is partially or entirely a personal use for which reimbursement is required under 11 CFR 113.1(g)(1)(ii)(C) or (D), it shall provide a brief explanation of the activity for which reimbursement is required.

\* \* \* \* \*

Dated: November 26, 2001.

**Danny L. McDonald,**  
Chairman, Federal Election Commission.  
[FR Doc. 01-29679 Filed 11-29-01; 8:45 am]  
**BILLING CODE 6715-01-P**

#### FEDERAL ELECTION COMMISSION

#### 11 CFR Part 111

#### [Notice 2001-18]

#### Extension to Administrative Fines

**AGENCY:** Federal Election Commission.

**ACTION:** Final rule; revision of the sunset date.

**SUMMARY:** The Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the expiration date in which the Federal Election Commission (hereinafter "the Commission") may assess civil money penalties for violations of the reporting requirements of section 434(a) of the Federal Election Campaign Act (hereinafter "the Act" or "FECA").

**DATES:** Effective on December 31, 2001.

**FOR FURTHER INFORMATION CONTACT:** Ms. Rosemary C. Smith, Assistant General Counsel, or Ms. Mai T. Dinh, Attorney, 999 E Street, NW., Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

#### SUPPLEMENTARY INFORMATION:

#### Explanation and Justification

Section 640 of the Treasury and General Government Appropriations Act, 2000, Pub. L. No. 106-58, 106th Cong., 113 Stat. 430, 476-77 (1999), amended § 309(a)(4) of the FECA, 2 U.S.C. 437g(a)(4), to provide for a modified enforcement process for violations of reporting requirements. Under § 437g(a)(4)(C) of the FECA, the Commission may assess a civil money penalty for violations of the reporting requirements of 2 U.S.C. 434(a). This authority, however, was to sunset on December 31, 2001. Pub. L. No. 106-58, 106th Cong., § 640(c). Recently, § 642 of the Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the sunset date to include all reports that cover activity between January 1, 2000, to December 31, 2003.

The Commission published final rules on May 19, 2000, to implement the amendment contained in the Treasury and General Government Appropriations Act, 2000. Section 111.30 of the regulations reflects the sunset provision of Pub. L. No. 106-58, 106th Cong., § 640(c). Therefore, the Commission is issuing this final rule to amend section 111.30 to extend the application of the administrative fine regulations, 11 CFR part 111, subpart B, to include all violations relating to reports that cover the period between January 1, 2000, to December 31, 2003.

The Commission is promulgating this final rule without notice or opportunity for comment because it falls under the "good cause" exemption of the Administrative Procedures Act, 5 U.S.C. 553(b)(B). The exemption allows

acceptable and unacceptable purpose descriptions to be reported by authorized committees. Paragraph (B) requires authorized committees, when itemizing certain disbursements for which reimbursements are required, to provide a brief explanation of the activity for which reimbursement is required. These provisions have been in Title 11 of the **Code of Federal Regulations** since 1980 and 1995, respectively, and were not affected by the recent statutory changes to the election cycle reporting requirements.

#### Need for Correction

As published, the final rules inadvertently omit two paragraphs describing information to be reported by authorized committees of Federal candidates.

All committees must report the purpose of itemized disbursements (i.e., those disbursements aggregating in excess of \$200). Omitted paragraph (A) contains examples of suitably specific purpose descriptions as well as examples of those descriptions that are unacceptably vague. This paragraph is inconsistent with the reporting of rules for unauthorized committees (committees other than candidate committees) in 11 CFR 104.3(b)(3).

Omitted paragraph (B) is used in administering the "personal use" rules in 11 CFR 113.1. Federal candidates are barred from using campaign funds for personal benefit. Paragraph (B) requires authorized committees of Federal candidates itemizing disbursements for which partial or total reimbursement is required under 11 CFR 113.1(g)(1)(iii)(C) or (D) to provide a brief explanation of the activity for which the reimbursement is made.

Section 801 of Title 5 of the United States Code requires Federal agencies to submit regulations to Congress. These regulations were submitted to the Speaker of the House of Representatives and the President of the Senate on November 26, 2001.

#### Certification of No Effect Pursuant to 5 U.S.C. § 605(b) [Regulatory Flexibility Act]

This correction will not have significant economic impact on a substantial number of small entities. The basis of this certification is that this correction only requires political committees to once again add information to the reports they are required to file. These regulations were in 11 CFR since 1980 and 1995, respectively, before being inadvertently omitted in 2000.

#### List of Subjects in 11 CFR Part 104

Campaign funds, Political committees and parties, Reporting and recordkeeping requirements.

Accordingly, 11 CFR part 104 is corrected by making the following correcting amendment:

#### PART 104—REPORTS BY POLITICAL COMMITTEES

1. The authority citation for part 104 continues to read as follows:

**Authority:** 2 U.S.C. 431(1), 431(8), 431(9), 432(i), 434, 438(a)(8), 438(b), 439a.

#### § 104.3 Contents of reports (2 U.S.C. 434(b), 439a).

\* \* \* \* \*

2. In § 104.3 add the following paragraphs (b)(4)(i)(A) and (B):

(b) \* \* \*

(4) \* \* \*

(i) \* \* \*

(A) As used in this paragraph, *purpose* means a brief statement or description of why the disbursement was made. Examples of statements or descriptions which meet the requirements of this paragraph include the following: dinner expenses, media, salary, polling, travel, party fees, phone banks, travel expenses, travel expense reimbursement, and catering costs. However, statements or descriptions such as *advance*, *election day expenses*, *other expenses*, *expenses*, *expense reimbursement*, *miscellaneous*, *outside services*, *get-out-the-vote* and *voter registration* would not meet the requirements of this paragraph for reporting the purpose of an expenditure.

(B) In addition to reporting the purpose described in paragraph (b)(4)(i)(A) of this section, whenever an authorized committee itemizes a disbursement that is partially or entirely a personal use for which reimbursement is required under 11 CFR 113.1(g)(1)(ii)(C) or (D), it shall provide a brief explanation of the activity for which reimbursement is required.

\* \* \* \* \*

Dated: November 26, 2001.

**Danny L. McDonald,**  
Chairman, Federal Election Commission.  
[FR Doc. 01-29679 Filed 11-29-01; 8:45 am]  
**BILLING CODE 6715-01-P**

#### FEDERAL ELECTION COMMISSION

#### 11 CFR Part 111

#### [Notice 2001-18]

#### Extension to Administrative Fines

**AGENCY:** Federal Election Commission.

**ACTION:** Final rule; revision of the sunset date.

**SUMMARY:** The Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the expiration date in which the Federal Election Commission (hereinafter "the Commission") may assess civil money penalties for violations of the reporting requirements of section 434(a) of the Federal Election Campaign Act (hereinafter "the Act" or "FECA").

**DATES:** Effective on December 31, 2001.

**FOR FURTHER INFORMATION CONTACT:** Ms. Rosemary C. Smith, Assistant General Counsel, or Ms. Mai T. Dinh, Attorney, 999 E Street, NW., Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

#### SUPPLEMENTARY INFORMATION:

#### Explanation and Justification

Section 640 of the Treasury and General Government Appropriations Act, 2000, Pub. L. No. 106-58, 106th Cong., 113 Stat. 430, 476-77 (1999), amended § 309(a)(4) of the FECA, 2 U.S.C. 437g(a)(4), to provide for a modified enforcement process for violations of reporting requirements. Under § 437g(a)(4)(C) of the FECA, the Commission may assess a civil money penalty for violations of the reporting requirements of 2 U.S.C. 434(a). This authority, however, was to sunset on December 31, 2001. Pub. L. No. 106-58, 106th Cong., § 640(c). Recently, § 642 of the Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the sunset date to include all reports that cover activity between January 1, 2000, to December 31, 2003.

The Commission published final rules on May 19, 2000, to implement the amendment contained in the Treasury and General Government Appropriations Act, 2000. Section 111.30 of the regulations reflects the sunset provision of Pub. L. No. 106-58, 106th Cong., § 640(c). Therefore, the Commission is issuing this final rule to amend section 111.30 to extend the application of the administrative fine regulations, 11 CFR part 111, subpart B, to include all violations relating to reports that cover the period between January 1, 2000, to December 31, 2003.

The Commission is promulgating this final rule without notice or opportunity for comment because it falls under the "good cause" exemption of the Administrative Procedures Act, 5 U.S.C. 553(b)(B). The exemption allows

agencies to dispense with notice and comment if the procedures are "impracticable, unnecessary, or contrary to public interest." *Id.* This final rule fulfills the "good cause" exemption requirement because a notice and comment period is impracticable in that it would prevent this final rule from taking effect before the administrative fine regulations sunset under the current 11 CFR 111.30. *See Administrative Procedure Act: Legislative History*, S. Doc. No. 248 200 (1946) ("'Impracticable' means a situation in which the due and required execution of the agency functions would be unavoidably prevented by its undertaking public rule-making proceedings"). In addition, this final rule merely extends the applicability of the administrative fine regulations and does not change the substantive regulations themselves. Those regulations were already subject to notice and comment when they were proposed in March, 2000, 65 FR 16534, and adopted in May, 2000, 65 FR 31787. Thus, it is appropriate and necessary for the Commission to publish this final rule without providing a notice and comment period. The Commission anticipates, however, that any substantive changes that may be made to the administrative fine rules at a later date will be subject to notice and comment.

#### **Certification of No Effect Pursuant to 5 U.S.C. 605(b) (Regulatory Flexibility Act)**

The attached final rule will not have a significant economic impact on a substantial number of small entities. The basis for this certification is that this final rule merely extends the applicability of existing regulations for two more years. The existing regulations have already been certified as not having a significant economic impact on a substantial number of small entities. 65 FR 31793 (2000). Therefore, the extension of these existing regulations will not have a significant economic impact on a substantial number of small entities.

#### **List of Subjects in 11 CFR Part 111**

Administrative practice and procedures, Elections, Law enforcement.

For reasons set out in the preamble, subchapter A, Chapter I of Title 11 of the **Code of Federal Regulations** is amended as follows:

#### **PART 111—COMPLIANCE PROCEDURES (2 U.S.C. 437g, 437d(a))**

1. The authority for part 111 continues to read as follows:

**Authority:** 2 U.S.C. 437g, 437d(a), 438(a)(8).

2. 11 CFR 111.30 is revised to read as follows:

#### **§ 111.30. When will subpart B apply?**

Subpart B applies to violations of the reporting requirements of 2 U.S.C. 434(a) that relate to the reporting periods that begin on or after July 14, 2000, and end on or before December 31, 2003, committed by political committees and their treasurers.

Dated: November 26, 2001.

**Danny L. McDonald,**  
*Chairman, Federal Election Commission.*  
[FR Doc. 01-29678 Filed 11-29-01; 8:45 am]  
**BILLING CODE 6715-01-P**

## **DEPARTMENT OF TRANSPORTATION**

### **Federal Aviation Administration**

#### **14 CFR Part 39**

[Docket No. 2000-NM-115-AD; Amendment 39-12518; AD 2001-24-02]

RIN 2120-AA64

#### **Airworthiness Directives; Boeing Model 707-100, -100B, -300, and -E3A (Military Airplanes); 727-100 and -200; 737-200, -200C, -300, -400, and -500; 747SP and 747SR; 747-100B, -200B, -200C, -200F, -300, -400, and -400D; 757-200 and -200PF; and 767-200 and -300 Series Airplanes**

**AGENCY:** Federal Aviation Administration, DOT.

**ACTION:** Final rule.

**SUMMARY:** This amendment adopts a new airworthiness directive (AD), applicable to certain Boeing Model 707-100, -100B, -300, and -E3A (military airplanes); 727-100 and -200; 737-200, -200C, -300, -400, and -500; 747SP and 747SR; 747-100B, -200B, -200C, -200F, -300, -400, and -400D; 757-200 and -200PF; and 767-200 and -300 series airplanes. This AD requires inspection of the attachment of the shoulder restraint harness to the mounting bracket on certain observer and attendant seats to determine if a C-clip is used in the attachment, and corrective action, if necessary. This action is necessary to prevent detachment of the shoulder restraint harness of the attendant or observer seat from its mounting bracket during service, which could result in injury to the occupant of the seat. This action is intended to address the identified unsafe condition.

**DATES:** Effective January 4, 2002.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of January 4, 2002.

**ADDRESSES:** The service information referenced in this AD may be obtained from Boeing Commercial Airplane Group, P.O. Box 3707, Seattle, Washington 98124-2207. This information may be examined at the Federal Aviation Administration (FAA), Transport Airplane Directorate, Rules Docket, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

**FOR FURTHER INFORMATION CONTACT:** Keith Ladderud, Aerospace Engineer, Airframe Branch, ANM-120S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98055-4056; telephone (425) 227-2780; fax (425) 227-1181.

**SUPPLEMENTARY INFORMATION:** A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an airworthiness directive (AD) that is applicable to certain Boeing Model 707-100, -100B, -300, and -E3A (military airplanes); 727-100 and -200; 737-200, -200C, -300, -400, and -500; 747SP and 747SR; 747-100B, -200B, -200C, -200F, -300, -400, and -400D; 757-200 and -200PF; and 767-200 and -300 series airplanes was published in the **Federal Register** on June 27, 2001 (66 FR 34128). That action proposed to require inspection of the attachment of the shoulder restraint harness to the mounting bracket on certain observer and attendant seats to determine if a C-clip is used in the attachment, and corrective action, if necessary.

#### **Comments**

Interested persons have been afforded an opportunity to participate in the making of this amendment. Due consideration has been given to the comments received.

One commenter states that the proposed AD does not apply to its fleet.

#### **Withdraw Proposed AD**

Two commenters request that the FAA withdraw the proposed AD. One commenter states that, on its fleet of Model 757 series airplanes, it has not observed any in-service problems with the shoulder restraint harness detaching from the mounting bracket. Therefore, it does not accept that the proposed modification is necessary.

The FAA does not concur. Though the commenter has not observed any problems related to the identified unsafe condition, at least two other operators



acceptable and unacceptable purpose descriptions to be reported by authorized committees. Paragraph (B) requires authorized committees, when itemizing certain disbursements for which reimbursements are required, to provide a brief explanation of the activity for which reimbursement is required. These provisions have been in Title 11 of the **Code of Federal Regulations** since 1980 and 1995, respectively, and were not affected by the recent statutory changes to the election cycle reporting requirements.

#### Need for Correction

As published, the final rules inadvertently omit two paragraphs describing information to be reported by authorized committees of Federal candidates.

All committees must report the purpose of itemized disbursements (i.e., those disbursements aggregating in excess of \$200). Omitted paragraph (A) contains examples of suitably specific purpose descriptions as well as examples of those descriptions that are unacceptably vague. This paragraph is inconsistent with the reporting of rules for unauthorized committees (committees other than candidate committees) in 11 CFR 104.3(b)(3).

Omitted paragraph (B) is used in administering the "personal use" rules in 11 CFR 113.1. Federal candidates are barred from using campaign funds for personal benefit. Paragraph (B) requires authorized committees of Federal candidates itemizing disbursements for which partial or total reimbursement is required under 11 CFR 113.1(g)(1)(iii)(C) or (D) to provide a brief explanation of the activity for which the reimbursement is made.

Section 801 of Title 5 of the United States Code requires Federal agencies to submit regulations to Congress. These regulations were submitted to the Speaker of the House of Representatives and the President of the Senate on November 26, 2001.

#### Certification of No Effect Pursuant to 5 U.S.C. § 605(b) [Regulatory Flexibility Act]

This correction will not have significant economic impact on a substantial number of small entities. The basis of this certification is that this correction only requires political committees to once again add information to the reports they are required to file. These regulations were in 11 CFR since 1980 and 1995, respectively, before being inadvertently omitted in 2000.

#### List of Subjects in 11 CFR Part 104

Campaign funds, Political committees and parties, Reporting and recordkeeping requirements.

Accordingly, 11 CFR part 104 is corrected by making the following correcting amendment:

#### PART 104—REPORTS BY POLITICAL COMMITTEES

1. The authority citation for part 104 continues to read as follows:

**Authority:** 2 U.S.C. 431(1), 431(8), 431(9), 432(i), 434, 438(a)(8), 438(b), 439a.

#### § 104.3 Contents of reports (2 U.S.C. 434(b), 439a).

\* \* \* \* \*

2. In § 104.3 add the following paragraphs (b)(4)(i)(A) and (B):

(b) \* \* \*

(4) \* \* \*

(i) \* \* \*

(A) As used in this paragraph, *purpose* means a brief statement or description of why the disbursement was made. Examples of statements or descriptions which meet the requirements of this paragraph include the following: dinner expenses, media, salary, polling, travel, party fees, phone banks, travel expenses, travel expense reimbursement, and catering costs. However, statements or descriptions such as *advance*, *election day expenses*, *other expenses*, *expenses*, *expense reimbursement*, *miscellaneous*, *outside services*, *get-out-the-vote* and *voter registration* would not meet the requirements of this paragraph for reporting the purpose of an expenditure.

(B) In addition to reporting the purpose described in paragraph (b)(4)(i)(A) of this section, whenever an authorized committee itemizes a disbursement that is partially or entirely a personal use for which reimbursement is required under 11 CFR 113.1(g)(1)(ii)(C) or (D), it shall provide a brief explanation of the activity for which reimbursement is required.

\* \* \* \* \*

Dated: November 26, 2001.

**Danny L. McDonald,**  
Chairman, Federal Election Commission.  
[FR Doc. 01-29679 Filed 11-29-01; 8:45 am]  
**BILLING CODE 6715-01-P**

#### FEDERAL ELECTION COMMISSION

#### 11 CFR Part 111

#### [Notice 2001-18]

#### Extension to Administrative Fines

**AGENCY:** Federal Election Commission.

**ACTION:** Final rule; revision of the sunset date.

**SUMMARY:** The Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the expiration date in which the Federal Election Commission (hereinafter "the Commission") may assess civil money penalties for violations of the reporting requirements of section 434(a) of the Federal Election Campaign Act (hereinafter "the Act" or "FECA").

**DATES:** Effective on December 31, 2001.

**FOR FURTHER INFORMATION CONTACT:** Ms. Rosemary C. Smith, Assistant General Counsel, or Ms. Mai T. Dinh, Attorney, 999 E Street, NW., Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

#### SUPPLEMENTARY INFORMATION:

#### Explanation and Justification

Section 640 of the Treasury and General Government Appropriations Act, 2000, Pub. L. No. 106-58, 106th Cong., 113 Stat. 430, 476-77 (1999), amended § 309(a)(4) of the FECA, 2 U.S.C. 437g(a)(4), to provide for a modified enforcement process for violations of reporting requirements. Under § 437g(a)(4)(C) of the FECA, the Commission may assess a civil money penalty for violations of the reporting requirements of 2 U.S.C. 434(a). This authority, however, was to sunset on December 31, 2001. Pub. L. No. 106-58, 106th Cong., § 640(c). Recently, § 642 of the Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the sunset date to include all reports that cover activity between January 1, 2000, to December 31, 2003.

The Commission published final rules on May 19, 2000, to implement the amendment contained in the Treasury and General Government Appropriations Act, 2000. Section 111.30 of the regulations reflects the sunset provision of Pub. L. No. 106-58, 106th Cong., § 640(c). Therefore, the Commission is issuing this final rule to amend section 111.30 to extend the application of the administrative fine regulations, 11 CFR part 111, subpart B, to include all violations relating to reports that cover the period between January 1, 2000, to December 31, 2003.

The Commission is promulgating this final rule without notice or opportunity for comment because it falls under the "good cause" exemption of the Administrative Procedures Act, 5 U.S.C. 553(b)(B). The exemption allows



**Executive Order 12866 and Regulatory Flexibility Act**

This rule has been reviewed under Executive Order 12866. For this action, the Office of Management and Budget has waived its review process required by Executive Order 12866.

We are amending the regulations by adding Austria to the list of regions where BSE exists because the disease has been detected in a native-born animal in that region. Austria has been listed among the regions that present an undue risk of introducing BSE into the United States. Regardless of which of the two lists a region is on, the same restrictions apply to the importation of ruminants and meat, meat products, and most other products and byproducts of ruminants that have been in the region. Therefore, this action, which is necessary in order to update the disease status of Austria regarding BSE, will not result in any change in the restrictions that apply to the importation of ruminants and meat, meat products, and certain other products and byproducts of ruminants that have been in Austria.

Under these circumstances, the Administrator of the Animal and Plant Health Inspection Service has determined that this action will not have a significant economic impact on a substantial number of small entities.

**Executive Order 12988**

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule: (1) Preempts all State and local laws and regulations that are inconsistent with this rule; (2) has retroactive effect to December 13, 2001; and (3) does not require administrative proceedings before parties may file suit in court challenging this rule.

**Paperwork Reduction Act**

This interim rule contains no information collection or recordkeeping requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

**List of Subjects in 9 CFR Part 94**

Animal diseases, Imports, Livestock, Meat and meat products, Milk, Poultry and poultry products, Reporting and recordkeeping requirements.

Accordingly, we are amending 9 CFR part 94 as follows:

**PART 94—RINDERPEST, FOOT-AND-MOUTH DISEASE, FOWL PEST (FOWL PLAGUE), EXOTIC NEWCASTLE DISEASE, AFRICAN SWINE FEVER, HOG CHOLERA, AND BOVINE SPONGIFORM ENCEPHALOPATHY: PROHIBITED AND RESTRICTED IMPORTATIONS**

1. The authority citation for part 94 continues to read as follows:

**Authority:** 7 U.S.C. 450, 7711, 7712, 7713, 7714, 7751, and 7754; 19 U.S.C. 1306; 21 U.S.C. 111, 114a, 134a, 134b, 134c, 134f, 136, and 136a; 31 U.S.C. 9701; 42 U.S.C. 4331 and 4332; 7 CFR 2.22, 2.80, and 371.4.

**§ 94.18 [Amended]**

2. Section 94.18 is amended as follows:

- a. In paragraph (a)(1), by adding, in alphabetical order, the word "Austria,".
- b. In paragraph (a)(2), by removing the word "Austria,".

Done in Washington, DC, this 14th day of March, 2002.

**Bobby R. Acord,**

*Administrator, Animal and Plant Health Inspection Service.*

[FR Doc. 02-6693 Filed 3-19-02; 8:45 am]

**BILLING CODE 3410-34-U**

**FEDERAL ELECTION COMMISSION****11 CFR Parts 100, 104, and 109**

[Notice 2002-3]

**Independent Expenditure Reporting**

**AGENCY:** Federal Election Commission.

**ACTION:** Final rules and transmittal of regulations to Congress.

**SUMMARY:** The Federal Election Commission is revising its regulations to implement statutory changes to the deadlines for filing certain reports of independent expenditures. Under the new law, reports of last minute independent expenditures ("24-hour reports") must be actually received by the Commission or the Secretary of the Senate's office within 24 hours of the time the independent expenditure was made. To assist those who must meet this new reporting deadline, the revised rules allow reports of last minute independent expenditures to be filed by facsimile machine or electronic mail, unless the filer participates in the Commission's electronic filing program. Electronic filers must continue to file all reports of independent expenditures (24-hour reports as well as regularly scheduled reports) using the Commission's electronic filing system. Further information is provided in the supplementary information that follows.

**DATES:** Further action, including the announcement of an effective date, will be taken after these regulations have been before Congress for 30 legislative days. 2 U.S.C. 438(d). A document announcing the effective date will be published in the **Federal Register**.

**FOR FURTHER INFORMATION CONTACT:** Ms. Rosemary C. Smith, Assistant General Counsel, or Ms. Cheryl Fowle, Attorney, 999 E Street, NW., Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

**SUPPLEMENTARY INFORMATION:** The Commission is issuing revised regulations at 11 CFR 100.19, 104.4, 104.5, 104.14, 104.18, 109.1 and 109.2. These revised rules implement Public Law 106-346 (Department of Transportation and Related Agencies Appropriations Act, 2001, 114 Stat. 1356 (2000)), which amended the Federal Election Campaign Act of 1971, 2 U.S.C. 431 *et seq.*, ("the Act" or "FECA"). Paragraphs (b) and (c) of 2 U.S.C. 434 require political committees and other persons making independent expenditures to file reports or statements if their independent expenditures exceed \$250. In addition, if independent expenditures of \$1,000 or more are made less than twenty (20) days but more than twenty-four (24) hours before the day of an election, an additional statement must be filed within 24 hours. Public Law 106-346 required, *inter alia*, the Commission to issue rules requiring that reports of independent expenditures made less than twenty (20) days but more than twenty-four (24) hours before an election ("24-hour reports") be received by the Commission or the Secretary of the Senate, as appropriate,<sup>1</sup> within 24 hours of the time the independent expenditure was made. The statutory change permits those who must file 24-hour reports to do so using facsimile machines or electronic mail, except for those required to file electronically (*see* 11 CFR 104.18). In addition to their 24-hour reports, persons other than political committees may file by fax or e-mail other reports of independent expenditures in accordance with the regular filing schedule (*see* 11 CFR 104.5). Public Law 106-346 also requires the Commission to provide methods of verification of documents (other than requiring a signature on the document) for all purposes, including submission under penalty of perjury. These new filing methods are intended

<sup>1</sup> The Secretary of the United States Senate Office of Public Records is the proper recipient of reports of independent expenditures that either support or oppose only candidates for the United States Senate. 11 CFR 104.4(c)(2).

to speed up disclosure and to provide political committees and other filers with more flexibility in choosing methods of compliance with reporting requirements. The new law requires these methods to be in place for elections occurring after January 1, 2001, subject to regulations to be promulgated by the Commission.

In addition to the amendments regarding independent expenditures, the new law also requires the Commission to amend its regulations to exclude from the definition of "contribution" loans that candidates receive from brokerage accounts, lines of credit, or other credit instruments as long as the loans were made under commercially reasonable terms and were from a source that provides such loans in the normal course of business. That topic is being addressed in a separate rulemaking. See Notice of Proposed Rulemaking, 65 **Federal Register** 38576 (Wednesday, July 25, 2001).

Before final promulgation of any rules or regulations to carry out the provisions of Title 2 of the United States Code, the Commission transmits the rules or regulations to the Speaker of the House of Representatives and the President of the Senate for a thirty legislative day review period. 2 U.S.C. 438(d). These rules on independent expenditure reporting were transmitted to Congress on March 15, 2002.

#### Explanation and Justification

The Commission published a Notice of Proposed Rulemaking ("NPRM") in the **Federal Register** on May 9, 2001, 65 FR 23628 (May 9, 2001). The NPRM contained proposed rules at 11 CFR 100.19, 104.4, 104.5, 104.15, 109.1 and 109.2 regarding, *inter alia*, when 24-hour reports are considered filed, the filing of 24-hour reports by facsimile machine or electronic mail, and a definition of when an independent expenditure is made. Additionally, the NPRM explicitly recognized that authorized committees may file reports of last-minute contributions (48-hour notices) using facsimile machines or the Commission's web site.

The comment period ended on June 8, 2001. The Commission received one written comment from the James Madison Center for Free Speech ("Madison Center").

#### *Section 100.19 File, filed or filing (2 U.S.C. 434(a))*

The Commission's regulations at 11 CFR 100.19 define *file*, *filed*, and *filing*. The introductory text of this section states that a document is considered filed if it is: (a) Delivered to the

appropriate filing office of the appropriate office, (b) sent by registered or certified mail and postmarked by midnight of the prescribed filing date—except for pre-election reports, or (c) electronically filed, and received and validated by the Commission's electronic filing system on or before 11:59 p.m. eastern time on the prescribed filing date. For clarification, the Commission has added a definition of "document" which mirrors the definition in the electronic filing regulations (11 CFR 104.18). A document is any report, statement, notice or designation required by the Act to be filed with the Commission or the Secretary of the Senate.

Paragraph (a) of this section states that a document is timely filed upon delivery to the Commission or Secretary of the Senate, as appropriate, by the close of the prescribed filing date. As explained below, revised paragraph (a) clarifies that the definition of "timely filed" is different for paper filers and electronic filers.

Under paragraph (b) of section 100.19 of the previous regulations, 24-hour reports were considered timely filed if they were deposited at a Post Office and were postmarked for certified or registered mail within 24 hours of the time the independent expenditure was made. Under Public Law 106-346 and the revised regulations at paragraph (b), 24-hour reports will only be considered timely filed if they are received by the Commission or Secretary of the Senate within 24 hours of the time the expenditure was made. Thus, sending 24-hour reports by mail will no longer be a viable option because it is unlikely that these reports will be received by the Commission within 24 hours of the making of the expenditure.

New paragraph (d) of section 100.19 defines "timely filed" with regard to 24-hour reports of independent expenditures. The new paragraph states that such reports are timely filed when they are received by the Commission or the Secretary of the Senate after a disbursement is made, or a debt reportable under 11 CFR 104.11(b) is incurred, for the independent expenditure, but no later than 24 hours from the time the independent expenditure is made. The new paragraph also states that such 24-hour reports may be filed by facsimile machine or electronic mail, in addition to other permissible means of filing (*e.g.*, hand delivery or overnight courier).

New paragraph (e) expressly incorporates the Commission's practice of allowing authorized committees to file their reports of contributions of

\$1,000 or more made less than twenty (20) days but more than forty-eight (48) hours before the day of an election (48-hour reports) using a fax machine or the Commission's web site. This change does not stem from Pub. L. 106-346. Rather, the Commission has for some time allowed authorized committees (if they are not electronic filers) to file these reports by facsimile machine in addition to other permissible filing methods. See Advisory Opinion ("AO") 1988-32. In the fall of 2000, the Commission began allowing all authorized committees who file with the Commission (including electronic filers) to file 48-hour reports on-line through the Commission's web site. Note that 48-hour reports filed with the Secretary of the Senate cannot be filed using the on-line program at the Commission's web site. They can, however be filed by fax to the Secretary of the Senate. New paragraph (e) of 11 CFR 100.19 specifically incorporates those filing methods in the regulations. The Commission received no comments on this section.

Note that the final rules differ from the rule proposed in the NPRM with regard to the web based filing of 48-hour reports. The proposed rule stated that only those who do not file electronically could use the Web based filing system implemented in the autumn of 2000. The Commission currently allows electronic filers to file 48 hour reports using either the electronic filing program or on the Commission's web site. Thus the final rules allow all authorized committees (including those who participate in the electronic filing program) to file their 48-hour notices using the Commission's web site.

#### *Section 104.4 Independent Expenditures by Political Committees (2 U.S.C. 434(c))*

The Commission's regulations at 11 CFR 104.4 set forth the requirements for political committees reporting independent expenditures. Paragraph (b) of this section is being revised in three respects. First, this paragraph is being revised to state that 24-hour reports must be *received* by the appropriate officers (the Commission or Secretary of the Senate) within 24 hours of the time the independent expenditure is made. Such reports were previously timely if they were postmarked as certified or registered mail within 24 hours of the making of the independent expenditure.

Second, to enable filers to meet the new deadline, amended paragraph (b) of section 104.4 permits political committees to file 24-hour reports by facsimile machine or electronic mail, as

long as the filer is not part of the electronic filing program under 11 CFR 104.18.

Third, section 104.4(b) is being modified to make it easier for political committees to certify the independence of the expenditures falling under this paragraph. Schedule E contains a notarized certification under penalty of perjury as to whether the committee's expenditures were "coordinated" with any candidate, authorized committee or agent thereof, and, if the independent expenditures were made by a corporation, that the maker is a qualified nonprofit corporation (see 11 CFR 114.10). No other campaign finance reports filed with the Commission or the Secretary of the Senate need to be notarized.

Public Law 106-346 at § 502(a) requires the Commission to create methods, other than by requiring a signature on the document, of verifying the independent expenditure certification on 24-hour reports for all purposes, including penalties of perjury. Consequently, the revised regulations allow the 24-hour report filer to verify the report using self-verification. This means that Schedule E no longer needs to be notarized. Instead, the political committee must self-verify the document using either a handwritten signature of the treasurer on a paper document or by typing the treasurer's name on e-mailed documents. The Commission intends to make the appropriate conforming amendments to Schedule E after the promulgation of these rules. This will extend self-verification to all reports of independent expenditures, including those made before the 20th day before the election and those that exceed \$250 but are under \$1000.

New paragraphs (b) (1) and (2) of 11 CFR 104.4 set forth two methods for verifying 24-hour reports of independent expenditures. Paper reports (e.g., filed by hand delivery or fax machine), must be verified by the filer's signature under the certification of independence. Reports filed by electronic mail must be verified by the filer typing his or her name under the certification.

As an alternative to self-verification, the NPRM sought comments on retaining the notarization requirement for faxed reports and requiring electronic notarizations for e-mailed reports. Additionally, the Commission sought comments on using digital signatures verified by a "Trusted Third Party" for e-mailed reports. Digital signatures utilize a Public Key Infrastructure. That structure uses Public and Private Keys to encode a

message and to provide a method of positively identifying the sender. The Commission received no comments addressing this topic or offering other possible methods of verification.

The revised regulations remove the notarization requirement for several reasons. First, the statute simply requires verification, not notarization. Second, no other reports filed with the Commission require notarization. Third, the statement that the filer must sign carries the penalty for perjury if falsely made.

The Commission decided not to institute electronic notarization or digital signatures because they, as relatively new technologies, are not widespread enough to ensure access to everyone who might make an independent expenditure. For example, only a handful of states have electronic notarization statutes, effectively leaving citizens of other states without means of verification. Digital signatures must be purchased and, generally, require the purchaser to have a computer on which the private key (a computer generated string of digits) resides. The Commission is concerned that such a requirement would unduly burden the making or reporting of independent expenditures by those who do not have access to these means of verification.

#### *Section 104.5 Filing Dates (2 U.S.C. 434(a)(2))*

Section 104.5 sets forth the required filing dates for each type of political committee and other individuals. The Commission is revising paragraph (f) of this section to follow new paragraph (e) of 11 CFR 100.19 discussed above.

Revised paragraph (g) of 11 CFR 104.5 states that 24-hour reports of independent expenditures must be received by the appropriate officers within 24 hours of the making of the independent expenditure. Previously, 24-hour reports were considered timely filed when they were postmarked to be sent by registered or certified mail. This change conforms to the amendments to 11 CFR 100.19 and 104.4(b) discussed above.

The Commission received no comments on the amendments to this section.

#### *Section 104.14 Formal Requirements Regarding Reports and Statements*

Under 11 CFR 104.14, reports and statements must be signed. Two conforming amendments are being made to paragraph (a) of this section. First, new paragraph (a)(1) provides that reports or statements of independent expenditures filed by facsimile machine or electronic mail under 11 CFR

104.4(b) or 11 CFR 109.2 must be verified in accordance with those sections. Secondly, new paragraph (a)(2) states that reports, designations or statements filed electronically under 11 CFR 104.18 must follow the signature requirements of 11 CFR 104.18(g). The Commission received no comments on this section.

#### *Section 104.18 Electronic Filing of Reports (2 U.S.C. 432(d) and 434(a)(11))*

Under the previous regulations at 11 CFR 104.18(h), those participating in the Commission's electronic filing program (either mandatory or voluntary) were required to file FEC Form 5 or Schedule E electronically accompanied by a paper copy in order to file a notarized document.

Public Law 106-346 does not allow electronic filers to use fax machines or electronic mail to file their independent expenditures reports. In order to afford all electronic filers the ability to comply with the new requirement that 24-hour reports be received by the appropriate office within 24 hours, the Commission is removing Schedule E and FEC Form 5 from the list in paragraph (h) of reports that require a paper follow-up. Instead, the revised rules require those in the electronic filing program to verify all reports of independent expenditures using the same process they use in filing any other report. Paragraph (h) is being reorganized to clarify which paper documents must accompany electronically filed reports, and when those paper copies must be filed.

The Commission's electronic filing software, FECFile, currently creates Schedule E for electronic filing by political committees. The Commission's electronic filing system accepts FEC Form 5 if created by another entity using the Commission's specifications (available on the FEC web site, [www.fec.gov](http://www.fec.gov)), but FECFile does not currently create Form 5. The Commission intends to make FEC Form 5 available in the FECFile software package. Note that this software is available for free from the Commission.

Further, the Commission is adding to the list of electronic filings that require paper follow-up Schedule C-P-1, used by Presidential candidates to report loans and lines of credit from lending institutions. Like Schedule C-1 (used by non-Presidential committees), Schedule C-P-1 requires the lending institution agent's signature.

On July 25, 2001, the Commission published in the **Federal Register** a Notice of Proposed Rulemaking on Brokerage Loans and Lines of Credit (65 FR 38576 (July 25, 2001)) which sought comments on further revisions to 11

CFR 104.18(h). Thus, additional changes to this section may be promulgated at a later time as part of that separate rulemaking.

*Section 109.1 Definitions (2 U.S.C. 432(17))*

Section 109.1 of the Commission's regulations contains definitions relevant to independent expenditures. Public Law 106-346 and the revised regulations at 11 CFR 100.19(d), 104.4(b), 104.5(g), and 109.2(b) require 24-hour reports to be received by the Commission or the Secretary of the Senate within 24 hours of the time the independent expenditure is made.

The NPRM sought comments on a three-pronged definition of when an independent expenditure is *made* that would apply to all independent expenditures, not just those reported on a 24-hour basis. That definition was taken from the statutory and regulatory definitions of "independent expenditure" (2 U.S.C. 431(17) and 11 CFR 100.8(a)(2)) and "expenditure" (2 U.S.C. 431(9)(A) and 11 CFR 109.1). Proposed new paragraph (f) of 11 CFR 109.1 stated that an independent expenditure is made at the earliest of three possible times: (1) The date on which a written contract, including a media contract, promise or agreement to make an independent expenditure is executed; (2) the first date on which the communication is printed, broadcast, or otherwise publicly disseminated; or (3) the date on which the person making the independent expenditure pays for it.

The sole commenter on this rulemaking objects to proposed paragraph (f) for several reasons. First, the commenter argues that the definition is a substantive change to the current provisions of the FECA and is, therefore, outside the Commission's regulatory authority. The commenter also asserts that the definition is illogical and that an independent expenditure is not made until the communication is disseminated to the public. Thus, the commenter argues, prong number one of the definition is incorrect.

The Commission believes that a legal basis arguably would exist for the first prong of its definition of "made". Language in the FECA states that an "independent expenditure is an expenditure" (2 U.S.C. 431(17)). An expenditure includes a "written contract, promise, or agreement to make an expenditure" (2 U.S.C. § 431(9)(A)(ii)). Thus, independent expenditures necessarily include written contracts, promises or agreements to make an expenditure for a communication. Nonetheless, here the

Commission is called upon to define when an independent expenditure should be considered "made" for purposes of reporting. Some practical and policy considerations come into play.

The Commission is dropping from the final rules the first prong of the test (the date on which a written contract, including a media contract, promise or agreement to make an independent expenditure, is executed). This will simplify the reporting rules, address the practical problem of reporting such transactions as independent expenditures and ensure that the relatively detailed rules on reporting debts at 11 CFR 104.11 apply only to political committees. Those latter rules require a debt (which includes a written contract debt) to be reported only if it exceeds \$500 or is for any amount that has been outstanding for more than 60 days.

The commenter also objects to the second prong of the proposed rule at 11 CFR 109.1(f)(2), which stated that an independent expenditure would be made "on the first date on which the communication is printed, broadcast or otherwise publicly disseminated." The commenter objects to the word "printed" on the grounds that fliers could be printed and sit in a garage for months, and thus not being publicly disseminated. The Commission is changing the word "printed" to "published" in the final rules to remove any confusion as to when a communication for an independent expenditure is made.

The commenter further objects to what it believes to be a consequence of the revised regulation which would, in some instances, require disclosure before publication of the communication. The commenter expresses concern that this could lead to mischievous interference with communications from opposing campaigns. The commenter argues that such disclosure would allow incumbents the advantage of knowing when independent expenditures have been made on behalf of their opponents, thus giving them the opportunity to convince broadcasters not to run the advertisements in question.

While the Commission does not necessarily agree with the commenter's legal analysis, the Commission is dropping the third prong of the proposed definition. New paragraph (f) of the final regulations states that an independent expenditure is made on the first date on which the communication is published, broadcast or otherwise publicly disseminated. New language in 11 CFR 104.4(b), 104.5(g) and 109.2(b)

would, however, allow persons to report an independent expenditure before the underlying communication is publicly disseminated, notwithstanding other regulations (11 CFR 104.11(b) or 104.3(b)) that could fairly be read to require earlier disclosure. The statutory change for 24-hour reports reflects Congressional intent to emphasize and ensure timely disclosure of independent expenditures. Consequently, the final rules will enhance timely disclosure by requiring that independent expenditures be reported after a disbursement is made, or a debt reportable under 11 CFR 104.11(b) is incurred, for an independent expenditure but no later than 24 hours after the time they are first publicly disseminated. Note that independent expenditures that are mailed to their intended audiences are publicly disseminated at the time that they are relinquished to the U.S. Post Office.

*Examples for Political Committees*

In some situations, a political committee will not make payment or incur a reportable debt before the communication underlying the independent expenditure is publicly disseminated. If the communication is both publicly disseminated and paid for in the same reporting period, then the committee reports the independent expenditure on Schedule E for that reporting period. If the communication is aired in one reporting period (e.g., during the 24-hour reporting period) and payment is made in a later reporting period (e.g., during the post-general election period), then the committee reports the independent expenditure as a memo entry on Schedule E during the reporting period in which the communication is publicly disseminated and reports it again as a positive entry on Schedule E in the reporting period in which payment is made.

In other situations, however, a political committee may pay the production and distributions costs associated with an independent expenditure in one reporting period, but not publicly disseminate it until a later reporting period. In this case, the committee reports the payment as a disbursement on Schedule B for operating expenditures. When, in a subsequent reporting period, the communication is publicly disseminated, the committee files a Schedule E for the independent expenditure referencing the earlier Schedule B transaction. The committee also reports the disbursement for the independent expenditure as a negative entry on Schedule B so the total

disbursements are not inflated. Alternatively, if the committee wishes to disclose the independent expenditure before the communication is publicly disseminated, it could report the independent expenditure on Schedule E for the reporting period in which the payment is made, with no further reporting obligation at the time the communication is disseminated.

Obligations incurred but not yet paid (that are reportable debts), must be reported on Schedule D. When, in a subsequent reporting period, the communication is publicly disseminated, the committee must file a Schedule E referencing the debt on Schedule D. The committee must continue to report the debt on Schedule D (and any payment on it on Schedule E), until the debt is extinguished.

*Example 1:* Committee A makes a \$10,000 payment on October 5 for a newspaper ad urging the defeat of Candidate X, where the ad will run on the 10th day before the November general election (i.e., during the 24-hour reporting period). The committee reports the payment on Schedule B for Operating Expenditures for its pre-general election report. The committee must file a 24-hour report on Schedule E no later than 24 hours after the ad was first published. Further, on its post-general election report, the committee must report the independent expenditure on Schedule E and report the disbursement for the independent expenditure as a negative entry on Schedule B for Operating Expenditures. Alternatively, the committee could report the independent expenditure on Schedule E for its pre-general election report with no further reporting obligation during the 24-hour and post-general reporting periods.

*Example 2:* In September, Committee B, a quarterly filer, enters a contract, but does not pay, for a mailing containing an independent expenditure supporting candidate X. The cost of the mailing is \$450. Because the debt is less than \$500, and has been outstanding for less than 60 days, it is not reportable on Schedule D of the committee's third quarter report. The mailing is delivered to a U.S. Post Office on October 5 (during the pre-general reporting period). Committee B reports the independent expenditure on a 12-day pre-general election report as a Memo Schedule E, using October 5 as the date. Payment is made on November 1. No 24-hour report is needed, because the independent expenditure was distributed before the 20 day before the general election. On the post-general election report, Committee B reports the payment as a positive entry on Schedule E and includes a cross-reference to the Memo Schedule E entry on the 12-day pre-general report.

*Example 3:* Committee C, a monthly filer, contracts in August for airtime to begin on October 31, five days before the November 5 general election. The costs of producing the ads and the airtime will exceed \$500, but no payment is actually made during the August, September, or pre-general reporting periods.

These amounts are reportable as debts on Schedule D. The ads run from October 31 through November 2. Payment is made on November 1. Committee C files a 24-hour report of independent expenditures on Memo Schedule E to be received by the Commission or the Secretary of the Senate, as appropriate, within 24 hours of the first time the ad ran on October 31. This Memo Schedule E uses October 31 as the date of the independent expenditure and includes the committee's best estimate of the total cost as the amount. (In this case, the exact amount would be known as of November 1.) The committee, on its post-general election report, shows the November 1 payment to extinguish the debt on Schedule D and also reports the independent expenditure payment as a positive disbursement on Schedule E so the line totals on the Detailed Summary Page will be accurate.

#### Examples for Persons Other Than Political Committees

Persons other than political committees simply report their independent expenditures on FEC Form 5 or by letter (if they are not required to file electronically). If the independent expenditure is first distributed during the 24-hour reporting period (less than 20 days but more than 24 hours before an election), it must be reported no later than 24 hours after the first time the ad is distributed. If the independent expenditure is first publicly disseminated outside the 24-hour reporting period, it must be reported no later than by the end of the regular reporting period during which the ad is first distributed.

*Example 4:* Mr. Jones takes out a newspaper ad supporting Candidate X. The ad runs October 4th through October 7th in an election year. Mr. Jones must report the independent expenditure no later than 24 hours after the time the ad first runs on October 4th.

#### Section 109.2 Reporting of Independent Expenditures by Persons Other Than a Political Committee (2 U.S.C. 434(c)).

Section 109.2 of the Commission's regulations requires persons other than political committees to report their independent expenditures on either FEC Form 5 or in a signed statement containing certain information about the person who made the independent expenditure and about the nature of the expenditure itself. Under the previous regulations, regardless of whether the filer reported the independent expenditure on Form 5 or in a signed statement, the report had to be notarized. As discussed in the Explanation and Justification for 11 CFR 104.4 above, the revised regulations no longer require notarization of reports of independent expenditures, but do

require filers to self-verify their reports. Accordingly, the introductory text of paragraphs (a) and (a)(1) of section 109.2 is being revised to change the signature requirement on reports of independent expenditures to the verification of reports of independent expenditures. To implement the self-verification, the amendments to 11 CFR 109.2(a)(1)(v) require that persons other than political committees continue to include a prescribed statement of certification as to the independence of the expenditure. The Commission intends to make conforming amendments to FEC Form 5 at a later point.

The NPRM proposed adding new paragraph (a)(1)(vi) to section 109.2 (and renumbering paragraph (a)(1)(vi) as (a)(1)(vii)). Proposed paragraph (a)(1)(vi) would have required those who file a statement instead of FEC Form 5 to certify that the expenditure was not made to finance, disseminate, distribute or republish campaign materials prepared by a candidate or a candidate's agent or authorized committee. This statement is in addition to the statement of independence required in 11 CFR 109.2(a)(1)(v), discussed above. While this "republishing statement" has long been included in the certification on FEC Form 5 (and on Schedule E, filed by political committees), it has not been required of those who file by letter. The NPRM further noted, that, on the other hand, the statutory certifications required by 2 U.S.C. 434(b)(6)(B)(iii) and (c)(2)(A) do not address distribution of candidate-prepared materials.

Consequently, comments were requested on not adding the certification statement to paragraph (a)(1)(vi) and removing that part of the certification from FEC Form 5 and Schedule E. The commenter did not address this issue.

The Commission has decided to remove the "republishing statement" from FEC Form 5 and Schedule E, and to not include it in revised 11 CFR 109.2. A statement regarding republication of candidate materials is not specifically mentioned in 2 U.S.C. 434(b)(6)(B)(iii) or (c)(2). Corresponding changes will be made to FEC Form 5 and Schedule E.

Conforming changes are being made to paragraph (b) of section 109.2 to indicate that 24-hour reports must be received after a disbursement is made for an independent expenditure, but no later than 24 hours from the time the independent expenditure is made.

New paragraph (c) of 11 CFR 109.2 sets forth the acceptable methods of verification for both e-mailed and paper reports. Note that faxed reports are considered to be filed on paper and must contain the certification statement

required by 11 CFR 109.2(a)(i) and new paragraph (a)(vi) followed by the signature of the filer. Electronically mailed reports must contain the certification statements and information required by 11 CFR 109.2(a)(i) through (a)(vii) followed by the typewritten name of the filer. The Commission received no comments on these amendments.

**Certification of No Effect Pursuant to 5 U.S.C. 605(b) (Regulatory Flexibility Act)**

The Commission certifies that these final rules will not have a significant economic impact on a substantial number of small entities. The basis of this certification is that the Commission is providing most filers with less than \$50,000 of activity with additional means of complying with the law, thereby increasing the filers' flexibility by allowing them to choose the most convenient and cost effective filing method. These additional filing methods will likely reduce costs for small entities.

**List of Subjects**

*11 CFR Part 100*

Elections.

*11 CFR Part 104*

Campaign funds, Political committees and parties, Reporting and recordkeeping requirements.

*11 CFR Part 109*

Elections, Reporting and recordkeeping requirements.

For the reasons set out in the preamble, subchapter A of chapter I of title 11 of the *Code of Federal Regulations* is amended to read as follows:

**PART 100—SCOPE AND DEFINITIONS (2 U.S.C. 431)**

1. The authority citation for part 100 is revised to read as follows:

**Authority:** 2 U.S.C. 431, 434(a)(11), 434(c) and 438(a)(8).

2. Section 100.19 is revised to read as follows:

**§ 100.19 File, filed or filing (2 U.S.C. 434(a)).**

With respect to documents required to be filed under 11 CFR parts 101, 102, 104, 105, 107, 108 and 109, and any modifications or amendments thereto, the terms *file*, *filed*, and *filing* mean one of the actions set forth in paragraphs (a) through (e) of this section. For purposes of this section, document means any report, statement, notice or designation

required by the Act to be filed with the Commission or the Secretary of the Senate.

(a) Except for documents electronically filed under paragraph (c) of this section, a document is timely filed upon delivery to the Federal Election Commission, 999 E Street, NW., Washington, DC 20463; or the Secretary of the United States Senate, Office of Public Records, 119 D Street NE., Washington, DC 20510 as required by 11 CFR part 105, by the close of business on the prescribed filing date.

(b) A document other than a 24-hour report of an independent expenditure under 11 CFR 104.4(b) or 109.2(c) is timely filed upon deposit as registered or certified mail in an established U.S. Post Office and postmarked no later than midnight of the day of the filing date, except that pre-election reports so mailed must be postmarked no later than midnight of the fifteenth day before the date of the election. Documents sent by first class mail must be received by the close of business on the prescribed filing date to be timely filed.

(c) For electronic filing purposes, a document is timely filed when it is received and validated by the Federal Election Commission at or before 11:59 p.m., Eastern Standard/Daylight Time, on the filing date.

(d) A 24-hour report of independent expenditures under 11 CFR 104.4(b) or 109.2(c) is timely filed when it is received by the appropriate filing officer as listed in 11 CFR 104.4(c) after a disbursement is made, or, in the case of a political committee, a debt reportable under 11 CFR 104.11(b) is incurred, for an independent expenditure, but no later than 24 hours from the time the independent expenditure was made. In addition to other permissible means of filing, a 24-hour report may be filed using a facsimile machine or by electronic mail if the filer is not required to file electronically in accordance with 11 CFR 104.18.

(e) In addition to other permissible means of filing, authorized committees that are not required to file electronically may file 48-hour notifications of contributions using facsimile machines. All authorized committees that file with the Commission, including electronic filers, may use the Commission's web site's on-line program to file 48-hour notifications of contributions. See 11 CFR 104.5(f).

**PART 104—REPORTS BY POLITICAL COMMITTEES (2 U.S.C. 434)**

3. The authority citation for part 104 continues to read as follows:

**Authority:** 2 U.S.C. 431(1), 431(8), 431(9), 432(i), 434, 438(a)(8) and (b) and 439a.

4. Section 104.4 is amended by revising paragraph (b) to read as follows:

**§ 104.4 Independent expenditures by political committees (2 U.S.C. 434(c)).**

\* \* \* \* \*

(b) *24-hour reports.* Reports of any independent expenditures aggregating \$1,000 or more made after the 20th day, but more than 24 hours, before 12:01 a.m. of the day of the election, shall be received by the appropriate officers listed in paragraph (c) of this section after a disbursement is made, or a debt reportable under 11 CFR 104.11(b) is incurred, for an independent expenditure, but no later than 24 hours after such independent expenditure is made. Such report shall contain the information required by 11 CFR 104.3(b)(3)(vii) indicating whether the independent expenditure is made in support of, or in opposition to, the candidate involved. In addition to other permissible means of filing, a 24-hour report may be filed using a facsimile machine or electronic mail if the filer is not required to file electronically in accordance with 11 CFR 104.18. Such report shall be verified by one of the methods stated in paragraph (b)(1) or (b)(2) of this section. Any report verified under either of these methods shall be treated for all purposes (including penalties for perjury) in the same manner as a document verified by signature.

(1) For reports filed on paper (e.g., by hand delivery, U.S. Mail or facsimile machine), the certification required by 11 CFR 104.3(b)(3)(vii) shall be immediately followed by the handwritten signature of the treasurer of the political committee that made the independent expenditure and who certifies, under penalty of perjury, its independence.

(2) For reports filed by electronic mail, the certification required by 11 CFR 104.3(b)(3)(vii) shall be immediately followed by the typewritten name of the treasurer of the political committee that made the independent expenditure and who certifies, under penalty of perjury, its independence.

\* \* \* \* \*

5. Section 104.5 is amended by revising paragraphs (f) and (g) to read as follows:

**§ 104.5 Filing Dates (2 U.S.C. 434(a)(2)).**

\* \* \* \* \*

(f) *48-hour notification of contributions.* If any contribution of \$1,000 or more is received by any

acceptable and unacceptable purpose descriptions to be reported by authorized committees. Paragraph (B) requires authorized committees, when itemizing certain disbursements for which reimbursements are required, to provide a brief explanation of the activity for which reimbursement is required. These provisions have been in Title 11 of the **Code of Federal Regulations** since 1980 and 1995, respectively, and were not affected by the recent statutory changes to the election cycle reporting requirements.

#### Need for Correction

As published, the final rules inadvertently omit two paragraphs describing information to be reported by authorized committees of Federal candidates.

All committees must report the purpose of itemized disbursements (i.e., those disbursements aggregating in excess of \$200). Omitted paragraph (A) contains examples of suitably specific purpose descriptions as well as examples of those descriptions that are unacceptably vague. This paragraph is inconsistent with the reporting of rules for unauthorized committees (committees other than candidate committees) in 11 CFR 104.3(b)(3).

Omitted paragraph (B) is used in administering the "personal use" rules in 11 CFR 113.1. Federal candidates are barred from using campaign funds for personal benefit. Paragraph (B) requires authorized committees of Federal candidates itemizing disbursements for which partial or total reimbursement is required under 11 CFR 113.1(g)(1)(iii)(C) or (D) to provide a brief explanation of the activity for which the reimbursement is made.

Section 801 of Title 5 of the United States Code requires Federal agencies to submit regulations to Congress. These regulations were submitted to the Speaker of the House of Representatives and the President of the Senate on November 26, 2001.

#### Certification of No Effect Pursuant to 5 U.S.C. § 605(b) [Regulatory Flexibility Act]

This correction will not have significant economic impact on a substantial number of small entities. The basis of this certification is that this correction only requires political committees to once again add information to the reports they are required to file. These regulations were in 11 CFR since 1980 and 1995, respectively, before being inadvertently omitted in 2000.

#### List of Subjects in 11 CFR Part 104

Campaign funds, Political committees and parties, Reporting and recordkeeping requirements.

Accordingly, 11 CFR part 104 is corrected by making the following correcting amendment:

#### PART 104—REPORTS BY POLITICAL COMMITTEES

1. The authority citation for part 104 continues to read as follows:

**Authority:** 2 U.S.C. 431(1), 431(8), 431(9), 432(i), 434, 438(a)(8), 438(b), 439a.

#### § 104.3 Contents of reports (2 U.S.C. 434(b), 439a).

\* \* \* \* \*

2. In § 104.3 add the following paragraphs (b)(4)(i)(A) and (B):

(b) \* \* \*  
(4) \* \* \*  
(i) \* \* \*

(A) As used in this paragraph, *purpose* means a brief statement or description of why the disbursement was made. Examples of statements or descriptions which meet the requirements of this paragraph include the following: dinner expenses, media, salary, polling, travel, party fees, phone banks, travel expenses, travel expense reimbursement, and catering costs. However, statements or descriptions such as *advance*, *election day expenses*, *other expenses*, *expenses*, *expense reimbursement*, *miscellaneous*, *outside services*, *get-out-the-vote* and *voter registration* would not meet the requirements of this paragraph for reporting the purpose of an expenditure.

(B) In addition to reporting the purpose described in paragraph (b)(4)(i)(A) of this section, whenever an authorized committee itemizes a disbursement that is partially or entirely a personal use for which reimbursement is required under 11 CFR 113.1(g)(1)(ii)(C) or (D), it shall provide a brief explanation of the activity for which reimbursement is required.

\* \* \* \* \*

Dated: November 26, 2001.

**Danny L. McDonald,**  
*Chairman, Federal Election Commission.*  
[FR Doc. 01-29679 Filed 11-29-01; 8:45 am]  
**BILLING CODE 6715-01-P**

#### FEDERAL ELECTION COMMISSION

#### 11 CFR Part 111

[Notice 2001-18]

#### Extension to Administrative Fines

**AGENCY:** Federal Election Commission.

**ACTION:** Final rule; revision of the sunset date.

**SUMMARY:** The Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the expiration date in which the Federal Election Commission (hereinafter "the Commission") may assess civil money penalties for violations of the reporting requirements of section 434(a) of the Federal Election Campaign Act (hereinafter "the Act" or "FECA").

**DATES:** Effective on December 31, 2001.

**FOR FURTHER INFORMATION CONTACT:** Ms. Rosemary C. Smith, Assistant General Counsel, or Ms. Mai T. Dinh, Attorney, 999 E Street, NW., Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

#### SUPPLEMENTARY INFORMATION:

#### Explanation and Justification

Section 640 of the Treasury and General Government Appropriations Act, 2000, Pub. L. No. 106-58, 106th Cong., 113 Stat. 430, 476-77 (1999), amended § 309(a)(4) of the FECA, 2 U.S.C. 437g(a)(4), to provide for a modified enforcement process for violations of reporting requirements. Under § 437g(a)(4)(C) of the FECA, the Commission may assess a civil money penalty for violations of the reporting requirements of 2 U.S.C. 434(a). This authority, however, was to sunset on December 31, 2001. Pub. L. No. 106-58, 106th Cong., § 640(c). Recently, § 642 of the Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the sunset date to include all reports that cover activity between January 1, 2000, to December 31, 2003.

The Commission published final rules on May 19, 2000, to implement the amendment contained in the Treasury and General Government Appropriations Act, 2000. Section 111.30 of the regulations reflects the sunset provision of Pub. L. No. 106-58, 106th Cong., § 640(c). Therefore, the Commission is issuing this final rule to amend section 111.30 to extend the application of the administrative fine regulations, 11 CFR part 111, subpart B, to include all violations relating to reports that cover the period between January 1, 2000, to December 31, 2003.

The Commission is promulgating this final rule without notice or opportunity for comment because it falls under the "good cause" exemption of the Administrative Procedures Act, 5 U.S.C. 553(b)(B). The exemption allows



**FEDERAL ELECTION COMMISSION****11 CFR Parts 100, 104, and 113**

[Notice 2002-8]

**Brokerage Loans and Lines of Credit****AGENCY:** Federal Election Commission.**ACTION:** Final rules and transmittal of regulations to Congress.

**SUMMARY:** The Department of Transportation and Related Agencies Appropriations Act, 2001, amended the Federal Election Campaign Act ("FECA" or "the Act") to allow a candidate to obtain a loan derived from an advance on a candidate's brokerage account, credit card, home equity line of credit, or other line of credit available to the candidate. The Federal Election Commission ("Commission") is issuing this final rule to implement this amendment to the FECA including reporting requirements. Further information is provided in the supplementary information that follows.

**DATES:** Further action, including the publication of a document in the **Federal Register** announcing an effective date, will be taken after these regulations have been before Congress for 30 legislative days. 2 U.S.C. 438(d).

**FOR FURTHER INFORMATION CONTACT:** Ms. Rosemary C. Smith, Acting Associate General Counsel, or Ms. Mai T. Dinh, Attorney, 999 E Street, NW, Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

**SUPPLEMENTARY INFORMATION:** As part of its 1999 legislative recommendations to Congress, the Commission sought guidance " \* \* \* on whether candidate committees may accept contributions which are derived from advances from a financial institution, such as advances on a candidate's brokerage accounts, credit card, or home equity line of credit \* \* \* " See 1999 Fed. Election Comm. Annual Rep. at 45 (2000). The Commission recognized that, since the FECA was first enacted, financial institutions have created new financing products to allow consumers more access to credit. The Commission recommended that the FECA be amended to allow candidates to access these new forms of credit to finance their campaigns for federal office, provided that the extension of credit is done in accordance with applicable law, under commercially reasonable terms and by persons who make these loans in the normal course of their business. *Id.*

In the Department of Transportation and Related Agencies Appropriations Act, 2001, Congress amended the FECA (2 U.S.C. 431(8)(B)) to exclude from the

definition of contribution "a loan of money derived from an advance on a candidate's brokerage account, credit card, home equity line of credit, or other line of credit available to the candidate\* \* \* " The amendment also included the three conditions contained in the Commission's legislative recommendation described above. The Department of Transportation and Related Agencies Appropriations Act, 2001, became Public Law 106-346 on October 23, 2000.<sup>1</sup>

The Commission is issuing these final rules to implement this amendment to the FECA. The final rules also include the reporting requirements associated with obtaining and repaying loans derived from brokerage accounts, credit card advances, and lines of credit. In addition to publishing the final rules in the **Federal Register**, the Commission is submitting these final rules to Congress for 30 legislative days before publishing an effective date. See 2 U.S.C. 438(d). This submission will satisfy the requirements of the Administrative Procedures Act, 5 U.S.C. 553(d), and the Congressional Review of Agency Rulemaking Act, 5 U.S.C. 801(a)(1), requiring agencies to submit final rules to the Speaker of the House of Representatives and the President of the Senate and to publish them in the **Federal Register** at least 30 calendar days before they take effect. The final rules on brokerage loans and lines of credit were transmitted to Congress on May 28, 2002.

**Explanation and Justification**

On July 25, 2001, the Commission published a Notice of Proposed Rulemaking ("NPRM") containing its proposal to make the regulatory changes that would implement the amendment to the FECA to permit candidates to receive advances from their brokerage accounts, credit cards, home equity lines of credit, or other lines of credit. 66 FR 38576. The Commission raised several issues in the NPRM and solicited comments on those issues, as well as the proposed rules in general. The Commission also announced that it would hold a public hearing on September 19, 2001, if there were sufficient requests to testify. The deadline for submitting comments and requesting to testify at the public hearing was August 24, 2001. Because the Commission did not receive any requests to testify, it canceled the public

hearing. The notice of the cancellation was published in the **Federal Register** on September 11, 2001. 66 FR 47120. The Commission received only one comment, which was from Mr. Scott Holz, Senior Counsel at the Board of Governors of the Federal Reserve System.

**Amendment to Definitions of Contribution and Expenditure**

11 CFR 100.7 Contribution (2 U.S.C. 431(8))

## 1. General Provisions on Brokerage Loans and Lines of Credit

In order to exempt loans covered by this amendment to the FECA from the definition of "contribution," the final rules amend 11 CFR 100.7(b) by changing the introductory language of paragraph (b)(11) and adding a new 11 CFR 100.7(b)(22) to include brokerage loans, credit card advances, and other lines of credit made to candidates as among the items that are not considered contributions. The amended and new paragraphs track the language of the amendment to the FECA including the conditions set forth, along with some additional clarifications and guidance regarding reporting requirements.

The Commission recognizes that commercial banks offer various lines of credit to their customers. Because the amendment to the FECA specifically establishes different criteria for lines of credit for candidates, the Commission is amending 11 CFR 100.7(b)(11) to exempt specifically brokerage loans, credit card advances, and other lines of credit extended to candidates from the requirements of bank loans contained in section 100.7(b)(11). The final rules amend paragraph (b)(11) by adding a sentence at the end of the introductory text that states that brokerage loans, credit card advances, and other lines of credit made to candidates under section 100.7(b)(22) are not subject to section 100.7(b)(11). This exception also includes overdrafts made on personal checking or savings accounts of candidates because overdraft protection is one form of a line of credit. Thus, overdrafts made on a candidate's personal bank accounts are subject to the requirements of new section 100.7(b)(22). It is important to note that section 100.7(b)(11) will still apply to all loans and lines of credit made to a political committee and to conventional bank loans made to a candidate. No substantive comments were received regarding this issue.

<sup>1</sup> Public Law 106-346 included other statutory changes regarding reporting of independent expenditures, which has been addressed in a separate rulemaking. See Independent Expenditure Reporting Final Rules, 67 FR 12834 (March 20, 2002).



## 2. Endorsers, Guarantors, and Co-Signers

New paragraph (b)(22) implements the three statutory requirements for obtaining a loan derived from an advance on a candidate's brokerage account, credit card, home equity line of credit, or other line of credit, which are: that the loan is made in accordance with applicable law; that the loan is made under commercially reasonable terms; and that persons making the loans make such loans in the normal course of their business. This new regulation also addresses situations where there are endorsers, guarantors, or co-signers of these loans. New paragraph (b)(22), similar to current paragraph (b)(11), provides that an endorser, guarantor, or co-signer is considered a contributor for the amount that the endorser, guarantor or co-signer is liable. This information must be disclosed on the Schedule C or C-P. See below. The exception is when the endorser, guarantor, or co-signer is the spouse of the candidate and the candidate's share of collateral used to obtain a secured loan equals or exceeds the amount of the loan. See 11 CFR 100.7(a)(1)(i)(D). Under proposed section 100.7(b)(22)(ii)(B) in the NPRM, when a spouse is an endorser, guarantor, or co-signer of an unsecured loan, the spouse would not be considered a contributor if the candidate uses, in connection with the campaign, only one-half of the available credit. The Commission sought comments on whether the regulations should allow the candidate to use the entire amount of the available credit for use in connection with a campaign in instances where the loan is in the ordinary course of business and the candidate is liable for the entire amount of the loan even though the spouse has endorsed, guaranteed, or co-signed for the loan. The Commission received no comments on this issue. In order for new section 100.7(b)(22)(ii)(B) to be consistent with the existing requirements of current paragraphs 100.7(a)(1)(i)(D) and (b)(11) regarding spouses who are endorsers, guarantors, or co-signers,<sup>2</sup> the Commission decided not to change the language in the proposed rule. Because no collateral is offered for unsecured debt, one-half of the available credit is a reasonable amount.

<sup>2</sup> Paragraph 100.7(a)(1)(i)(D), which paragraph (b)(11) adopts by reference, states that:

The spouse shall not be considered a contributor to the candidate's campaign if the value of the candidate's share of the property equals or exceeds the amount of the loan which is used for the candidate's campaign.

Finally, section 432(e)(2) of the FECA and 11 CFR 101.2 state that a candidate is an agent of the candidate's authorized committee when he or she obtains a loan for use in connection with a campaign. Given that Public Law 106-346 did not distinguish loans derived from an advance on the candidate's brokerage account, credit card, home equity line of credit, or other line of credit, from other types of loans, a candidate who obtains these loans for use in connection with the candidate's campaign is acting as an agent for his or her authorized committee under 2 U.S.C. 432(e) and 11 CFR 101.2.

## 3. Loans for Routine Living Expenses

In addition to provisions described above, new section 100.7(b)(22) contains a provision that addresses loans derived from an advance on the candidate's brokerage account, credit card, home equity line of credit, or other line of credit that are used for the candidate's routine living expenses. The Commission has determined that such loans would not violate 2 U.S.C. 439a or 11 CFR 113.2(d), prohibiting personal use of campaign funds. The loan, however, must be repaid from the candidate's personal funds.

The Commission sought comment in the NPRM on whether the final rules should contain a descriptive and/or inclusive definition of the phrase "personal living expenses." The Commission did not receive any comments on this question. Upon further examination of 11 CFR part 100, the Commission has determined that "personal living expenses" are no different than "routine living expenses" as described in 11 CFR 100.8(b)(22). Because it is unnecessary to introduce a new term into the regulations in this instance, the Commission has decided to use "routine living expenses" in new section 100.7(b)(22)(iii) instead of "personal living expenses."

Although the final rules do not define "personal living expenses," the Commission has determined that it may be useful if this Explanation and Justification includes examples of items that are considered to be "routine living expenses," recognizing that it would be impossible to describe every possible expense of a candidate that is not for the purpose of influencing the candidate's election to Federal office. The examples are: (1) Household items or supplies, including food, furniture, and accessories; (2) funeral, cremation, or burial expenses; (3) clothing, other than clothing purchased to attend campaign related events or appearances; (4) tuition payments, other than those associated with training relating to the

campaign; (5) mortgage, rent, and utility payments, and maintenance and repair expenses associated with residential real property; (6) investment expenses such as acquiring securities on margin if no amount of the investment and its proceeds are used for the purpose of influencing the candidate's election for Federal office; (7) vehicle expenses, including loan payments, gas, insurance, maintenance, and repair; (8) charitable donations unless the candidate receives compensation for services to the charitable entity that become personal funds of the candidate and then are used for the purpose of influencing the candidate's election for Federal office; and (9) travel expenses if the travel is unrelated to the campaign.

*A. Loans Used Exclusively for Routine Living Expenses.* In the NPRM the Commission sought comments on whether the final rule should require the candidate's authorized committee to report loans used exclusively for the candidate's routine living expenses. The Commission did not receive any comments on this issue. If a candidate used all of the loan proceeds for routine living expenses, then it logically follows that none of the loan proceeds is used for the purpose of influencing the candidate's election for federal office. Therefore, the Commission concludes that the reporting requirements in the final rule, which remains unchanged from the proposed rule, are a reasonable approach to loans used for this purpose. Under new paragraph 100.7(b)(22)(iii)(A), loans used *solely* for routine living expenses do not need to be reported in accordance with 11 CFR part 104.

*B. Loans Used for Routine Living Expenses and for the Purpose of Influencing the Candidate's Election for Federal Office.* Unlike loans that are used exclusively for routine living expenses, the final rules require reporting of loans that are used both for routine living expenses and for the purpose of influencing the candidate's election for federal office. Under new section 100.7(b)(22)(iii)(D), if a loan or an advance that is derived from the candidate's brokerage account, credit card, home equity line of credit, or other line of credit is used for the purpose of influencing the candidate's election for Federal office and for other purposes, including routine living expenses, then the portion that is used for the purpose of influencing the candidate's election for Federal office must be reported under 11 CFR part 104. For example, if a candidate establishes a margin account with a brokerage firm to acquire additional securities on margin and to obtain non-purpose credit to finance the

campaign, then the non-purpose credit used to finance the campaign must be reported, but the credit used to purchase securities purchased on margin does not need to be reported.

*C. Repayments of Loans Used for Routine Living Expenses by Third Parties.* Under new paragraphs (b)(22)(iii)(C), the candidate's principal campaign committee must report a loan that is used for routine living expenses if a third party, except the candidate's spouse, repays, guarantees, endorses, or co-signs the loan, in part or in whole. The third party is deemed to make a contribution in the amount of the endorsement, guarantee, or liability and this amount would be subject to the limitations and prohibitions of the FECA. See 11 CFR 113.1(g)(6). Thus, if a third party repays, guarantees, endorses, or co-signs the loan, the authorized committee must report the loan and the repayment under 11 CFR 104.3, 104.8 and 104.9.

*D. Defining "Used for the Candidate's Campaign".* In addition to seeking comment on whether the term "personal living expenses" is sufficiently descriptive and inclusive, the Commission also sought comment on whether the final rules should define the scope of the phrase "used for the candidate's campaign," which is included in proposed section 100.7(b)(22)(ii)(A) in the NPRM and is derived from 2 U.S.C. 432(e)(2). No comments concerning this issue were received. After additional analysis, the Commission decided not to define the phrase "used for the candidate's campaign." Rather, the phrases "used for the candidate's campaign" and "used in connection with the campaign" (in proposed section 100.7(b)(22)(ii)(B) in the NPRM) have been replaced by the phrase "used for the purpose of influencing the candidate's election for Federal office" in the final rules. This new phrase is derived from the statutory language in 2 U.S.C. 431(8)(A)(i).<sup>3</sup> The amendment to the FECA, that is the basis of this rulemaking, added loans derived from an advance on a candidate's brokerage account, credit card, home equity line of credit, and other lines of credit available to the candidate to the list of valuable services in 2 U.S.C. 431(8)(B) that are not considered as contributions. It is appropriate to use similar terminology because regulatory language should reflect the statutory language on which

it is based and section 100.7 is grounded in 2 U.S.C. 431(8).

The only difference is that the regulatory language of new paragraph 100.7(b)(22) limits the application to the candidate's election, not to any election, for Federal office. For example, if Candidate X uses a draw on his own personal line of credit to make a contribution to Candidate Y's campaign, then Candidate X's committee does not have to report the draw.

The final rules do not contain a definition of "used for the purpose of influencing the candidate's election for Federal office" because the meaning of the phrase "for the purpose of influencing any election for Federal office" has been extensively discussed in advisory opinions, enforcement actions (matter under review or "MUR"), and court cases. See e.g. *FEC v. Ted Haley Cong. Comm.*, 852 F.2d 111, 114-16 (9th Cir. 1998); Advisory Opinions 1983-12, 1990-5, and 1992-6; MUR 3918 (Hyatt for Senate). The court cases, advisory opinions, and enforcement actions provide guidance on when a loan is being used for the purpose of influencing the candidate's election for Federal office.

*E. Bank Loans Used for Routine Living Expenses.* The NPRM sought comments on whether the final rules should make similar clarifications regarding the reporting of bank loans that are used solely for the candidate's personal living expenses. The Commission did not receive any comments on this issue. The FECA standards for bank loans are higher than those for loans derived from a candidate's brokerage account, credit card, home equity line of credit, or other lines of credit. Bank loans are required, among other things, to be made on a basis that assures repayment and must be subject to a due date or amortization schedule, requirements that do not generally exist for loans derived from a candidate's brokerage account, credit card, home equity line of credit, or other lines of credit. See 2 U.S.C. 431(8)(B)(vii)(II). Thus, the FECA already provides for greater safeguards ensuring repayment of bank loans. Consequently, the Commission has concluded that it is not necessary to amend the bank loan rules at this time to address more specifically loans whose proceeds are used for routine living expenses.

#### 4. Repayments of Loans by Authorized Committees to Either the Candidate or the Lending Institution

Under new section 100.7(b)(22)(iv), the candidate's authorized committee will have the option of repaying the loan directly to the lending institution

or to the candidate. The NPRM included an alternative approach as to how the candidate's authorized committee must accept and use the proceeds of a loan derived from a candidate's brokerage account, credit card, home equity line of credit, or other lines of credit, and repays that loan. The alternative approach set out in the proposed rules would require that the initial receipt and eventual repayment of the loan must pass through the candidate's personal account. In other words, the lending institution must disburse the loan proceeds to the candidate who would then loan or contribute the money to the authorized committee. If the candidate loans the money to the authorized committee, the committee would be required to repay the loan to the candidate, not to the lending institution, and the candidate would then repay the lending institution. If the candidate makes a contribution as a gift to the campaign, the committee would not repay either the candidate or the financial institution.

The Commission did not receive any comments to this alternative approach. The final rules do not adopt this alternative approach in order to allow the candidates and their authorized committees the flexibility to structure and manage these loans in a manner that fits their needs and circumstances. Requiring that the disbursement and repayment of these loans pass through the candidate's personal bank account may be burdensome and inefficient for some candidates and their committees. Therefore, the final rules allow the candidate and the authorized committee to decide whether the disbursement of the loan proceeds and the loan repayments should pass through the candidate's personal bank account or be paid, and repaid, directly between the financial institution and the authorized committee.

#### 5. Other Amendments to 11 CFR 100.7(b)

The final rules delete an obsolete reference in the introductory text of 11 CFR 100.7(b)(11) to the Federal Savings and Loan Insurance Corporation ("FSLC"). The FSLC has been dissolved and its deposit insurance responsibilities have been transferred to the Federal Deposit Insurance Corporation pursuant to the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. 101-73 (August 9, 1989).

#### 11 CFR 100.8 Expenditure

Currently, 11 CFR 100.8(b)(12) exempts bank loans from the definition of "expenditure" and contains parallel

<sup>3</sup> The statutory language states that "[t]he term 'contribution' includes—(i) 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; \* \* \*

language to that found in the exceptions to the definition of "contribution" in section 100.7(b)(11). The final rules exempt loans derived from advances on a candidate's brokerage account, credit card, home equity line of credit, or other line of credit available to the candidate, from the definition of "expenditure" by amending section 100.8(b)(12) and by adding a new section 100.8(b)(24). The amendments to section 100.8(b)(12) are similar to the amendments to section 100.7(b)(11). See above. New section 100.8(b)(24) adopts, by reference, the language of new section 100.7(b)(22).

### Reporting Requirements

The NPRM included several reporting requirements pertaining to loans derived from an advance on a candidate's brokerage account, credit card, home equity line of credit, or other line of credit for use in connection with the candidate's campaign. Under the proposed rules, the candidate's principal campaign committee would report transactions between the lending institution and the candidate, and between the candidate and the principal campaign committee.

The NPRM also included an alternative reporting approach and sought comments on the approach. Under this alternative, a committee would be required only to report certain limited information about loans derived from advances on brokerage accounts, credit cards, home equity lines of credit, or other lines of credit when the candidate has loaned or contributed outright, as a gift, such funds to the committee. This information would include the name of the institution and any applicable interest rate and the due date. Further, in the situation where the candidate has loaned the funds to the committee, the committee would only be required to report repayments to the candidate, and would not report the repayments by the candidate to the lending institution. This limited reporting approach would be applied to loans from banks as well as to the loans derived from other sources covered by the recent statutory amendment. It would rely on the complaint and audit processes to monitor situations where the lending institution forgives the loan, in part or in whole, or where the candidate relies on third parties to make the repayments to the lending institution. The Commission did not receive any comments on this alternative. The Commission has decided to adopt this alternative reporting approach. The new reporting requirements are described below.

### 11 CFR 104.3 Contents of Reports

As noted above, the final rules require that loans derived from an advance on a candidate's brokerage account, credit card, home equity line of credit, or other line of credit for use in connection with the candidate's campaign, be reported by the candidate's principal campaign committee. The requirements are set forth in several sections in 11 CFR part 104. In section 104.3, the candidate's principal campaign committee is required to report the loan of money from the candidate as a receipt under revised paragraph (a)(3)(vii)(B). It is also required to report any repayment of the loan to the candidate as a disbursement under revised paragraph (b)(2)(iii)(A). These two paragraphs are amended to reflect that loans from the candidate may derive from a bank loan or an advance from a brokerage account, credit card, home equity line of credit or other lines of credit available to the candidate.

Under the final rules, section 104.3(b)(4)(iii) is amended to specifically include persons who receive repayments from a reporting committee of loans derived from an advance on a candidate's brokerage account, credit card, or lines of credit, as among those who must be identified and itemized in the report. "Persons" in this new section include candidates and lending institutions. Section 104.3(b)(4)(iv) is deleted, removing the requirement that the principal campaign committee report each person who receives a repayment from the candidate.

Current 11 CFR 104.3(d) describes the requirements for reporting debts and obligations. The final rules amend this paragraph to set forth the new reporting requirements for loans derived from advances on a candidate's brokerage account, credit card, home equity line of credit and other lines of credit and for bank loans made to candidates. First, the introductory language of paragraph (d) is amended to make clear that these advances must be reported if they are used for the candidate's campaign even if the advances were received before the individual became a candidate for federal office. Second, the reference to "candidate" in paragraph (d)(1) is deleted to exclude bank loans to candidates from the reporting requirements of that paragraph. Instead of paragraph (d)(1), bank loans to candidates must now be reported in accordance with paragraph (d)(4) in Schedule C-1 or C-P-1. Political committees must continue to report the information listed in paragraph (d)(1) in Schedule C-1 and C-P-1.

The final rules add a new section 104.3(d)(4) to describe the information that must be disclosed in the report about loans to candidates, including bank loans. The new paragraph requires authorized committees to disclose loans derived from an advance from a candidate's brokerage account, credit card, or line of credit on Schedules C, C-P, C-1, and C-P-1. Current Schedules C, C-P, C-1 and C-P-1 have not been revised to reflect the new reporting requirements for loans to candidates from financial institutions. Rather, the instructions to Schedules C, C-P, C-1 and C-P-1, and to the Detailed Summary Pages for Forms 3 and 3P, will be modified to reflect the new reporting requirements under new section 104.3(d)(4). Revisions to the instructions to these schedules will be transmitted to Congress at a later point, and will become effective at the same time as the amendments to the regulations. The revised instructions will be posted on the Commission's Web site ([www.fec.gov](http://www.fec.gov)) and will be available to the public through the Commission's Information Division.

Under new section 104.3(d)(4), committees are required to disclose the following information: date, amount and interest rate of the loan; name and address of the lending institution; and type and value of collateral or security, if any. The Commission did not receive any comments pertaining to this section.

### 11 CFR 104.8 Uniform Reporting of Receipts

Current 11 CFR 104.8 requires that certain receipts, including loans, be disclosed on Schedule A. The final rules add new paragraph (g) to section 104.8 to describe how receipt of bank loans to candidates and loans derived from an advance from a candidate's brokerage account, credit card, or line of credit must be reported on Schedule A. When the candidate's committee receives the funds directly from the lending institution or from the candidate (as a loan or a contribution, as a gift), it is reported as an itemized entry on Schedule A. A cross reference to section 100.7(b)(22)(iii) is also included in new section 104.8(g) regarding the reporting of loans obtained solely for the candidate's routine living expenses. Unlike the proposed rules, the committee is not required to report loan disbursements to the candidate. Also, the loan must be continuously reported on Schedule C or C-P until it is extinguished. The candidate may choose either to loan or to contribute, as a gift, the loan proceeds to the

authorized committee.<sup>4</sup> If the money is designated as a contribution when the authorized committee reports the receipt, then the authorized committee cannot repay the underlying loan to the financial institution. Any repayment of the underlying loan would constitute conversion of campaign funds for personal use and is prohibited by 11 CFR 113.2(d). The reporting requirements remain the same. The contribution, as a gift, from the candidate to the authorized committee must be reported as an itemized receipt in Schedule A. The underlying loan must be reported on the Schedule C-1 or C-P-1.

#### 11 CFR 104.9 Uniform Reporting of Disbursements

Current 11 CFR 104.9 requires that certain disbursements, including loan repayments, be disclosed on Schedule B. The final rules add new paragraph (f) to section 104.9 to explain how repayments of bank loans to candidates and loans derived from an advance from a candidate's brokerage account, credit card, or line of credit are to be reported on Schedule B. Repayment by the candidate's committee to the lending institution or the candidate is reported as an itemized entry on Schedule B. Unlike the proposed rules, the committee is not required by the final rules to report repayments by the candidate to the lending institution.

#### 11 CFR 104.14 Formal Requirements Regarding Reports and Statements

Unlike the regulations for bank loans to political committees, the final rules do not require principal campaign committees to submit to the Commission loan agreements or similar documents that are connected with a bank loan to the candidate or a loan derived from an advance from a candidate's brokerage account, credit card, or line of credit. However, the alternative reporting approach, which the Commission has adopted in the final rules, contemplates that in lieu of requiring the candidate's committee to disclose detailed information about these loans, the final rules would require candidates to preserve records pertaining to bank loans to the candidates or loans derived from an advance from a candidate's brokerage account, credit card, or line of credit. This will enable the Commission to conduct investigations and audits when necessary, pursuant to the enforcement and audit authority. See 2 U.S.C. 437g

<sup>4</sup> The contribution is not subject to contribution limitations in 2 U.S.C. 441a(a). See *Buckley v. Valeo*, 424 U.S. 1 (1976).

and 438(b). Therefore, the final rules added new paragraph (b)(4) to section 104.14 that lists the following types of documents that candidates must preserve for three years following the date of the election for which they were candidates:

- a. Records that demonstrate the ownership of the accounts or assets securing the loans such as statements for accounts that identify the account holders, the owners of the credit card account, and the names on the deed for the home used for a line of credit;
- b. Copies of the executed loan agreements and all security and guarantee statements;
- c. Statements of account for all accounts used to secure any loan for the period the loan is outstanding such as brokerage accounts or credit card accounts, and statements on any line of credit account that was used for the purpose of influencing the candidate's election for Federal office;
- d. For brokerage loans or other loans secured by financial assets, documentation to establish the source of the funds in the account at the time of the loan; and
- e. Documentation (check copies *etc.*) for all payments made on the loan by any person.

The NPRM solicited comments on whether to require the candidate's principal campaign committee to submit loan agreements and similar documents on loans derived from an advance from a candidate's brokerage account, credit card, or line of credit when the committee files Schedule D. The Commission did not receive any comments on this issue. Because the Commission has decided to adopt the alternative reporting approach, the candidate's principal campaign committee is not required to submit these documents.

The Commission, however, did receive a comment concerning the documents that are required to be maintained under section 104.14. The NPRM listed the Federal Reserve's Form T-4 as among the documents that must be maintained for three years. The commenter stated that non-purpose credit extended from margin accounts does not require a Form T-4. Only those that are extended from non-purpose credit accounts require Form T-4. Also, the brokerage firms generally retain the forms and do not necessarily provide a copy to the customer. Therefore, authorized committees do not need to maintain copies of Form T-4 in their files.

## Conforming Amendment

### 11 CFR 113.1 Definitions

Under the final rules, the third party payments provisions of the definition of "personal use" in 11 CFR 113.1(g)(6) is amended to include a repayment, endorsement, guarantee, or co-signature of a loan derived from a candidate's brokerage account, credit card, home equity line of credit, or other line of credit and used for the candidate's routine living expenses within the meaning of "payment." A cross reference to section 100.7(b)(22) is included in this paragraph.

### Additional Topics on Which No Changes to the Rules Are Being Made

#### Margin Requirements

The NPRM stated that a loan derived from a brokerage account is obtained by opening a non-purpose credit account. The commenter pointed out that non-purpose credit can also be extended from margin accounts but they are subject to the limitations and regulations of Regulation T, 12 CFR part 220. Under 12 CFR 220.6(e), however, non-purpose credit accounts are not subject to Regulation T's margin requirements but are subject to the rules of the self regulating organizations ("SRO") that regulate the exchanges. Recognizing that non-purpose credit accounts contain similar inherent risks to margin accounts, the two largest SRO, the New York Stock Exchange ("NYSE") and the National Association of Securities Dealers ("NASD"), established minimum maintenance margins for non-purpose credit accounts that are applicable to the members in their exchanges.<sup>5</sup> Generally, the minimum maintenance margin is 25 percent.<sup>6</sup> That is, a customer must maintain securities valued at 125 percent of the outstanding non-purpose credit. Individual brokerage firms may require higher maintenance margins.

<sup>5</sup> Margin is the amount paid by the customer when using the broker's credit to purchase securities. The maintenance margin is the minimum margin that must be held or maintained in an account. As long as the value of the equity in the customer's account exceeds the maintenance margin, the customer is not required to make payments on the loan. A margin call occurs when the value of a customer's account falls below the maintenance margin and the brokerage firm issues a demand to a customer to deposit more cash or securities into the account so that the value of the account increases to at least the maintenance margin.

<sup>6</sup> However, the Federal Reserve Board may amend Regulation T to change the minimum maintenance for margin accounts. Also, the SRO may change the maintenance margin for non-purpose credit account with the approval of the Securities and Exchange Commission (SEC).

Brokerage firms are supposed to issue a margin call if the equity in a customer's non-purpose credit account falls below the maintenance margin. Both the NYSE and the NASD, however, allow firms not to issue a margin call if the firm is willing to take a charge against its net capital, pursuant to SEC Rule 15c3-1, for the amount the customer would have been required to deposit to meet the margin call.<sup>7</sup> See NYSE Rule 431(e)(7) and NASD Rule 2520(e)(7).

Although this practice may be considered to be in the ordinary course of business, nevertheless, the candidate would receive something of value—not having to deposit additional cash or securities into an account—for free. Essentially, the brokerage firm is providing additional collateral to the candidate without being compensated. Even though the brokerage firm may provide the same service to other customers who are not seeking Federal office, the Commission has determined that services offered free of charge by corporations in the ordinary course of business for promotional or good will purposes (if these services might otherwise have required consideration) are prohibited by 2 U.S.C. 441b. See Advisory Opinions 1996-2, 1988-25, 1988-12. Moreover, by not making the margin call, the candidate has increased his or her risk exposure and may be less likely to be able to repay the loan.

In the NPRM, the Commission sought comments on whether a brokerage firm that makes a charge against net capital may, under certain circumstances, provide something of value to candidates which is prohibited by 2 U.S.C. 441b. The Commission did not receive any comments on this issue. Given the analysis above, the Commission has concluded that brokerage firms that take a charge against their net capital instead of making a margin call on non-purpose credit accounts used by candidates to finance their campaign are making an unlawful corporate contribution. The final rules do not specifically address this issue because the Federal Reserve Board and the Securities and Exchange Commission have primary jurisdiction over these transactions. Rather, should the situation arise, the Commission may address this issue on a case-by-case basis through its enforcement or advisory opinion processes.

<sup>7</sup> This practice is not available to non-purpose credit extended from margin accounts because the Federal Reserve Board's Regulation T requires that brokers issue a margin call when a margin account falls below the maintenance margin.

#### *Repayment and Termination*

Loans derived from a candidate's brokerage account, credit card account, home equity line of credit, or other lines of credit, present several repayment issues. Under 2 U.S.C. 432(e)(2), a candidate is considered an agent of the authorized committee when obtaining a loan for use in connection with the candidate's campaign for federal office. As such, the authorized committee currently has a continuing obligation to report the loan until it is repaid to the lending institution. In practice, customers are not required to make payments on the loans derived from a brokerage account unless the value of the non-purpose credit account falls below the maintenance margin. If the securities in margin and non-purpose credit accounts continually increase in value, then the customer does not have to make any payments. Thus, a candidate could maintain a loan balance well after the candidate is no longer seeking federal office.

Currently, a committee reports the disposition and repayment of its loans, including loans to the candidate that are used for campaign purposes, before it can terminate. For purposes of determining the disposition of these loans, the Commission sought comments on when a brokerage loan should be considered repaid in full and on when a committee can terminate. The Commission did not receive any comments on these questions.

Because the Commission has adopted the alternative reporting approach, the candidate's principal campaign committee no longer must report the candidate's repayments directly to the lending institution. Thus, the committee may terminate once it has repaid the loans made to the committee even if the underlying loan remains outstanding against the candidate. However, it is important to note that the candidate must still preserve the records described in new section 104(b)(4) for three years after the election even if the committee terminates before that date.

#### **Certification of No Effect Pursuant to 5 U.S.C. 605(b) (Regulatory Flexibility Act)**

The attached final rules do not have a significant economic impact on a substantial number of small entities. The final rules implement the changes to the FECA expressly permitting candidates to obtain loans from a wider range of financial institutions. This increases the flexibility that candidates would have to seek financing for their campaigns. The requirement to report loans derived from an advance from a

candidate's brokerage account, credit card, or line of credit only impacts the candidates and their campaign committees. It does not have a significant economic impact on these committees because they are already required to report all loans that are made in connection with a federal campaign. In fact, the reporting requirements in the final rules are minimal. The changes will not cause committees to devote much additional time or resources to comply with the reporting requirements. Therefore, the attached final rules do not have a significant economic impact on a substantial number of small entities.

#### **List of Subjects**

##### *11 CFR Part 100*

Elections.

##### *11 CFR Part 104*

Campaign funds, Political committees and parties, Reporting and recordkeeping requirements.

##### *11 CFR Part 113*

Campaign funds.

For the reasons set out in the preamble, Subchapter A, Chapter I of title 11 of the *Code of Federal Regulations* is amended as follows:

#### **PART 100—SCOPE AND DEFINITIONS (2 U.S.C. 431)**

1. The authority citation for part 100 continues to read as follows:

**Authority:** 2 U.S.C. 431, 434(a)(11), 438(a)(8).

2. 11 CFR 100.7 is amended by revising the introductory text of paragraph (b)(11) and adding new paragraph (b)(22) to read as follows:

#### **§ 100.7. Contribution (2 U.S.C. 431(8)).**

\* \* \* \* \*

(b) \* \* \*

(11) A loan of money by a State bank, a federally chartered depository institution (including a national bank) or a depository institution whose deposits and accounts are insured by the Federal Deposit Insurance Corporation or the National Credit Union Administration is not a contribution by the lending institution if such loan is made in accordance with applicable banking laws and regulations and is made in the ordinary course of business. A loan will be deemed to be made in the ordinary course of business if it: Bears the usual and customary interest rate of the lending institution for the category of loan involved; is made on a basis which assures repayment; is evidenced by a written

acceptable and unacceptable purpose descriptions to be reported by authorized committees. Paragraph (B) requires authorized committees, when itemizing certain disbursements for which reimbursements are required, to provide a brief explanation of the activity for which reimbursement is required. These provisions have been in Title 11 of the **Code of Federal Regulations** since 1980 and 1995, respectively, and were not affected by the recent statutory changes to the election cycle reporting requirements.

#### Need for Correction

As published, the final rules inadvertently omit two paragraphs describing information to be reported by authorized committees of Federal candidates.

All committees must report the purpose of itemized disbursements (i.e., those disbursements aggregating in excess of \$200). Omitted paragraph (A) contains examples of suitably specific purpose descriptions as well as examples of those descriptions that are unacceptably vague. This paragraph is inconsistent with the reporting of rules for unauthorized committees (committees other than candidate committees) in 11 CFR 104.3(b)(3).

Omitted paragraph (B) is used in administering the "personal use" rules in 11 CFR 113.1. Federal candidates are barred from using campaign funds for personal benefit. Paragraph (B) requires authorized committees of Federal candidates itemizing disbursements for which partial or total reimbursement is required under 11 CFR 113.1(g)(1)(iii)(C) or (D) to provide a brief explanation of the activity for which the reimbursement is made.

Section 801 of Title 5 of the United States Code requires Federal agencies to submit regulations to Congress. These regulations were submitted to the Speaker of the House of Representatives and the President of the Senate on November 26, 2001.

#### Certification of No Effect Pursuant to 5 U.S.C. § 605(b) [Regulatory Flexibility Act]

This correction will not have significant economic impact on a substantial number of small entities. The basis of this certification is that this correction only requires political committees to once again add information to the reports they are required to file. These regulations were in 11 CFR since 1980 and 1995, respectively, before being inadvertently omitted in 2000.

#### List of Subjects in 11 CFR Part 104

Campaign funds, Political committees and parties, Reporting and recordkeeping requirements.

Accordingly, 11 CFR part 104 is corrected by making the following correcting amendment:

#### PART 104—REPORTS BY POLITICAL COMMITTEES

1. The authority citation for part 104 continues to read as follows:

**Authority:** 2 U.S.C. 431(1), 431(8), 431(9), 432(i), 434, 438(a)(8), 438(b), 439a.

#### § 104.3 Contents of reports (2 U.S.C. 434(b), 439a).

\* \* \* \* \*

2. In § 104.3 add the following paragraphs (b)(4)(i)(A) and (B):

(b) \* \* \*  
(4) \* \* \*  
(i) \* \* \*

(A) As used in this paragraph, *purpose* means a brief statement or description of why the disbursement was made. Examples of statements or descriptions which meet the requirements of this paragraph include the following: dinner expenses, media, salary, polling, travel, party fees, phone banks, travel expenses, travel expense reimbursement, and catering costs. However, statements or descriptions such as *advance*, *election day expenses*, *other expenses*, *expenses*, *expense reimbursement*, *miscellaneous*, *outside services*, *get-out-the-vote* and *voter registration* would not meet the requirements of this paragraph for reporting the purpose of an expenditure.

(B) In addition to reporting the purpose described in paragraph (b)(4)(i)(A) of this section, whenever an authorized committee itemizes a disbursement that is partially or entirely a personal use for which reimbursement is required under 11 CFR 113.1(g)(1)(ii)(C) or (D), it shall provide a brief explanation of the activity for which reimbursement is required.

\* \* \* \* \*

Dated: November 26, 2001.

**Danny L. McDonald,**  
*Chairman, Federal Election Commission.*  
[FR Doc. 01-29679 Filed 11-29-01; 8:45 am]  
**BILLING CODE 6715-01-P**

#### FEDERAL ELECTION COMMISSION

#### 11 CFR Part 111

[Notice 2001-18]

#### Extension to Administrative Fines

**AGENCY:** Federal Election Commission.

**ACTION:** Final rule; revision of the sunset date.

**SUMMARY:** The Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the expiration date in which the Federal Election Commission (hereinafter "the Commission") may assess civil money penalties for violations of the reporting requirements of section 434(a) of the Federal Election Campaign Act (hereinafter "the Act" or "FECA").

**DATES:** Effective on December 31, 2001.

**FOR FURTHER INFORMATION CONTACT:** Ms. Rosemary C. Smith, Assistant General Counsel, or Ms. Mai T. Dinh, Attorney, 999 E Street, NW., Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

#### SUPPLEMENTARY INFORMATION:

#### Explanation and Justification

Section 640 of the Treasury and General Government Appropriations Act, 2000, Pub. L. No. 106-58, 106th Cong., 113 Stat. 430, 476-77 (1999), amended § 309(a)(4) of the FECA, 2 U.S.C. 437g(a)(4), to provide for a modified enforcement process for violations of reporting requirements. Under § 437g(a)(4)(C) of the FECA, the Commission may assess a civil money penalty for violations of the reporting requirements of 2 U.S.C. 434(a). This authority, however, was to sunset on December 31, 2001. Pub. L. No. 106-58, 106th Cong., § 640(c). Recently, § 642 of the Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the sunset date to include all reports that cover activity between January 1, 2000, to December 31, 2003.

The Commission published final rules on May 19, 2000, to implement the amendment contained in the Treasury and General Government Appropriations Act, 2000. Section 111.30 of the regulations reflects the sunset provision of Pub. L. No. 106-58, 106th Cong., § 640(c). Therefore, the Commission is issuing this final rule to amend section 111.30 to extend the application of the administrative fine regulations, 11 CFR part 111, subpart B, to include all violations relating to reports that cover the period between January 1, 2000, to December 31, 2003.

The Commission is promulgating this final rule without notice or opportunity for comment because it falls under the "good cause" exemption of the Administrative Procedures Act, 5 U.S.C. 553(b)(B). The exemption allows

**FEDERAL ELECTION COMMISSION**

**11 CFR Parts 100, 102, 104, 106, 108, 110, 114, 300, and 9034**

[Notice 2002–11]

**Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money**

**AGENCY:** Federal Election Commission.

**ACTION:** Final rules and transmittal of regulations to Congress.

**SUMMARY:** The Federal Election Commission is revising its rules relating to funds raised, received, and spent by party committees under the Federal Election Campaign Act of 1971, as amended (“FECA” or the “Act”). The revisions are based on the Bipartisan Campaign Reform Act of 2002 (“BCRA”), which adds to the Act new restrictions and prohibitions on the receipt, solicitation, and use of certain types of non-Federal funds, which are commonly referred to as “soft money.” BCRA and the revised rules prohibit national parties from raising or spending non-Federal funds. They also permit State, district, and local party committees to fund certain “Federal election activity,” including certain voter registration and get-out-the-vote (“GOTV”) drives, with money raised pursuant to new limitations, prohibitions, and reporting requirements under BCRA, or with a combination of funds subject to various requirements of the Act and BCRA. They also address fundraising by Federal and non-Federal candidates and Federal officeholders on behalf of political party committees, other candidates, and non-profit organizations. Further information is contained in the Supplementary Information that follows.

**DATES:** The effective date is November 6, 2002, except for 11 CFR 106.7(a) which is effective January 1, 2003.

**FOR FURTHER INFORMATION CONTACT:** Mr. John C. Vergelli, Acting Assistant General Counsel; or Attorneys Mr. Anthony T. Buckley, Mr. Jonathan M. Levin, Ms. Dawn Odrowski, Ms. Anne A. Weissenborn, 999 E Street, NW., Washington, DC 20463, (202) 694–1650 or (800) 424–9530.

**SUPPLEMENTARY INFORMATION:** The Bipartisan Campaign Reform Act of 2002 (“BCRA”), Public Law 107–155, 116 Stat. 81 (March 27, 2002), contains extensive and detailed amendments to the Federal Election Campaign Act of 1971, as amended (“FECA” or the “Act”), 2 U.S.C. 431 *et seq.* This is the first of a series of rulemakings the

Commission is undertaking this year in order to meet the rulemaking deadlines set out in BCRA. These rules address BCRA’s new limitations on party, candidate, and officeholder solicitation and use of non-Federal funds.<sup>1</sup>

Section 402(c)(2) of BCRA establishes a 90-day deadline for the Commission to promulgate these rules. Since BCRA was signed into law on March 27, 2002, the 90-day deadline was June 25, 2002.<sup>2</sup> The Commission promulgated these rules on June 22, 2002. The new rules will take effect on November 6, 2002, the day following the November 2002 general election, except rules that take effect after the transition period. 2 U.S.C. 431 note.

Because of the extremely tight deadline for promulgating these rules, the Commission adhered to a shorter-than-usual timeline for receiving and considering public comments. The Notice of Proposed Rulemaking (“NPRM”) on which these rules are based was published in the **Federal Register** on May 20, 2002. 67 FR 35654 (May 20, 2002). Comments were received from the Alliance for Justice; the American Federation of Labor and Congress of Industrial Organizations (“AFL-CIO”); the American Federation of State, County, and Municipal Employees (“AFSCME”); the Association of State Democratic Chairs (“ASDC”); Dr. Peter Bearse; the California Republican Party; the Campaign and Media Legal Center; the Center for Responsive Politics (“CRP”) and FEC Watch (joint comment); Common Cause and Democracy 21 (joint comment); the Connecticut Republican State Central Committee; the Democratic National Committee (“DNC”), the Democratic Senatorial Campaign Committee (“DSCC”) and the Democratic Congressional Campaign Committee (“DCCC”) (joint comment); Development Strategies Corporation; Benjamin L. Ginsberg, Esq.; Ms. Janice P. Johnson; the Latino Coalition and

<sup>1</sup> Future rulemakings will address: (1) Electioneering communications and issue ads; (2) coordinated and independent expenditures; (3) the so-called “millionaires” amendment, which increases contribution limits for congressional candidates facing self-financed candidates on a sliding scale, based on the amount of personal funds the opponent contributes to his or her campaign; (4) the increase in contribution limits; and (5) other new and amended provisions, including contribution prohibitions and reporting. This last rulemaking will address contributions by minors, foreign nationals, and U.S. nationals; inaugural committees; fraudulent solicitations; disclaimers; personal use of campaign funds; and civil penalties. BCRA’s impact on national nominating conventions will be addressed in a separate rulemaking.

<sup>2</sup> BCRA’s deadline for promulgation of the remaining rules is 270 days after the date of enactment, or December 22, 2002.

National Taxpayer Network, Inc. (joint comment); the Michigan Democratic Party (“MDP”); Mindshare Internet Campaigns L.L.C.; the NAACP National Voter Fund (“NAACP NVF”); the National Republican Congressional Committee (“NRCC”); OMB Watch; Senators John S. McCain and Russell D. Feingold, and Representatives Christopher Shays and Marty Meehan (joint comment), and a supplemental comment from Senator McCain; Representative Bob Ney; Norman D. Petrick; and the Republican National Committee (“RNC”).

The Commission held a public hearing on the NPRM on June 4 and 5, 2002, at which it heard testimony from representatives of the ASDC; the AFL-CIO; the Campaign and Media Legal Center; Common Cause and Democracy 21; CRP and FEC Watch; the DNC, DSCC and DCCC; the Latino Coalition and the Taxpayer Network, Inc.; NAACP NVF; the MDP; the RNC, the RNCC, and the Republican State Chairmen; and Mr. Ginsberg. Please note that, for purposes of this document, the terms “commenter” and “comment” cover both written comments and oral testimony at the public hearing.

Under the Administrative Procedures Act, 5 U.S.C. 553(d), and the Congressional Review of Agency Rulemaking Act, 5 U.S.C. 801(a)(1), agencies must submit final rules to the Speaker of the House of Representatives and the President of the Senate and publish them in the **Federal Register** at least 30 calendar days before they take effect. The final rules on Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money were transmitted to Congress on July 16, 2002.

## Explanation and Justification

### I. Terminology

Because the term “soft money” is used by different people to refer to a wide variety of funds under different circumstances, the Commission is using the term “non-Federal funds” in the final rules rather than the term “soft money.” BCRA does not use the term “soft money” except in the heading of Title I and the headings within Title IV. Nonetheless, the Commission sought comment on whether use of the term “soft money” would in some instances be preferable.

Not all commenters addressed this issue, and several of those who did not address the issue used the term “soft money” throughout their comments. Most of those who addressed this question, however, urged the Commission to use the terms “Federal funds” and “non-Federal funds” in



place of what they characterized as the often-misunderstood term “soft money.” One commenter urged the Commission to use the terms “regulated” and “unregulated” funds, arguing that the terms “Federal” and “non-Federal” funds are also confusing. However, the terms “Federal” and “non-Federal” have been used by the Commission for many years throughout the rules and are thus familiar to those active in this area. See, for example, 11 CFR 102.5 (“Federal” and “non-Federal” accounts); 11 CFR 106.5 (“Federal” and “non-Federal” disbursements). The terms “regulated” and “unregulated” could also be subject to different interpretations. Moreover, non-Federal funds are regulated by State law. The Commission is, therefore, using the terms “Federal” and “non-Federal” throughout the text of the regulations and the accompanying Explanation and Justification.

## II. The Statutory Framework

The Act limits the amount that individuals can contribute to candidates, political committees, and political parties for use in Federal elections. 2 U.S.C. 441a. The Act also prohibits corporations and labor organizations from contributing their general treasury funds for these purposes. 2 U.S.C. 441b. Contributions from national banks, 2 U.S.C. 441b(a); government contractors, 2 U.S.C. 441c; foreign nationals, 2 U.S.C. 441e; and minors, new 2 U.S.C. 441k, as enacted by BCRA; as well as contributions made in the name of another, 2 U.S.C. 441f; are also prohibited. These strictures regulate what is often referred to as “hard money,” or Federal funds.

Some donations that do not meet the FECA hard money requirements, for example, corporate and labor organization general treasury contributions, may not be used for Federal elections, and are referred to as non-Federal funds. Non-Federal funds may not be used for the purpose of influencing any election for Federal office. Funds raised that are used by State or local parties or State or local candidates on non-Federal elections are governed by State or local law. Prior to BCRA’s revisions, the FECA permitted national party committees, Federal candidates, and officeholders to raise money not subject to some of the Act’s source limitations and prohibitions. Beginning November 6, 2002, under BCRA, national party committees “may not solicit, receive, or direct to another person a contribution, donation, or transfer of funds or any other thing of value, or spend any funds, that are not subject to the limitations, prohibitions,

and reporting requirements of this Act.” 2 U.S.C. 441i(a).

BCRA also requires State, district, and local political party committees to pay for “Federal election activities,” which is a new term introduced and defined by BCRA, 2 U.S.C. 431(20), with entirely Federal funds or, in some cases, a mix of Federal funds and a new type of non-Federal funds, which the rules call “Levin funds.” These two provisions are related in that the latter is intended to prevent evasion of the former. A State, district, or local political party committee may not evade the restrictions in BCRA by receiving funds transferred from a national party committee and spending those funds on Federal election activity. A State, district, or local party committee must spend Federal and Levin funds it raises itself on these activities. See 148 Cong. Rec. H408–409 (daily ed. Feb. 13, 2002) (statement of Rep. Shays).

As discussed below, these new and revised rules partially supersede the following advisory opinions relating to preemption as to party office buildings: Advisory Opinions 2001–12, 2001–1, 1998–8, 1998–7, 1997–14, 1993–9, 1991–5, and 1986–40. Other advisory opinions may no longer be relied upon to the extent they conflict with BCRA. Further guidance will be forthcoming in future advisory opinions and rulemakings.

## III. Part 100—Scope and Definition

### 11 CFR 100.14 Definition of “State Committee, Subordinate Committee, District, or Local Committee”

Several provisions of BCRA refer to “State, district, and local committees of a political party.” See, e.g., the “Levin Amendment,” 2 U.S.C. 441i(b)(2). In the NPRM, the Commission pointed out that the terms “State committee,” “subordinate committee,” and “party committee,” are already defined in the regulations, although “district committee” and “local committee” are not. 11 CFR 100.14, 100.5(e)(4); see also 2 U.S.C. 431(15).

In paragraph (a) of section 100.14, status as a State committee is determined by reference to the party bylaws or State law. This provision, which did not draw comment, allows the regulation to cover those States in which party committee status is a matter of State law and those in which it is a matter of party bylaws.

The proposed regulation published in the NPRM provided, in paragraphs (a), (b), and (c), with regard to “State committees,” “subordinate committees,” and “district or local committees,” respectively, that an

organization must be “part of the official party structure” and be “responsible for the day-to-day operation of the political party” to meet the definition. Three commenters, including the principal Congressional sponsors of BCRA, objected to this conjunctive requirement. These commenters collectively believe that limiting the definition to organizations that are part of the “official party structure” will open the door to purportedly “unofficial” party organizations that would be able to avoid BCRA’s requirement while “manifestly engaged in party operations.” Instead, they propose a disjunctive definition, which would provide that a party organization meets the respective definitions if it is part of the official party structure or responsible for the day-to-day operation of the party. The Commission has concluded that requiring a committee to be part of the official party structure before it satisfies the regulatory definition is an important safeguard, ensuring that BCRA’s provisions sweep only as far as necessary to accomplish its ends. The Commission also believes that its definition of “subordinate committee of a State, district, or local committee,” which includes any organization that is directly or indirectly established, financed, maintained, or controlled by the State, district, or local committee fully addresses the sponsor’s regulatory concerns in this area.

Paragraph (b) is a new provision defining “district or local committee.” (This provision was labeled paragraph (c) in the NPRM, while subordinate committees were covered by paragraph (b). In the final rules, the Commission has covered subordinate committees in paragraph (c). This reordering of paragraphs within section 100.14 reflects the priority given to district and local party committees in BCRA.) This definition largely parallels paragraph (a) but for political subdivisions below the State level, and encompasses those political party committees that do not necessarily operate formally under the “control or direction” of the State party committee. In the final rules, the Commission has deleted the phrase, “including an entity that is directly or indirectly established, financed, maintained, or controlled by the district or local committee.”

The principal Congressional sponsors of BCRA commented that the words, “under State law,” as they appeared in the NPRM, are redundant given the preceding reference to “operation of State law.” The Commission agrees, and has deleted the redundant words in the final rule.



Three commenters objected to adding language, "as determined by the Commission," in paragraph (b) of section 100.14. An association of State party officials stated, referring to paragraph (b), "there should be no discretion left to the Commission to decide whether a particular organization is a local party committee." A national party committee described status as a local committee as a "quintessential State and local" issue. The Commission has not included the phrase, "as determined by the Commission," in paragraph (b) of section 100.14.

With regard to subordinate committees, in paragraph (c) of section 100.14, the phrase, "as determined by the Commission," which was included in the proposed regulation published in the NPRM, has not been included in the final rules. The Commission has concluded that this language, which refers to the availability of the advisory opinion process, is not appropriate with regard to committees other than State committees, whose status as State party committees, as determined by the Commission, makes them eligible for higher contribution limits and permits them to make coordinated expenditures under FECA. The principal Congressional sponsors of BCRA commented that, as proposed in the NPRM, this definition did not, but should, include within the definition an entity that is directly or indirectly established, financed, maintained, or controlled by the subordinate committee. The Commission has included such a provision in paragraph (c) of section 100.14 of the final rules.

#### *11 CFR 100.24 Definition of "Federal Election Activity"*

Many of the operative provisions of Title I of BCRA use the term "Federal election activity" ("FEA"). See, e.g., 2 U.S.C. 441i(b)(1), (2), 2 U.S.C. 441i(d). Congress defined the term at 2 U.S.C. 431(20). The Commission is adopting new regulation 11 CFR 100.24 to implement the statutory definition.

The definition of FEA proposed in the NPRM drew numerous comments urging divergent interpretations of key statutory terminology. Many of these comments focused on four important phrases that are used in the statutory definition at 2 U.S.C. 431(20). In light of these comments, the Commission has revised the regulation proposed in the NPRM by adding a new first paragraph, 11 CFR 100.24(a), which defines these four terms for the purposes of the rest of the regulation and for use in part 300 of chapter 1 of Title 11. These terms are "voter registration activity" (see 2 U.S.C. 431(20)(A)(i)), "in connection

with an election in which a candidate for Federal office appears on the ballot," "get-out-the-vote activity" ("GOTV"), and "voter identification" (see 2 U.S.C. 431(20)(A)(ii)).

#### *A. Elections in Which Federal Candidates "Appear on the Ballot"*

The statutory definition of FEA provides that certain activities are FEA if they are "in connection with an election in which a candidate for Federal office appears on the ballot." 2 U.S.C. 431(20)(A)(ii). Congress clearly intended to establish certain periods of time in which no candidates for Federal office appear on the ballot. The NPRM requested comment as to how to interpret this statutory provision. Several commenters, including the principal Congressional sponsors of BCRA, urged the Commission to construe this phrase to mean "starting at the beginning of a two-year Federal election cycle, except in states holding regularly scheduled state elections in odd-numbered years." These commenters argued that this approach is "consistent with the Commission's current practice with respect to allocation of generic voter drive and administrative expenses," and comports with the plain meaning of the statute.

In contrast, two commenters, a national party committee and a labor organization, urged the Commission to pick a date certain, January 1 of even-numbered years, to identify the time-frame that is "in connection with an election in which a candidate for Federal office appears on the ballot." The commenters commended this approach as "practical" and "reasonable." One of these commenters suggested that the concept of even-numbered Federal election years is already familiar, and that party activities are "more diverse" in odd-numbered years, in that they are more focused on local and State activities. The Commission notes that a large number of State and local elections take place in odd-numbered years (e.g., mayoral elections in some large cities). Activities in connection with such elections are presumably not "conducted in connection with an election in which a candidate for Federal office appears on the ballot," even under the most expansive reading of the statute.

A civil rights organization urged the Commission to interpret the term, "in connection with an election in which a candidate for Federal office appears on the ballot," to mean that period of time beginning on the day on which a Federal candidate is actually certified for the ballot in a given jurisdiction.

This commenter argues this interpretation is the plainest possible reading of the statute. This civil rights organization also cautioned that an overly broad definition of when a candidate "appears on the ballot" would unduly hamper their legitimate fundraising efforts, and thus impede many, if not all, of their non-partisan GOTV efforts. A Latino rights group and a taxpayers' organization suggested that the Commission interpret the statutory term to mean the earliest date on which a Federal candidate could qualify for the ballot in a given jurisdiction.

Paragraph (a)(1) of 11 CFR 100.24 defines "in connection with an election in which a candidate for Federal office appears on the ballot" to mean two specific periods of time. The first begins on the earliest filing deadline for access to the primary election ballot for Federal candidates, as determined by State law, or in those States that do not conduct primaries, on January 1 of each even-numbered year. This time period ends on the date of the general election, up to and including the date of any general runoff. This definition of "in connection with an election in which a candidate for Federal office appears on the ballot" closely tracks the statutory language of 2 U.S.C. 431(20)(A)(ii) by tying the definition to the actual date that Federal candidates appear on the ballot. Although this definition may result in all fifty States having different time-periods in which "a candidate for Federal office appears on the ballot," for purposes of the Act, there will be only one relevant date in any particular State. Thus, this is not at all burdensome on State and local party committees, who are the primary actors affected by this clause, especially since many of these committees must already pay attention to State dates in order to file certain pre-election reports with the Commission. Finally, this definition harmonizes the rule for regularly scheduled Federal elections and special elections for Federal office held outside normal election time frames. (See next paragraph.)

The second time-frame that is "in connection with an election in which a candidate for Federal office appears on the ballot" occurs in odd-numbered years in which a special election for a Federal office occurs. Paragraph (a)(1)(ii) prescribes that the period beginning on the date the special election date is set and ending on the day of the special election is considered to be "in connection with an election in which a candidate for Federal office appears on the ballot."

### B. Voter Registration Activity

BCRA does not define “voter registration activity,” as that term is used in the statutory definition of “Federal election activity,” although “voter registration activity” is “Federal election activity” only when it is conducted 120 days or fewer before a regularly scheduled Federal election. 2 U.S.C. 431(20)(A)(i). Paragraph (a)(2) of section 100.24, in the final rules, defines voter registration activity to encompass individualized contact for the specific purpose of assisting individuals with the process of registering to vote. The definition in paragraph (a)(2) also includes the costs of printing and distributing voter registration information, such as registration forms, and voting information, for example, pamphlets of similar materials explaining the voter-registration process.

The Commission has expressly rejected an approach whereby merely encouraging voter registration would constitute Federal election activity. The regulation requires concrete actions to assist voters, rather than mere exhortation. A more expansive definition would run the risk that thousands of political committees and grassroots organizations that merely encouraged voting as a civic duty, who have never been subject to Federal regulation for such conduct, would be swept into the extensive reporting and filing requirements mandated under Federal law.

### C. Get-Out-the-Vote

Based upon the comments received in response to the rules proposed in the NPRM, the testimony at the public hearing, and its own analysis of BCRA, the Commission has concluded that it must define GOTV in a manner that distinguishes the activity from ordinary or usual campaigning that a party committee may conduct on behalf of its candidates. Stated another way, if GOTV is defined too broadly, the effect of the regulations would be to federalize a vast percentage of ordinary campaign activity.

The Commission received several comments on this topic. A State political party and an association of State party officials argued that the timing (i.e., relative to the election) should not be relevant to determining whether an activity is GOTV. Rather, both commenters suggested that GOTV “should refer to actual communications with voters for the purpose of encouraging them to vote.” Two public interest groups agreed that timing relative to the election is not relevant to

determining whether an activity is GOTV. Neither group, however, suggests an actual definition of the term. The Congressional sponsors “strongly disagree with the suggestion that \* \* \* voter contacts may constitute [GOTV] only if they occur ‘on Election day or shortly before.’ Contacting voters to encourage voting is [GOTV] whenever it occurs.” A labor organization suggested that timing is relevant, and urged that the Commission’s definition of GOTV be limited to activities that occur on election day.

In the final rules, at 11 CFR 100.24(a)(3), the Commission adopts a definition of “GOTV activity” as “contacting registered voters \* \* \* to assist them in engaging in the act of voting.” This definition is focused on activity that is ultimately directed to *registered* voters, even if the efforts also incidentally reach the general public. Second, GOTV has a very particular purpose: assisting registered voters to take any and all necessary steps to get to the polls and cast their ballots, or to vote by absentee ballot or other means provided by law. The Commission understands this purpose to be narrower and more specific than the broader purposes of generally increasing public support for a candidate or decreasing public support for an opposing candidate.

Paragraph (a)(3) provides a list of two examples of get-out-the-vote activity that is intended to assist in applying the regulation to particular factual situations. The first example, in paragraph (a)(3)(i), is activity whereby an individual is provided specific information on voting within 72 hours of an election, such as the date of the election, the location of polling places, and the hours the polls are open. The second example, in paragraph (a)(3)(ii), is offering to transport or actually transporting voters to the polls.

The regulation explicitly excludes “any communication by an association or similar group of candidates for State and local office or of individuals holding State or local office if such communication refers only to one or more state or local candidates.” Similar to the exclusion for voter identification discussed below, this exclusion keeps State and local candidates’ grassroots and local political activity a question of State, not Federal law. Interpreting the statute to extend to purely State and local activity by State and local candidates would potentially bring into the Federal regulatory scheme thousands of State and local candidates that are currently outside the Federal system. The Commission declines to undertake such a vast federalization of

State and local activity without greater direction from Congress.

In the NPRM, the Commission posed several questions as to how the term “get-out-the-vote” activity should be interpreted in the statute. Among the issues raised was whether there should be an exception for “non-partisan” GOTV. In their comment, the principal Congressional sponsors of BCRA strongly opposed a non-partisan exception as “flatly inconsistent with BCRA.” They argued that the plain language of the statute does not permit such an exception. Three other commenters, all of whom are public interest groups, make the same general argument. These commenters, and the Congressional sponsors, each opposed regulations that might contemplate “non-partisan” voter-drive activities by party committees and candidates, which one of the commenters labeled as “oxymoronic.”

In contrast, one commenter, a non-profit corporation, urged the Commission to adopt a “non-partisan exception” for non-profit organizations that engage in non-partisan voter-drive activities such as GOTV and voter registration. This group noted that the proposed regulations would restrict fundraising on behalf of a non-profit by political party committees and Federal candidates if the non-profit spent money for FEA. It contended that, if the Commission fails to distinguish between partisan and non-partisan voter-drive activities, the efforts of legitimate, non-partisan groups to encourage voting will be hampered, perhaps fatally, in the case of some organizations. This commenter also argued that the Commission should create a “safe harbor” to allow political party committees and Federal candidates to raise funds on behalf of section 501(c)(3) organizations that legally engage in non-partisan voter-drive activities.

In Title I of BCRA, Congress expressly addressed party fundraising for tax-exempt organizations. Congress specifically provided that national, State, district, and local political party committees “shall not solicit any funds for, or make or direct any donations to” section 501(c) organizations that spend money on Federal election activity. 2 U.S.C. 441i(d)(1). The Commission does not discern, from the plain language of section 441i(d)(1), any authority to craft a regulatory exception to the definition of FEA that would modify the effect of section 441i(d)(1). This conclusion is supported by the fact that Congress did provide a limited exception for fundraising by Federal candidates on behalf of 501(c) organization that engage in FEA. See 2 U.S.C. 441i(e)(4)(B)

(which provides that a Federal candidate is permitted to raise up to \$20,000 per calendar year from individuals for a section 501(c) organization, even if the organization engages in certain FEA.) Clearly, Congress could have crafted a non-partisan exception, but did not do so with regard to party committees' GOTV drives. Therefore, the Commission declines to adopt a "non-partisan" exception in 11 CFR 100.24 with regard to the definition of FEA.

In the NPRM, the Commission solicited comments as to whether there should be a *de minimis* exception allowing a certain, nominal amount of GOTV related to a Federal election that would nonetheless not render these activities as FEA. The principal Congressional sponsors of BCRA and a public interest group commented that there is no basis in the statute for a *de minimis* exception, and that such an exception "would be contrary to the plain meaning of the statute." A labor organization, a national party, and a State political party committee support the inclusion of a *de minimis* exception. The State party committee suggests a \$5,000 exception, so that "informal and occasional GOTV and grassroots activities do not invoke the full force of federal regulations." One of the labor organizations asserts the exception would prevent the regulation from having a "strict liability" aspect. The Commission declines to adopt a *de minimis* exception in 11 CFR 100.24.

#### D. Slate Cards, Sample Ballots, and Other Exempt Activities

In the NPRM, the Commission specifically sought comment as to the use of printed slate cards, sample ballots, palm cards, and similar listings of three or more candidates in the context of GOTV. The Commission also sought comment about the larger issue of the relationship of "exempt activities" to "Federal election activities." 67 FR 35656.

The term "exempt activities" refers to three types of spending by State and local party organizations, each of which is excluded from the statutory definitions of contribution and expenditure in 2 U.S.C. 431(8) and (9). That is, a payment by a State or local party organization for an exempt activity is not a "contribution," within the meaning of the Act, to a candidate benefited by the activity, nor an "expenditure," within the meaning of the Act, by the party organization.

Slate cards are one type of exempt activity. A payment for the "costs of preparation, display, or mailing or other distribution . . . with respect to a printed

slate card or sample ballot, or other printed listing, of 3 or more candidates for any public office," is not a contribution or expenditure. The exclusion does not apply to spending for displaying the slate card "on broadcast stations, or in newspapers, magazines, or similar types of general public political advertising." 2 U.S.C. 431(8)(B)(v) (contribution); 2 U.S.C. 431(9)(B)(iv) (expenditure). See also 11 CFR 100.7(b)(9), 100.8(b)(10). Note that the exemption extends to the costs of a mass mailing of the slate card.

"The original intent of the slate card amendment was to allow parties to print slate cards, sample ballots, etc., to educate voters and encourage straight party voting without being subject to the disclosure provisions and contribution and expenditure limitations in Federal law." H.R. Rep. No. 93-1239, at 142 (1974) (House Committee on Administration Report on the Federal Election Campaign Act Amendments of 1974) (Supp. View of Rep. Frenzel). Other statements in the legislative history tend to confirm this view of the intent behind the provision. See, e.g., H.R. Rep. No. 93-1438, at 65 (1974) (Conference Report on Federal Election Campaign Act Amendments of 1974) (intent of provision "is to allow State and local parties to educate the general public as to the identity of the candidates of the party.")

Several commenters have addressed the relationship between FEA and exempt activities, including slate cards. One State party committee commented that it understands BCRA to have "clearly redefined all such \* \* \* activities as Federal election activities that must be funded entirely by hard money." The principal Congressional sponsors of BCRA commented that slate cards, sample ballots, and palm cards should be included in GOTV. With regard to the larger issue of the relationship between all exempt activities and FEA, the principal sponsors urged that if an activity constitutes FEA, then it must be treated as such. A public interest group argues that "federal election activity subsumes all previously allocable expenses," with certain exceptions not relevant here.

In a joint comment, a national party committee and two Congressional campaign committees advocated the opposite conclusion: "Congress did not leave any suggestion in the legislative history that these important exceptions were somehow overridden \* \* \* by BICRA." These commenters argued that the Commission's current treatment of exempt activities is consistent with BCRA because BCRA focuses on "soft money" spending for "issue

advertising," whereas exempt activities are, by definition, at the grassroots level. Thus, they conclude, "exempt activities should not be deemed to be 'Federal election activity,' and that the costs of exempt activities should continue to be allocated between Federal and non-Federal funds," by which they mean non-Federal funds other than Levin funds. Another national party committee, a State party committee, and a labor organization made essentially the same points, agreeing that the definition of Federal election activity should exclude exempt activities.

The Commission does not interpret the Act, as amended by BCRA, to permit blanket conclusions about the relationship of exempt activities and FEA, in the sense of asserting that all exempt activities are necessarily now FEA, or *vice versa*. It is clear that not all exempt activities are FEA. For example, voter registration activities undertaken by a State or local political party on behalf of the Presidential ticket more than 120 days before a regularly scheduled election is an exempt activity under 2 U.S.C. 431(8)(B)(xii) and (9)(B)(ix), but not a Federal election activity. 11 CFR 100.24(b)(1). It is also clear that some activities satisfy one of the definitions of exempt activities and simultaneously satisfy one of the definitions of FEA. For example, voter registration activities undertaken by a State or local political party on behalf of the Presidential ticket fewer than 120 days before a regularly scheduled election satisfy both the definition of exempt activity and of Federal election activity. 2 U.S.C. 431(8)(B)(xii), (9)(B)(ix), and 20(A)(i).

In cases where a given activity undertaken by a State, district, or local political party committee is both an exempt activity and a Federal election activity, the issue is how it may or must be paid for. On this point, BCRA and the Commission's pre-BCRA regulations appear to be in conflict. Under BCRA, as interpreted in these final rules, if the activity is deemed a FEA, it must be paid for with Federal funds, Levin funds, or with an allocated mix of Federal and Levin funds. See 11 CFR 300.32(b). Under the Commission's pre-BCRA regulations, if the activity is deemed an exempt activity that is combined with non-Federal activity it may be paid for with an allocated mix of Federal and non-Federal funds. 11 CFR 100.7(b)(9), (15), (17), 100.8(b)(10), (16), (18), and 106.5(a)(2)(iii). See *Common Cause v. Federal Election Com'n*, 692 F.Supp. 1391, 1394-1396 (D.D.C. 1987). The *Common Cause* case directly addressed two of the three categories of exempt activities:

campaign materials used by volunteers (see 11 CFR 100.7(b)(15) and 100.8(b)(16)) and voter registration and GOTV activities on behalf of the Presidential ticket (see 11 CFR 100.7(b)(17) and 100.8(b)(18)), establishing that allocation of payments for these activities between Federal and non-Federal funds was properly a matter for the Commission to address in its regulations. *Common Cause*, 692 F.Supp. at 1396. While not directly addressed in *Common Cause*, the allocation of the costs of slate cards is also addressed in the Commission's regulations, but not in FECA. Compare 2 U.S.C. 431(8)(B)(v) and (9)(B)(iv) (which does not specifically provide for allocation) with 11 CFR 100.7(b)(9) and 100.8(b)(10) (which provides for allocation).

Since the Commission's regulations may not override the Act, as amended by BCRA, if an activity undertaken by a State, district, or local political party committee simultaneously constitutes both exempt activity and Federal election activity, that activity must now be paid for as a Federal election activity, not as an exempt activity.

The Commission emphasizes, however, that payments by a State, district, or local political party committee for an activity that is within one of the exempt activity categories remains excluded from the definitions of "contribution" and "expenditure." That is, the conclusion explained in the preceding paragraph goes only to how the activity must be paid for, not to characterizing the payment as a contribution or expenditure under the Act.

With these considerations in mind, the Commission sees no valid reason to handle slate cards differently from any other type of exempt activity with regard to the definition of Federal election activity. If a State, district, or local political party committee uses slate cards as part of GOTV activity, or in a public communication that promotes or supports, or attacks or opposes a Federal candidate, then the committee must pay for the costs of these slate cards as a Federal election activity (see 2 U.S.C. 431(20)(A)(ii), (iii)), although these payments are excluded from the definition of "expenditure." On the other hand, if a State, district, or local political party committee uses slate cards mentioning Federal and non-Federal candidates in the course of campaigning that does not constitute Federal election activity, then it may allocate the costs of these slate cards between Federal and non-Federal funds.

#### E. Voter Identification

In BCRA, Congress included "voter identification" within the definition of "Federal election activity." 2 U.S.C. 431(20)(A)(ii). In the NPRM, the Commission sought comment as to whether the proposed definition was too narrowly or broadly crafted, and, in the alternative, what activities should be incorporated into the definition of "voter identification." A consortium of non-profit groups expressed concern that the term "voter identification" could be read too broadly by encompassing "efforts to identify the shared interests of individuals for non-electoral purposes." They urged the Commission to restrict the definition to "activities designed primarily to identify the political preferences of individuals in order to influence their voting." Similarly, a State political party commented that the definition in the proposed regulation was "far too broad and instead should be defined to include only activity that involved actual contact of voters, by phone, in person or otherwise, to determine their likelihood of voting generally or their likelihood of voting for a specific Federal candidate." This State party committee specifically urged that the final definition exclude the costs of "acquisition or enhancement of a list of voters, or the acquisition of publicly available demographic information regarding these voters," arguing that such functions are properly treated as administrative expenses because they are part of the party's "fundamental functions." Several national party committees offered essentially similar views. A labor organization commented that "voter identification" should be defined as telephone calls or canvassing "to identify voters for other Federal election activities," and agreed that gathering data about voters should be excluded. Another labor organization commented that "voter identification" should be limited to determining voter intent with regard to specific Federal candidates only.

In contrast, the principal Congressional sponsors of BCRA commented that "voter identification" should include all activities designed to determine registered voters, likely voters, or voters indicating a preference for a specific candidate or party." They also commented that voter identification efforts should not be excluded simply because no mention is made of a Federal candidate. A public interest group commented that "voter identification" includes "all efforts to identify voters, even if done in the name of state and local candidates."

With regard to the Commission's question, posed in the NPRM, about distinguishing voter identification from GOTV, the principal Congressional sponsors commented that the distinction "makes no difference" because both types of activity are covered under the same provision of BCRA (see 2 U.S.C. 431(20)(A)(ii)). A public interest group urged the Commission not to limit voter identification to efforts to identify voters for other Federal election activities, arguing that only a "tortured reading" of the statute allows [GOTV] activity to modify "voter identification." A labor union disagreed, arguing that only voter identification for the purposes of GOTV should be included. Another public interest group argued against distinguishing the two activities according to proximity in time to the election. (See previous discussion under the discussion of GOTV.)

The Commission requested comments as to whether the regulations should include a *de minimis* exception to voter identification activities. One labor union requested that there be a *de minimis* exception, particularly to allow for the maintenance and development of voter files during non-election years. Both the Congressional sponsors and a public interest group argued that such an exception would be contrary to the plain language and intent of BCRA.

In paragraph (a)(4) of section 100.24, the Commission adopts a definition of "voter identification" that includes the costs of "creating or enhancing voter lists by verifying or adding information about the voters' likelihood of voting or likelihood of voting for specific candidates." The Commission notes that "voter identification" is one of the types of Federal election activity that will occur only during those times when a candidate for Federal office appears on the ballot. See 11 CFR 100.24(a)(1).

The Commission recognizes that even during the period when a Federal candidate appears on the ballot, the act of acquiring a voter list in and of itself does not constitute voter identification. Committees have a number of reasons for acquiring voter lists, including fundraising and off-year party building activities. Such activity, on its face, does not constitute "voter identification" with respect to the statute, as there lacks a nexus between the activity and the statutory language that contemplates activity "in connection with an election in which a candidate appears on the ballot."

The final rule excludes from the definition certain voter identification undertaken by groups or associations of State or local candidates or

officeholders, solely in reference to State or local candidates. The Commission included this exclusion because it finds it implausible that Congress intended to federalize State and local election activity to such an extent without any mention of the issue during the floor debate for BCRA. BCRA makes voter identification a subset of Federal election activity, and the regulatory implications of engaging in Federal election activity are significant. For the Commission to exercise its discretion so as to sweep within Federal regulation candidates for city council, or the local school board, who join together to identify potential voters for their own candidacies, the Commission would require more explicit instruction from Congress.

#### *F. Definition of "Federal Election Activity"*

Paragraph (b) of section 100.24 defines Federal election activity. Paragraph (b)(1) implements 2 U.S.C. 431(20)(A)(i) by including voter registration activity during the period that begins on the date that is 120 calendar days before the date of a regularly scheduled Federal election. "Special elections" are not "regularly scheduled," and therefore excluded from the definition. Paragraph (b)(2) of section 100.24 implements 2 U.S.C. 431(20)(A)(ii) by including with the definition of Federal election activity voter identification, GOTV, and generic campaign activity when they are conducted in connection with an election in which a Federal candidate appears on the ballot.

11 CFR 100.24(b)(3) follows new 2 U.S.C. 431(20) by providing that a public communication that refers to a clearly identified candidate for Federal office would constitute "Federal election activity" that must be paid for with entirely Federal funds if the communication promotes, supports, attacks, or opposes any candidate for that Federal office. This is true even if a candidate for State or local office is also mentioned or identified. "Public communication" is defined in proposed 11 CFR 100.26, discussed below. Public communications falling within this category of the definition of "Federal election activity" extend beyond communications expressly advocating a vote for or against a candidate.

11 CFR 100.24(b)(4) implements 2 U.S.C. 431(20)(A)(iv) by providing that Federal election activity includes services provided during any month by an employee of a State, district, or local committee of a political party who spends over 25% of that individual's compensated time on activities in

connection with a Federal election. There were no comments on this definition. A number of issues involving employees are discussed below in the Explanation and Justification for section 300.33. The Commission has concluded that the statute is clear on its face, and therefore paragraph (b)(4) follows that statutory language without additional interpretation.

#### *G. Activities Excluded From the Definition of "Federal Election Activity"*

In BCRA, Congress specifically excluded certain activities from the definition of Federal election activity. 2 U.S.C. 431(20)(B). Activities falling within one of the exceptions may be paid for with entirely non-Federal funds. 11 CFR 100.24(c) implements these statutory exceptions. Paragraphs (c)(1) through (c)(4) of section 100.24 parallel the statutory exclusions at 2 U.S.C. 431(20)(B)(i) through (iv).

Paragraph (c)(1) excludes a public communication that refers solely to one or more clearly identified State or local candidates, and does not promote or support, or attack or oppose, a clearly identified candidate for Federal office, provided that the public communication is not a voter registration activity, or GOTV, or voter identification. 2 U.S.C. 431(20)(B)(i). As an example of the application of this paragraph, this exception does not apply to a telephone bank on the day before an election where there is a Federal candidate on the ballot and where GOTV phone calls are made to over 500 voters, even if the calls only refer to a State or local candidate. 2 U.S.C. 431(20)(B)(i); *see* 11 CFR 100.24(b)(2).

Paragraph (c)(2) excludes a contribution to a State or local candidate, provided that the contribution is not designated to pay for voter registration activity, voter identification, GOTV, generic campaign activity, a public communication promoting or supporting, or attacking or opposing, a clearly identified Federal candidate, or employee services as set forth in paragraphs (b)(1) through (b)(4) of section 100.24. 2 U.S.C. 431(20)(B)(ii). In the final rules, the Commission has added a reference to employee services as set forth in paragraph (b)(4) for the sake of completeness.

Paragraph (c)(3) excludes the costs of State, district, or local political conventions, meetings, or conferences. The principal Congressional sponsors of BCRA commented that this approach was too broad, in that it included "a meeting or conference," whereas the statutory provision it implemented, 2 U.S.C. 431(20)(B)(iii), refers only to

"conventions." These commenters failed to note, however, that meetings or conferences do not fall within the statutory definition of Federal election activity, and this remains true whether the Commission explicitly states it or not. Therefore, paragraph (c)(3) excludes the costs of a State, district, or local convention, meeting or conference. 2 U.S.C. 431(20)(B)(iii). The principal Congressional sponsors otherwise supported paragraphs (c)(1) through (c)(4).

Paragraph (c)(4) excludes the costs of grassroots campaign materials that name or depict only State and local candidates. 2 U.S.C. 431(20)(B)(iv). The list of examples of such materials in paragraph (c)(4) includes certain items not mentioned in the statute. The Commission received no comments objecting to the additional items.

In the version of the regulation published in the NPRM, the Commission included two additional exceptions that it has subsequently determined should not be listed as exceptions to the definition of Federal election activity in paragraph (c). These provisions would have covered voter registration activity at any time other than the period of time that is within 120 days of a regularly scheduled Federal election, and GOTV and voter identification in elections in which no Federal candidate appears on the ballot. While these activities are not Federal election activities, under certain circumstances payments for these activities must be allocated between Federal funds and non-Federal funds. *See* 11 CFR 106.5. In this regard, these two types of activities differ from the activities described in paragraphs (c)(1) through (c)(4) of section 100.24, which always may be paid for with entirely non-Federal funds. Therefore, the Commission has removed these two provisions from the final regulation.

#### *11 CFR 100.25 Definition of "Generic Campaign Activity"*

Section 100.25 implements the statutory definition of "generic campaign activity," which has been added to the Act by BCRA. "Generic campaign activity" is defined in BCRA as campaign activity "that promotes a political party and does not promote a candidate or non-Federal candidate." 2 U.S.C. 431(21).

Generic campaign activity is a form of Federal election activity when it takes place in connection with an election in which a candidate for Federal office appears on the ballot. 11 CFR 100.24(b)(2)(ii). The Commission is defining "in connection with an election in which a candidate for

Federal office appears on the ballot” to include special elections fitting that description. 11 CFR 100.24(a)(1). Therefore, generic campaign activity may, in principle, occur in connection with a special election in which a candidate for Federal office appears on the ballot, provided, of course, that the elements of the definition are otherwise satisfied. An association of State party officials commented favorably on this approach. A public interest group pointed out that Advisory Opinion 1998–9, which was issued to a State party committee, addressed a special election in which only one Federal office was at stake, and thus only one candidate of the party on the ballot. The Commission opined that under such circumstances a candidate was clearly identified, and allocable “generic activities” by the party under pre-BCRA 11 CFR 106.5(a)(2)(iv) were thus not possible with regard to that special election. The final regulation is consistent with the reasoning of Advisory Opinion 1998–9 in defining “generic campaign activity.”

The final regulation elaborates on the statute by including within the definition of “generic campaign activity” those activities that oppose a political party without opposing a specific candidate. A labor organization commented that the regulation impermissibly goes beyond the statute by including activities in opposition to another party. In the Commission’s experience, however, such activities in opposition to another party implicitly promote the party undertaking the activities, and are thus properly included in the definition. A national party committee also argued against the approach taken in the proposed regulation, characterizing it as “confusing” because it is framed in terms of promoting and opposing the party, which “unnecessarily clouds the distinction of voter registration and GOTV activities.” This commenter would have the Commission define “generic campaign activity” as an “activity that promotes or opposes the particular party’s ticket, without mentioning or referring to candidates by name.” The Commission believes most of these concerns are addressed in the definitions of voter registration activity and GOTV at 11 CFR 100.24(a)(2) and (3), respectively. Also, the distinction drawn by the commenter, that is, between promoting the party and promoting the party’s ticket, is limited in practical application. Whether an activity is characterized as voter registration, GOTV, or generic campaign activity, it is treated as a Federal

election activity when conducted in certain relation to a Federal election, *see* 100.24(b)(1) and (2), and is, in each case, a Federal election activity on which Levin funds may be spent, *see* 11 CFR 300.32(b)(1).

In the version of the regulation proposed in the NPRM, “generic campaign activity” would have been defined as a “campaign activity” that promotes or opposes a political party but not a candidate. In the final rules, the definition instead refers to a “public communication” that promotes or opposes a political party but not a candidate. The Commission made this change to ensure that the definition encompasses only the external activities of a political party committee, that is, activities targeted to the public. This interpretation is also consistent with the plain meaning of the statutory provision, since it is difficult to envision how a campaign activity could effectively promote or oppose a political party without it taking the form of a public communication. This interpretation is also consistent with Advisory Opinion 1998–9, which dealt with numerous campaign activities that involved public communications.

In the final rules, the Commission has added the words “clearly identified” to qualify the phrase, “Federal candidate or a non-Federal candidate.” The intent of this addition is to remove ambiguity from the definition.

In the NPRM, the Commission sought comment on the extent, if any, to which the exclusions for exempt activities in 11 CFR 100.7(b)(9), (15), and (17) and 100.8(b)(8), (10), and (16), should apply to the definition of “generic campaign activity.” A public interest group commented that “exempt activities should not be excluded from the definition of ‘generic campaign activity.’” An association of State party officials commented that there appears to be no overlap between exempt activities and generic campaign activities since the former, “by definition, reference a clearly identified Federal candidate,” while the latter, by definition, may not.

The Commission understands two of the categories of exempt activities, slate cards (*see* 11 CFR 100.7(b)(9) and 100.8(b)(8)) and voter registration on behalf of the Presidential ticket (*see* 11 CFR 100.7(b)(17) and 100.8(b)(16)), to have no applicability to payments for generic campaign activity. This is so because these two types of exempt activities, by their nature, promote one or more candidates, and activities that promote a candidate are outside the scope of the definition of generic campaign activity. The remaining

category of exempt activity—payments for certain campaign materials used by party volunteers (*see* 11 CFR 100.7(b)(15) and 100.8(b)(10))—may in certain circumstances also qualify as generic campaign activity under 11 CFR 100.25. If the campaign materials used by the volunteers promote only the party, and do not promote a candidate, then this activity would be both exempt and a generic campaign activity. A public interest group included an essentially similar analysis of this point in their comment.

#### *11 CFR 100.26 Definition of “Public communication”*

BCRA amends 2 U.S.C. 431 by adding a new definition for the term “public communication.” BCRA defines “public communication” to include communications by broadcast, cable, satellite, newspaper, magazine, outdoor advertising facility, mass mailing or telephone bank to the general public, or any other form of general public political advertising.

The Commission did not include the Internet as a form of “general public political advertising” in proposed 11 CFR 100.26 because this provision of BCRA does not refer to the Internet. The Commission, however, sought comment as to whether the definition of “public communication” in proposed 11 CFR 100.26 should include or exclude communications provided through the use of World Wide Web sites available to the public, widely distributed electronic mail, or other uses of the Internet, such as “Webcasts” or the transmission of high-quality voice, graphics, or video advertisements.

Many commenters addressed this issue. A national political party, an association of State party officials, an LLC that provides technical services to campaigns, a State political party, a public interest group, and a labor union urged the Commission not to include the Internet in the definition of “public communication.” Four commenters pointed to the lack of inclusion of the Internet in the list of modes of public communications, noting that Congress had had an opportunity to include the Internet in this definition, but declined to do so.

A number of commenters argued that the Internet provides a low cost way for parties and other interested persons to disseminate their message widely, and the Commission should not attempt to regulate their doing so. The commenter who provides technical services to campaigns wrote, “[the Internet] is an open, decentralized platform on which every user has the capacity to reach literally every other user. Candidates

and interest groups can and do use this medium to engage in meaningful, two-way dialogue \* \* \*. Congress did not include other forms of two-way dialogue such as candidate forums, rallies, debates, or other events that are open to the public."

The same commenter noted the practical impossibility in fashioning restrictions on Internet communications given the rapidly changing environment: "Although the Internet itself has been in existence since the early 1970s, it is only recently that the medium has emerged in the mainstream \* \* \* Internet technology continues to evolve, and so does its application."

Other commenters were strongly opposed to the exclusion of the Internet from the media classified as public communications. The principal Congressional sponsors of BCRA and three public interest groups who support campaign finance reform argued that failure to include the Internet in this definition could carve out an exception for a widespread and growing form of political advertising. A public interest group echoed the words of the Congressional sponsors: "A broad *per se* exclusion of that nature would be inadvisable because it could permit state and local party entities to exploit rapidly developing technology and new communications media to re-create or prolong the current soft money system."

The Commission has considered the issue of Internet communication, both in the context of this rulemaking, as well as in previous rulemakings and the advisory opinion process. The Commission concludes that excluding the Internet from the definition of "public communication" is consistent with the plain meaning of the statute, consistent with Congress' decision not to include the Internet in the statutory definition of "public communication," and is the best policy decision with regard to implementation of BCRA.

The Commission is convinced that the exclusion is appropriate from the perspective of statutory construction because the Internet is excluded from the list of media that constitute public communication under the statute. BCRA does not reference the "Internet" or "electronic mail" in this section, although Congress used the terms "Internet," "website," and "World Wide Web address" in other sections of BCRA. See, for example, 2 U.S.C. 434 note, enacted by BCRA section 201 (Federal Communications Commission to compile and maintain on its website information the FEC may need to carry out Title 2, Subtitle A, of BCRA, relating to electioneering communications); 2 U.S.C. 438a, as enacted by BCRA section

502 (Commission to maintain a website of election reports). Congress has also used the terms "Internet" and "electronic mail" in other statutes and distinguished them from "telecommunications services." See Communications Decency Act of 1996, 47 U.S.C. § 230(f)(1) (defining "Internet") and 231(e)(4) (including "electronic mail" and excluding "telecommunications services" from definition of "Internet access service"). BCRA does reference "any other form of general public political advertising" in the definition of "public communication." General language following a listing of specific terms, however, does not evidence Congressional intent to include a separate and distinct term that is not listed, such as the Internet. See Sutherland Statutes and Statutory Construction, section 47; 17 *Ejusdem generis*, Vol. 2A (6th ed. 2000). It is also noted that there is no indication in the legislative history that Congress contemplated including the Internet in the definition of public communication.

Perhaps most important, there are significant policy reasons to exclude the Internet as a public communication. The Commission fails to see the threat of corruption that is present in a medium that allows almost limitless, inexpensive communication across the broadest possible cross-section of the American population. Unlike media such as television and radio, where the constraints of the medium make access financially prohibitive for the general population, the Internet is by definition a bastion of free political speech, where any individual has access to almost limitless political expression with minimal cost. As one public interest group who favors campaign finance reform argued: "There are good policy reasons for leaving the Internet out of the definition, as it is cheap and widely available. Internet communications are not part of the campaign finance problem, and should not be regulated as such unless Congress specifically mandates it."

#### 11 CFR 100.27 Definition of "Mass Mailing"

BCRA amends 2 U.S.C. 431 by adding a new definition of the term "mass mailing" at section 431(23). This definition, which is set out in new 11 CFR 100.27, includes any mailing by United States mail or facsimile of more than 500 pieces of mail matter of an identical or substantially similar nature within any 30-day period. For the reasons explained in the Explanation and Justification for 11 CFR 100.26, the term "mass mailing" excludes

communications sent over the Internet. It also excludes "electronic mail." Cf. 47 U.S.C. 231(e)(4) ("electronic mail" is included in the definition of "Internet access service").

The term "substantially similar" is also used in the Commission's disclaimer regulations at 11 CFR 110.11(a)(3). When the disclaimer rules were adopted in 1995, the Commission explained that technological advances now permit what is basically the same communication to be personalized to include the recipient's name, occupation, geographic location, and similar variables. Communications are considered "substantially similar" for purposes of the disclaimer rules if they would be the same but for such individualization. See *Explanation and Justification for Regulations on Communications Disclaimer Requirements*, 60 FR 52069, 52070 (Oct. 5, 1995). The Commission proposed in the NPRM that the term "substantially similar" in 11 CFR 100.27 have the identical meaning.

Several commenters expressed the view that this definition of "substantially similar" is too narrow as applied to mass mailings. They pointed out, for example, that the sponsoring group could change an internal sentence every 490 letters and thereby escape coverage under this definition. Also, many communications are largely identical but contain a separate paragraph addressing a targeted group, such as retired teachers or those with a particular hobby. The Commission has therefore revised the final rules to state that communications are considered substantially similar for purposes of this section if they include substantially the same template or language, but vary in non-material respects such as communications customized by the recipient's name, occupation, or geographic location.

#### 11 CFR 100.28 Definition of "Telephone Bank"

BCRA amends 2 U.S.C. 431 by adding a new definition of the term "telephone bank" at section 431(24). This definition, which is set out in new 11 CFR 100.28, includes more than 500 telephone calls of an identical or substantially similar nature within any 30-day period. A telephone bank does not include electronic mail sent over telephone lines. See 47 U.S.C. 231(e)(4) (distinguishing "electronic mail" from "telecommunications services"). Nor does it include Internet communications transmitted over telephone lines, for the reasons discussed above in the Explanation and Justification for 11 CFR 100.26.



The Commission also proposed addressing the meaning of “substantially similar” in the text of the rules. See discussion of 11 CFR 100.27, above. As with the definition of “mass mailing,” discussed above, several commenters urged the Commission to broaden the definition of “substantially similar” contained in the proposed rules. They pointed out that, even more so than with mass mailings, phone conversations, even those where the caller is using a prepared script, are likely to vary somewhat from call to call. The Commission accordingly has revised the language of section 100.28 as proposed in the NPRM to provide that, consistent with the definition of “mass mailing” contained in section 100.27, communications are considered substantially similar for purposes of section 100.28 if they include substantially the same template or language, but vary in non-material respects such as communications customized by the recipient’s name, occupation, or geographic location.

#### **IV. Part 102—Registration, Organization, and Recordkeeping by Political Committees**

##### *11 CFR 102.5 Organizations Financing Political Activity in Connection With Federal and Non-Federal Elections, Other Than Through Transfers and Joint Fundraisers: Accounts and Accounting*

This section continues to set out requirements for accounts or accounting methods that must be established and maintained by organizations, including political committees, that fund activities in connection with Federal elections and non-Federal elections. The section has, however, been revised in several respects. 2 USC 441i(a) expressly prohibits national party committees from raising and spending non-Federal funds. Paragraph 102.5(c) addresses the application of this section to national party committees, while corresponding changes have been made to other portions of 11 CFR 102.5 to clarify that various provisions are now applicable to only State, district, and local party committees and organizations. While this section will continue to apply to all these party committees between November 6, 2002 and December 31, 2002, after the latter date, national party committees will no longer be covered by its provisions.

Paragraph (a)(1) remains largely unchanged except for the addition of language clarifying that State, district, and local party committees are the party organizations covered in these provisions, the addition of certain citations to other regulatory provisions,

including 11 CFR part 300, and the separate discussions of administrative expenses incurred by party committees and by other political committees that are not party committees.

Paragraph (a)(2) is revised to require committees to meet at least one of the three listed conditions for depositing contributions into their Federal accounts. The purpose of this regulation is to assure that funds placed in this account are from contributors who know the intended use of their contributions, and the Commission believes that this purpose can be fulfilled by means of either contributor designations, solicitations for express purposes, or solicitations or notifications that inform contributors that their contributions are subject to the prohibitions and limitations of the Act.

New paragraph (a)(3) addresses the new category of “Levin funds” created by BCRA to be used by State, district, and local party committees for certain Federal election activity. These funds are subject to certain prohibitions and limitations pursuant to 11 CFR 300.31 and may be used by these party committees to pay allocable shares of particular Federal election activities under particular circumstances, including voter registration, voter identification, get-out-the-vote and generic campaign activities. See also 11 CFR 100.24 and 11 CFR 300.32(b) and 300.33.

The NPRM proposed requiring State, district, and local party committees to establish separate Levin accounts. Responses to the NPRM from the principal Congressional sponsors of BCRA urged retention of this requirement; however, several other responses, in particular those from party committees, requested the Commission to make such separate accounts an option rather than a requirement. One commenter stated that “although it would seem generally prudent to establish separate ‘Levin accounts,’ imposing such a requirement in the regulations would be problematic,” noting that some States prohibit party committees from establishing more than one depository account. In light of these concerns, and because BCRA’s statutory provisions do not mandate the creation of separate Levin accounts, revised paragraphs (a)(3)(i) and (ii) set out generally two alternative methods of accounting for Levin funds: a separate Levin account and the use of a reasonable accounting method approved by the Commission that will permit the committee to demonstrate that funds received and disbursed by the party committee in its existing non-Federal

account meet the requirements of the Act as amended by BCRA. Paragraph (a)(3)(ii) also requires those party committees electing not to establish a separate Levin account to maintain records of funds used for Levin activities and to make these records available to the Commission upon request. Party committees intending to undertake activities pursuant to 11 CFR 300.32(b) are urged to consult 11 CFR 300.30(c) for more detailed rules regarding alternative required accounts and accounting methods.

A comment submitted in response to the NPRM expressed concern that the draft regulations could have been construed as allowing Federal candidates and officeholders to solicit funds that would be excessive or prohibited under Federal law, if the solicitation being used stated that the funds would be used for a non-Federal purpose. To address this concern, paragraph (a)(4) has been added to emphasize that the restrictions on solicitations by Federal candidates and Federal officeholders in 11 CFR 300.31(e) and 11 CFR part 300, subpart D, apply to solicitations for State, district, and local party committees.

The final rules also include a new paragraph (a)(5) that clarifies the permissibility of State, district, and local party committees and organizations creating separate allocation accounts to be used for funding Levin activities that are allocable between Federal and Levin funds pursuant to 11 CFR 300.33 and for funding other activities allocable between a committee’s Federal and non-Federal funds pursuant to 11 CFR 106.7. See also the Explanation and Justification below for new 11 CFR 106.7 and for new 11 CFR 300.33.

11 CFR 102.5(b) addresses organizations that are not political committees. Pursuant to paragraph (b)(1), when such organizations make contributions and expenditures or payments for exempt activities under 11 CFR 100.7(b)(9), (15), and (17) and 100.8(b)(10), (16), and (18), they must maintain records of the related receipts and disbursements and must make those records available to the Commission upon request. These organizations must also be able to demonstrate through a reasonable accounting method that funds used to make contributions, expenditures, and payments for exempt activities meet the requirements of the Act.

Paragraph (b)(2) of 11 CFR 102.5 applies to those State, district, and local party organizations that are not political committees but that wish to undertake Federal election activities pursuant to

11 CFR 300.32(b). Pursuant to 11 CFR 102.5(b)(2)(i) and (ii), these party organizations are given a choice of accounting methods: establishment of a separate Levin account or use of a reasonable accounting method approved by the Commission that will permit the organization to demonstrate that permissible funds from its existing accounts were used for permissible activities. They must also make their records of funds received and expended for these activities available to the Commission upon request. Party organizations that intend to undertake activities pursuant to 11 CFR 300.32(b) are urged to consult 11 CFR 300.30(c) for more detailed rules regarding alternative required accounts and accounting methods.

*11 CFR 102.17 Joint Fundraising by Committees Other Than Separate Segregated Funds*

The ban on national party non-Federal fundraising affects the Commission's joint fundraising rules at 11 CFR 102.17. The Commission is, therefore, adding introductory language to this section, advising readers that "[n]othing in this section shall supersede 11 CFR part 300, which prohibits any person from soliciting, receiving, directing, transferring, or spending any non-Federal funds, or from transferring Federal funds for Federal election activities." Part 300 is discussed below.

**V. Part 104—Reports by Political Committees**

*11 CFR 104.8 and 104.9 Uniform Reporting of Receipts and Disbursements*

As of November 6, 2002, BCRA prohibits national committees of political parties and entities directly or indirectly established, financed, maintained, and controlled by them, including their subordinate committees, from raising and spending non-Federal funds. BCRA further requires that national party committees, including subordinate committees thereof, dispose of all non-Federal funds by December 31, 2002 in accordance with 11 CFR 300.12, and report the disposition of those funds pursuant to section 300.13. Since national party committees will no longer maintain non-Federal accounts, including office building and facility accounts, the national party non-Federal account reporting rules at 11 CFR 104.8(e) and (f), and 11 CFR 104.9(c), (d) and (e) will no longer be necessary. Therefore, the final rules covering receipts by non-Federal accounts at 11 CFR 104.8(e) and (f), and disbursements

in the form of transfers to State and local party committees at 11 CFR 104.9(e), have been amended so that they apply to reports covering non-Federal account activity through December 31, 2002. In contrast, the final rules governing disbursements of non-Federal funds at 11 CFR 104.9(c) and (d) are amended to remain in effect for reports covering activity on or before March 31, 2003, rather than December 31, 2002 as provided in the NPRM. This change is prompted by the Commission's decision to permit national party committees to refund to donors by December 31, 2002 any excess non-Federal funds as provided in 11 CFR 300.12(c) and (d). Any refund checks not cashed by February 28, 2003, must be disgorged to the United States Treasury by March 31, 2003. Consequently any such disgorgements must be reported in disclosure reports covering activity through that date.

*11 CFR 104.10 Reporting by Separate Segregated Funds and Nonconnected Committees of Expenses Allocated Among Candidates and Activities*

Section 104.10 of the pre-BCRA regulations addressed the reporting of expenses that are allocated among more than one clearly identified candidate (paragraph (a)) and expenses that are allocated among specific types of mixed Federal/non-Federal activities by political party committees and by separate segregated funds and nonconnected committees (paragraph (b)). However, allocation with respect to certain mixed party activities has changed as a result of BCRA, notably in the introduction of the use of Levin funds. Some of the activity that was allocable under former 11 CFR 106.5 (allocation of mixed Federal/non-Federal activities by party committees) is now Federal election activity under certain circumstances. In addition, most of the categories are now allocated according to specified percentages. Moreover, the use of non-Federal funds by national party committees has been eliminated.

In view of these new circumstances, the rules for reporting of allocable expenses are being divided into three sections: 11 CFR 104.10 applies to political committees that are separate segregated funds or nonconnected committees; new 11 CFR 104.17 applies to payments allocated between the Federal and non-Federal accounts of State, district, and local party committees; and new 11 CFR 300.36 covers payments allocated by those party committees between Federal funds and Levin funds, pursuant to 11 CFR 300.32(b)(1) and 300.33.

Pre-BCRA section 104.10(a), which addressed payments entailing combined expenditures and disbursements on behalf of more than one clearly identified Federal and non-Federal candidate, is being changed very little at this point. Paragraph (a) is being amended to specify that it applies only to separate segregated funds and nonconnected committees, and to delete references to section 106.5(g) (now section 106.7(f)), which addresses non-Federal to Federal transfers made by party committees for the purpose of mixed payments.

Similar changes are being made to paragraph (b) of section 104.10. In view of the removal of party committees from this section, other adjustments are being made. In the discussion of itemization of allocated disbursements for administrative and generic voter drive expenses, the references to the Senate and House campaign committees of a political party are being deleted from paragraph (b)(1)(i) and (ii). In paragraph (b)(1)(ii), the specific reference to the types of committees using the funds expended method is being deleted because all committees addressed in this regulation would use the funds expended method for those two allocation categories. References to exempt activities are also deleted because those exemptions do not apply to the activities of separate segregated funds and nonconnected committees.

The only specific comments received on section 104.10 were general expressions of support from the principal Congressional sponsors of BCRA and two commenters on behalf of State party committees. Consequently, the final rules follow the proposed rules, except for two small reversions back to the pre-BCRA regulation. Instead of citing to 11 CFR 106.1 specifically as the regulation providing instructions on allocation for candidate support, the revised citation is to 11 CFR part 106 because 11 CFR 106.4 is applicable to the allocation of polling costs.

*11 CFR 104.17 Reporting of Allocable Expenses by Party Committees*

As indicated in the Explanations and Justifications for 11 CFR 104.10 and 106.1, pre-BCRA section 104.10 has been divided into two sections for the reporting of allocable payments. Section 104.10 now addresses reporting of allocable expenses by separate segregated funds and non-connected committees. Section 104.17, which had been a reserved section prior to the enactment of BCRA, now addresses reporting of allocable expenses by party committees.

Paragraph (a) of new section 104.17 addresses allocation of the support of candidates, including Federal and non-Federal candidates, by national party committees and by State, district, and local party committees. As indicated below, national party committees must use all Federal funds, while State, district, and local party committees may use a mixture of Federal and non-Federal funds under certain circumstances. Paragraph (b) of this section addresses the reporting of the allocation of expenditures and disbursements for mixed Federal/non-Federal activities that are not Federal election activities undertaken by State, district, and local party committees. These include, for example, administrative costs and the costs of exempt activities that do not fall within the definition of Federal election activity. Reporting requirements with regard to specific Federal election activities allocable between Federal and Levin funds pursuant to 11 CFR 300.33 are addressed separately in 11 CFR 300.36.

The NPRM included proposed 11 CFR 104.17(a) to address payments on behalf of more than one clearly identified candidate, including payments that entail an expenditure on behalf of one or more Federal candidates and a disbursement on behalf of one or more non-Federal candidates. The NPRM explained that all such payments must be made with Federal funds and must be reported.

Proposed paragraphs (a)(1) and (a)(2) provided for the use of a unique identifying title or code for each program or activity conducted on behalf of more than one candidate and for the retention of records in accordance with 11 CFR 104.14. These requirements were in pre-BCRA 11 CFR 104.10.

The Commission sought comments on the proposed requirement that a State, district, or local party use only Federal funds for the combined payments on behalf of clearly identified Federal and clearly identified non-Federal candidates. As indicated in the Explanation and Justification of 11 CFR 106.1, a number of commenters noted that materials and communications that refer to both Federal and non-Federal candidates, but are not public communications and do not otherwise meet the definition of Federal election activity, should continue to be subject to allocation based on the time or space devoted to each candidate. Other commenters asserted that only Federal funds could be used.

The final rule in 11 CFR 104.17 clarifies the issue as to the use of Federal funds. Paragraph (a) makes clear

that, where a national party committee makes a payment that consists of both an expenditure on behalf of a Federal candidate and a disbursement on behalf of a non-Federal candidate, the amounts attributed to each candidate must be disclosed, but only a Federal account may be used.

Paragraph (a) changes the approach taken in the NPRM with respect to State, district, and local party committees, which, unlike national party committees, may have non-Federal accounts under BCRA. The application of the new Federal election activity provisions of BCRA means that many disbursements by State, district, and local party committees mentioning Federal candidates that in the past were allocable between Federal and non-Federal accounts pre-BCRA must now be paid solely with Federal funds. There will still be, however, other payments entailing expenditures by State, district, and local party committees on behalf of Federal candidates and disbursements by these committees on behalf of non-Federal candidates that will not be Federal election activities; these will continue to be allocable between Federal and non-Federal accounts.

Accordingly, paragraph (a)(1) in the final rule generally follows pre-BCRA 11 CFR 104.10(a)(1), including the retention of the requirement of unique identifying titles or codes. All report entries that reflect the same allocable program or activity will share the same title or code to better track the particular program or activity. The use of unique identifiers for other various categories of mixed party activities is discussed below.

Paragraphs (a)(2) and (a)(3) of 11 CFR 104.17 follow pre-BCRA 11 CFR 104.10 with a minor citation change. Paragraph (a)(2) includes reporting of transfers to allocation accounts, which did not appear in either paragraph (a) or (b) of proposed 11 CFR 104.17. Proposed paragraph (a)(2), addressing recordkeeping, is re-numbered as (a)(4) in the final rules.

Section 104.17(b) in the NPRM addressed the reporting of all allocations of disbursements for activities of State, district, and local party committees, including disbursements for allocable Federal election activities, i.e., certain activities eligible to be paid in part with Levin funds pursuant to 11 CFR 300.33. For purposes of clarity, the final rule covers only the reporting of disbursements for allocable party activities that are not Federal election activities. The reporting of allocable Federal election activities is subject to the rules in 11 CFR 300.36.

Section 104.17(b) establishes that State, district, and local party committees that have set up Federal and non-Federal accounts, including any allocation accounts being used to make disbursements for allocable activities, must report all payments that are allocated pursuant to 11 CFR 106.7.

Paragraph (b)(1)(i) requires statements by State, district, and local party committees in their initial reports at the beginning of a calendar year of the percentages the committee will use for payments to be allocated between Federal and non-Federal accounts for specific categories of party activity. Paragraph (b)(1)(ii) requires a statement of the category for each allocable disbursement and the total amounts spent that year for each category. These requirements are similar to those contained in the pre-BCRA regulations.

With regard to a requirement of unique identifiers in the reports of allocable activities, the NPRM asked for comments as to whether such identifying codes would be useful. The principal Congressional sponsors of BCRA in their comments left this decision to the Commission, although they stated that identifying codes would be of "significant utility in greater specificity in reporting." Two of the comments from party committees argued against such a requirement, arguing that the purpose of the codes in the past had been to distinguish among activities that had differing allocation ratios and that use of the same allocation ratio made the codes unnecessary.

The final rule at paragraph (b)(1)(iii) of 11 CFR 104.17 requires party committees to assign unique identifiers to certain allocable activities, excluding allocable administrative costs. This requirement follows requirements in the pre-BCRA regulations at 11 CFR 104.10(b)(2) with regard to the reporting of the direct costs of fundraising and the costs of exempt activities. Paragraph (b)(1)(iii) also specifies that unique identifying titles or codes are not required for salaries and wages under 11 CFR 106.7(c)(1) because salaries and wages are not allocable.

The Commission recognizes that, as noted by certain party committees in their comments, the rules will now require use of the same set of percentages in a given year for almost all allocable party activity categories, thereby weakening one of the previous rationales for using unique identifiers for some categories of activities. Such identifying mechanisms are, however, still needed to enable reviewers of a party committee's reports, including members of the public, to track

accurately the specific transactions involved in a particular allocable activity. It is significant that party committees frequently make many disbursements to the same vendor for differing purposes and that a number of vendors may be paid for similar activities. Thus, the Commission is requiring that certain allocable activities or programs carry a unique identifying title or code. The Commission has also concluded that, while unique identifiers for administrative costs would be of some utility, it will continue the practice of not requiring them in order to avoid imposing an additional administrative burden on party committees. All entries of disbursements to pay for an allocated program or activity must include a reference to the unique identifier, if an identifier is required for that allocation category. In addition, each reporting entry of a transfer (from the non-Federal account to the Federal or allocation account) for a program or activity must include a reference to the unique identifier, if an identifier is required for that allocation category.

Paragraph (b)(2) of 11 CFR 104.17 addresses the reporting of transfers from the non-Federal to the Federal account, or from both accounts into the allocation account, of funds to be used for allocable expenses. As did the pre-BCRA rules, this paragraph requires memo entries on reports as to the allocable expenses for which the transfer is being made and the date of the transfer. If more than one activity is covered by a transfer, the report must itemize the amounts designated for each category of expense. The Commission received no comments on this provision.

Section 104.17(b)(3)(i) sets out the details required in the reporting of disbursements for allocable activity by State, district, and local committees of political parties.

Section 104.17(b)(3)(ii) addresses the reporting of State, district, and local party disbursements for activity that is allocable between a committee's Federal and Levin funds by referring the reader to the requirements of 11 CFR 300.36.

Section 104.17(b)(4) requires the retention of all documents supporting allocations of expenditures and disbursements for three years, consistent with FECA.

## **VI. Part 106—Allocations of Candidate and Committee Activities**

### *11 CFR 106.1 Allocation of Expenses Between Candidates*

Pre-BCRA 11 CFR 106.1 addressed the allocation of expenditures and/or

disbursements among more than one candidate. Paragraph (a)(1) set out the general rule for allocation of an expenditure made on behalf of more than one clearly identified Federal candidate. It also addressed allocation of a payment involving both an expenditure made on behalf of one or more clearly identified Federal candidates and a disbursement on behalf of one or more non-Federal candidates. The proposed regulation in the NPRM added language indicating that a party committee must use only Federal funds for both kinds of situations, not just the first one. This was based on proposed 11 CFR 300.33(c)(1), which stated that only Federal funds could be used for activities that referred to a Federal candidate. It was also based on BCRA and proposed 11 CFR 100.24(a)(3), which provided that only Federal funds may be used for a public communication that refers to a clearly identified Federal candidate and that promotes, attacks, supports, or opposes the candidate (regardless of whether a non-Federal candidate is also mentioned).

The NPRM divided pre-BCRA section 104.10, which addressed reporting of allocation by nonconnected committees and separate segregated funds, as well as by party committees, into two sections: 11 CFR 104.10 for nonconnected committees and separate segregated funds, and 11 CFR 104.17 for party committees. In view of this rearrangement, the proposed rules in paragraph (a)(2) of section 106.1 added a reference to 11 CFR 104.17(a) to cover party committee reporting. In addition, the pre-BCRA rules addressing allocation among Federal and non-Federal candidates was modified in the NPRM to delete the citation to party committee transfer procedures. This was premised on the position that such payments had to be made entirely with Federal funds.

The NPRM proposed no changes to pre-BCRA paragraphs (b), (c), and (d) of 11 CFR 106.1. Paragraph (e) is a signpost to the sections that address allocation of specific types of mixed Federal/non-Federal activity, other than expenditures and/or disbursements on behalf of clearly identified candidates. The NPRM proposed to delete from this paragraph a reference to 11 CFR 106.5, to add a reference to 11 CFR 300.33, and to amend the list of allocation categories to conform to other proposed regulations, including a deletion of exempt activities.

The NPRM narrative asked whether the proposed requirement that a State, district, or local party committee use

only Federal funds for all payments made on behalf of both clearly identified Federal and clearly identified non-Federal candidates is appropriate under BCRA. The NPRM also asked for comments on, and discussed whether exempt party activities<sup>3</sup> for both Federal and non-Federal candidates (i.e., entailing disbursements for Federal candidates that were exempt from the definition of contribution or expenditure) still exist as an allocable category after passage of BCRA.

Three commenters on behalf of party committees stated that not every activity that mentions a clearly identified Federal candidate must be paid for exclusively with Federal funds. They argued that materials and communications that refer to both Federal and non-Federal candidates but are not public communications and do not otherwise meet the definition of Federal election activity should continue to be subject to allocation based on time or space devoted to the Federal and non-Federal candidates as under the pre-BCRA regulations. One of these commenters also argued that the costs of "non-communicative activities" that result in an in-kind contribution and donation to Federal and non-Federal candidates respectively should continue to be allocable between Federal and non-Federal accounts.

The principal Congressional sponsors of BCRA stated that BCRA required the proposed result for such payments by State, district, and local party committees. Another commenter referred to several specific provisions in BCRA to support the view that only Federal funds can be used for the payment on behalf of both a Federal and non-Federal candidate: (1) 2 U.S.C. 441i(b)(1), which provides that costs for Federal election activity shall be paid for with Federal funds; and (2) 2 U.S.C. 441i(b)(2)(A) and (B), which allow for allocation of some Federal election activities but not when the activity refers to a clearly identified Federal candidate. A third commenter agreed that national party committees must use only Federal funds for payments involving both expenditures on behalf of a Federal candidate and disbursements on behalf of a non-Federal candidate but did not comment on State, district, or local party committees.

The comments on the relationship of Federal election activities to exempt activities are summarized in the

<sup>3</sup> For discussion of exempt activities, see Explanation and Justification for 11 CFR 100.24, above; see also 2 U.S.C. 431(B)(v), (ix), and (xi), and 431(9)(B)(iv), (viii), and (ix).

Explanation and Justification of 11 CFR 100.24, above. Some commenters concluded that exempt activities should not be included within Federal election activity at all or that many exempt activities are not redefined as Federal election activity. Thus, they concluded that there are a number of exempt activities that are not Federal election activity. Others believe that exempt activities are nearly or completely subsumed by, or redefined as, Federal election activity. Within both groups, there was a variety of opinion as to the precise relationship.

The final rule at 11 CFR 106.1 has been changed from the proposed regulation with respect to the use by a party committee of both Federal and non-Federal funds for a payment that is an expenditure on behalf of a clearly identified Federal candidate and a disbursement on behalf of a clearly identified non-Federal candidate. Any such payment that is for a Federal election activity requires the use of Federal funds only, as set out in 11 CFR 106.1(a)(2). The final rule, in paragraph (a)(2), also includes references to other sections to the effect that payments for Federal election activities that are also attributable to clearly identified candidates are subject to new 11 CFR 300.33 and that the allocation among the particular candidates must be reported, in accordance with 11 CFR 104.17(a).

However, a payment that is not for Federal election activities but that is an expenditure on behalf of a clearly identified Federal candidate and also a disbursement on behalf of a clearly identified non-Federal candidate is either allocable between Federal and non-Federal accounts or payable with Federal funds only. Hence, the last sentence of proposed paragraph (a)(1), indicating that only Federal funds can be used, is deleted from the final rules. In addition, the final rule does not include language from proposed paragraph (a)(2) to the effect that only separate segregated funds and nonconnected committees may make a payment that includes an expenditure of Federal funds on behalf of a Federal candidate and a disbursement on behalf of a non-Federal candidate. Moreover, the reference to party committee transfer procedures for allocable expenses is added back into paragraph (a)(2).

Paragraph (a)(1) of the final rule includes also the appropriate method for attributing expenditures and disbursements among candidates in the case of a phone bank. This method is derived from pre-BCRA 11 CFR 106.5(e) (re-numbered 11 CFR 106.7), which addressed Federal/non-Federal

allocation in the analogous situation of exempt activities. This method, which has provided guidance for allocation of expenditures and disbursements for direct candidate support, is no longer in the new regulations after December 31, 2002 for other mixed party activities. Therefore, the regulations at 11 CFR 106.1 directly address phone banks.

Federal election activity includes some of the activities that also meet the definition of exempt activities. As indicated in the Explanation and Justification of 11 CFR 100.24, a Federal election activity that, pre-BCRA, would have been allocable as an exempt activity, is now a Federal election activity covered by the allocation rules at 11 CFR 300.33. Under 11 CFR 106.7, however, exempt activities still exist as an allocable category of expenses in a number of situations. Hence, a complete list of particular allocable costs other than those addressed in 11 CFR 106.1 should include exempt activities. The final rule at 11 CFR 106.1(e) does not list individual allocation categories but still serves as a signpost to sections addressing the allocation of mixed Federal/non-Federal or mixed Federal/Levin payments.

Exempt party activities also relate to section 106.1 as follows. If an activity supporting clearly identified Federal and non-Federal candidates is a Federal election activity and is not also an exempt activity, the portion of the payment attributable to each Federal candidate is an expenditure for that candidate, and may constitute an in-kind contribution, an independent expenditure, or a coordinated expenditure. If the payment is for a Federal election activity that is also an exempt activity, the amounts are exempted from the definition of "expenditure" or "contribution." Although the expense must be paid for entirely with Federal funds, only the amounts that are attributable to the Federal candidates or Federal elections (but using the new percentages in 11 CFR 106.7) count toward the political committee registration threshold at 2 U.S.C. 431(4)(C) for local party committees, which is more than \$5,000 in exempt activity payments. See 11 CFR 100.5(c) and the Explanation and Justification for 11 CFR 100.24(a) and 11 CFR 300.36(a).

#### *11 CFR 106.5 Allocation of Expenses Between Federal and Non-Federal Activities by National Party Committees*

The NPRM proposed amending 11 CFR 106.5 to explain the allocation rules for State, district, and local party committees. Proposed paragraph (a) also stated that because national party

committees would no longer be able to raise and spend non-Federal funds, they would no longer be able to allocate their expenses between their Federal and non-Federal accounts. See 67 FR 35679. While this is true after December 31, 2002, national party committees will be able to spend non-Federal funds for limited purposes during the transition period of November 6, 2002, through December 31, 2002. For discussion of the transition period, see the Explanation and Justification for 11 CFR 300.12, below. The Commission realizes that the regulations need to contain allocation rules for national party committees during this transition period. Therefore, the final rules include several technical amendments to section 106.5 to make it applicable solely to national party committees and only during the transition period. The current allocation rules remain unchanged for national party committees. The final rules that apply to State, district, and local party committees, set out in proposed 11 CFR 106.5, are being designated as new 11 CFR 106.7 in the final rules. See below.

Consistent with this reorganization, the word "national" is placed before "party committees" in several places in 11 CFR 106.5, including the title of the section, to clarify that this section only applies to national party committees. A title is added to paragraph (a)(1) for consistency because all other paragraphs under paragraph (a) have titles. Paragraphs (a)(2)(iii), (d), and (e) are removed and reserved because they apply to State, district, and local party committees. Paragraph (h) is added to be a sunset provision. Paragraph (h) states that section 106.5 only applies during the transition period and will no longer be effective after December 31, 2002.

#### *11 CFR 106.7 Allocation of Expenses Between Federal and Non-Federal Accounts by Party Committees, Other Than for Federal Election Activities*

Section 106.7 sets forth rules governing the allocation of certain expenses between the Federal and non-Federal accounts of political parties. Much of new section 106.7 covers topics formerly addressed in pre-BCRA 11 CFR 106.5. The final rules addressing allocation of expenditures and disbursements at 11 CFR 106.7 and 11 CFR 300.33 separate between the two sections respectively those activities that are not "Federal election activity" and those that are. This reorganization is based in large part upon the need to clarify in the rules the relationship between "exempt activities" and "Federal election activities," particularly given certain timing

parameters involved in the sub-set of Federal election activities that may be paid in part with Levin funds. See 11 CFR 300.32 and 300.33. Therefore, 11 CFR 106.7 addresses allocation of expenses for all State, district, and local party activity that falls outside the definition of Federal election activity, which are allocable between Federal and non-Federal accounts. In contrast, 11 CFR 300.33 addresses the allocation of those types of Federal election activity that may be allocated between Federal and Levin accounts.

#### *A. Allocable Activities That Are Not FEA*

The content of 11 CFR 106.7(a) and (b) remains much the same as the NPRM, when it was designated 11 CFR 106.5(a) and (b), although new language has been added to emphasize that these provisions address activities other than Federal election activities. These paragraphs state the general principles that after December 31, 2002: (1) National party committees are no longer permitted to raise and spend non-Federal funds,<sup>4</sup> and thus are unable to allocate expenses between Federal and non-Federal accounts; and (2) State, district, and local party committees that make expenditures and disbursements for activities other than Federal election activities in connection with both Federal and non-Federal elections must either use only Federal funds for these purposes or must establish separate Federal and non-Federal accounts and allocate expenditures between or among those accounts.

The prohibitions on national party committee use of non-Federal funds has resulted in the complete elimination of pre-BCRA 11 CFR 106.5(b) and (c). Thus, the provisions in new 11 CFR 106.7(b) through (f) only apply to State, district, and local party committees, and do not apply to national party committees.

#### *B. Salaries and Wages*

Paragraph 106.7(c) addresses costs that must be either paid totally from Federal accounts or allocated by State, district, and local party committees between their Federal and non-Federal accounts. Under paragraph (c)(1), however, State, district, and local party committees must pay entirely with funds that comply with State law the salaries and wages of employees who spend 25% or less of their compensated time on Federal election activity or an activity in connection with Federal elections. The inclusion of "wages" is

intended to include hourly employees. The compensation of other employees who spend more time on Federal election activity or activity in connection with Federal elections is addressed in paragraph (d)(1)(ii) and new 11 CFR 300.33. BCRA defines "Federal election activity" to include the cost of all services provided by an employee in any month in which the individual spends more than 25% of his or her compensated time on activities in connection with a Federal election. 2 U.S.C. 431(20)(A)(iv). This federalizes a high proportion of salary payments that were previously paid for with an allocation of Federal and non-Federal dollars. By requiring the salaries and wages related to many activities that are primarily, or even entirely, State or local in their orientation to be paid for with Federal funds, when the amount of time spent on them exceeds 25%, Congress clearly expressed its desire to federalize these costs. By implication, Congress appears to have concluded that salaries for employees spending 25% or less of their time on activities in connection with a Federal election or on Federal election activities do not have to be paid from any mix of Federal funds. Thus, this new regulation in 11 CFR 106.7(c) is in accord with Congressional intent, and it comports with Congress's expectation that the Commission would develop allocation regulations for Federal election activity paid for in part with Levin funds.

The proposed regulations at 11 CFR 300.33(b)(1) would have required State, district, and local party committees to keep time records for all employees, the purpose being to provide documentation for allocation purposes. The NPRM set out three possible alternative methods by which a committee could collect such documentation. In response to the NPRM, a State party committee asserted that time sheets would be "burdensome," that written certifications by employees would be "equally impractical," but that a tally sheet kept by the employer would be "more reasonable." The same commenter nonetheless urged the Commission not to require any particular method of documentation. For the reasons noted by the commenters, the final rule at 11 CFR 106.7(d)(1) requires only that a monthly log be kept of the percentage of time each employee spends in connection with a Federal election.

#### *C. Administrative Costs*

One category of allocable expenses in 11 CFR 106.7 is "administrative costs." Under paragraph (c)(2), these costs

cover administrative expenses except for employee salaries and wages. The final rule requires allocation of these costs between a party committee's Federal and non-Federal accounts, unless they can be attributed to a clearly identified Federal candidate, in which case they are totally Federal costs to be paid with Federal funds.

A number of the comments received in response to the NPRM argued that, because BCRA does not address administrative costs, State, district, and local party committees should be able to pay them totally out of their non-Federal accounts. One commenter representing a State party emphasized the many State and local elections and ballot initiatives with which his party is involved as compared to the number of Federal elections. Other commenters, however, including the principal Congressional sponsors of BCRA, argued that BCRA was never intended to change the allocations required by the pre-BCRA regulations, and that administrative costs should continue to be allocable between Federal and non-Federal accounts.

While the Commission recognizes that non-Federal activity consumes a large portion of State party time and finances, there is no doubt that Federal candidates benefit from such party committees' efforts to reach and motivate potential voters. The Commission also agrees that nothing in BCRA or the legislative history suggests that Congress intended the Commission to abandon its longstanding allocation requirement for these expenses. Therefore, the final rules continue to require allocation of administrative costs under a simplified allocation method discussed below.

#### *D. Exempt Activities*

Under the Act, as amended by BCRA, how the costs of voter registration, voter identification, get-out-the-vote ("GOTV") and other campaign activities that may promote or oppose a political party without promoting or opposing a candidate are allocated depends on whether such activities come within the definition of "Federal election activity" or not. See 11 CFR 100.24(a), (b). Numerous commenters focused upon the relationship between the provisions in FECA and in the Commission's regulations that exempt certain party activities from the definitions of "contribution" and "expenditure" and the provisions in BCRA establishing "Federal election activities" as a general category, and activities for which Levin funds may be used. The comments and the Commission's determinations in this regard are discussed in the Explanation

<sup>4</sup> The actual ban on this activity takes effect on November 6, 2002.

and Justification for 11 CFR 100.24 defining "Federal election activity."

The final rules in 11 CFR 106.7(c)(3) set out the permitted allocations of costs for categories of party expenditures and disbursements for activities that are exempt party activities but are not Federal election activities. The party committee must either pay the costs of this activity from its Federal account or allocate the costs between its Federal and non-Federal accounts.

#### E. Fundraising Costs

11 CFR 106.7(c)(4) addresses the direct costs of a fundraising program or event when the State, district, or local party committee is raising both Federal and non-Federal funds for itself. The NPRM indicated that all *direct* fundraising costs must be paid from a Federal account, while other fundraising-related costs not directly related to particular fundraising programs or events could be allocated between Federal and non-Federal accounts as administrative costs.

There was no consensus among the public comments addressing this topic. The principal Congressional sponsors of BCRA supported the proposed rules that would have required entirely Federal funds to be used for these purposes. A public interest group and a party committee urged the Commission to continue to use the previous funds received method for allocating these fundraising costs. Two party committees urged allocation of only those fundraising costs that are directly associated with a particular fundraising program or event.

The Commission observes that BCRA requires the use by State, district, and local party committees of funds "subject to the limitations, prohibitions, and reporting requirements of this Act." 2 U.S.C. 441i(c). Thus, the Commission has concluded that not only Federal funds, but Levin funds as well, may be used to raise funds that are used, in whole or in part, for Federal election activities. See 11 CFR 300.33(c)(3). Non-Federal funds may not be used. The reasons for this conclusion are set out in greater details in the Explanation and Justification for 11 CFR 300.32 below.

With regard to fundraising purposes other than Federal election activity, the final rule at 11 CFR 106.7(c)(4) permits the direct costs of fundraising to be allocated between Federal and non-Federal funds, provided that none of the proceeds so raised will ever be used for Federal election activities. In addition, the rule requires the segregation of the proceeds in bank accounts that are never used for Federal election activity. Paragraph (c)(4) specifies that direct

costs of fundraising include the solicitation costs and the costs of planning and administering a particular fundraising event or program.

#### F. Certain Voter Drive Activities

11 CFR 106.7(c)(5), which did not appear in the version of the regulation published in the NPRM, addresses expenses, other than salaries and wages, for voter-drive activities and other party committee activities that are not candidate-specific and that do not qualify as Federal election activities. These may include, for example, certain voter identification, GOTV, or other activities that do not promote or oppose a Federal candidate or non-Federal candidate, and that do not qualify as Federal election activities because they are not in connection with an election in which a Federal candidate appears on the ballot. See 11 CFR 100.24(a)(1) and (b)(2). Paragraph (c)(5) provides that the costs of such activities may be allocated between the Federal and non-Federal accounts of the State, district, or local party committee.

#### G. Allocation Percentages and Recordkeeping

One goal of the final rule is to assure that activities deemed allocable are not paid for with a disproportionate amount of non-Federal funds. Another goal is to simplify the allocation process, in particular by establishing formulas that do not vary from State to State. Therefore, in lieu of the State-by-State ballot composition ratios for administrative costs and generic campaign activity and in lieu of the time or space method applied to exempt State activities, which were required by the pre-BCRA regulations, the rules at 11 CFR 106.7(d)(2) and (3) establish fixed percentages for all States for certain activities. The percentages vary only in terms of whether or not a Presidential campaign and/or a Senate campaign is to be held in a particular election year.

In the NPRM, the Commission set out proposed required allocation percentages for the Federal shares of salaries and other compensation paid employees who spend 25% or less of their time on Federal elections, for administrative expenses, and for exempt party activities that are not Federal election activities. For the reasons explained above, the Commission has decided that no salaries and wages are to be allocated. With regard to administrative costs and exempt activities, State, district, and local party committees must allocate no less than the following amounts to their Federal

accounts during the following years (and in the preceding year):

(i) Presidential only election year—28% of costs

(ii) Presidential and Senate election year—36% of costs

(iii) Senate only election year—21% of costs

(iv) Non-Presidential and Non-Senate election year—15% of costs.

These figures were derived by taking averages of the ballot composition-based allocation percentages reported by State party committees in four groupings of States selected for their diversities of size and geographic location and for the particular elections held in each State in 2000 and 2002. The groupings were: (1) Six States (Alabama, Colorado, Illinois, New Hampshire, Oklahoma, and Oregon) in which there was a Presidential but no Senate campaign in 2000; (2) 10 States (California, Delaware, Georgia, Florida, Michigan, New York, North Dakota, Texas, Vermont, and Wyoming) in which there were both a Presidential campaign and a Senate campaign in 2000; (3) six States (Delaware, Georgia, Michigan, Oklahoma, Texas, and Wyoming) in which there will be a Senate campaign in 2002; and (4) six States (California, Florida, New York, North Dakota, Vermont, and Washington) in which there will be no Senate campaign in 2002.

In 2000, the Federal percentages for the two parties in six States with only a Presidential campaign ranged from 20% to 33.33%, with an average of 28%, while the Federal percentages for the two parties in ten States which held both Presidential and Senate campaign that year ranged from 30% to 43%, with an average of 36%. In 2002, the Federal percentages for the two parties in six States with a Senate campaign ranged from 20% to 25%, with an average of 21%, while the Federal percentages for the two parties in six States with no Senate campaign ranged from 11.11% to 16.67%, with an average of 15%. The rules apply the average percentages in each of the four groupings of States to all 50 States.

One comment on the proposed rules from a public interest organization addressed the Commission's proposed fixed percentages by providing two alternatives to the Commission's figures. The first alternative would have set a flat 33% requirement for Federal shares of what the commenter termed "Levin expenditures" (see 11 CFR 300.33) and for allocable costs other than administrative costs in odd-numbered years or in non-Presidential election years, and a flat 40% requirement for Federal shares of these same categories



of activities in Presidential election years. This alternative would also have required a 25% allocation for administrative costs in all years. The commenter based these percentages on what were termed "the current assumption" as to what State party committees spend in certain years.

The second alternative urged by this commenter adopted the Commission's calculations, but called for the use of the higher percentages in the sample States for what the response termed "Levin spending" and for voter registration outside the 120 day period before an election, plus the average percentages for non-Levin expenses such as administrative costs. The commenter also urged the Commission to be clear that its allocation percentages apply to a two-year election cycle, not just to the year of a Federal election.

The comment submitted on behalf of the principal Congressional sponsors of BCRA with regard to fixed allocation percentages was very similar to that of the public interest organization's response cited above in that, as one alternative approach, it called for at least a 33% Federal allocation of what it termed "Levin activities" and of voter registration activities outside the 120 period before an election, plus 25% Federal allocations for administrative expenses. It also called for 40% Federal allocations of Levin activities and of voter registration activities that are not Federal election activities in Presidential election years. This alternative assumed the application of the percentages to two-year Federal election cycles. As a second alternative, this commenter also agreed to use of the Commission's percentages for administrative costs in a two year cycle, but urged the application over that cycle of the highest, not the average, Federal percentages for what it termed "Levin activities and voter registration activities that are not 'Federal election activity' \* \* \* ." Another comment from a public interest organization also called for use of the highest percentages in the identified States, not the average percentages.

The comments received from party committees with regard to fixed percentages for Federal allocations ranged from support for the Commission's position to giving party committees a choice at the beginning of each cycle between the proposed formula and ballot composition ratios.

The final rules at 11 CFR 106.7(d) include the phrase, "and in the preceding year," to clarify that the allocation formula in this section apply to both years of a Federal election cycle.

With regard to the amounts of the fixed minimum Federal allocations, the final rules adopt the percentages contained in the NPRM because they represent averages of actual allocation ratios used in specific States at specific times, not assumptions as to possible State, district, and local party behavior in the future. These percentages represent a clear, bright line test intended to be more easily understood and applied than the previous regulations, consistent with statutory intent. As noted above, the percentages apply throughout a two-year cycle—i.e., from January 1st of odd-numbered years through December 31st of even-numbered years.

#### H. Allocable Fundraising Costs

The NPRM sought comment as to whether costs of fundraising, other than fundraising for Federal election activities, should be allocated under the "funds received" method in previous 11 CFR 106.5(f). Two commenters, a political party organization and a public interest organization, supported the idea of using the "funds received" method for fundraising where the funds raised are not used for Federal election activity.

The Commission has decided to continue the use of the "funds received" method for allocating direct costs of fundraising. This is set out in a new 11 CFR 106.7(d)(4). Under this method, the State, district, or local party committee must allocate based on the ratio of funds received into the Federal account to the total receipts for the fundraising program or event. The ratio must be estimated prior to each such program or event based upon a reasonable prediction and, as provided in the rule, subsequent adjustments must be made, if necessary. New 11 CFR 106.7(e)(4) clarifies that fundraising costs for Federal election activities are governed by new 11 CFR 300.32.

#### I. Non-Allocable Costs

Section 106.7(e) sets out those activities that are not allocable between Federal and non-Federal accounts. Paragraph (e)(1) requires that a payment for any activity that refers only to one or more candidates for Federal office must not be allocated between Federal and non-Federal accounts. These costs must be paid for entirely with funds from a Federal account. Paragraphs (e)(2) and (3) indicate that employee salaries and wages under certain conditions must not be allocated between Federal and non-Federal accounts, but must be paid for entirely with non-Federal funds.

#### J. Transfers

Section 106.7(f), which addresses transfers to pay for allocable activities, is similar to the proposed rule, with the addition of language providing for allocation accounts as an alternative to the use of Federal accounts for initial payments of allocable expenditures and disbursements. This provision tracks for the most part the language and requirements of pre-BCRA 11 CFR 106.5(g). No comments addressed the continuation of this requirement. Reimbursements from a non-Federal account to a Federal account must take place within a specified number of days. The continuation of these timing provisions will ensure that party committees need not change this aspect of their operations.

Section 106.7(f)(2)(ii), like former 11 CFR 106.5(g)(2)(B)(iii), explains that any payment outside this time frame, absent the need for an advance payment of a reasonably estimated amount, could result, depending on the circumstances, in a loan of non-Federal funds to the Federal account and a violation of the Act. No commenters addressed this provision.

### VII. Part 108—Filing Copies of Reports and Statements With State Officers

#### 11 CFR 108.7 Effect of State Law

Section 108.7 addresses Federal preemption of State law based on 2 U.S.C. 453(a) and its legislative history. Paragraph (c) lists the types of State laws that are not preempted or superseded by the Act and the regulations. BCRA amended the Act at 2 U.S.C. 453(b), providing for the application of State law to the use of non-Federal funds for the purchase or construction by a State or local party of its office building. Federal preemption continues to exist when Federal funds are used. This amendment is implemented in new section 300.35. Paragraph (c) of section 108.7 is therefore being amended to include the application of State law to the use of non-Federal funds for the purchase or construction of a State or local party office building in accordance with 11 CFR 300.35.

### VIII. Part 110—Contribution and Expenditure Limitations and Prohibitions

#### 11 CFR 110.1 Contributions by Persons Other than Multicandidate Political Committees

BCRA amended 2 U.S.C. 441a(a)(1) to raise the amount that individuals may donate to State committees of political parties from \$5,000 to \$10,000 in any

calendar year. New 11 CFR 110.1(c)(5) incorporates this increased contribution limitation, which is effective January 1, 2003. The principal Congressional sponsors of BCRA included in their comment an emphasis upon the fact that this is an increase in the limitation on Federal funds. No other comments on this provision were received.

#### **IX. Part 114—Corporate and Labor Organization Activity**

##### *11 CFR 114.1 Definitions*

The pre-BCRA text of 11 CFR 114.1(a)(2)(ix) follows the repealed statutory provision as to the purchase or construction by a national or State party committee of an office facility. It is therefore being deleted and replaced with an annotated cross-reference to new 11 CFR 300.35 which describes how the purchase or construction of an office building by a State or local party committee may be funded. A national committee's office building must be purchased or constructed only with Federal funds. See new section 300.10. The texts of the regulations currently at 11 CFR 100.7(b)(12) and 100.8(b)(13), which are similar to the pre-BCRA text of section 114.1(a)(2)(ix), are the subject of a separate rulemaking. See *Notice of Proposed Rulemaking*, 67 FR 40881 (June 14, 2002).

#### **X. Part 300—Non-Federal Funds**

##### *11 CFR 300.1 Scope and Effective Date, and Organization*

The bulk of the new rules that address non-Federal funds of political party committees are contained in 11 CFR part 300. Section 300.1 addresses the scope of new part 300, sets forth the effective date of the provisions contained in the new part, and outlines the organization of the new part. Specifically, paragraph (a) of section 300.1 states that new part 300 implements changes to the FECA enacted by Title I of BCRA. It also notes that nothing in part 300 is intended to alter the definitions, restrictions, liabilities, and obligations imposed by sections 431–455 of Title 2 of the United States Code or in the regulations prescribed thereunder in 11 CFR parts 100–116.

The effective date of BCRA, except where otherwise stated, is November 6, 2002. See 2 U.S.C. 431 note, section 402(a). Consistent with BCRA, paragraph (b) of section 300.1 states that part 300 takes effect on November 6, 2002, except for the following: (1) Where otherwise stated in part 300; (2) subpart B of part 300 relating to State, district, and local party committees does not apply with respect to runoff

elections, recounts, or election contests resulting from elections held prior to November 6, 2002; (3) the increase in individual contribution limits to State party committees as set forth in proposed 11 CFR 110.1(c)(5) applies to contributions made on or after January 1, 2003; and (4) national parties must spend any remaining non-Federal funds received before November 6 and in their possession on that date before January 1, 2003, subject to the transition rules set forth in proposed 11 CFR 300.12.

Finally, paragraph (c) of section 300.1 explains that part 300 is organized into five subparts, with each subpart addressing a specific category of persons affected by BCRA. Subpart A of part 300 prescribes rules pertaining to national party committees; subpart B prescribes rules pertaining to State, district, and local party committees and organizations; subpart C addresses rules affecting certain tax-exempt organizations; subpart D prescribes rules pertaining to Federal candidates and Federal officeholders; and subpart E prescribes rules pertaining to State and local candidates. In addition, BCRA requires changes in other parts of Title 11 of the *Code of Federal Regulations*, which are also addressed in this rulemaking. One commenter supported the provisions of this section. The final rules follow the proposed rules, with the exception of minor revisions to clarify the scope of each subpart.

##### *11 CFR 300.2 Definitions*

A. 11 CFR 300.2(a) Definition of “501(c) organization that makes expenditures or disbursements in connection with a Federal Election”

New 11 CFR 300.2(a) defines a 501(c) organization “that makes expenditures or disbursements in connection with a Federal election.” BCRA prohibits national and State party committees, their officers and agents, and certain entities associated with them, from soliciting any funds for, or making or directing any donations to, 501(c) organizations that fit this definition.

The NPRM sought comments on whether the definition of 501(c) organizations affected by the prohibition on party fundraising and donations should contain a temporal requirement so that this prohibition is not overbroad and does not encompass, for example, an organization that made expenditures and disbursements in connection with a Federal election many years ago but has not done so recently and does not plan to do so in the future.

Commenters were in general agreement that a temporal requirement was a good idea. Several commenters

suggested that the prohibition should encompass organizations that have made expenditures and disbursements in connection with a Federal election during the past three election cycles, or six years. Other commenters stated that the definition was overbroad without a temporal requirement but offered no suggestion for a specific time frame.

The final rule at 11 CFR 300.2(a) defines a 501(c) organization “that makes expenditures or disbursements in connection with a Federal election” as one that plans to make such expenditures or disbursements, including for Federal election activity, within the current election cycle or plans to pay a debt incurred in a prior election cycle for making such expenditures or disbursements. Because BCRA uses the present tense in referring to affected 501(c) organizations, the Commission believes that the prohibition on party fundraising should only apply to Section 501(c) organizations that undertake such spending within the current two-year election cycle. The definition in new 11 CFR 300.2(a) also includes organizations that plan to pay debts incurred in a prior election cycle for such expenditures or disbursements. This will prevent, for example, an organization from certifying that it does not plan to make expenditures or disbursements in connection with a Federal election in the current 2-year election cycle, if it receives donations or fundraising assistance from a party committee and uses those funds to pay off debt incurred for such expenditures or disbursements relating to a prior election cycle.

The proposed definition in the NPRM would have also delineated the types of activity that constitute expenditures or disbursements in connection with a Federal election. One commenter expressed support for this proposed rule. The final rule does not, however, set out specific activities that constitute such expenditures or disbursements. Federal election activity is defined at new 11 CFR 100.24 so that one component of the definition is clear. Moreover, the Commission believes that advisory opinions and closed enforcement matters provide guidance as to what constitutes activities in connection with a Federal election. Attempting to include specific activities in the definition in 11 CFR 300.2(a) might result in an overbroad definition.

B. 11 CFR 300.2(b) Definition of “Agent”

Many of the prohibitions and restrictions of BCRA apply to a principal entity, such as a political party

committee or a candidate, and to the "agents" of such principals where they act on behalf of those principals. See, e.g., 2 U.S.C. 441i(a)(1), (2); 2 U.S.C. 441i(b)(1); 2 U.S.C. 441i(e)(1). Congress did not define the term, "agent," in BCRA. In the NPRM, the Commission proposed a regulatory definition framed in terms of "a person who has actual express oral or written authority" to act on behalf of a principal. This definition would have defined "actual authority" as "instructions, either oral or written," from the principal. The Commission solicited comments on several aspects of this proposed definition, such as the potential applicability of the definition to volunteers, whether the principal's actual knowledge of the putative agent's activities is relevant, and the potential applicability of the concept of apparent authority.

The Commission received many comments on the proposed definition of agent. Several commenters found the proposed definition "too narrow." One described the requirement that an agent's authority must be actual and express to be a "loophole that would utterly swallow the rule," arguing that in the "real world" fundraising is accomplished largely through agents without express authority in a "technical" or "legal" sense. The principal Congressional sponsors of BCRA commented that the proper definition of "agent" is critical to prevent evasion of the "soft-money" prohibitions at the center of Title I of BCRA. The definition, they believe, should encompass "anyone who has an agency relationship under common law," including apparent authority. The principal Congressional sponsors and a public interest group commented that the new definition should not be narrower than the definition of agent currently used by the Commission in regulating independent expenditures. See 11 CFR 109.1(b)(5). The sponsors also commented that the Commission should not exclude volunteers and vendors *per se*. A public interest group also urged the Commission to include apparent authority within the definition. This group argued that "bestowing" a title or position on an individual implies that the individual is working on behalf of the principal who bestowed the title or position.

In contrast, other commenters, comprised of national and State political party committees and labor organizations, applauded the proposed rule's conjunctive requirement that the agent's authority must be actual and express. Three national party committees commented that the definition should be further limited to

individuals with "substantive decision-making authority." Many of these commenters stressed that the Commission should consider two issues in implementing the regulatory definition of "agent." The first issue is the nature of an agent's "individual liability" for his or her own actions. The second issue is the perceived "vicarious liability" of the principal. With regard to the first issue, several commenters, including a State party committee, an association of State party officials, and several national party committees, suggested the Commission use 11 CFR 109.1(b)(5) as a model for the new definition, presumably modified to provide that authority must be actual and express. Regarding the second issue, several commenters urged the Commission to give full effect to a requirement that the agent must be acting on behalf of the principal before the principal incurs liability derived from the agent's actions. Two labor organizations commented that the principal's derivative liability should not extend beyond activities the agent has been specifically authorized to conduct. Two national party committees commented that the final definition must impose liability only when a principal exercises actual control over the actions of the agent, arguing that it would be unfair to impose liability for actions beyond the principal's control. Another commenter, a State party committee, framed its suggestion in terms of limiting a principal's liability to actions taken by an agent on the principal's "explicit instructions."

The final rules define "agent" for purposes of Title I of BCRA as "any person who has actual authority, either express or implied." The final rules make clear that the definition of "agent" is limited to those individuals who have actual authority, express or implied, to act on behalf of their principals and does not apply to individuals who do not have any actual authority to act on their behalf, but only "apparent authority" to do so. The final regulation thus differs from the regulation proposed in the NPRM. The Commission makes this change for reasons articulated by the United States Supreme Court. In *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739 (1989) the High Court held that the defining of statutory terms should be guided by "settled meaning under \* \* \* the common law \* \* \* unless the statute otherwise dictates." In this regard, the Commission notes that under the common law of agency, an "agent's authority may be actual or apparent." *Moriarty v. Glueckert Funeral Home*,

*Ltd.*, 155 F.3d 859, 865-866 (7th Cir. 1998) (quoting Restatement (Second) of Agency, 26). But the Supreme Court has made it equally clear that not every nuance of agency law should be incorporated into Federal statutes where full incorporation is not necessary to effect the statute's underlying purpose. See *Faragher v. City of Boca Raton*, 524 U.S. 775, 802 n.3 (1998) (The "obligation is not to make a pronouncement of agency law in general or to transplant [the Restatement (Second) of Agency into a Federal statute, but] is to adapt agency concepts to the [statute's] practical objectives.")

For these reasons, the definition of "agent" in the final regulation does not incorporate apparent authority. "[A]pparent authority to do an act is created as to a third party by written or spoken words or any other conduct of the principal which, reasonably interpreted, causes the third party to believe that the principal consents to have the act done on his behalf by the person purporting to act for him." Restatement (Second) of Agency, 27. As has been noted by commenters, apparent authority is largely a concept created to protect innocent third parties who have suffered monetary damages as a result of reasonably relying on the representations of individuals who purported to have, but did not actually have, authority to act on behalf of principals. Unlike other legislative areas, such as consumer protection and anti-fraud legislation, BCRA does not affect individuals who have been defrauded or have suffered economic loss due to their detrimental reliance on unauthorized representations. Rather, the Commission interprets Title I of BCRA to use agency concepts to prevent evasion or avoidance of certain prohibitions and restrictions by individuals who have actual authority and who do act on behalf of their principals. In this light, apparent authority concepts are not necessary to give effect to BCRA.

It is necessary, however, to define "agent" to include implied and express authority in order to fully implement Title I of BCRA. Otherwise, agents with actual authority would be able to engage in activities that would not be imputed to their principals so long as the principal was careful enough to confer authority through conduct or a mix of conduct and spoken words. The comments and testimony received by the Commission perhaps reveal some confusion about the term "implied authority." Implied authority is a form of actual authority. *Moriarty, supra*, 155 F.3d at 865-866 (7th Cir. 1998) (quoting Restatement (Second) of Agency, 26)

(actual authority may be express or implied). Implied authority should not be confused with apparent authority, which is a distinct concept. Restatement (Second) of Agency, 8, cmt a. It is well settled that whether an agent has implied authority is within the control of the principal. Thus, the Commission emphasizes that a principal may not be held liable, under an implied actual authority theory, unless the principal's own conduct reasonably causes the agent to believe that he or she had authority. For example, a party committee cannot be held liable for the actions of a rogue or misguided volunteer who purported to act on behalf of the committee, unless the committee's own written or spoken word, or other conduct, caused the volunteer to reasonably believe that the committee desired him or her to so act. Once an agent has actual authority, however, "[u]nless otherwise agreed, authority to conduct a transaction includes authority to do acts which are incidental to it, usually accompany it, or are reasonably necessary to accomplish it." Restatement (Second) of Agency, 35; see *U.S. v. Flemmi*, 225 F.3d 78, 85 (1st Cir. 2000).

Title I of BCRA refers to "agents" in order to implement specific prohibitions and limitations with regard to particular, enumerated activities on behalf of specific principals. The final regulation limits the scope of the definition accordingly in paragraphs (b)(1) through (b)(4). Each provision in paragraphs (b)(1) through (b)(4) is tied to a specific provision in Title I of BCRA that relies on agency concepts to implement a specific prohibition or limitation. The Commission emphasizes that, under the Commission's final regulation, a principal cannot be held liable for the actions of an agent unless (1) the agent has actual authority, (2) the agent is acting on behalf of his or her principal, and (3) the agent is engaged in one of the specific activities described in paragraphs (b)(1) through (4).

Paragraph (b)(1) limits a national party committee's liability to an agent's authorized actions with regard to two activities. The first is soliciting, directing, or receiving any contribution, donation, or transfer of funds on behalf of the national party committee. 2 U.S.C. 441i(a)(1), (2). The second is soliciting funds for, or making or directing donations to, section 501(c) and 527 organizations. 2 U.S.C. 441i(d).

Paragraph (b)(2) limits the liability of State, district, or local political party committees to the actions of an agent who has actual authority in four particular areas. The first is to make

expenditures or disbursements of any funds for Federal election activity on behalf of the State, district or local party committee. 2 U.S.C. 441i(b)(1). The second is to transfer, or to accept a transfer of, funds to make expenditures or disbursements for Federal election activity on behalf of the State, district or local party committee. 2 U.S.C. 441i(b)(2)(B)(iv). The third is to engage in joint fundraising activities on behalf of the State, district or local party committee with any person if any part of the funds raised are used, in whole or in part, to pay for Federal election activity. 2 U.S.C. 441i(b)(2)(C). The fourth is to solicit funds for, or to make or direct donations to, section 501(c) and 527 organizations. 2 U.S.C. 441i(d).

Paragraph (b)(3) limits the liability of a Federal candidate to the actions of an agent who has actual authority to solicit, receive, direct, transfer, or spend funds in connection with any election on behalf of the Federal candidate. 2 U.S.C. 441i(e)(1). The Commission notes that the exception to 2 U.S.C. 441i(e)(1)'s general rule found in paragraph (e)(2) of that section also applies to agents of such Federal candidates who are or were State or local candidates.

Paragraph (b)(4) applies to State candidates, and limits their liability to actions taken by their agents who have actual authority to spend funds for public communications on their behalf. 2 U.S.C. 441i(f).

Under the Commission's final rules defining "agent," a principal can only be held liable for the actions of an agent when the agent is acting on behalf of the principal, and not when the agent is acting on behalf of other organizations or individuals. Specifically, it is not enough that there is some relationship or contact between the principal and agent; rather, the agent must be acting on behalf of the principal to create potential liability for the principal. This additional requirement ensures that liability will not attach due solely to the agency relationship, but only to the agent's performance of prohibited acts for the principal. In light of the foregoing, it is clear that individuals, such as State party chairmen and chairwomen, who also serve as members of their national party committees, can, consistent with BCRA, wear multiple hats, and can raise non-Federal funds for their State party organizations without violating the prohibition against non-Federal fundraising by national parties.

C. 11 CFR 300.2(c) Definition of "Directly or Indirectly Established, Financed, Maintained, or Controlled"

11 CFR 300.2(c) defines "directly or indirectly establish, finance, maintain, or control," a term that is used in several provisions of BCRA. The term appears in BCRA in the context of national party committees (see 2 U.S.C. 441i(a)(2)), of State, district, and local political party committees (see, e.g., 2 U.S.C. 441i(b)(2)(B)(iii)), and of Federal candidates and Federal officeholders (see, e.g., 2 U.S.C. 441i(e)(1)). The phrase "established, financed, maintained, or controlled," without the modifier "directly or indirectly," was already used in the anti-proliferation provisions of the FECA and in the Commission's "affiliation" regulation. See 2 U.S.C. 441a(a)(5); 11 CFR 100.5(g), and 110.3.

Paragraph (c)(1) of section 300.2 enumerates the persons to whom the regulation applies, and employs the shorthand "sponsor" to refer collectively to these persons. A public interest group commented that the regulation should apply to national, as well as to State, district, and local political party committees. Accordingly, given that the term, "directly or indirectly established, financed, maintained, or controlled," is applied to national party committees in 2 U.S.C. 441i(a)(2), the Commission is incorporating this suggestion in the final regulation. Another commenter suggested that agents should be included in the description of the term "sponsor," rather than addressed in another part of the rule. The final rules also adopt this suggestion. In paragraph (c)(1), the statutory concept of "indirect" establishment, financing, maintenance, or control is addressed by including actions taken by a sponsor's agents on behalf of the sponsor.

The version of 11 CFR 300.2(c) proposed in the NPRM defining the term "directly or indirectly establish, finance, maintain, or control" included factors that extended beyond the affiliation provisions of 11 CFR 100.5(g). Several commenters, including an association of State party officials, several national party committees, and two State party committees, objected to this portion of the regulation proposed in the NPRM, and suggested uniformly that the final regulation should be based solely upon the existing affiliation regulation in 11 CFR 100.5(g), which one commenter described as "relatively well-established and well-understood." A Latino rights group and a taxpayers' organization concurred with this approach. In addition, a civil rights

organization stated that the regulation proposed in the NPRM was “not only vague as to provide no practical guidance, but also is likely to deem entities as being ‘controlled’ by a party committee when the BCRA never intended to reach such entities.” On the other hand, two public interest groups supported the Commission’s proposed use of factors extending beyond the reach of 11 CFR 100.5(g), one of whom argued that Congress used the term, “directly or indirectly established, financed, maintained, or controlled,” in several contexts to “make it clear that Congress wanted to move beyond the current affiliation rules.”

The Commission has concluded that the affiliation factors laid out in 11 CFR 100.5(g) properly define “directly or indirectly established, financed, maintained, or controlled” for purposes of BCRA. Therefore, in paragraph (c)(2), the affiliation factors found at 11 CFR 100.5(g)(4)(ii) have been recast in the terminology demanded by the BCRA context. Paragraphs (c)(2)(i) through (x) of section 300.2 generally correspond to paragraphs (g)(4)(ii)(A) through (J) of section 100.5. This change in terminology, for example, substituting “entity” for “committee,” and “sponsor” for “sponsoring organization,” recognizes that affiliation concepts are being applied in a different context. Besides the changes in terminology, the words “and otherwise lawfully” have been added to the phrase about joint fundraising in paragraphs (c)(2)(vii) and (viii) of section 300.2(c). This addition is intended to preclude any confusion that might arise between these provisions and the joint fundraising restrictions in subpart B of part 300.

In the NPRM, the Commission sought comment on whether this regulation should be based on the actions and activities of entities occurring solely after November 6, 2002, the effective date of BCRA. The Commission considered taking this course of action to prevent a retroactive application of BCRA or, specifically, to prevent the actions and activities of entities before November 6, 2002, that are legal under current law from creating potential legal liability based on the new requirements of BCRA, which do not take effect until after November 5, 2002. The Commission also asked, alternatively, whether there should be a rebuttable presumption that entities organized before a given date are not directly or indirectly established by a sponsor, provided that the sponsor and the entity are not affiliated. 67 FR 35658.

The principal Congressional sponsors of BCRA and two public interest groups

opposed these options. The principal Congressional sponsors stated, “There is nothing in the statutory language that permits the term \* \* \* to apply only to entities established after the effective date of the Act \* \* \*.” Such a rebuttable presumption, they continued, would “create an obvious loophole for organizations established or controlled by members of Congress that are currently raising soft money.” One of the public interest groups commented that “grandfathering” existing entities would “effectively prop the [soft-money] loophole open.” The other public interest group opposing this idea said: “This would, as a practical matter, allow the activity sought to be regulated by BCRA to continue on an unregulated basis through the preexisting entity.”

A non-profit organization commented that the Commission should not apply the new regulation to existing entities that may have been directly or indirectly established, financed, maintained, or controlled by a sponsor because, “otherwise, the rule would go against any conceivable precept of the BCRA having an effective date after the 2002 general elections.” This organization asserted, “the only relevant question \* \* \* is whether an entity is controlled by a sponsor after the effective date of BCRA.” This organization supported the idea of a rebuttable presumption. Several party committees urged the Commission to apply the regulation if there is affiliation “on or after the effective date of BCRA.” Notably, a civil rights organization concluded that “the only relevant question for the purposes of BCRA is whether an entity is controlled by a sponsor after the effective date of BCRA.” The civil rights organization further stated that “we agree with the Commission’s suggestion that there should be a rebuttable presumption that entities ‘organized’ before a given date are not directly or indirectly established by a sponsor. [To proceed otherwise] would go against any conceivable precept of the BCRA having an effective date after the 2002 elections.”

For the foregoing reasons, the Commission has concluded that BCRA should not be interpreted in a manner that penalizes people for the way they ordered their affairs before the effective date of BCRA. This will help ensure that BCRA is not enforced in a retroactive manner with respect to activities that were legal when performed. Therefore, the Commission has added, in the final rules, a new paragraph (c)(3). The paragraph, under the heading, “safe harbor,” provides that on or after November 6, 2002 (the effective date of BCRA), an entity shall not be deemed to

be directly or indirectly established, maintained, or controlled by another entity unless, based on the entities’ actions and activities solely after November 6, 2002, they satisfy the requirements of 11 CFR 300.2(c). The Commission notes that financing, within the meaning of this definition, presents special considerations. Therefore, with regard to financing, paragraph (c)(3) provides that if an entity receives funds from another entity prior to November 6, 2002, and the recipient entity disposes of the funds prior to November 6, 2002, the receipt of such funds prior to November 6, 2002 shall have no bearing on determining whether the recipient entity is financed by the sponsoring entity within the meaning of 11 CFR 300.2(c). If funds received from another entity prior to November 6, 2002, are spent by the recipient entity on or after that date, that fact will be relevant to a determination under section 300.2(c).

In the NPRM, the Commission sought comment as to whether there should be an exception for a *de minimis* level of funding by a sponsor. 67 FR 35659. Only one commenter, a State party committee, supported this idea and suggested \$5,000 for this purpose. The Commission has not included a *de minimis* exception in the final regulation. Such an exception does not square with the overall, situation-specific approach of the regulation, which is to weigh factors such as “[w]hether a sponsor or its agent provides funds or goods in a significant amount or on an ongoing basis to the entity” “in the context of the overall relationship between sponsor and the entity.” See 11 CFR 300.2(c)(2), (c)(2)(vi). Nor does a *de minimis* exception appear to be supported by the plain language of the statute.

Paragraph (c)(4) (which was labeled (c)(2) in the version of the regulation proposed in the NPRM) provides a mechanism for a sponsor or an entity to request a determination by the Commission through the advisory opinion process that the sponsor is no longer deemed to finance, maintain, or control an entity, even if the sponsor established the entity. There have been several changes from the version of the regulation published in the NPRM. In paragraph (c)(4)(i), the Commission has clarified that the requestor of an advisory opinion must demonstrate that the entity is not directly or indirectly financed, maintained, or controlled by the sponsor. Under paragraph (c)(4)(ii) of the final rules, the requestor must demonstrate that all material connections between the sponsor and

the entity have been severed for two years.

The Commission notes that nothing in paragraph (c)(4) should be construed to require any given entity that has not directly or indirectly established, financed, maintained, or controlled another entity to obtain a determination to that effect before the two entities may operate independently of each other. Therefore, in the final rules, the Commission has added a new paragraph (c)(4)(iii), which provides that nothing in section 300.2(c) should be construed to require entities that are separate organizations on November 6, 2002, to obtain an advisory opinion to operate separately from one another.

#### D. 11 CFR 300.2(d) Definition of "Disbursement"

Both FECA and BCRA use the term "disbursement," but do not provide a definition. The NPRM contained a proposed definition of "disbursement" as "any purchase or payment made by a political committee or organization that is not a political committee." One commenter pointed out that this term should not be limited to payments by political parties or organizations, since it covers spending by individuals or entities that do not constitute political parties or organizations. *See, for example, 2 U.S.C. 441i(b)(1), which refers to disbursements by (among others) "an association or similar group of candidates \* \* \* or of individuals."* The Commission, therefore, is revising the proposed definition in the final rule to clarify that it covers purchases and payments by a political party or other person, including an organization that is not a political committee, that is nevertheless subject to FECA or BCRA.

#### E. 11 CFR 300.2(e) Definition of "donation"

In BCRA, Congress uses but does not define the term "donation." The Commission proposed in the NPRM to define a "donation," in 11 CFR 300.2(e), as a payment, gift, subscription, loan, advance, deposit, or anything of value given to a non-Federal candidate, party committee, 501(c) organization, or 527 organization, but not including a contribution or transfer.

Comments were sought on specifically excluding from "donation" some of the exemptions to "contribution" set forth in existing 11 CFR 100.7(b). The comments were split on this approach.

The Commission did not include these exemptions, or any others, in the final rule, because donations in many cases will be essentially a matter of State law, and thus the inclusion or

exclusion of certain payments should be left to State campaign finance law. For example, in the Levin Amendment, donations of Levin funds must be in accordance with State law, with one Federal limitation: a \$10,000 amount limitation per year per donor. 2 U.S.C. 441i(b)(2)(B)(iii). The Commission believes States should be free to craft their own exemptions to donations of Levin funds, subject only to the \$10,000 overall limitation imposed by BCRA.

Several commenters asked the Commission to specifically incorporate additional exemptions, such as money spent for redistricting, election recounts, FECA civil penalties, and legal defense funds. The exemption for recounts is addressed in the Commission's current rules at 11 CFR 100.7(b)(20); as are payments for civil penalties, *cf. 11 CFR 9034.4(b)(4)*. The Commission's interpretations on the raising and spending of funds for the purposes of redistricting were done in the context of Advisory Opinions that interpreted the terms "contribution" and "expenditure." *See Advisory Opinions 1990-23 and 1982-37*. The question of legal defense funds implicates not only the definition of "contribution," but also the Commission's personal use regulations at 11 CFR 113.1(g) in the case of a candidate legal defense fund. With respect to legal defense funds or any other legal expenses incurred by national party committees, the Commission does not interpret the broad language of 2 U.S.C. 441i(a) to permit the receipt or use of any non-Federal funds for such purposes.

As with the exemptions in 11 CFR 100.7(b), discussed above, State laws may address each of these payments in a variety of different ways. In addressing these issues, the Commission does not believe it is appropriate to require States to follow the Commission's precedents, which were established to implement the specific, detailed provisions of the FECA regarding "contributions" and "expenditures" for the purpose of influencing Federal elections. Moreover, to do so could present issues involving the preemption of State law.

Several commenters suggested that the definition of "donation" be expanded to include anything of value given to a "person," to conform with the use of this term in 11 CFR 300.10, 300.11, 300.37, 300.50, and 300.51. The Commission has made this change to 11 CFR 300.2(e), given the broad statutory reach of the term "donation" in 2 U.S.C. 441i(a)(1). The Commission has also deleted the reference to "transfers," because those are covered elsewhere in these rules. *See 11 CFR 300.34*.

#### F. 11 CFR 300.2(f) Definition of "Federal Account"

Paragraph (f) of section 300.2 defines "Federal account" as an account at a campaign depository that contains funds to be used in connection with a Federal election. The term "financial depository institution" proposed in the NPRM has been changed to the more accurate term "campaign depository." *See 2 U.S.C. 432(h) and 11 CFR 103.2*.

Some commenters asked the Commission to include in this definition the requirement that only Federal funds and funds transferred for the purpose of paying the non-Federal share of allocated expenditures may be deposited into these accounts. This topic is treated elsewhere in the Commission's rules and in this rulemaking. *See 11 CFR 103.3, 106.5(g), 300.30, and 300.33*.

#### G. 11 CFR 300.2(g) Definition of "Federal Funds"

Paragraph (g) of section 300.2 defines "Federal funds" to mean funds that comply with the limitations, prohibitions, and reporting requirements of the FECA. The Commission received no comments regarding this definition.

#### H. 11 CFR 300.2(h) Definition of "Levin Account"

Section 300.2(h) defines "Levin account" as an account established by a State, district, or local committee of a political party pursuant to 11 CFR 300.30 for purposes of making expenditures or disbursements for Federal election activity or non-Federal activity (subject to State law) under 11 CFR 300.32(b). The Commission revised the definition proposed in the NPRM to clarify that these accounts must be established at a campaign depository in accordance with 2 U.S.C. 432(h).

The NPRM raised substantive questions on the operation of these accounts. The comments that addressed these questions are discussed in connection with 11 CFR 300.30, below.

#### I. 11 CFR 300.2(i) Definition of "Levin Funds"

As explained above, BCRA's Levin Amendment provides that State, district, and local political party committees may spend certain non-Federal funds for Federal election activities if those funds comply with certain requirements. 2 U.S.C. 441i(b)(2)(A)(ii). Thus, these funds are unlike Federal funds, which are fully subject to the Act's requirements, and unlike ordinary non-Federal funds because they are subject to certain additional requirements under BCRA.

Section 300.2(i) defines these funds as “Levin funds,” with the intention that “Levin funds” become a definite, unambiguous reference to such funds. The Commission has slightly modified the definition proposed in the NPRM for streamlining purposes, but has made no substantive changes.

One commenter requested that the Commission use a “functionally descriptive” term, such as “specially allocated,” for these funds, rather than the name of their legislative sponsor. It proved difficult, however, to draft a term that clearly and unambiguously includes these funds, while excluding all others. For that reason, the Commission has retained the term “Levin funds” in the final rules.

Two commenters suggested that the definition should include the limits on the use of the term “Levin funds” found at 2 U.S.C. 441i(b)(2)(A). These restrictions go to the use of the funds, and are implemented in 11 CFR 300.32, to which the definition in 11 CFR 300.2(i) already expressly refers. Therefore, these restrictions are not repeated in this definitional paragraph.

**J. 11 CFR 300.2(j) Definition of “Non-Federal Account”**

Section 300.2(j) defines “non-Federal account” as an account that contains funds to be used in connection with a State or local election or allocable expenses under 11 CFR 106.7, 300.30, or 300.33. The term “financial depository institution” proposed in the NPRM has been deleted because non-Federal accounts are not required to comply with 2 U.S.C. 432(h).

Consistent with the revisions to 11 CFR 106.7 discussed above, the definition has been expanded to include accounts used for payment of certain allocable activities. The account may also serve as a depository for Levin funds, provided that the committee complies with the requirements of 11 CFR 300.30, below.

No commenters addressed this paragraph.

**K. 11 CFR 300.2(k) Definition of “Non-Federal Funds”**

This section defines “non-Federal funds” as funds that are not subject to the limitations and prohibitions of the Act. No commenters addressed this definition.

**L. 11 CFR 300.2(m) and (n) Definitions of “To Solicit,” and “To Direct”**

The NPRM proposed a definition of “to solicit or direct” a contribution or donation, which would be located at 11 CFR 300.2(m). The proposed definition included a request, suggestion, or

recommendation to make a contribution or donation, including those made through a conduit or intermediary. The Commission’s final rule defines “to solicit” as “to ask another person to make a contribution or donation, or transfer of funds, or to provide anything of value, including through a conduit or intermediary.” Similarly, the Commission defines “to direct” as “to ask a person who has expressed an intent to make a contribution, donation, or transfer of funds, or to provide anything of value, to make that contribution, donation, or transfer of funds, or to provide that thing of value, including through a conduit or intermediary.”

Comment was sought as to whether the proposed definition was too broad or narrow, as well as to whether the term “direct” in BCRA should be interpreted to follow the earmarking rules regarding contributions directed through a conduit or intermediary under 2 U.S.C. 441a(a)(8). Comment was also sought as to whether the passive providing of information in response to an unsolicited request for information should be specifically excluded from this definition.

Two commenters, a labor organization and a public interest organization, expressed qualified support for the proposed rule. The labor organization stated that it concurred with the proposed rule, and that it particularly endorsed the express acknowledgment that the mere provision of information or guidance as to applicable legal requirements does not fall within the statutory language. The public interest organization stated that the proposed rule was “generally consistent” with the letter and spirit of BCRA. For purposes of clarity, it suggested that the proposed rule be revised to read: “Merely providing information or guidance as to the requirements of applicable law is not a solicitation.”

In contrast, five commenters argued that the proposed rule was too vague or broad. A group representing certain State parties stated that the phrase “request, suggest and recommend” is an invitation for endless Commission investigation. This commenter urged that “solicit” be limited to an explicit request that a person make a contribution. This commenter also supported including examples in the Explanation and Justification of what is not soliciting or directing. Likewise, national party political organizations asserted that the final rule should not contain a reference to “suggestion” because that is too vague a term, and compels inquiry into whether a communication conveys a sense, or

creates an impression, of a solicitation. These commenters believed BCRA’s rules should be clearer. This group further urged that clear exclusions should be provided, such as for inquiries into positions or issues, as well as political speech or commentary to an audience who may respond with contributions in the absence of an express request for them.

Another commenter, a public interest organization, stated that “ambiguous standards” such as “suggest[ion]” or “series of conversations” will merely lead to confusion. This commenter suggested that the Commission look to past advisory opinions for guidance. Similarly, a State and a national political party argued that “request, suggest and recommend” is unconstitutionally vague and potentially overbroad, as it would involve an investigation into what a person meant in a series of conversations, and would thus chill political speech. A Latino rights group and a taxpayers’ organization commented that in light of the “severe restrictions now imposed by BCRA,” there need to be “clear definitive guidelines” in this area. Specifically, the Latino rights group and the taxpayers’ organization argued that “[a]mbiguous standards such as ‘suggestion’ or a ‘series of conversations’ which taken together constitute a request for a contribution or donation, but which do not do so individually’ will lead to more confusion and allegations of violations.” Several party committee commenters argued that solicitation should be confined to an explicit request that an entity make a contribution.

Three commenters argued that the proposed rule was too lenient. One public interest organization stated that the discussion should include scenarios where a person suggests where a contributor, who has already decided to make a contribution, should send their contribution. This commenter read the proposed rule as confining itself to candidates, committees and nonprofits, and suggested it should also apply to solicitations from individuals, partnerships, labor organizations, and corporations. Another public interest organization agreed with the first point of the previous response. The sponsors of BCRA stated that the proposed definition failed to capture the plain meaning of the words and to effectuate the central goal of the law. They supported the position regarding suggestions to already-willing contributors. These commenters read the proposed rule in the same manner as the public interest organization, as if



it only applies to candidates, committees and nonprofits. They stated that, "certain provisions in the Act apply to soliciting contributions from any 'person,' which would obviously include individuals and corporations." They urged that the rule be modified to reflect this.

The Commission has determined that the concepts of "to solicit" and "to direct" embody different activity, and they thus should be separately defined. Accordingly, 11 CFR 300.2(m) defines "to solicit," and 11 CFR 300.2(n) contains the definition of "to direct." Both definitions include "transfer of funds" and "anything of value" in addition to "contribution" and "donation," because the phrases "transfer of funds" and "anything of value" or "any other thing of value" appear several times *in seriatim* with "contribution" and "donation" in applicable rules. See, e.g., 11 CFR 300.2(b)(1)(i).

Comments were sought as to whether the concept of soliciting should apply to a series of conversations which, when taken together, constitute a request for contributions or donations. BCRA's sponsors and several public interest organizations supported applying the definition to a series of conversations if, when taken as a whole, they are consistent with a solicitation, stating that, otherwise, restrictions will be easily circumvented. One group of national political party organizations opposed applying the rule to a series of conversations, stating that it would involve heavy government involvement in deciphering political speech and that the Commission should look only at express statements.

The Commission does not believe it is appropriate to promulgate a regulation that would require examination of a private conversation to impute intent when the conversation is not clear on its face. The Commission is concerned that the ability to impute intent could lead to finding a violation when the individual who made the comment may have had no intention whatever of soliciting a contribution. Such a result is not dictated by BCRA's statutory language, and would raise constitutional concerns.

For the reasons set forth above, the Commission is not defining "to solicit" in terms of a series of conversations.

Regarding the definition of the term "to direct," the Commission sought comment as to whether it should be interpreted to follow earmarking rules under 2 USC 441a(a)(8). A group of State party leaders supported limiting "to direct" to the definition at 11 CFR 110.6(b)(2), as did one of the national

political parties. One of the public interest organizations opposed this approach, stating that this was inconsistent with BCRA and far too narrow an approach. None of the commenters explained their criticisms in detail.

This issue of the meaning of "to direct" is also tied to another question asked by the Commission: whether the passive providing of information in response to an unsolicited request for information should be specifically excluded in this definition. Two commenters, a public interest organization and the sponsors, felt that the Commission should not exclude providing information if that information includes the names of organizations to which contributions can be made. One commenter, a national political party, said that such information should be excluded, because any other approach would be unworkable and would lead to endless accusations and investigations.

The Commission concludes that a precise definition in this context is necessary to avoid vague and overbroad application of the term. Therefore, the regulation defines "to direct" as "to ask a person who has expressed an intent to make a contribution, donation, or transfer of funds, or to provide anything of value, to make that contribution, donation, or transfer of funds, or to provide that thing of value."

The final rules in 11 CFR 300.2(m) and (n) each include a statement indicating that merely providing information or guidance as to the requirements of particular law is not solicitation or direction. Each rule confines itself to defining the term as it appears in part 300 of the Commission's regulations.

#### M. 11 CFR 300.2(o) Definition of "Individual Holding Federal Office"

New section 300.2(o), which parallels 11 CFR 100.4 (definition of "Federal office") and 11 CFR 113.1(c) (definition of "Federal officeholder"), has been added for the reader's convenience. Consistent with those sections and 2 U.S.C. 431(3), it states that "individual holding Federal office" means an individual elected to or serving in the office of President or Vice President of the United States; or a Senator or a Representative in, or Delegate or Resident Commissioner to, the Congress of the United States. It does not, however, include officeholders who are appointed to positions such as the secretaries of departments in the executive branch, or other positions that are not filled by election.

### Subpart A—National Party Committees

#### 11 CFR 300.10 General Prohibitions on Raising and Spending Non-Federal Funds

BCRA prohibits national party committees from raising and spending non-Federal funds, that is, funds that are not subject to the prohibitions, limitations, and reporting requirements of the Act. See 2 U.S.C. 441i(a). The Commission is placing the regulations that address this prohibition in a new part of the Code of Federal Regulations, 11 CFR part 300, subpart A. In addition to this new subpart, the Commission is amending several sections of its current rules to conform to these prohibitions. See Explanation and Justification for 11 CFR 102.5 and 106.5.

Paragraph (a) of new section 300.10 tracks the language of BCRA, which prohibits national party committees from soliciting, receiving, or directing to another person "a contribution, donation, or transfer of funds or any other thing of value," or spending funds that are not subject to the Act's prohibitions, limitations, and reporting requirements. Accordingly, as of November 6, 2002, BCRA's effective date, national party committees must not receive or solicit or direct to another person contributions or donations from corporations, labor organizations or other prohibited sources, and must not receive or solicit or direct to another person contributions or donations from individuals and others that exceed the amount limitations of the Act. Additionally, after a brief transition period set forth in 11 CFR 300.12, discussed below, all expenditures and disbursements made by a national party committee, including donations to State and local candidates and donations and transfers to State party committees, must be made with funds that comply with the limitations, prohibitions, and reporting requirements of the Act.

BCRA's ban on the raising and spending of non-Federal funds by national party committees has widespread application. Tracking the language in 2 U.S.C. 441i(a)(1) and (2), 11 CFR 300.10(a) and (c) provide that the ban on raising and spending non-Federal funds also applies to the national congressional campaign committees (currently, the Democratic Senatorial Campaign Committee, the National Republican Senatorial Committee, the Democratic Congressional Campaign Committee, and the National Republican Congressional Committee), to officers and agents acting on behalf of a national party committee or a national congressional campaign committee, and

to any entities directly or indirectly established, financed, maintained, or controlled by either. As noted by one of BCRA's congressional co-sponsors during the congressional debate, "[t]he provision is intended to be comprehensive at the national party level. Simply put, the national parties and anyone operating on behalf of them are not to raise or spend, nor to direct or control, soft money." 148 Cong. Rec. H408-409 (daily ed. February 13, 2002) (statement of Rep. Shays).

Thus, under BCRA and 11 CFR 300.10, a Federal candidate or a Federal officeholder acting on behalf of a national congressional campaign committee must not solicit or direct to any person funds from corporations or labor organizations, or funds from individuals or entities in amounts that exceed the Act's contribution limits.

Section 300.10(a)(3) makes clear that national parties cannot raise, spend, or direct to another person Levin funds. See 2 U.S.C. 441i(b)(2)(A) and (B) and 11 CFR 300.31, discussed below.

Section 300.10(b) tracks the statutory language at 2 U.S.C. 441i(c). It provides that national parties and others covered by section 300.10(a) must use only Federal funds to finance Federal election activity.

The NPRM noted that the Commission would address in a subsequent rulemaking whether BCRA bans national party committees, and their officers and agents, from directing non-Federal funds to a host committee for a national party convention in light of the statutory language that they are not permitted to direct non-Federal funds to other persons. See 2 U.S.C. 441i(a)(1). In comments submitted to the NPRM, BCRA's sponsors stated that since BCRA prohibits national parties and their agents from soliciting or directing non-Federal funds to any person, they could not raise or direct non-Federal funds to host committees. 2 U.S.C. 431(11) of FECA defines "person" to include "a committee \* \* \* or any other organization or group of persons \* \* \*." It has also been suggested that no further rulemakings are necessary, as a host committee would be treated as any other 501(c) organization under the Act. The Commission has decided that the sponsor's interpretation of BCRA and additional issues concerning BCRA's effect on conventions will be addressed, if necessary, in a future rulemaking on national party conventions.

Virtually all of the commenters opined that the definition of "agent" was critically important to many of BCRA's provisions, including 11 CFR 300.10.

The breadth of the national party non-Federal funds prohibition is limited in 2 U.S.C. 441i(a)(2) and in 11 CFR 300.11(c) to the extent that the prohibition applies to officers and agents "acting on behalf" of national parties. This limiting construction appears in other Federal statutes and indeed, in some State campaign finance laws. The Commission also has decided to limit the definition of "agent" to those individuals who have actual authority to act on behalf of their principals. See Explanation and Justification for 11 CFR 300.2(b) above.

Several party committee commenters expressed the view that, despite BCRA's broad prohibition on national parties' raising and spending non-Federal funds, the Commission should consider a rule that would permit national parties to continue to maintain non-Federal accounts devoted specifically to support State and local candidates as long as funds raised for such an account meet the source and contribution limits of the Act. The party committees' position is based on the NPRM's discussion of "leadership PACs" maintained by Federal candidates and on statements made by a principal BCRA sponsor during the Senate debate. 148 Cong. Rec. S2140 (daily ed. February 20, 2002) (statement of Senator McCain).

Specifically, Senator McCain interpreted 2 U.S.C. 441i(e)(1)(A) and (B) (see 11 CFR 300.61 and 300.62) to permit a Federal candidate or officeholder to raise funds for both a Federal and non-Federal account of a leadership PAC, provided that the funds raised for the non-Federal account met the source and contribution limits of the Act. The party committees' comments specifically referenced another statement made by Senator McCain suggesting that an officeholder could solicit a donation up to the Act's contribution limits for the non-Federal account of a leadership PAC, even if the donor had already contributed to the PAC's Federal account. The application of these statutory provisions to leadership PACs and candidate PACs is discussed below. See Explanation and Justification for 11 CFR 300.62. Regardless of the application of BCRA to leadership PACs and candidate PACs under 2 U.S.C. 441i(e)(1), however, the plain language of the ban on national party non-Federal fundraising at 2 U.S.C. 441i(a) cannot be plausibly construed to allow party committees to continue to raise non-Federal funds for any purpose. The language is broad in prohibiting a national party committee from soliciting, receiving, or directing to another person "a contribution,

donation, or transfer of funds or any other thing of value" or spending funds that are not subject to the Act's limitation, prohibitions, and reporting requirements. A separate "non-Federal" account, even if it contained funds that complied with the prohibitions of the Act, would not contain funds complying with the amount limitations of the Act, if for example, individuals gave \$20,000 per year to a national party's account and also gave another \$20,000 to the party's "non-Federal" account as suggested by the party committee commenters.

The legislative history supports this statutory interpretation. As noted above, a primary sponsor of BCRA in the House specifically explained the national party non-Federal funds ban as follows: "The soft money provisions of the Shays-Meehan bill regarding the national political parties operate in a straightforward way. The national parties are prohibited entirely from raising or spending any soft money \* \* \* The purpose of these provisions is simple: to put the national parties entirely out of the soft money business." 148 Cong. Rec. H408 (daily ed. February 13, 2002) (statement of Rep. Shays). According to Congressman Shays, the prohibition "covers all activities of the national party committees, even those that might appear to affect only non-federal elections." Shays further explained the reason for the ban: "Because the national parties operate at the national level, and are inextricably intertwined with Federal officeholders and candidates, who raise money for the national party committees, there is a close connection between the funding of the national parties and the corrupting dangers of soft money on the federal political process." *Id.* at H409.

In addition, a comment by one of BCRA's principal sponsors stated that Congress' intent was absolutely clear that BCRA prohibits national party committees from raising, spending or directing non-Federal funds. He further pointed out that an amendment that would have allowed party committees to continue to raise "soft money" subject to limits on the amounts and purposes failed. The Commission notes that a House amendment that would have continued to permit national parties to raise non-Federal funds for certain activities in amounts not exceeding \$20,000 per year per person was defeated. See 148 Cong. Rec. H459-H465 (daily ed. February 13, 2002).

Finally, the party committee commenters also maintained that the Commission should define the term "donation," which is not defined in BCRA, to exclude funds received by

national party committees for certain purposes such as funds provided for redistricting, legal expense funds, and the payment of civil penalties for violations of the Act. The parties argued that the Commission has, over time, recognized these activities as wholly exempt from the reach of FECA.

As discussed in the Explanation and Justification for the definition of "donation" at 300.2(e), the plain language of BCRA, supported by the legislative history, indicates that the ban on national party raising and spending non-Federal funds was intended to be broad, prohibiting a party from raising, receiving, or directing to another person "a contribution, donation or transfer of funds, or *any other thing of value*" or spending "*any funds*" that are not subject to the Act's limitations, prohibitions, and reporting requirements (emphasis added). Consequently, neither 11 CFR 300.10 nor the definition of "donation" in 11 CFR 300.2(e) contains a sweeping exclusion of donations that would permit national parties to raise funds for these purposes under any and all circumstances. See the Explanation and Justification for 11 CFR 300.2(e) (definition of "donation").

#### *11 CFR 300.11 Prohibitions on Fundraising for and Donating to Certain Tax-Exempt Organizations*

BCRA prohibits national party committees, their officers and agents, and entities directly or indirectly established, financed, maintained, or controlled by them from raising any funds for, or making or directing any donations to, certain tax-exempt organizations. 2 U.S.C. 441i(d). BCRA's prohibition on this type of donor and fundraising activity extends only to tax-exempt organizations with a political purpose or that conduct activities in connection with a Federal election. Specifically, this prohibition extends to organizations exempt from taxation under 26 U.S.C. 501(c) that "[make] expenditures or disbursements in connection with an election for Federal office (including expenditures or disbursements for Federal election activity)." *Id.* (Organizations formed under 26 U.S.C. 501(c) are referred to as "501(c) organizations" below.) The ban also extends to political organizations exempt from taxation under 26 U.S.C. 527 (referred to as "section 527 organizations" below). These entities are defined in the Internal Revenue Code as parties, committees, associations, funds, or other organizations organized and operated primarily to directly or indirectly accept contributions and make expenditures

for the "exempt function" of influencing or attempting to influence the selection, nomination, election or appointment of an individual to a Federal, State, or local public office, political organization office, or election of Presidential and Vice Presidential electors. 26 U.S.C. 527(e)(1) and (2). BCRA excludes from the prohibition certain section 527 organizations as discussed below.

The regulations implementing this provision are set forth in new 11 CFR 300.11. A parallel provision of this regulation, 11 CFR 300.50, and others affecting tax-exempt organizations that appear elsewhere in part 300, have been placed together in subpart C for the convenience of those interested in locating rules pertaining to fundraising and donations to tax-exempt organizations.

Section 300.11 as proposed closely tracked the language of BCRA. The final rule has taken into account comments received on questions posed in the NPRM, as discussed below. The Commission also notes that since 11 CFR 300.37 contains a comparable provision applicable to State, district, and local party committees, the discussion below also applies to those entities unless otherwise indicated.

#### A. General Prohibition

Paragraphs (a)(1) and (2) of the final rules in section 300.11 remain unchanged from the proposed rule except for minor language changes to the description of national congressional campaign committees to conform with other formulations of the phrase.

Paragraph (a)(3) of the final rules implements BCRA's prohibition on national party committee fundraising for, and donating to, a section 527 organization unless the organization is a "political committee," a State or local party committee, or an authorized committee of a State or local candidate. In the context of a parallel provision in 11 CFR 300.37 applicable to State, district, and local party committees, the NPRM asked whether "political committee" should mirror the definition of that term in 2 U.S.C. 431(4), which would encompass only organizations that make contributions and expenditures in connection with Federal elections, or whether the term should be interpreted to also encompass State-registered political committees that support only State and local candidates.

As discussed in the Explanation and Justification for 11 CFR 300.37, commenters supported a broader interpretation of "political committee" in the context of donations by State and

local party committees. None of the commenters addressed this issue in the context of the national party prohibition, however. The Commission concludes that the broad prohibition applicable to national party fundraising and spending in 2 U.S.C. 441i(a) (see 11 CFR 300.10) prevents a broader construction of "political committee" in 11 CFR 300.11. Thus, 2 U.S.C. 441i(a) prohibits national party committees from soliciting or directing to another person "a contribution, donation or transfer of funds or any other thing of value" or spending any funds that are not subject to the limitations, prohibitions and reporting requirements of the Act. Funds solicited or directed by a national party committee to a State-registered section 527 organization are not subject to the reporting requirements of the Act. Accordingly, in the final rules, paragraph (a)(3)(i) of 11 CFR 300.11 prohibits national party committees from soliciting funds for, or making donations to a section 527 "political committee" unless the organization is a "political committee" as defined in 11 CFR 100.5.

Paragraph (b) of 11 CFR 300.11, which describes the other persons and entities to whom the prohibition applies, remains unchanged from the proposed rule. The NPRM asked whether the final rule should provide examples of the types of persons and entities covered by this provision, and sought specific examples that might illuminate the scope of this provision. Although many commenters expressed approval for including examples as to who is covered by the provision, none provided specific examples. The final rule does not include specific examples.

The NPRM also sought comments on whether the regulations should contain a temporal requirement so that the prohibition on national and State party fundraising and donations to non-profits is appropriately circumscribed and does not encompass, for example, an organization that made expenditures and disbursements in connection with a Federal election many years ago but has not done so recently and does not plan to do so in the future. After further consideration, the Commission has determined that a temporal requirement is unnecessary because the statutory language, "makes expenditures and disbursements \* \* \*" is in the present tense. Thus, the final rules do not contain a temporal requirement. The definition of a 501(c) organization "that makes expenditures and disbursements in connection with a Federal election" at 11 CFR 300.2(a) encompasses an organization's activities in the current two-year election cycle only. See the

Explanation and Justification of 11 CFR 300.2(a) for further discussion.

One non-profit organization urged the Commission to exclude 501(c)(3) organizations from the party committee fundraising/donation prohibition. This commenter argued that because 501(c)(3) organizations are required by tax law to undertake only election-related activity that cannot benefit any particular candidate or party, they should not be subject to the prohibition. However, the plain language of BCRA applies to all 501(c) organizations that make disbursements or expenditures in connection with Federal elections, including expenditures and disbursements for Federal election activity. Financing certain voter registration and GOTV activities are considered Federal election activities under BCRA and new 11 CFR 100.24. Moreover, even nonpartisan voter registration and GOTV activities are capable of having an impact on Federal elections. Indeed, BCRA's co-sponsors specifically indicated in their comments that nonpartisan voter registration drives or GOTV activities were not intended to be excluded from the definition of Federal election activity. The Commission notes that this provision does not prohibit non-profit organizations from undertaking any type of voter registration or GOTV activities. Because Congress clearly could have excluded 501(c)(3) organizations from this provision but chose not to do so, the final rules do not include any such exclusion or exemption.

#### B. Safe Harbor Provisions

The NPRM asked whether a safe harbor provision should be provided so that a national or State party committee and others affected by the prohibition may raise funds for or make donations to a section 501(c) or a section 527 organization if they take certain steps to ensure that the organization is not one that falls within the prohibition. The NPRM listed examples of possible safe harbors such as requiring party committees to: (1) Obtain and examine a 501(c) organization's application for tax-exempt status or annual IRS Form 990 returns to determine whether the organization has reported making, or indicates plans to make, expenditures or disbursements in connection with a Federal election, or (2) with respect to current or planned activity, obtain and examine a certification from the organization that indicates it does not make, or plan to make, such expenditures.

The commenters agreed that the regulations should provide a safe harbor for national and State party committees.

The commenters split, however, on what the safe harbor should be. The primary sponsors of BCRA and one public interest group suggested that section 501(c) and section 527 organizations be required to file sworn certifications with the Commission, enforceable under 18 U.S.C. 1001, upon which a party committee could rely in determining whether it could solicit funds for, or make or direct donations to, such organizations. The sponsors of BCRA urged that party committees be held strictly liable for any violations of the Act if, in the absence of such a certification, an organization misrepresents itself.

Without addressing the concept of a safe harbor, another public interest group commented that a party committee should be required to obtain a sworn certification from a section 501(c) or a section 527 organization for whom it wishes to solicit or to whom it wishes to donate or direct funds.

Several party committee commenters expressed approval for a safe harbor that would permit a party committee to obtain and rely on applications for tax-exempt status or IRS Form 990 returns to determine whether it could permissibly fundraise for, or donate to, a tax-exempt organization. One commenter suggested that party committees be given a choice between obtaining certifications or relying upon publicly available tax documents. A labor organization argued that the regulations should not require party committees to investigate non-profits it wishes to donate to or assist. Rather, this commenter urged that the Commission adopt specific language that a party committee could use, presumably in a cover letter, when it makes a donation to a 501(c) to serve as a safe harbor "from prosecution." The commenter suggested that the party committee merely be required to state to the section 501(c) organization that any funds it donated cannot be used for activities that would "constitute an expenditure in a Federal election."

In considering how to implement these BCRA provisions, the Commission has concluded that a safe harbor is an appropriate way to help ensure that party committees, and others to whom 11 CFR 300.11 and 300.37 apply, comply with the Act. The Commission believes that requiring a 501(c) organization to file a certification with the Commission would be burdensome. However, requiring party committees and others covered by this provision to obtain a written certification from an official with knowledge of an organization's activities is the best way to ensure that the party committee or

other person has information as to whether a particular organization engages in certain election-related activities. IRS Form 990s may not clearly show whether an organization has undertaken specific election-related activities. Moreover, these forms do not provide information on current activities. Accordingly, new paragraph (c) of the final rule provides that a party committee may obtain and rely upon a certification from a section 501(c) organization to determine whether it may permissibly raise funds for, or make or direct donations to, the organization.

New paragraph (d) of the final rule sets forth specific criteria a certification must include. These criteria are: (1) That the certification is a signed written statement by an officer or other authorized representative with knowledge of the organization's activities; (2) that the certification states that, within the current two-year election cycle, the organization has not made, and does not intend to make, expenditures or disbursements in connection with an election for Federal office (including for Federal election activity); and (3) that the certification states that the organization does not intend to pay debts incurred from the making of expenditures or disbursements in connection with an election for Federal office (including for Federal election activity) in a prior two-year election cycle. The Commission believes that a requirement that the certification be sworn to is unnecessary and that a certification is sufficiently reliable if it is made in writing by an official of a tax-exempt organization with knowledge of the organization's activities. Moreover, requiring that the certification contain a statement that an organization does not intend to pay Federal-election related debts from a prior cycle will help ensure that the prohibition is not evaded.

New paragraph (e) states that a certification cannot be relied upon if a national party committee, its officers or agents, or others covered by the prohibition has actual knowledge that the certification is false.

Finally, the NPRM sought comments on whether it would be considered "directing" a donation if a party committee responded to an unsolicited request for information about organizations that share a party's political, social, or philosophical goals. Commenters who addressed this point stated that sharing such information would be permissible. One party commenter opined that it would be unconstitutional to try to prohibit this sharing of information as well as

difficult to enforce. A public interest group commenter noted that responding to such requests was permissible but would amount to "directing" a donation if the donor's request or the party's response was in connection with a proposed "or potential" donation.

The Commission agrees that a rule prohibiting this type of information-sharing is not necessary to enforce BCRA and would create significant constitutional concerns. Therefore, new paragraph (f) of the final rules states that it is not prohibited for a national party or its agents to respond to a request for information about a tax-exempt group that shares the party's political or philosophical goals.

#### 11 CFR 300.12 Transition Rules

One of the BCRA amendments to the FECA prohibits national party committees from raising and spending non-Federal funds after November 5, 2002, the effective date of BCRA.<sup>5</sup> 2 U.S.C. 431 note. BCRA, however, created a transition period between November 6, 2002 and December 31, 2002, that permits national party committees to spend non-Federal funds in their accounts as of November 5, 2002, for certain expenses and debts. The rules governing the use of non-Federal funds by national party committees, including national congressional campaign committees, during this transition period are set forth in 11 CFR 300.12.

#### A. Permissible Uses of Excess Non-Federal Funds During the Transition Period

Paragraph (a) of section 300.12 describes the two permissible uses of funds in a national committee's non-Federal accounts, other than an office building or facility account, as of November 5, 2002. They are: (1) To retire outstanding non-Federal debts or non-Federal obligations incurred solely in connection with an election held before November 6, 2002; or (2) to pay non-Federal expenses or retire outstanding non-Federal debts or obligations incurred solely in connection with any run-off election, recount, or election contest resulting from an election held prior to November 6, 2002. BCRA expressly provides that, subject to the restrictions incorporated into paragraph (b) of 11 CFR 300.12, these non-Federal funds must be used solely for the two enumerated purposes and must be spent before January 1, 2003. 2 U.S.C. 431 note.

<sup>5</sup> The raising and spending of non-Federal funds by State, district, and local committees or organizations are addressed in 11 CFR part 300, subpart B, discussed below.

The NPRM sought comments on whether the use of the word "solely" in the enumeration of the permissible uses of non-Federal funds in paragraph (a) during the transition period precluded permitting any funds remaining thereafter to be disgorged to the United States Treasury or donated to a charitable organization. The Commission received several comments on this issue as well as suggestions for other permissible uses under paragraph (a).

The commenters split on whether the Commission should permit remaining non-Federal funds in any non-Federal account to be donated to charity. BCRA's sponsors and one public interest group stated that BCRA provides no statutory basis for transferring any non-Federal funds as of November 6, 2002, to non-profit organizations and doing so could undermine a central purpose of the law which is to prohibit national party non-Federal funds from being used in the 2004 elections. Since charitable organizations under section 170 include section 501(c)(3) organizations, the sponsors pointed out that there is a potential that any donated funds could be used for Federal election purposes in the next election. Section 501(c)(3) organizations are permitted to engage in voter registration, get-out-the-vote activities, and other activities defined as "Federal election activities" in BCRA.

The sponsors suggested, instead, that any funds remaining in a national party committee's non-Federal accounts be either disgorged to the United States Treasury or refunded to donors on a *pro rata* basis. Another commenter concurred with this suggestion, pointing out that because the statutory language only permitted specific uses during the transition period, any funds remaining thereafter must be disgorged or refunded.

On the other hand, other commenters believed that permitting donations to at least some charitable organizations was permissible. A public interest group commented that the Commission could require disgorgement or permit donations to charitable organizations as long as the charitable organization is not one that the national parties would be prohibited from donating to under 11 CFR 300.10(b). A commenter from a non-profit organization maintained that BCRA should be construed to permit national parties to use any non-Federal funds remaining after payment of non-Federal election-related debts for any purpose currently permitted under FECA. According to this commenter such a construction is warranted because BCRA is silent as to the

disposition of funds during the transition period after permissible debts are paid under paragraph (a) of 11 CFR 300.12, and only specific uses are prohibited in paragraph (b). The commenter further stated that the rules should permit national parties to transfer non-Federal funds remaining after non-Federal debt is paid to 501(c) organizations because these organizations are required to engage in non-partisan charitable or social welfare activity under tax law. None of the party committee commenters addressed this issue.

The final rules address the disposal of excess non-Federal funds in new paragraph (c), discussed below. Other minor changes made to paragraph (a) in the final rules include: the word "only" has been changed to "solely" to better track the language used in BCRA and a reference to paragraph (e) has been deleted. Changes in the organization of 11 CFR 300.12 are discussed below.

#### B. Prohibited Uses of Non-Federal Funds After November 5, 2002

BCRA provides that the permissible uses of non-Federal funds enumerated in paragraph (a) are subject to certain restrictions. The final rules at 11 CFR 300.12(b) set forth these restrictions. Specifically, paragraph (b) states that national party committees will no longer be able to use non-Federal funds for any of the following activities after November 5, 2002: (1) To pay any expenditure as defined in 2 U.S.C. 431(9); (2) to retire outstanding debts or obligations that were incurred for any expenditure; or (3) to defray the costs of the construction or purchase of any office building or facility. The final rules track the language in the proposed rules. The Commission did not receive any comments concerning this paragraph, other than those pertaining to building funds, which are discussed below.

#### C. Disposal of Remaining Non-Federal Funds

New paragraph (c) provides that any non-Federal funds remaining after payment for permissible debts and obligations described in paragraph (a) must be either disgorged to the United States Treasury or returned by check to the donors by December 31, 2002. This approach gives effect to the use of the word "solely" in 2 U.S.C. 431 note, and to the legislative intent to prohibit national party non-Federal money from being used in future Federal elections. The Commission did not adopt the suggestion that refunds must be made to contributors on a *pro rata* basis. National party committees have the

option of making these refunds on a last-in, first-out (LIFO) or first-in, first-out (FIFO) basis. Paragraph (c) further provides that all refund checks not cashed by donors by February 28, 2003 must be disgorged to the United States Treasury by March 31, 2003. The latter provision ensures that the national party committees do not make use of any uncashed refund checks. Requiring either disgorgement to the United States Treasury or refunds to donors is consistent with the Commission's practice in enforcement matters when a contributor has made, and a political committee has accepted, funds prohibited under the Act.

#### D. National Party Committee Office Building or Facility Accounts

BCRA treats non-Federal funds contained in national party building fund accounts more stringently than non-Federal funds in the national party committees' other non-Federal accounts. Under current law, funds in a national party building fund account may be used only for the purchase or construction of the national party committees' office building or facility. Beginning November 6, 2002, however, any funds remaining in a national party building fund account must not be used for the purchase or construction of any office building or facility. *See* 2 U.S.C. 431 note. Consequently, the Commission proposed requiring that funds on deposit in any party office building or facility account be disgorged to the United States Treasury or donated to a organization described in 26 U.S.C. 170(c) no later than December 31, 2002.

As discussed above, although some commenters suggested that national party committees be permitted to donate the remaining non-Federal funds to a charitable organization, other commenters noted that such organizations include organizations exempt under 26 U.S.C. 501(c)(3) which could result in non-Federal funds making their way into future Federal elections since 501(c)(3) organizations may engage in Federal election activity such as voter registration and get-out-the-vote activities. For this reason, the final rule in 11 CFR 300.12(d) follows the approach taken in paragraph (c) for disposal of excess non-Federal funds: Paragraph (d) requires that non-Federal funds remaining in national party building and office facility accounts on November 6, 2002 be disgorged or refunded to donors by December 31, 2002. As in paragraph (c), any refund checks not cashed by donors by February 28, 2003, must be disgorged to the United States Treasury by March 31, 2003.

Additionally, in their comments, the sponsors pointed out that while the proposed rule only prohibited excess building funds from being used to construct or purchase a national party office building, the statutory language prohibits the use of such funds to defray construction or purchase costs for "any" office building or facility. *See* 2 U.S.C. 431 note. Paragraph (d) of the final rules also incorporates this change.

#### E. Application

The final rule at 11 CFR 300.12(e) clarifies that the transition rules apply to officers and agents acting on behalf of a national party committee or a national congressional campaign committee, and to entities that are directly or indirectly established, financed, maintained, or controlled by a national party committee or a national congressional campaign committee. The Commission did not receive any comments relating to this provision. The final rule follows the proposed rule at 300.12(c) except that it has been redesignated as paragraph (e).

#### F. Allocation and Payment of Expenses During the Transition Period

Section 300.12(f) clarifies that the allocation rules applicable to national party non-Federal and Federal accounts in revised 11 CFR 106.5 remain in effect during the transition period. No comments addressed this provision. The final rules in paragraph (f) are identical to proposed paragraph (d).

#### 11 CFR 300.13 Reporting

BCRA requires national party committees, including national congressional campaign committees, and any subordinate committee of either, to report all receipts and disbursements during regular reporting periods. 2 U.S.C. 434(e). New 11 CFR 300.13(a) tracks the statutory language.

The NPRM sought comment on whether this provision of BCRA was intended to require reporting by existing entities that currently are not required to report and sought the identity of any such entities. The primary sponsors of BCRA commented that the term "subordinate committee" was intended to ensure that any new committees created by the national party committees would file required reports for all receipts and disbursements. The sponsors further stated that this provision requires existing entities that are subordinate to the national parties to report all of their receipts and disbursements whether or not they are required to do so under current law. The sponsors and several other public interest group commenters identified

the College Democrats and College Republicans as subordinate committees of the national parties. None of the party committee commenters addressed this point.

Although neither BCRA nor FECA contains a definition of a "subordinate committee" of a national political party, the phrase is used in 2 U.S.C. 441a(a)(4). That provision states that limitations on contributions do not apply to transfers between and among political committees that are national, State, district, or local committees of the same political party "including any subordinate committee thereof." In Advisory Opinion 1976-112, the Commission concluded that Democrats Abroad was a subordinate committee of the Democratic National Committee for purposes of 2 U.S.C. 441a(a)(4). The advisory opinion noted that the group was "an organization of American citizens living overseas who support the basic principles of the National Democratic Party," had a central office in London, and local clubs in several countries that anticipated reaching political committee status. The Commission concluded that Democrats Abroad functioned as a part of the official structure of the Democratic Party and represented the Democratic Party to Americans living in foreign countries. Factors relied upon in this conclusion included: the group held fundraisers, the proceeds of which were donated to the DNC; the Democratic Party charter authorized a voting delegate from the group to participate at the 1976 party convention; the Call to Convention gave the group three votes to be cast by six delegates elected by group members in accordance with the rules of the party's Compliance Review Commission; the group was allowed representation on the Standing Committee of the Democratic Party; and the group functioned as a party committee by participation in voter registration and GOTV drives for the Democratic Party in 1976. The Commission specifically rejected the conclusion that Democrats Abroad was the equivalent of a State party committee based on the statutory definitions of "State committee" and "State."

Based on the prior construction of the term in Advisory Opinion 1976-112, the Commission concludes that a "subordinate committee" of a national party committee is one that is affiliated with, and participates in, the official party structure of the national party committee. As applied to a particular group, whether an organization is a subordinate committee of a national party is a factual determination. Based on the broad legislative intent to

prohibit national parties from raising and spending non-Federal funds, however, the Commission further concludes that a subordinate committee for purposes of 11 CFR 300.13(a) is an entity that is directly or indirectly established, financed, maintained, or controlled by a national committee of a political party.

Since national party committees and entities directly or indirectly established, financed, maintained, or controlled by them cannot solicit, receive, direct, or spend non-Federal funds as of November 6, 2002, and must dispose of all funds in their non-Federal accounts as of December 31, 2002, 11 CFR 300.13(b) requires national party committees and their subordinate committees to file termination reports for all non-Federal accounts, whether or not a subordinate committee was required to file disclosure reports under FECA prior to BCRA. Paragraph (b) of the final rule also takes into consideration the Commission's determination that excess non-Federal funds must be either refunded to donors or disgorged to the United States Treasury. If a national party committee does not issue refund checks, the national party committee must file a termination report for all non-Federal accounts, including building fund accounts by January 31, 2003. If a national party committee issues refund checks to donors, it must file a termination report covering the period ending March 31, 2003 disclosing the refunds and the disgorgement of any refund checks not cashed by February 28, 2003.

Paragraph (c) of § 300.13 makes clear that the reporting regulations at 11 CFR 104.8 and 104.9 applicable to non-Federal accounts, including building funds, will remain in effect during the transition period. Paragraph (c)(2) provides that reporting requirements at 11 CFR 104.9(c) and (d) covering disbursements from non-Federal account and building fund accounts remain in effect for reports covering the period through March 31, 2003. In contrast, under paragraph (c)(1), the reporting requirements at 11 CFR 104.8(e) and (f), covering receipts of non-Federal and building fund accounts and 11 CFR 104.9(e) covering non-Federal account transfers to State party committees, remain in effect only until December 31, 2002.

#### **Subpart B—State, District, and Local Party Committees and Organizations**

##### *11 CFR 300.30 Accounts*

Under proposed 11 CFR 300.30 in the NPRM, State, district, and local party

organizations would have been required to maintain certain separate Levin accounts in depositories if they paid for the costs of voter registration within a fixed time period or for certain voter identification, GOTV, and generic campaign activity pursuant to 11 CFR 100.24 and 300.32(b)(1). Several of the comments received in response to the NPRM agreed with the proposal that all State, district, and local party committees and organizations be required to maintain separate Levin accounts, no matter the organization's size, level of activity and political committee status, if they desired to undertake certain Federal election activities pursuant to 11 CFR 300.32(b). Other comments raised directly or indirectly the issue of whether the Commission should or even could require such accounts, particularly in light of laws in certain States either limiting the number of non-Federal accounts that a State party organization may hold or, more often, requiring numerous such accounts for varying purposes. It was also argued that the number of non-Federal accounts held by a party committee or party organization is a State, not a Federal issue.

The final rules do not require a separate Levin account. Instead, State, district, and local party organizations that decide to undertake activities pursuant to 11 CFR 300.32(b) may deposit Levin funds in either a separate Levin account or their non-Federal account. If a committee's non-Federal account also functions as its Levin account, it must demonstrate through a reasonable accounting method approved by the Commission (including any method embedded in software provided or approved by the Commission) that it has sufficient Levin funds to cover the non-Federal share of any disbursement it makes for allocable Federal election activity.

The Commission recognizes that some States already require multiple accounts, while a few may prohibit more than one account for all activity. Most importantly, the Commission is very aware of, and concerned about, the complexities of FECA as amended by BCRA, and wants to provide party organizations with procedural flexibility to facilitate compliance with the substantive conditions and restrictions arising from the Levin Amendment.

The NPRM proposed a requirement that, in order for donations to be placed in a Levin account, either the solicitations for the donations must have expressly stated that donations will be subject to the special limitations and prohibitions of section 300.31, or there must have been an express

designation to the Levin account by the donors. Several commenters objected to these requirements, arguing that they are not in BCRA and would be unnecessary, inappropriate, and could make it difficult for State, district and local party committees to engage in bona fide Levin activities. The Commission agrees, and the final rules contain no such requirement.

Paragraph (a) provides an overview of the section and specifies that 11 CFR 300.30 applies to any State, district, or local committee or organization of a political party that has receipts or makes disbursements for Federal election activity, whether or not such committee is a political committee under 11 CFR 100.5.

Paragraph (b) describes the requirements for four different types of accounts: Federal accounts, Levin accounts, non-Federal accounts, and allocation accounts. Paragraph (b)(1) provides for the use of non-Federal accounts by State, district, and local party committees, to the extent permitted by State law, and lists the provisions under which non-Federal funds may be used in connection with Federal elections. Paragraph (b)(2) provides for an account solely for Levin funds, and references 11 CFR 300.31 and 300.32(b), which track the statutory requirements for raising Levin funds and disbursing Levin funds, respectively.

Paragraph (b)(3)(i) requires that only contributions permissible under the Act be deposited into a State, district, or local party committee's Federal account, even when such funds may be used in connection with both Federal and non-Federal elections. It also provides a cross-reference to 11 CFR 103.3, which explains the procedure for dealing with impermissible funds. Paragraph (b)(3)(ii) describes the information that must be provided to or received from contributors regarding contributions deposited in a Federal account. Paragraph (b)(3)(iii) requires that only Federal accounts or allocation accounts be used to make disbursements, contributions, or expenditures in connection with Federal elections. This procedure tracks the longstanding requirements at 11 CFR 106.5 for transfers to Federal accounts or to allocation accounts for shared Federal and non-Federal activity.

Paragraph (b)(3)(iv) provides that, when a Federal rather than an allocation account is to be used to make allocable expenditures, the initial payment must be made from the Federal account with timely reimbursements from other accounts involved in a transaction. Paragraph (b)(3)(v) prohibits transfers



into a party committee's Federal account from other accounts of the same party committee or from other party committees or party organizations to pay for Federal election activity, except as permitted by 11 CFR 300.30(b)(3)(iv), 300.33, and 300.34. The language of this paragraph in the NPRM has been changed to better track the requirements of BCRA.

The NPRM requested comments on whether the Commission should continue to permit the use of allocation accounts for purposes of making allocable expenditures. The consensus of those responding to this question was in the affirmative. Therefore, a new paragraph (b)(4) is being added expressly permitting the establishment of such allocation accounts in lieu of making all allocated expenditures from a Federal account and setting out the requirements for the use of such allocation accounts. Paragraphs (b)(4)(i) and (ii) state that only certain funds may be deposited in each allocation account, depending upon whether the purpose of the account is to make expenditures and disbursements that have been allocated between a party committee's Federal and non-Federal accounts or to make expenditures and disbursements that have been allocated between its Federal and Levin accounts. This rule is necessitated by the requirements in BCRA that define the specific funds that can and cannot be used for such activities. Paragraph (b)(4)(iii) requires that, once allocation accounts are established, they must be used for all allocable expenses so long as the accounts are maintained. Pursuant to paragraph (b)(4)(iv) and (v), only the amount needed to meet the allocable share of expenses may be transferred into these allocation accounts and no funds from these accounts may be transferred out to other accounts.

Paragraph (c) provides three different options for paying for Federal election activity. Paragraph (c)(1) requires that one or more Federal account be established, which would need to be used to pay for Federal election activity that is not allocable, as well as to pay the Federal portion of Federal election activity that is allocable. Paragraph (c)(1) also allows Federal funds to be used in non-Federal elections, provided that the contributors of the Federal funds have been informed that their contributions will be subject to the limitations and prohibitions of the Act and provided that the disbursements are reported pursuant to section 300.36. The phrase "subject to State law" has been added in response to a comment on the NPRM.

Paragraph (c)(2) provides the option of having at least three separate accounts: one or more Federal, Levin, and non-Federal accounts.

Paragraph (c)(3) provides that if a committee opts not to have a separate Levin account, but instead uses its non-Federal account for depositing and disbursing Levin funds, the committee must demonstrate through a reasonable accounting method approved by the Commission (including any method embedded in software provided or approved by the Commission) that the committee has sufficient Levin funds on hand to cover disbursements for Levin activity.

Paragraph (d) requires all party organizations to keep records and to make them available to the Commission upon request.

#### *11 CFR 300.31 Receipt of Levin Funds*

In BCRA, Congress placed several restrictions on how State, district, and local political party committees raise Levin funds. New 11 CFR 300.31 implements these statutory restrictions. Paragraph (a) states as a general proposition a key point in the statute: a State, district, or local political party committee that spends Levin funds must raise those funds solely by itself. 2 U.S.C. 441i(b)(2)(B)(iv).

Paragraphs (b) and (c) of section 300.31 elaborate on the statutory requirement that Levin funds must be raised from donations that comply with the laws of the State in which the State, district, or local party committee is organized. 2 U.S.C. 441i(b)(2)(B)(iii). Paragraph (b) states this as a general requirement. More specifically, paragraph (c) clarifies the status of donations from sources that are permitted under State law, but prohibited by the Act. A prime example is donations from corporations and labor organizations. Under 2 U.S.C. 441b of the Act, "[i]t is unlawful \* \* \* for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election" for Federal office. 2 U.S.C. 441b(a). Under the campaign finance laws of several States, however, donations by corporations or labor organizations to political party committees are legal. Section 300.31(c) clarifies that in such States, a political party committee may solicit and accept donations of Levin funds from corporations and labor organizations, subject to the other conditions of the Act. (Of course, if donations from corporations or labor organizations to a political party committee are illegal in a State, political party committees in that State would

not be able to accept Levin fund donations from those sources.)

Three commenters expressed concern that section 300.31(c), as published in the NPRM, could be misinterpreted to allow donations from foreign nationals. One of these commenters suggested adding the phrase, "other than 2 U.S.C. 441e," after the word "chapter." Although the sweeping nature of the 2 U.S.C. 441e as amended by BCRA seems to preclude the possibility that a donation by a foreign national to a party committee could be lawful under any State law, the Commission has revised paragraph (c) of section 300.31 as suggested.

The principal Congressional sponsors commented that paragraph (c) should not be misinterpreted to allow a donation of Levin funds to a State, district, or local political party committee from a person established, financed, maintained, or controlled by a person forbidden from providing Levin funds to the committee. The Commission has addressed this concern in paragraphs (e) and (f) of section 300.31. (See discussion below.)

Paragraph (d), in general, addresses amount limitations on donations of Levin funds to a State, district, or local party committee. In the Levin Amendment, Congress placed a \$10,000 per calendar year per donor limitation on donations to a State, district, and local political party committee to be used as Levin funds. This statutory amount limitation applies to a person, including "any person established, financed, maintained, or controlled by such person." 2 U.S.C. 441i(b)(2)(B)(iii). Paragraph (d)(1) clarifies that this is an aggregate limit per recipient committee (i.e., the aggregate limit applies separately to each party committee) and, therefore, a person may contribute to an unlimited number of State, district, and local committees of a political party. See discussion of 11 CFR 300.31(d)(3), below. Paragraph (d)(1) did not draw comment. In the NPRM, the Commission sought comment on whether its current "affiliation" regulation (11 CFR 100.5(g)) would appropriately determine whether a person is "established, financed, maintained, or controlled," within the meaning of this paragraph. The Commission received no comments on this point. The Commission, in this rulemaking, is adopting 11 CFR 300.2(c), which is based on 11 CFR 100.5(g), which should be applied to determine whether certain persons share a \$10,000 per year per committee contribution amount limitation under paragraph (d)(1).

Paragraph (d)(2) addresses those cases in which State law imposes an amount limitation on donations to a State, district, or local party committee that differs from the amount limitation in 2 U.S.C. 441i(b)(2)(B)(iii) and paragraph (d)(1). Paragraph (d)(2) strikes a balance between respect for State law and protecting the integrity of the Levin Amendment amount limitation. It makes clear that lower State law amount limitations prevail over the \$10,000 limitation in the Levin Amendment, but that the Levin Amendment \$10,000 limit controls where State law amount limitations exceed \$10,000. There were no public comments on paragraph (d)(2).

Paragraph (d)(3) of section 300.31 addresses the question of whether State, district, and local committees of the same political party are affiliated for purposes of applying the donation amount limitation as set forth in paragraphs (d)(1) and (d)(2) of section 300.31. *See generally* 11 CFR 110.3. The paragraph clarifies that such committees are not considered affiliated only for the purpose of determining compliance with paragraph (d)(1). *See* 148 Cong. Rec. H410 (daily ed. Feb. 13, 2002) (statement of Rep. Shays).

The last sentence of paragraph (d)(3) is intended to make clear that there is no limit to the number of State, district, and local committees to which a person may donate Levin funds. The phrase "individually or together with" in paragraph (d)(3) is intended to clarify that the amount limitations in paragraphs (d)(1) and (d)(2) apply collectively to the amounts donated to a particular party committee by a person and by any entities established, financed, maintained, or controlled by such person.

Three commenters discussed paragraph (d)(3). A national party committee supported the provision. Another commenter suggested that there should be a "rebuttable presumption" of affiliation of party organizations "at the same political or geographic unit" in order to prevent a possible proliferation of party organizations each with its own \$10,000 per donor limit. The legislative history indicates, however, that Congress contemplated the possibility of such a proliferation of party committees and chose to address it by imposing a ban on transfers of Levin funds between party committees rather than by affiliating the committees under a single contribution limit. 148 Cong. Rec. H410 (daily ed. Feb. 13, 2002) (statement of Rep. Shays); *see* 2 U.S.C. 441i(b)(2)(B)(iv). Therefore, the Commission has not adopted this suggestion.

As mentioned above in the discussion of paragraph (a) of section 300.31, a key point made in the statute is that expenditures and disbursements of Levin funds by a State, district, or local political party committees must be "made solely from funds raised by the \* \* \* committee which makes such expenditure or disbursement \* \* \*." 2 U.S.C. 441i(b)(2)(B)(iv). Congress elaborated on this fundamental requirement by specifically providing that Levin funds must not be "solicited, received, directed, transferred, or spent by or in the name of" a national committee of a political party, including a national Congressional campaign committee, or a Federal candidate or individual holding Federal office. 2 U.S.C. 441i(b)(2)(C)(i). This statutory prohibition extends to an agent acting on behalf of a national party committee or a candidate or Federal officeholder, and to any entity that is directly or indirectly established, financed, maintained, or controlled by a national party committee or a candidate or Federal officeholder. 2 U.S.C. 441i(a)(2), and (e)(1); *see* 2 U.S.C. 441i(b)(2)(C).

Paragraph (e) of section 300.31 implements these specific statutory restrictions. Paragraph (e)(1) provides that a State, district, or local political party committee must not "accept or use" as Levin funds any funds "solicited, received, directed, transferred or spent" by a national committee of a political party, including a national Congressional campaign committee. Paragraph (e)(2) extends the same prohibition to funds "solicited, received, directed, transferred or spent" by a Federal candidate or officeholder. Two commenters pointed out that paragraphs (e)(1) and (e)(2), as published in the NPRM, did not consistently or expressly refer to agents of, or to entities directly or indirectly established, financed, maintained, or controlled by, national party committees and Federal candidates and officeholders. The prohibition in paragraph (e)(1) has been revised in the final regulation to extend explicitly to agents of, and to entities directly or indirectly established, financed, maintained, or controlled by, national party committees and by Federal candidates and officeholders. Similarly, paragraph (e)(2) has been revised to refer expressly to agents of Federal candidates and officeholders.

Confusion could arise about the relationship of the Commission's long standing joint fundraising regulation, 11 CFR 102.17, and the restrictions imposed in paragraphs (e)(1) and (e)(2) of section 300.31. Therefore, both paragraphs (e)(1) and (e)(2) explicitly

provide that 11 CFR 102.17 does not permit joint fundraising of Levin funds by a State, district, or local political party committee, and a national party committee or a Federal candidate or officeholder. Paragraph (e)(1) also clarifies that a State, district, or local political party committee may jointly raise, under 11 CFR 102.17, Federal funds not to be used for Federal election activity.

Congress specifically addressed other joint fundraising of Levin funds by providing that a State, district, or local political party committee must not use as Levin funds any amounts "solicited, received, or directed through fundraising activities conducted jointly by two or more State, local, or district committees of any political party or their agents." 2 U.S.C. 441i(b)(2)(C)(ii). This prohibition extends across State lines. *Ibid.* New paragraph (f) implements this statutory prohibition against joint fundraising of Levin funds by more than one State, district, or local committee of a political party, including such parties from more than one State. Paragraph (f) also clarifies that nothing in BCRA forbids two or more State, district, or local political party committees from jointly raising Federal funds that are not to be used for Federal election activity.

The provisions of paragraphs (e)(1), (e)(2), and (f) of section 300.31 regarding joint fundraising drew several comments. A national party committee suggested that the Commission clarify that these joint fundraising prohibitions extend only to Levin funds. In response, the Commission emphasizes that the section heading and the language in the introduction to paragraph (e) explicitly limit the scope of these provisions to "Levin funds." Similarly, the Commission emphasizes that paragraph (f) explicitly refers to "Levin funds."

One commenter approved of the scope of joint fundraising provisions of paragraphs (e)(1), (e)(2), and (f), stating that the joint fundraising prohibition should extend beyond particular "events" to all fundraising activities for Levin funds that are conducted jointly. Conversely, three commenters, a national party committee, a State party committee, and an association of State party officials, urged the Commission to limit the reach of the joint fundraising prohibition in paragraphs (e)(1), (e)(2), and (f) to "specific joint fundraising events," in contrast to joint fundraising "activities." They urge that such joint fundraising "activities" for Levin funds should be permitted. In support, they quote Rep. Shays, who said, "joint fundraisers between state committees or state and local committees are not

permitted \* \* \* The joint fundraising prohibition will prevent a single fundraiser for multiple state and local party committees." 148 Cong. Rec. H410 (daily ed. Feb. 13, 2002). These commenters apparently have focused upon Rep. Shays' use of the term "single fundraiser," which they seem to interpret to mean a dinner, a speech, or similar "event." Presumably, a fundraising "activity," such as a direct mail campaign, would be permitted under the commenters' suggested interpretation. In response, the Commission notes that statements by any member of Congress during the floor debate should not be used to contradict the plain language of the statute. BCRA itself broadly refers to "fundraising activities conducted jointly" by State, district, or local political party committees. 2 U.S.C. 441i(b)(2)(C)(ii) (emphasis added). In addition, the specific statement made by Rep. Shays, referring to a "single fundraiser," could easily encompass either a dinner or a specific direct mail campaign.

In the final rules, the Commission has added as a separate paragraph (g) a rule stated in the NPRM as the final sentence of paragraph (f). Paragraph (g), under the heading "Safe harbor," provides that the use of a common vendor by more than one State, district, or local political party committees does not constitute joint fundraising within the meaning of section 300.31. In the version of the regulation published in the NPRM (then in paragraph (f)), the rule would have provided that the use of a common vendor would not, by itself, be deemed joint fundraising. The Commission revised this language in order to provide a "bright-line" rule. The principal Congressional sponsors of BCRA, responding to the NPRM, agreed with this provision in principle, but noted that use of a common vendor may, in some circumstances, be a means of carrying out actual 'joint fundraising' schemes. The sponsors urged the Commission to be "highly attentive" to this practice.

#### 11 CFR 300.32 Expenditures and Disbursements

11 CFR part 300, subpart B, generally addresses expenditures and disbursements of Federal funds and of Levin funds for Federal election activities. 11 CFR 300.32 specifically addresses both kinds of spending by a State, district, or local political party committee, and clarifies that BCRA does not affect spending of non-Federal funds for purely State or local activity. 11 CFR 300.32 also implements part of 2 U.S.C. 441i(b)(1), which requires that an

association or similar group of candidates for State or local office, or an association of State or local officeholders, must make expenditures or disbursements for Federal election activity solely with Federal funds.

In the NPRM, the Commission solicited comments about the term, "association or similar group of candidates for State or local office, or an association of State or local officeholders," specifically asking whether it should be further defined in the regulations, and if so, about examples of such associations or groups to include in the final regulations. The Commission received no comments on this point, nor did the Commission receive any other comments about paragraph (a)(1).

Paragraph (a)(1) requires that an association or similar group of candidates for State or local office, or an association of State or local officeholders, must make expenditures or disbursements for Federal election activity solely with Federal funds. Paragraph (a)(2) makes clear that the general rule in BCRA is that a State, district, or local political party committee spending on Federal election activity must use Federal funds for that spending, except as provided in 2 U.S.C. 441i(b)(1). The Commission received no comments regarding this provision.

Paragraphs (a)(3) and (a)(4) address how State, district, or local party committees must pay the costs of raising funds used to pay for Federal election activities. In BCRA, Congress required that spending by a State, district, or local committee of a political party "to raise funds that are used, in whole or in part, for expenditures and disbursements for a Federal election activity shall be made from funds subject to the limitations, prohibitions, and reporting requirements of this Act." 2 U.S.C. 441i(c). As published in the NPRM, paragraphs (a)(3) and (a)(4) sought to implement section 441i(c) as it applied to Federal funds raised for Federal election activity and Levin funds raised for Federal election activity, respectively.

In the NPRM, the Commission sought comment about section 441i(c) with regard to Levin funds. In particular, the Commission sought comment on (1) whether proposed paragraph (a)(4) could be limited to the direct costs (see pre-BCRA 11 CFR 106.5(a)(2)(ii)) of raising Levin funds; and (2) whether the costs of fundraising for Levin funds could be allocated between a party committee's Federal and non-Federal accounts under the "funds received" method. See pre-BCRA 11 CFR 106.5(f). Comments were also sought as to

whether, generally, greater specificity should be provided in proposed section 300.32 as to the nature of fundraising costs in this section. 67 FR 35664.

The Commission received several comments about paragraphs (a)(3) and (a)(4). The principal Congressional sponsors of BCRA and a public interest group suggested that both paragraphs (a)(3) and (a)(4) should be clarified by including the statutory language, "in whole or in part." The Commission has included this suggestion in the final regulation. The added language better conforms the scope of the regulation to the scope of the statute.

Another commenter suggested that both paragraphs (a)(3) and (a)(4) should be limited to the direct costs of raising funds to be spent for Federal election activity, in contrast to the regulation proposed in the NPRM, which would have covered all costs of fundraising. The Commission has included this suggestion in the final rules. The purposes of 2 U.S.C. 441i(c) are adequately served by regulating only the direct costs of raising funds for Federal election activity. This limitation also avoids unnecessary confusion about allocation of administrative costs in the fundraising context in that covering the direct costs of fundraising is consistent with the Commission's longstanding regulation of fundraising costs. Given this change in the final regulation, the Commission has imported language from its pre-BCRA allocation regulation describing what constitutes direct costs.

A public interest group supported paragraph (a)(4) of the NPRM, while a State party committee objected to paragraph (a)(4) to the extent that it forbids a State, district, or local political party committee from spending Levin funds to raise Levin funds. This commenter suggests that Levin funds are subject to the limitations, prohibition, and reporting requirements of the Act, as specified in 2 U.S.C. 441i(c).

The Commission notes that 2 U.S.C. 441i(b)(2)(A), which addresses the use of Levin funds for certain Federal election activity, refers to "amounts which are not subject to the limitations, prohibitions, and reporting requirements of this Act (other than any requirements of this subsection)." Although that statutory phrase is somewhat incomplete, in that it omits any reference to the reporting requirements for Levin activity that are found in a different section of the Act (2 U.S.C. 434(e)), it is nonetheless a recognition that Levin funds are subject to requirements of the Act.

Yet even without this phrase, the Commission would find that Levin

funds are subject to the limitations and prohibitions found in the Act at 2 U.S.C. 441i(b)(2), and the reporting requirements found in the Act at 2 U.S.C. 434(e)(2)(A). The Commission notes that 2 U.S.C. 441i(b)(2)(B) places a \$10,000 limit on Levin funds donated to any one State, district, or local committee of a political party, which is greater than the amount limitation for contributors to authorized committees under 2 U.S.C. 441a(a)(1)(A), but less than the amount limitation for contributors to national committees under 2 U.S.C. 441a(a)(1)(B). The Commission finds that even though there are different amount limitations that apply to different contexts in the Act, that does not cause any of those limitations to not be limitations "of the Act." Similarly, 2 U.S.C. 441i(b)(2)(B) and 441i(b)(2)(C)—which, among other things, prohibit the use of Levin funds for activity that refers to a Federal candidate and prohibit the receipt of Levin funds raised by other party committees—contain different prohibitions than other sections of the Act (*see, e.g.,* 2 U.S.C. 441b), but are prohibitions "of the Act" nonetheless. And finally, reporting requirements under the Act can vary depending on the amount and nature of the receipt or disbursement, as well as on the nature of the entity that is receiving and disbursing the amount at issue. *See* 2 U.S.C. 434. The same variables apply to the reporting requirements for funds raised and disbursed for Federal election activity. *See* 2 U.S.C. 434(e). In light of the statutory limitations, prohibitions and reporting requirements to which Levin funds are subject, the Commission concludes that State, district, and local party committees or organizations may spend Levin funds to raise Levin funds.

Paragraph (b) of section 300.32 lists the types of activities for which a State, district, or local political party committee may spend Levin funds. Paragraph (b)(1) spells out the two kinds of Federal election activity for which Levin funds may be spent, *see* 2 U.S.C. 441i(b)(2)(A), and provides that such spending must be made subject to the conditions set out in paragraph (c) of section 300.32. The principal Congressional sponsors of BCRA suggested that the word "only" be included to preclude any possible misinterpretation of the provision. The Commission has adopted this suggestion in the final regulation.

Paragraph (b)(2) of section 300.32, as proposed in the NPRM, drew several comments. A national party committee and a State party committee supported the provision. The principal

Congressional sponsors of BCRA and a public interest group expressed concern that paragraph (b)(2) could be misinterpreted to allow spending of Levin funds for the Federal election activities described in 2 U.S.C. 431(20)(A)(iii) and (iv). In response to this concern, the Commission has added the language, "other than the Federal election activities defined in 11 CFR 100.24(b)(3) and (4)," which implement section 431(20)(A)(iii) and (iv).

As published in the NPRM, paragraph (b)(2) of section 300.32 would have allowed a State, district, or local political party committee to spend Levin funds for any purposes allowed by State law, and would have also provided that such spending was not subject to paragraph (c) (*see* below). The principal Congressional sponsors of BCRA expressed concern that the latter provision could be misinterpreted to allow fundraising and unallocated spending of Levin funds otherwise forbidden in other regulations. The Commission agrees. Therefore, the final rule, paragraph (b)(2), exempts spending of Levin funds for purposes permissible under State law from only paragraphs (c)(1) and (c)(2) of section 300.32 because those two paragraphs are specifically focused on spending for Federal election activities. As revised, the final rule subjects all spending of Levin funds to paragraphs (c)(3) and (c)(4). The heading for paragraph (c) has been changed slightly in the final rule to conform with this change.

While the Levin Amendment permits the spending of Levin funds for the purposes set out in paragraphs (b)(1) and (2), it places restrictions and conditions on that spending when it is for Federal election activity. Paragraph (c) sets out in one place important restrictions and conditions that are stated in different sections of BCRA. Paragraph (c)(1) implements the restriction that the Federal election activity paid for partly with Levin funds must not refer to a clearly identified Federal candidate. *See* 2 U.S.C. 441i(b)(2)(B)(i). Paragraph (c)(2) implements the restriction that the Federal election activity paid for partly with Levin funds must not be for any broadcast, cable, or satellite communications, other than a communication that refers solely to a clearly identified candidate for State or local office. *See* 2 U.S.C. 441i(b)(2)(B)(ii). Paragraph (c)(3) ties together the provisions of this regulation with 11 CFR 300.31, which covers the raising of Levin funds. Paragraph (c)(4) requires allocable Federal election activity (*i.e.*, voter registration, voter identification, GOTV, or generic

campaign activity that does not refer to a clearly identified Federal candidate and is not a broadcast, cable, or satellite communication) that exceeds in the aggregate \$5,000 in a calendar year to be paid for either entirely with Federal funds, or with a combination of Federal funds and Levin funds pursuant to the allocation percentages set forth in 11 CFR 300.33. Disbursements that aggregate \$5,000 or less in a calendar year for this restricted category of Federal election activity may be paid for entirely with Federal funds, entirely with Levin funds, or pursuant to the allocation percentages set forth in 11 CFR 300.33.

In implementing 2 U.S.C. 441i(b)(2)(A), the Commission chose to permit a greater amount of Levin funds to be used when disbursements for allocable Federal election activity do not exceed in the aggregate \$5,000 in a calendar year for several reasons. First, the Commission notes that the reporting requirements for Federal election activity contain an exception for activity below \$5,000 in the aggregate in a calendar year. *See* 2 U.S.C. 434(e)(2)(A). While that exception applies to aggregate receipts and disbursements, rather than just aggregate disbursements, it does suggest that Congress did not take a rigid approach to low levels of Federal election activity. Second, the Commission is particularly sensitive to the nature of the Federal election activity to which this provision applies: Grassroots activities for which references to Federal candidates are prohibited. There is a far weaker nexus between Federal candidates and this category of Federal election activity than other types of Federal election activity for which Levin funds are prohibited. Finally, the Commission notes that \$5,000 is only half of what any single donor may donate (subject to State law) to each and every State, district, and local party committee under 2 U.S.C. 441i(b)(2), so there is no danger that allowing a committee to use entirely Levin funds for allocable Federal election activity that aggregates \$5,000 or less in a calendar year will somehow lead to circumvention of the amount limitations set forth in 2 U.S.C. 441i(b)(2). The distinction in paragraph (c)(4) between allocable Federal election activity below \$5,000 and allocable Federal election activity above \$5,000 reflects these considerations.

Paragraph (d) serves as a clarifying reminder that spending of non-Federal funds by a State, district, or local political party committee for State or local political activity, including the raising of non-Federal funds, remains a matter of State law. In response to

several comments, the Commission is making two minor clarifications to this paragraph in the final rules. First, the paragraph heading has been changed to refer to "activities," rather than "funds," as it read in the NPRM, to be more descriptive of the actual subject of the paragraph. Second, the first sentence of the paragraph now refers to spending "Federal, Levin, or non-Federal" funds to conform this paragraph with paragraph (b)(2) of section 300.32.

*11 CFR 300.33 Allocation of Costs of Federal Election Activity*

The final regulations in this section address only the allocations of expenditures and disbursements by State, district, and local party committees for Federal election activity, pursuant to the requirements of BCRA. The requirements for allocations by these committees of other categories of expenditures and disbursements that are not Federal election activity are to be found at 11 CFR 106.7. This division of rules represents an attempt to clarify how different categories of activities are addressed with regard to allocation, depending upon their nature, timing and, in certain instances, the presence or absence of a Federal candidate on the ballot, i.e., whether they come or do not come within the definition of "Federal election activity" at 11 CFR 100.24. Provisions at proposed 11 CFR 300.33 that addressed activities not within the definition of Federal election activity now appear in new 11 CFR 106.7. See also the Explanation and Justification for 11 CFR 106.7.

Section 441i(b)(1) of Title 2, United States Code, states that State, district, and local party committees must make all disbursements and expenditures for Federal election activity with Federal funds, with one exception. This requirement holds even when the expenses involved are also related to activities in connection with non-Federal elections. The exception to the required use of Federal funds in connection with Federal election activity involves certain activities to be paid in part with Levin funds, pursuant to 2 U.S.C. 441i(b)(2).

Section 441i(b)(2)(A) permits State, district, and local party committees, under certain conditions, to use Levin funds from a Levin or non-Federal account for particular categories of activity, including voter registration, voter identification, get-out-the-vote ("GOTV"), and generic campaign activities during the time periods when they constitute Federal election activity. These funds must have been received by a party committee pursuant to specific limitations, and are to be used to meet

expenses related to voter registration activity that takes place within 120 days of a Federal election and/or expenses related to voter identification, GOTV activities, and generic campaign activities that are conducted when a Federal candidate appears on the ballot. Such activities must not refer to a clearly identified candidate for Federal office. Section 441i(b)(2)(A) permits the use of Levin funds for these purposes "to the extent that" the costs of the activities are allocated. Levin funds may also be used for non-Federal purposes permissible under State law. See 11 CFR 300.32(b)(2).

Paragraphs 300.33(a)(1) and (2) of the proposed regulations, which addressed the costs of salaries and wages paid to employees who spend less than 25% of their time in connection with Federal elections and of other administrative costs, are being replaced by new 11 CFR 106.7(c)(1) and (d)(1) for the reasons explained in the Explanation and Justification for that section.

In the final rules, 11 CFR 300.33(a) addresses costs that may be allocated between Federal and Levin funds. Paragraphs (a)(1) and (a)(2) represent a division of the proposed rule into two parts, the first addressing voter registration within 120 days of the date of an election and the second the costs of voter identification, GOTV, and generic campaign activities occurring during time periods when they constitute Federal election activity. The relevant time periods for the latter categories of activity are set out at 11 CFR 100.24(a)(1). Both paragraphs (a)(1) and (a)(2) are subject to 11 CFR 300.32(c), which permits committees to fund these activities entirely with Levin funds only when the disbursements for the activities do not exceed \$5,000 in the aggregate in a calendar year.

Paragraph (b) of section 300.33 sets out fixed minimum amounts of Federal funds to be required for the Federal portions of costs of the specified activities for which allocation between Federal and Levin funds is permissible. One goal of the allocation rules is to assure that activities deemed allocable are not paid for with a disproportionate amount of Levin funds. Another goal is to simplify the allocation process, in particular by establishing formulas that do not vary from State to State and that do not require measurements of time or space. Therefore, in lieu of the State-by-State ballot composition ratios for generic campaign activity and in lieu of the time or space method applied to exempt State party activities in the pre-BCRA regulations, the rules establish a fixed formula for all States that would vary only in terms of whether or not a

Presidential campaign and/or a Senate campaign is to be held in a particular election year.

In the NPRM, the Commission set out allocation percentages for the Federal shares of the allocable Federal election activities described in paragraph (a). The final rules at 11 CFR 300.33(b)(1) through (4) use the same minimum Federal percentages. Thus, State, district, and local party committees and organizations must allocate no less than the following amounts to their Federal accounts:

(i) Presidential only election year—28% of costs

(ii) Presidential and Senate election year—36% of costs

(iii) Senate only election year—21% of costs

(iv) Non-Presidential and Non-Senate election year—15% of costs.

As with the percentages used in 11 CFR 106.7 for the allocation of activities that are not Federal election activities, the percentages for those allocable Federal election activities that may be paid for in part with Levin funds were derived by taking averages of the ballot composition-based allocation percentages reported by State party committees in four groupings of States selected for their diversities of size and geographic location and for the particular elections held in each State in 2000 and 2002. The groupings were: (1) Six States (Alabama, Colorado, Illinois, New Hampshire, Oklahoma, and Oregon) in which there was a Presidential but no Senate campaign in 2000; (2) ten States (California, Delaware, Georgia, Florida, Michigan, New York, North Dakota, Texas, Vermont, and Wyoming) in which there were both a Presidential campaign and a Senate campaign in 2000; (3) six States (Delaware, Georgia, Michigan, Oklahoma, Texas, and Wyoming) in which there will be a Senate campaign in 2002; and (4) six States (California, Florida, New York, North Dakota, Vermont, and Washington) in which there will be no Senate campaign in 2002.

In 2000, the Federal percentages for the two parties in six States with only a Presidential campaign ranged from 20% to 33.33%, with an average of 28%, while the Federal percentages for the two parties in the ten States that held both Presidential and Senate campaigns that year ranged from 30% to 43%, with an average of 36%. In 2002, the Federal percentages for the two parties in six States with a Senate campaign ranged from 20% to 25%, with an average of 21%, while the Federal percentages for the two parties in six States with no Senate campaign ranged from 11.11% to

16.67%, with an average of 15%. The rules apply the average percentages in each of the four groupings of States to all 50 States.

As discussed in the Explanation and Justification for 11 CFR 106.7, one comment on the NPRM from a public interest organization addressed the Commission's proposed fixed percentages by providing two alternatives to the Commission's figures. The first alternative would have set a flat 33% requirement for Federal shares of what the response termed "Levin expenditures" and for allocable costs other than administrative costs in odd-numbered years or in non-Presidential election years, and a flat 40% requirement for Federal shares of these same categories of activities in Presidential election years. The commenter based these percentages on what was termed "the current assumption" as to what State party committees spend in certain years.

The second alternative posed by the same commenter adopted the Commission's calculations, but called for the use of the higher percentages in the sample States for what the response termed "Levin spending" and for voter registration outside the 120 day period before an election, plus the average percentages for certain non-Levin expenses. The commenter also urged the Commission to apply the allocation percentages to a two-year election cycle, not just to the year of a Federal election.

The comment submitted on behalf of the principal Congressional sponsors of BCRA with regard to fixed allocation percentages was very similar to that of the public interest organization's response cited above in that, as one alternative approach, it called for at least a 33% Federal allocation of what it termed "Levin activities" and of voter registration activities outside the 120 day period before an election. It also called for 40% Federal allocations of Levin activities and of voter registration activities that are not Federal election activities in Presidential election years. This alternative urged the application of the percentages to two-year Federal election cycles. As a second alternative, this commenter also agreed to use of the Commission's percentages for administrative costs in a two year cycle, but urged the application over that cycle of the highest, not the average, Federal percentages for what it termed "Levin activities" and voter registration activities that are not 'Federal election activity'. \* \* \* Another comment from a public interest organization also called for use of the highest percentages in the identified States, not the average percentages.

Comments on the NPRM received from party committees with regard to fixed percentages for Federal allocations ranged from support for the Commission's position to giving party committees a choice at the beginning of each cycle between the proposed formula and ballot composition ratios.

The final rules at paragraph 300.33(b) retain the fixed percentage approach to allocation proposed in the NRPM and adopt the percentages proposed in the NPRM to disbursements for Federal election activities. As discussed above, disbursements for salaries and wages, and allocations of administrative costs, are addressed at 11 CFR 106.7. The final rules at 11 CFR 300.33(b) also contain additional language to clarify that the allocation percentages must be used for activities that occur within the time periods described in 11 CFR 100.24, time periods that establish when specific activities are to be treated as "Federal election activity" under BCRA. The time periods differ between voter registration on the one hand and voter identification, GOTV, and generic campaign activities on the other. See 11 CFR 100.24(a) and (b). As explained in the Explanation and Justification for 11 CFR 100.24, the complete two-year cycle approach urged by some commenters has not been adopted for Federal election activities.

With regard to the amounts of the fixed minimum Federal allocations, the Commission has retained the percentages contained in the NPRM because they represent averages of actual allocation ratios used in specific States at specific times, not assumptions of State, district, and local party behavior. The Explanation and Justification for 11 CFR 106.7 explains the basis for this approach in greater detail.

Paragraphs (c)(1) and (2) of section 300.33 set out the categories of Federal election activity costs that must not be allocated between Federal funds and Levin funds. These categories include: (1) The costs of public communications as defined at 11 CFR 100.26, which must be paid with all Federal funds, and (2) the costs of salaries and wages for employees who spend more than 25% of their compensated time in a month on activities in connection with a Federal election, which must also be paid entirely with Federal funds. The costs of salaries and wages for employees that spend 25% or less of their compensated time in a month on activities in connection with a Federal election must be paid entirely with non-Federal funds that comply with State law. See 11 CFR 106.7(c)(1). This approach to salaries and wages is

explained more fully in the Explanation and Justification for 11 CFR 106.7.

Section 300.33(c)(3) requires that the *direct* costs of raising funds for Federal election activities be paid solely from the party committee's Federal funds, pursuant to 2 U.S.C. 441i(e), or with Levin funds. The Explanation and Justification for 11 CFR 106.7 and 300.32 explain the reasons for this approach. The proposed rules had indicated that non-Federal funds could be used in certain limited fundraising situations involving non-Federal activity. This language has been deleted from the final rules for the reasons explained in the accompanying Explanation and Justification for 11 CFR 106.7.

Paragraph 300.33(d) addresses transfers of Levin funds from a State, district, or local party committee's Levin account or from its non-Federal account to its Federal account or to an allocation account to meet the Levin fund portion of the costs of allocable expenditures made pursuant to 2 U.S.C. 441i(b)(2). The final rule largely tracks pre-BCRA 11 CFR 106.5(g) by requiring that reimbursements from a Levin account or from a non-Federal account to a Federal account or to an allocation account take place within a specified number of days. New paragraph (d), like former 11 CFR 106.5(g)(2)(B)(iii), states that any payment outside this time frame, absent the need for an advance payment of a reasonably estimated amount, could result, depending upon the circumstances, in a loan to the Federal account and a violation of the Act. No commenters addressed this provision.

#### 11 CFR 300.34 Transfers

As explained above, the Levin Amendment permits spending on certain Federal election activities subject to restrictions and conditions, one of which is that the spending must be allocated between Levin funds and Federal funds. 2 U.S.C. 441i(b)(2)(A)(i), (ii). A State, district, or local committee must raise by itself all money spent under the Levin Amendment. 2 U.S.C. 441i(b)(2)(B)(iv). Congress expressly stated that a State, district, or local committee must not use as Levin funds "any funds provided to such committee" by certain enumerated entities. These entities are: any other State, district, or local committee; any national political party committee; any agent of a political party committee; and any entity directly or indirectly established, financed, maintained, or controlled by a political party committee. 2 U.S.C. 441i(b)(2)(B)(iv)(I) through (IV). By the plain language of these provisions, these restrictions

extend to the Federal funds component of the disbursement allocated between Levin funds and Federal funds. See 148 Cong. Rec. H410 (daily ed. February 13, 2002) (Rep. Shays).

This provision of the Levin Amendment could cause confusion given the pre-existing rule that party committees of the same political party may transfer Federal funds among themselves without limit on amount. See 11 CFR 102.6(a)(1)(ii).<sup>6</sup> Paragraph (a) of section 300.34 makes clear that 11 CFR 102.6(a)(1)(ii) does not override the Levin Amendment as to transfers of Federal funds. Specifically, the committee must not use such transferred Federal funds to pay the Federal portion of Federal election activity. A State party committee and an association of State party officials commented that this provision about transferred Federal funds should apply only to transferred Federal funds "earmarked" for spending under the Levin Amendment by the transferring committee. The Commission has not adopted this suggestion in the final rules. Congress, at 2 U.S.C. 441i(b)(2)(B)(iv), specifically bars a State, district, or local committee spending Federal funds (and Levin funds) for Federal election activity from using transferred funds. How a transferring committee may or may not characterize the transfer is irrelevant to this prohibition.

In response to the NPRM, a public interest group noted that a State, district, or local political party committee's Federal account may commingle Federal funds raised by the committee itself, which are eligible for spending for Federal election activities, and transferred Federal funds, which are not so eligible. This commenter suggested that the Commission should require party committees to use "a reasonable and industry-accepted accounting method" to ensure that they have sufficient self-raised, non-transferred Federal funds to cover expenditures for Federal election activities as the expenditures are made. The Commission has responded to this suggestion in the final rules. Paragraph (a) of section 300.34 is organized into two paragraphs. Paragraph (a)(1) contains the language published in the NPRM, without change. Paragraph (a)(2) provides that a State, district, or local political party committee must demonstrate through a reasonable

accounting method approved by the Commission (including any method embedded in software provided or approved by the Commission) that its Federal account has sufficient Federal funds raised by the committee itself to make a given disbursement of Federal funds for Federal election activity. Paragraph (a)(2) alternatively permits, but does not require, a State, district, or local political party committee to establish a separate Federal account to use for spending on Federal election activities, and into which it deposits only Federal funds it has raised by itself.

The principal Congressional sponsors of BCRA commented that 11 CFR 300.34 should not be interpreted to forbid a State, district, or local political party committee from using Federal funds raised lawfully on its behalf by a Federal or State candidate or officeholder as long as the funds are contributed directly to the party committee. The Commission agrees with the sponsors' interpretation, and emphasizes that 11 CFR 300.34 applies to transfers of funds from the persons described in paragraphs (b)(1) and (b)(2).

The final sentence of paragraph (a)(1) states as a positive requirement that a State, district, or local political party committee that spends Levin funds must raise the Federal funds component of those funds by itself. As already mentioned above, the Levin Amendment imposes this fundraising requirement. 2 U.S.C. 441i(b)(2)(B)(iv).

The Levin Amendment specifically forbids particular transfers of Levin funds; that is, a State, district, or local party committee may not use as Levin funds any funds transferred to it by certain persons. 2 U.S.C. 441i(b)(2)(B)(iv)(I) through (IV). 11 CFR 300.34(b)(1) and (b)(2) implement these transfer prohibitions by expressly identifying these persons to, and from, which transfers must not be made.

Paragraph (c) of section 300.34 cross-refers to 11 CFR 300.30, which sets forth the permissible account structures for Levin funds, and 11 CFR 300.33, in which are the rules for allocation transfers between the accounts of a given State, district, or local political party committee.

#### 11 CFR 300.35 Office Buildings

BCRA repealed 2 U.S.C. 431(8)(B)(viii), which had exempted from the definition of contribution any donation of money or anything of value, or loan, to a national or State party committee that is specifically designated to "defray any cost for construction or purchase of any office

facility not acquired for the purpose of influencing the election of any candidate in any particular election for Federal office." In subsequent technical amendments, however, Congress enacted 2 U.S.C. 453(b), which states: "Notwithstanding any other provision of this Act, a State or local committee of a political party may, subject to State law, use exclusively funds that are not subject to the prohibitions, limitations, and reporting requirements of the Act for the purchase or construction of an office building for such State or local committee." 2 U.S.C. 453(b).

New section 300.35 addresses three areas in implementing 2 U.S.C. 453(b). Paragraphs (a) and (b) provide for the application of State law to the source and use of funds, and provide that Federal law will not preempt the application of State law with respect to the use of non-Federal funds and Levin funds, but that Federal law will preempt State law if Federal funds are used.

Paragraph (c) specifically allows a party committee to lease space in its office building to others with conditions on the deposit of funds into a Federal or non-Federal account. Finally, paragraph (d) addresses the transitional requirements for the current State party office building funds established under the repealed statutory section.

#### A. Application of State Law

A principal sponsor of the technical amendments described the party office building provision as "[r]especting the primacy of State law in financing State and local party buildings." 148 Cong. Rec. S2339 (daily ed. March 22, 2002) (statement of Sen. McConnell). A principal sponsor of BCRA described the proposal as providing that Federal law would no longer allow a State or local party committee to receive non-Federal donations to purchase or construct an office building where such donations violated State law, that State law governs the receipt and disbursement of non-Federal donations used by State or local parties for such purposes, and that there is no "required match consisting of Federal contributions." 148 Cong. Rec. S2143-2144 (daily ed. March 20, 2002) (statement of Sen. Feingold).

The final rule at paragraph (a) of new section 300.35 provides that a State or local party committee may spend either Federal funds or non-Federal funds that are not subject to the limitations, prohibitions, or disclosure provisions of the Act, so long as such funds are not contributed or donated by a foreign national. If non-Federal funds are used, they are subject to State law. If Federal funds are used, they are subject to

<sup>6</sup>The Commission emphasizes that revisions to section 102.6(a) regarding transfers may be forthcoming in a future rulemaking to implement changes to 2 U.S.C. 441a(d) made by BCRA. The present discussion and this rulemaking extend only to Title I of BCRA. Pub L. 107-155, March 27, 2002.



Federal law. The paragraph also incorporates language from the repealed statute and deleted regulations to the effect that the exemptions from Federal limits and prohibitions are based on the building not being purchased or constructed for the purpose of any particular Federal candidacy, but, rather, for the functioning of the party, which entails the support of most or all of the party's candidates over a number of years. The purchase or construction of the building to assist the campaign of a particular Federal candidate would entail the use of impermissible funds in a manner contrary to the basic purpose of the Federal law.

Paragraph (b) explains the coverage of State law with respect to non-Federal funds or Levin funds received by a State or local party that are spent for the purchase or construction of its office building. Other than with respect to donations by foreign nationals, Federal law would not preempt State law as to the source of non-Federal funds, State restrictions on the use of those funds (i.e., the State can prohibit or limit the use of funds with respect to the purchase or construction), or the reporting of the receipt and disbursement of those funds. In addition, Levin funds (which also exclude foreign national funds) may be used for purchase or construction, subject to State law.

The application of State law to the use of non-Federal funds is derived directly from the wording of 2 U.S.C. 453(b) and from Congressional statements. Commission advisory opinions have addressed the question of whether the repealed contribution exemption, which permitted donations to a building fund from such Federally impermissible sources as corporations, preempted State law prohibitions on the use of such funds for campaign purposes. Advisory Opinions 2001-12, 1998-8, 1998-7, 1997-14, 1993-9, 1991-5, and 1986-40. The Commission stated in these opinions that: (1) Congress decided not to place restrictions on the subject even though it could have determined that the purchase of the facility was for the purpose of influencing a Federal election; (2) Congress took the affirmative step of deleting the receipt and disbursement of funds for such activity from the proscriptions of the Act; and (3) there is no indication that Congress intended to limit the preemptive effect to some allocable portion of the purchase costs. New section 300.35 supersedes these Commission advisory opinions to the extent that they might pertain to Federal preemption with respect to use of funds from a State (and now local) party

committee's non-Federal account for the purchase or construction of its office building. For example, corporate donations and donations that are excessive under Federal law, and that are in a non-Federal account, may be used for the purchase or construction of a State party office building where State law permits, and if State law forbids corporate donations and donations in excess of a particular amount, Federal law would not preempt the application of State law prohibiting the use of funds from a party committee's non-Federal account.

Although receipts and disbursements from the non-Federal accounts must comply with State law, section 300.35 does not contemplate that the Commission would take enforcement action against a party committee for violating State law with respect to the purchase or construction of its office building. Such an action is the State's responsibility. Moreover, although section 300.35 does not require the establishment of a separate bank account or book account for the receipt and disbursement of non-Federal funds for purchase or construction of the office building, Federal law does not preempt a State law requirement to establish such an account.

Paragraphs (a) and (b) of the proposed rules in the NPRM differed from the final rules. They were revised, in part, in response to public comments. Proposed paragraph (a) did not refer to the prohibition on contributions or donations from foreign nationals. In addition, paragraphs (a) and (b) provided that if the party committee used funds from the Federal account, Federal law would not preempt State law as to the permissibility of the disbursements and as to the source of funds where State law establishes additional limits or prohibitions.

Several commenters remarked on the provisions in proposed paragraphs (a) and (b) relating to the application of State law. Two commenters representing party committees expressed the concern that, with respect to the use of Federal account funds, Federal law would not supersede a State law that would further limit or prohibit contributions. They stated that this could conceivably prevent a party committee from using 100 percent Federal funds to pay for a building. They asserted that there is no support in the BCRA legislative history for this proposition, and that BCRA's intent was simply to allow State and local parties to pay for their buildings entirely with non-Federal funds and would not require them to use non-Federal funds.

Three comments, including one from the four principal sponsors of BCRA, stated that the provisions regarding application of State law should not be read to allow for the use of contributions or donations by foreign nationals to pay for the purchase or construction of the party office buildings. They indicated that BCRA was not intended to allow for such funds to be used. Two of those commenters recommended that these rules should make this prohibition clear.

As indicated above, the final rules reflect commenter input on both of these issues. The Commission notes that the exemption from Federal preemption at section 453(b) refers to the use of "exclusively funds that are not subject to the prohibitions, limitations, and reporting requirements of the Act," subject to State law. It did not extend non-preemption to Federal funds. The Commission concurs with those commenters who interpret BCRA as allowing use of funds from the committee's non-Federal account, so long as they complied with State law, but as not subjecting funds from the committee's Federal account to State law. Hence, funds in the Federal account (that are lawful under Federal law) may be used, even if they are not in compliance with the limitations and prohibitions of State law.

The final rules in paragraphs (a) and (b) also reflect the comments on the explicit inclusion of a ban on the use of funds contributed or donated by foreign nationals, and incorporate such a ban. The prohibition at 2 U.S.C. 441e is so sweeping and explicit (including an explicit prohibition of donations "to a committee of a political party") that it would be difficult to read the intent of BCRA as allowing for the use of such funds by a party committee for those activities. One of BCRA's principal sponsors stated that BCRA "prohibits foreign nationals from making any contribution to a committee of a political party or any contribution in connection with federal, state or local elections \* \* \* This clarifies that the ban on contributions [by] foreign nationals applies to soft money donations." 148 Cong. Rec. S1994 (daily ed. March 18, 2002) (statement of Senator Feingold). See also *United States v. Kanchanalak*, 192 F.3d 1037 (D.C. Cir. 1999). This ban also applies to any in-kind contribution or donation by a foreign national such as a direct payment to a seller, builder, or other vendor for purchase or construction.

Paragraphs (a) and (b) of the final rules include technical changes to state more clearly than the proposed rule that

the pertinent funds include funds that are in the accounts but were not received specifically for the purchase or construction, as well as funds specifically received for that purpose. In addition, the sentence in paragraph (a) discussing the application of State law is changed to conform to other parts of the regulation emphasizing that this exemption is meant to apply only to a State or local committee paying for its own building.

#### B. Proposals Excluded From the Final Rule

The proposed rule included two paragraphs, (c) and (d), which are not included in the final rule. Proposed paragraph (c) would have defined "purchase or construction of an office building" by defining the individual terms, "office building," "purchase," and "construction." The terms were defined to explicitly include and exclude certain items or actions. The proposed definition of "office building," particularly as it pertained to the explicit exclusion of certain items, would have treated the use of the term "building" in 2 U.S.C. 453(b), instead of the term "facility" in the repealed exemption, as signifying a Congressional intent to narrow the scope of the covered costs. Recent advisory opinions stated that expenses that were "capital expenditures" under the Internal Revenue Code would be payable by the building fund (as opposed to business expenses). These opinions have been interpreted to allow building fund payments to purchase office equipment, furniture, and similar items. See Advisory Opinions 2002-12, 2001-01, and 1998-7; see also 26 CFR 1.263(a)-(1) and 1.263(a)-(2).

Proposed exclusions explicitly listed in the draft definitions of "purchase" and "construction" were drawn from exclusions specified in previous Commission advisory opinions (in those aspects of the opinions that did not pertain to Federal preemption). The NPRM narrative for these definitions also included examples of what would and would not constitute "construction." Proposed paragraph (d) would have stated that an expense that did not fit within the definition of "purchase or construction of an office building" would be an allocable administrative cost unless it fell within another category, such as a support of a Federal candidate.

The Commission sought comment on whether the proposed definition of "building" should include, rather than explicitly exclude, items such as office equipment, machinery, or furniture. More generally, the Commission sought

comment on whether BCRA's use of the term "building" instead of "facility" contemplated a narrowing of the range of expenses falling within the exemption.

Three commenters representing party committees asserted that BCRA did not intend the change in terminology from "facility" to "building" to represent a change in the expenses covered by the exemption. One commenter noted that the McCain-Feingold bill as passed by the Senate in 2001 eliminated the building fund exemption for national and State parties and also provided that "Federal election activity" would specifically not include "the cost of constructing or purchasing an office facility or equipment for a State, district, or local committee." An amendment adopted by the House eliminated a transition provision allowing national party committees to spend building fund donations raised prior to the effective date of the new law, and that amendment also eliminated the language as to the purchase of an office facility or equipment. The commenter characterized the technical amendment now in effect as merely a restoration of the deleted provision on the State and local office facility or equipment, noting that one of BCRA's principal sponsors characterized this as a non-substantive amendment.

One of the party committee commenters urged the Commission to continue to use principles from the Internal Revenue Code "such that capital expenditures would be allowed from the building fund (subject to state law) and ongoing expenses would not." Two of the party committee commenters maintained that the question of narrowing the definition is a moot point because they believe that if certain costs were not deemed to be within the definition, they would be classified as administrative costs and should be payable with 100% non-Federal funds.

In contrast, three comments, including one from the principal sponsors, maintained that the change from "facility" to "building" indicated a Congressional intent to narrow the scope of the exemption and that items such as office equipment, machinery, or furniture should not be included within the exemption. They agreed with the proposed definition of "office building." The sponsors also stated that it was their intent that administrative expenses related to office buildings should be allocable between Federal and non-Federal accounts or Federal and Levin accounts.

The Commission also sought comment on whether more examples should be included in the sub-

definitions of "purchase" or "construction," or whether the advisory opinion process would best suit that purpose. Specifically, it asked whether payments for a long-term lease with an option to purchase the rented building should be included within the definition of purchase. One commenter stated that, to avoid abuses, the Commission should establish a bright line rule that treats purchases as falling within the exemption and leases as administrative expenses.

The final rule does not include the proposed definitions of "office building," "purchase," or "construction," or the proposed allocation provision. The Commission does not view section 453(b) as evidence of any Congressional intent to narrow or otherwise change the scope of the activities (from that of the repealed exemption) for which building fund monies may be donated or spent. Specifically, the Commission concludes that BCRA does not supercede or in any way displace the Commission's various advisory opinions regarding building fund activities as applied to State, district or local political party committees. Accordingly, those advisory opinions remain in force and effect. The Commission believes that State and local party committees needing information as to the scope of the costs covered can receive guidance from the Commission's previous advisory opinions.

#### C. Leasing a Portion of the Office Building to Others

Paragraph (c) of the final rule allows a State or local party committee to lease a portion of its office building to others at the usual and normal rental charge. The sources of funds will determine the account in which the rent revenues can be deposited.

This provision did not appear in the NPRM. The Commission requested comments, however, on whether a party that owned an entire office building would also be able to lease space in the building to others at fair market rates in order to generate income. The Commission also sought comments on whether the sources of the funds used to purchase or construct the office building should govern or guide the Commission in the determination of the lawful uses of such income.

One commenter, speaking on behalf of party committees, stated that party committees should be permitted to rent space in their office buildings to State and local candidates regardless of the source of funds used to purchase the buildings. The comment from the principal sponsors of BCRA stated that

BCRA permits a party committee to generate income by leasing parts of its building and describes how to determine whether the funds may be deposited in a Federal or non-Federal account. Specifically, a purchase in whole or in part with non-Federal funds would require the deposit of rental income into the non-Federal account to be used only for non-Federal purposes. Rental income generated from a building purchased solely with Federal funds may be deposited in the committee's Federal account only if all the revenues collected comply with the limitations, prohibitions, and reporting requirements of the Act.

The Commission has concluded that the source of funds used to construct or purchase the building must determine where the rental revenues may be deposited. If only Federal funds were used, the revenues may be deposited in the Federal account. If any non-Federal funds were used, the revenues must be deposited in a non-Federal account, provided that State law permits. These requirements ensure that the committee's Federal account is not indirectly funded (through rental payments) by donations that do not meet the requirements of the Act, such as corporate donations.

Consistent with the jurisdiction of State law over non-Federal accounts, the rule provides that the revenue received by the non-Federal account must comply with State law. The rental amounts deposited in the Federal account would have to be disclosed as an "other receipt," pursuant to 11 CFR 104.3(a)(4)(vi). The Commission notes that the purchase or rental of a committee asset is considered a contribution, unless excepted through the advisory opinion process with respect to specific types of assets or particular circumstances (e.g., isolated sales of specific committee assets developed or purchased for the committee's own use, rather than for fundraising, and campaign equipment and leftover supplies of an authorized committee wishing to terminate). See, e.g., Advisory Opinions 1992-24, 1991-34, 1990-26, 1989-4, and 1986-14; see also 11 CFR 100.7(a)(2). Commission advisory opinions have also interpreted the regulations to allow a committee to invest its funds and to treat the interest, dividends, or other returns on the investment (under particular circumstances) as "other receipts." See Advisory Opinions 1999-8, 1989-6, and 1986-18. The Commission views the leasing of portions of the building as the equivalent of obtaining income through the investment of committee assets or funds. Under particular circumstances,

such leasing out may also be viewed as an isolated sale of a unique committee asset purchased for the committee's own use. Hence, the payment of rent for office building space to the party committee at the usual and normal charge is not a contribution. If the tenant pays rent in excess of the usual and normal charge and the rent is deposited in the Federal account, then the amount in excess would be a contribution and reportable as such. An excess payment from a corporate tenant would be in violation of 2 U.S.C. 441b. See Advisory Opinions 1992-24 and 1990-26.

#### D. Transitional Provisions for State Party Building or Facility Account

The final rule at 11 CFR 300.35(d) addresses office building accounts set up by State party committees under repealed 2 U.S.C. 431(8)(B)(viii). The regulation states that up to and including November 5, 2002, such accounts may accept funds that are "designated for the purchase or construction of an office building." The rule then states that, starting on November 6, 2002, the funds in the account may not be used for Federal account or Levin account purposes but may be used for any other non-Federal purposes as permitted by State law.

The NPRM differed from the final rule in two respects. Like the final rule, the proposed rule provided that, up until November 5, 2002, a State party committee could accept funds into the account, but then indicated that the funds in the account could only be used for the construction or purchase of an office building or facility. In place of the language on the use of the funds in the account, the final rule states that it applies to funds "designated for the purchase or construction of an office building." Both the final rule and the proposed rule provide that, starting on November 6, 2002, the funds are not useable for Federal account or Levin account purposes but may be used for any other non-Federal purposes, as permitted by State law. However, the proposed rule also would have provided that the funds would be subject to specific paragraphs of the proposed rule, including the definitional paragraph that is now deleted.

Two commenters from the party committees criticized the NPRM version of the transitional provisions, stating that unlike the national party building and facility fund transition provisions in BCRA, there is no BCRA provision covering the spending of funds by the already existing State party office facility fund. One of those commenters criticized the State law limitation on the

use of the funds from the account once BCRA goes into effect, noting that the funds had been lawfully raised under the exemption in the repealed statutory section.

The final rule as to the use of building fund accounts prior to the effective date of BCRA is not meant to deviate from any current permissible uses of those accounts. As to the use of those accounts after the effective date, the regulation was written to conform the treatment of the funds in the accounts established under the repealed statutory section with BCRA and still allow their use for election purposes. As unlimited non-Federal funds, they could not be used for Federal account or Levin account purposes. As such, however, they may be used for non-Federal purposes, and the Commission also recognizes the control by State law over the permissibility of such funds.

#### 11 CFR 300.36 Reporting Federal Election Activity; Recordkeeping

BCRA establishes certain reporting requirements for State, district, and local committees that are political committees and that finance Federal election activities. See 2 U.S.C. 434(e)(2). This requirement for these political committees extends generally to all receipts and disbursements for Federal election activities if the aggregate amount of receipts and disbursements for such activity is \$5,000 or more per calendar year, 2 U.S.C. 434(e)(2)(A), and specifically extends to receipts and disbursements of Levin funds. 2 U.S.C. 434(e)(2)(B). These requirements added by BCRA are in addition to the existing FECA requirements to report expenditures of Federal funds under 2 U.S.C. 434. See also 11 CFR part 104.

Paragraph (a) of new section 300.36 applies to two types of entities. The first is a State, district, or local political party committee that has not qualified as a political committee under 2 U.S.C. 431(4) or 11 CFR 100.5. The second is an association or similar group of candidates for State or local office or of individuals holding State or local office (see 2 U.S.C. 441i(b)(1)) that has not qualified as a political committee under 11 CFR 100.5. In the NPRM, the Commission sought comments as to what, if any, reporting requirements an association or similar group of candidates for, or holders of, State and local office may have under 2 U.S.C. 434(e)(2) if it is not a political committee. The Commission received one comment, from a public interest group, which suggested that the result should depend on whether the association or similar group has attained

political committee status under 11 CFR 100.5. The Commission has concluded that such an association or similar group that has not qualified as a political committee has no reporting requirements under 2 U.S.C. 434(e)(2) because that section, by its own terms, applies to "political committees." The Commission further concludes such an association or similar group is in a position analogous to a political party organization that is not a political committee under 11 CFR 100.5 to the extent both engage in Federal election activity. Therefore, in the final rules, such an association or similar group that has not qualified as a political committee under 11 CFR 100.5 must comply with paragraph (a) of section 300.36.

Paragraph (a) recognizes that neither type of organization has reporting requirements under BCRA because it is not a political committee. *See* 2 U.S.C. 434(e)(2). Under paragraph (a)(1), both types of organizations must demonstrate through a reasonable accounting method that they have sufficient Federal funds on hand to pay the required Federal portion of the costs of Federal election activity under 11 CFR 300.32 and 300.33. Paragraph (a)(1) also requires each type of organization to keep records of Federal receipts and disbursements and to make those records available to the Commission upon request. A State party committee and an association of State party officials commented in support of paragraph (a)(1), to the extent that it applies to political party committees.

A national party committee commented in opposition to proposed paragraph (a)(2), which would have required a payment for Federal election activity to be treated as an expenditure, regardless of whether it qualified as an expenditure under the statutory definition. *See* 2 U.S.C. 431(9). This commenter objected to characterizing a payment of Federal funds for Federal election activity as an expenditure "even if such activity does not reference any Federal candidate." A State party committee and an association of State party officials made very similar comments, citing Advisory Opinion 1999-4. The State party committee characterizes this advisory opinion as "rul[ing] that only disbursements that influence a specific Federal election count towards the dollar thresholds in [11 CFR 100.5(c)]." The State party committee's primary concern is that "thousands" of local and district committees not currently required to register and file reports with the Commission will be required to do so. One of the commenters stated that the

Commission has "effectively acknowledged" in paragraph (a)(1) of section 300.36 that "Congress did not intend first-dollar disclosure of" Federal election activity spending. Conversely, a public interest group commented in support of this paragraph.

Paragraph (a)(2) clarifies that a payment of Federal funds or Levin funds for the costs of Federal election activity does not constitute an expenditure for purposes of determining whether or not a State, district, or local political party committee, or an association or similar group of candidates for State or local office or of individuals holding State or local office, becomes a political committee, under 11 CFR 100.5, unless the payment otherwise qualifies as an expenditure under 2 U.S.C. 431(9). Paragraph (a)(2) also states that a payment of Federal funds for the costs of Federal election activity that refers to a clearly identified Federal candidate and that meets the definition of "exempt activities" (*see* 11 CFR 100.8(b)(10), (16), and (18)) is to be treated as a payment for exempt activities for the purposes of determining political committee status under 2 U.S.C. 431(4)(C) and 11 CFR 100.5(c).

Paragraph (b) of section 300.36 applies to State, district, and local political party committees, and to an association or similar group of State and local candidates and officeholders, that disburse Federal funds for Federal election activities and that have qualified as political committees under 11 CFR 100.5. The heading of paragraph (b)(1) is revised from the version of the regulation published in the NPRM. The new heading makes clear that paragraph (b)(1) applies to State, district, and local political party committees that have qualified as political committees and that have less than \$5,000 in total receipts and disbursements for Federal election activity (*see* 2 U.S.C. 434(e)(2)(A)), and to an association or similar group of candidates for State or local office or of individuals holding State or local office at all times. Paragraph (b)(1) provides that such committees must report all receipts and disbursements of Federal funds for all or part of the costs of Federal election activity. Paragraph (b)(1) goes on to state that this requirement applies even if the committee has less than \$5,000 of aggregate receipts and disbursements for Federal election activity. *See* 2 U.S.C. 434(e)(2)(A). A national party committee and a State party committee commented in opposition to the requirement of itemization of Federal receipts for Levin activity, because "Federal receipts will be used fungible for multiple purposes."

The Commission points out that Federal receipts are not fungible, as far as spending for Federal election activity goes, to the extent that receipts include transfers from other party committees. A State, district, or local committee must not use transferred funds for Federal election activity spending. 2 U.S.C. 441i(b)(2)(B)(iv). Moreover, Congress has specifically required itemization of these receipts. 2 U.S.C. 434(e)(3). The final sentence of 11 CFR 300.36(b)(1) provides that a disbursement of Federal funds or Levin funds for Federal election activity will not be deemed an expenditure and reported as such, unless it satisfies the definition of expenditure in 2 U.S.C. 431(9).

In the final rules, the Commission has corrected an inadvertent omission that appeared in the version of paragraph (b)(1) of section 300.36 published in the NPRM. The words "receipts and" have been inserted before the word "disbursement" in the second sentence. The preamble of 11 CFR 300.36(b)(1) correctly discussed the paragraph, referring to "receipts and disbursements." 67 FR 35671. The Commission has also deleted an unnecessary and potentially confusing introductory clause in one of the sentences in this paragraph.

Paragraph (b)(2) implements the broader reporting provisions of 2 U.S.C. 434(e)(2)(A) and (B) with regard to State, district, and local political party committees. The heading of this paragraph has been revised from the version of the regulation published in the NPRM. The change is intended to make clear that this paragraph applies to State, district, and local political party committees that are political committees and that have \$5,000 or more of total receipts and disbursements for Federal election activity. 2 U.S.C. 434(e)(2)(A) and (B). Paragraph (b)(2) does not apply to an association or similar group of State and local candidates and officeholders that disburses Federal funds for Federal election activities because such groups are not authorized to raise and spend Levin funds, and thus may not allocate disbursements for Federal election activity between Federal funds and Levin funds. *See* 2 U.S.C. 441i(b)(2), which applies only to party committees. These committees always report under part 104 of Title 11 because they may have no Levin funds to report pursuant to paragraph (a), discussed above.

The first sentence of paragraph (b)(2) states the basic rule that all receipts and disbursements for Federal election activity must be reported if the political committee has an aggregate of \$5,000 or more of such receipts and

disbursements in a calendar year. The second sentence makes it clear that this basic reporting rule extends to Levin funds used for Federal election activity.

Paragraphs (b)(2)(i) through (iv) have been revised, or added, since the version of the regulation published in the NPRM. As published in the NPRM, the regulation would have referred the reader to 11 CFR 104.17(b) to identify important elements of information that must be reported under this section 300.36. Instead, paragraphs (b)(2)(i) through (iv), as adopted in the final rules, state these requirements expressly, for the convenience of the reader. These requirements generally parallel the requirements adopted in 11 CFR 104.17(b) with certain modifications appropriate to the context of expenses allocated among Federal election activities.

Paragraph (b)(2)(i) pertains to disclosure of the methods State, district, or local committees use to report allocating expenses for Federal election activity between Federal funds and Levin funds. Paragraph (b)(2)(i)(A) of section 300.36 specifies that a committee must state the allocation percentages for Federal election activity disbursements that are used in its reports. This paragraph includes a specific cross-reference to 11 CFR 300.33(b), where these allocation percentages for Federal election activity are set out.

Paragraph (b)(2)(i)(B) of section 300.36 requires the committee to report which allocable category of Federal election activity a given allocated disbursement falls into. In paragraph (b)(2)(i)(B), the reference to allocable category of Federal election activity means the type of Federal election activity as defined in 11 CFR 100.24 (e.g., voter registration activity as defined in section 100.24(b)(1), or voter identification as defined in section 100.24(b)(2)(i)). Note that expenses for certain categories of Federal election activity are not allocable between Federal funds and Levin funds (e.g., public communications that promote or support, or attack or oppose, a clearly identified Federal candidate under 11 CFR 100.24(b)(3)). See 11 CFR 300.33(a).

Paragraph (b)(2)(ii) pertains to reporting of allocation transfers between a Levin or non-Federal account and a Federal account, or among a Levin or non-Federal account, a Federal account, and a designated allocation account for allocated Federal election activity. All transfers related to a category of Federal election activity must identify that category. Paragraph (b)(2)(iii) specifies the elements of information that must be reported for an allocated disbursement

for Federal election activity, including the name and address of the payee, the date of the payment, and the purpose of the payment. This paragraph also sets out itemization requirements for disbursements covering more than one program or activity. Paragraph (b)(2)(iv) covers itemization of disbursements of more than \$200. 2 U.S.C. 434(e)(3).

Paragraph (b)(3) alerts the reader to the rules for reporting payments allocated between Federal funds and non-Federal funds that are not covered in paragraph (b)(2). As explained above, paragraph (b)(2) applies only to payments for Federal election activity allocated between Federal funds and Levin funds under 11 CFR 300.33. The reporting regulation for payments allocated between Federal funds and non-Federal funds are contained in 11 CFR 104.17. For example, section 104.17 addresses reporting of administrative expenses.

Paragraph (c)(1) implements BCRA's new requirement for monthly filing by party committees that come under new section 434(e) of the Act. 2 U.S.C. 434(e)(4). This is accomplished by referring to the Commission's existing regulation specifying monthly reporting, e.g., 11 CFR 104.5(c)(3).

In the NPRM, the Commission sought comments on the applicability of the \$50,000 annual threshold for electronic filing to receipts and disbursements for Federal election activities. See 11 CFR 104.18. The Commission received two comments. An association of State party officials opposed applying receipts and disbursements for Federal election activities toward the electronic filing threshold because these "will also be disclosed on the party committee's regularly filed reports." The Commission notes that this comment, while true, could be applied to any committee with regard to electronic filing. A public interest group commented that receipts and disbursements for Federal election activity should apply to the electronic filing threshold.

Consistent with 2 U.S.C. 434(a)(11), paragraph (c)(2) of section 300.36 provides that contributions and expenditures of Federal funds for Federal election activity apply to the \$50,000 threshold for mandatory electronic filing. When determining whether a receipt of Federal funds for Federal election activities is a contribution, the Commission's regulation at 11 CFR 100.7, including the exclusions in paragraph (b) of that section, must be applied. Similarly, when determining whether a disbursement of Federal funds for Federal election activity is an

expenditure, the Commission's regulation at 11 CFR 100.8, including the exclusions in paragraph (b) of that section, must be applied. The Commission discerns no reason why a contribution or expenditure should be treated differently for this purpose simply because it is related to a Federal election activity. The Commission emphasizes that this provision does not apply to receipts and disbursements of Levin funds for Federal election activity, and does not apply to receipts and disbursements that are not "contributions" or "expenditures" as defined by the FECA.

Finally, paragraph (d) of section 300.36 supports the disclosure provisions outlined above by adding a recordkeeping requirement. Paragraph (d) refers to the Commission's existing regulation on recordkeeping, 11 CFR 104.14. This requirement is necessary to ensure that sufficient documentation exists to ensure compliance with the disclosure provisions of BCRA.

#### *11 CFR 300.37 Prohibitions on Fundraising for and Donating to Certain Tax-Exempt Organizations*

BCRA prohibits State, district, and local party committees, their officers and agents acting on their behalf, and entities directly or indirectly established, maintained, financed, or controlled by them, from soliciting any funds for, or making or directing any donations to certain tax exempt organizations engaged in certain election-related activity. 2 U.S.C. 441i(d). Except as discussed below, the ban on State party fundraising for tax-exempt organizations at new 11 CFR 300.37 mirrors the provision applicable to the prohibition on national party committee fundraising for these organizations at new 11 CFR 300.11. See Explanation and Justification for 11 CFR section 300.11 above for a discussion of comments received in response to specific questions raised in the NPRM.

Paragraph (a)(3) implements BCRA's prohibition on State party committee fundraising for, and donations to, a section 527 organization unless the organization is a "political committee," a State or local party committee, or an authorized committee of a State or local candidate. The NPRM asked whether the term "political committee" in 11 CFR 300.37 should mirror the definition of that term in 2 U.S.C. 431(4), which would encompass only organizations that make contributions and expenditures in connection with Federal elections or whether it should be interpreted to also encompass State-registered political committees that support only State and local candidates.

BCRA's cosponsors stated that it would be in keeping with the intent of BCRA to permit State, district, and local party committees "to make a non-federal donation to a section 527 organization registered as a State PAC as long as such a State PAC does not make expenditures and disbursements in connection with an election for Federal office, including expenditures and disbursements for Federal election activity." Several party committee commenters and at least one public interest group agreed with this approach. One public interest commenter disagreed, stating that permitting State and local party committees to fundraise for, or donate to, State political committees "would be contrary to the letter and spirit of BCRA."

Accordingly, in the final rules, new paragraph (a)(3)(iv) of section 300.37 permits a State, District or local party committee to solicit funds for, or donate to, a political committee registered under State law that supports only State or local candidates and does not make expenditures or disbursements in connection with an election for Federal office, including expenditures and disbursements for Federal election activity. The Commission agrees with the sponsors and other commenters that this new paragraph is consistent with the major purpose of BCRA—to prohibit non-Federal funds from being used in connection with Federal elections. As long as the section 527 organization for which funds are being raised exclusively supports non-Federal candidates and does not finance activities that could benefit Federal candidates, such as get-out-the-vote activities in connection with an election in which a Federal candidate appears on the ballot, BCRA's intent is preserved.

As discussed in the Explanation and Justification for 11 CFR 300.11, a safe harbor provision has been added at 11 CFR 300.37(c). Because 11 CFR 300.37(a) permits State, district and local party committees to solicit funds for, or donate funds to, section 527 organizations that are State-registered political committees and that meet certain other requirements, paragraph (c)(2) of the final rules contains an additional safe harbor provision applicable to those organizations. This safe harbor is similar to the safe harbor provision applicable to section 501(c) organizations in paragraph (c)(1). The safe harbor provides that a State, district, and local party committee may obtain and rely upon a certification from certain section 527 organizations to determine whether such organizations

fall outside the fundraising/donations prohibition.

Paragraph (d) of 11 CFR 300.37 sets forth the criteria for the certification for both 501(c) organizations and certain section 527 organizations. This paragraph for the most part tracks the criteria for certifications by section 501(c) organizations set forth in 11 CFR 300.11(d). *See* Explanation and Justification for 11 CFR 300.11. Additionally, paragraph (d)(1) of 11 CFR 300.37 provides that in the case of a section 527 organization that is a State-registered political committee pursuant to paragraph (a)(3)(iv), the certification is a written statement signed by the committee treasurer. As the individual who oversees expenditures of a political committee, the treasurer has knowledge of the types of activities undertaken by the organization. The remaining certification requirements are identical to those for section 501(c) organizations.

New paragraphs (e) and (f) of 11 CFR 300.37 mirror the provisions in 11 CFR 300.11(e) and (f) as applied to State, district, and local party committees and other covered persons rather than national party committees. *See* Explanation and Justification for 11 CFR 300.11.

#### Subpart C—Tax-exempt Organizations

For the convenience of readers interested in locating rules pertaining to fundraising and donations to tax-exempt organizations, subpart C of new part 300 combines in a single place the prohibitions on national, State, district, and local party committee donations to, and fundraising for, certain 501(c) and 527 tax-exempt organizations and the rules governing fundraising by Federal candidates and officeholders for 501(c) organizations.

The proposed rules for 11 CFR 300.50 (national party prohibition) and 11 CFR 300.51 (State party prohibition) were identical to proposed 11 CFR 300.11 (national party prohibition) and proposed 11 CFR 300.37 (State party prohibition), respectively.

The final rule at 11 CFR 300.50 (national party prohibition) is identical to the final rule at 11 CFR 300.11; the final rule at 11 CFR 300.51 (State party prohibition) is identical to the final rule at 11 CFR 300.37; and the final rule at 11 CFR 300.52 (regulations governing Federal candidate and officeholder solicitations for 501(c) organizations) is identical to the final rule at 11 CFR 300.65. The Explanation and Justification for 11 CFR 300.11, 300.37 and 300.65 apply to 11 CFR 300.50, 300.51 and 300.52, respectively.

#### Subpart D—Federal Candidates and Officeholders

##### 11 CFR 300.60 Scope

BCRA places limits on the amounts and types of funds that can be raised by Federal candidates and officeholders for both Federal and State candidates. *See* 2 U.S.C. 441i(e). The Commission is placing the regulations that address these limitations in 11 CFR part 300, subpart D.

Section 300.60 explains that these restrictions apply to Federal candidates and officeholders, their agents, and entities directly or indirectly established, maintained, or controlled by, or acting on behalf of, any such candidate(s) or officeholder(s). As defined in 2 U.S.C. 431(3) and existing 11 CFR 100.4, "Federal office" means the elective office of President or Vice President of the United States, Senator or Representative in, or Delegate or Resident Commissioner to, the Congress of the United States. There is a similar definition of "Federal officeholder" in 11 CFR 113.1(c). As noted above, the Commission is adding a comparable definition at 11 CFR 300.2(o). Persons covered by the restrictions in this subpart may not "solicit, receive, direct, transfer or spend" non-Federal funds unless certain requirements are satisfied, and subject to certain exceptions explained below.

No comments were received on this section.

##### 11 CFR 300.61 Federal Elections

Section 300.61 as proposed in the NPRM prohibited any Federal candidate or officeholder, his or her agent, or any person described in section 300.60, above, from soliciting, receiving, directing, transferring, or spending non-Federal funds in connection with an election for Federal office, including funds for any Federal election activity described in 11 CFR 100.24, discussed above. 2 U.S.C. 441i(e)(1)(A). One commenter urged the Commission to construe this language to prohibit a candidate only from raising non-Federal funds that would eventually benefit the candidate's own campaign. Because the Commission does not find support in the statutory language for this approach, it is not incorporating this recommendation.

The principal sponsors of BCRA asked the Commission to include "disburse" in the list of specified actions, so as to clarify that a person described in 11 CFR 300.60 must use Federal funds when disbursing funds in connection with an election for Federal office. The Commission appreciates the desire for uniformity between sections

300.61 and 300.62, discussed below; and also notes that drawing a distinction between funds that are "spent" and funds that are "disbursed" for certain purposes could prove problematic. Accordingly, it is adding "disburse" to the list of covered activities in section 300.61.

#### 11 CFR 300.62 Non-Federal Elections

BCRA also prohibits any Federal candidate or officeholder, his or her agent, or any other person described in § 300.60, from raising, receiving, directing, transferring, or spending or disbursing funds in connection with any non-Federal election, unless the funds are not in excess of the amounts permitted with respect to contributions to candidates and political committees and are not from sources prohibited by the Act from making contributions in connection with Federal elections. 2 U.S.C. 441i(e)(1)(B).

The NPRM limited this restriction to Federal funds subject to the limitations and prohibitions of the Act. One comment requested the Commission to remove the term "Federal" from this definition, to make it cover all funds that are subject to the limitations and prohibitions of the Act. The Commission is making this change, which is consistent with the statutory language; and is making additional changes to further parallel the statutory language.

In discussing proposed 11 CFR 300.61 and 300.62, the NPRM stated that these prohibitions encompassed "leadership PACs" and "candidate PACs" because they are entities "directly or indirectly established, financed, maintained, or controlled by" Federal candidates and/or officeholders as defined in 11 CFR 300.2(c). Generally, "leadership PACs" and "candidate PACs" are political organizations set up by congressional leaders and other Federal candidates and officeholders, in part, as a way to support other candidates' campaigns. Although candidate PACs and leadership PACs are not specifically mentioned, the legislative history indicates that 2 U.S.C. 441i(e)(1) is intended to prohibit Federal officeholders and candidates from soliciting any funds for these committees that do not comply with FECA's source and amount limitations. *See* 148 Cong. Rec. S2140 (Daily ed. March 20, 2002) (statement of Sen. McCain). Consequently, the NRPM stated that Federal candidates and officeholders and their leadership and candidate PACs must not solicit, receive, direct, transfer, or spend funds for such a PAC's Federal or non-Federal account unless the funds complied with

the Act's source and limitations requirements.

The comments of the national party committees construed the NPRM statements, in light of statements made in the Senate debates, to mean that a person could contribute \$5,000 to the Federal account of a "leadership" PAC and could donate an additional \$5,000 to the non-Federal account of the same committee. These commenters expressed support for such an interpretation of the proposed rules and further argued that the national party ban on raising and spending non-Federal funds found at 2 U.S.C. 441i(a) should be construed similarly. As noted elsewhere, the Commission believes that the plain language of 2 U.S.C. 441i(a) prevents such an interpretation as to the national party committees. No other commenters addressed this point in their written comments, although some commenters testified that the statutory language could be interpreted either to permit solicitations of \$5,000 each for a Federal and non-Federal account of a leadership PAC in light of the floor statements, or not to permit such PACs to have non-Federal accounts at all. Another commenter argued that the statutory language did not include the term "non-Federal accounts," but instead permitted a Federal officeholder to solicit, receive, direct and spend funds "in connection with non-Federal elections."

The Commission notes first that the definition of an entity "directly or indirectly established, financed, maintained, or controlled" is being modified in the final rules from the definition contained in the proposed rule at section 300.2(c). The final rule defines this phrase by incorporating the affiliation factors set forth at 11 CFR 100.5(g)(4)(ii). Consequently, 11 CFR 300.62, permitting solicitations and spending for funds "in connection with" a non-Federal election applies to a candidate PAC or leadership PAC to the extent that the PAC comes within the new definition of 11 CFR 300.2(c). Secondly, in discussing BCRA's restrictions on the solicitation and spending of non-Federal funds by Federal candidates and officeholders, the co-sponsors stated that these provisions were part of a "system of prohibitions and limitations on the ability of Federal officeholders and candidates, to raise, spend and control soft money" in order "to stop the use of soft money as a means of buying influence and access with Federal officeholders and candidates." *See* 148 Cong. Rec. S2139 (Daily ed. March 20, 2002) (statement of Sen. McCain). In light of this purpose, the Commission

notes that new 11 CFR 300.62 permits Federal candidates and officeholders to solicit, receive, direct, transfer, spend, or disburse funds in connection with Federal and non-Federal elections only from sources permitted under the Act and only when the combined amounts solicited and received from any particular person or entity do not exceed the amounts permitted under the Act's contribution limits and are not from prohibited sources. In other words, a Leadership PAC that comes within the definition of 11 CFR 300.2(c) can raise up to a total of \$5,000 from any particular person or entity, regardless of whether the funds are contributed to the PAC's Federal account, donated to its non-Federal account, or allocated between the two. In addition, the Commission agrees with commenters who pointed out that 11 CFR 300.62 does not permit Federal candidates and officeholders, their agents and entities established, financed, maintained, or controlled by them to solicit, receive, direct, transfer, spend, or disburse non-Federal funds for Federal elections.

#### 11 CFR 300.63 Exception for Non-Federal Candidates

An exception to the fundraising prohibition applies when a Federal candidate or Federal officeholder is a candidate for State or local office. 2 U.S.C. 441i(e)(2). Such candidates may raise and spend non-Federal funds for their State campaign, as long as their activities are consistent with State law and refer only to their status as a State or local candidate, to other candidates for that same office, or both. This exception is reflected in new 11 CFR 300.63. Please note that if a State or local candidate is simultaneously a candidate for Federal office, he or she must raise and spend only Federal funds in connection with the Federal campaign. No comments addressed this provision.

#### 11 CFR 300.64 Exemption for Attending, Speaking, or Appearing as a Featured Guest at Fundraising Events

BCRA contains an exemption from the fundraising prohibition for Federal candidates and officeholders who attend, speak, or appear as a featured guest at a State, district, or local party committee fundraising event. 2 U.S.C. 441i(e)(3). The NPRM sought comment on how to construe and implement this exemption, particularly in light of the separate general prohibition on Federal candidates and officeholders soliciting non-Federal funds in connection with an election for Federal, State, or local office. The NPRM sought comment on the provision in light of Sen. McCain's



explanation in the Senate debate that Federal candidates and officeholders “cannot solicit soft money funds, funds that do not comply with Federal contribution limits and source prohibitions, for any party committee—national, State, or local.” 148 Cong. Rec. S2139 (daily ed. March 20, 2002) (statement of Sen. McCain). The Commission initially sought comment on a rule proposing that, while such individuals could attend, speak, or be a featured guest at a State or local party fundraising event, they could not say anything that could be construed as soliciting or otherwise seeking non-Federal funds. In the alternative, the NPRM sought comment on whether the fundraising event provision was a total exemption from the general solicitation ban, whereby Federal candidates and officeholders and their agents may attend and speak freely at such events. The phrase “featured guest” strongly suggests that State, district, or local party committees may publicize in advance that a Federal candidate or officeholder will be attending and speaking at an event, and the Commission sought comments on whether this means that Federal candidates and officeholders may be referred to in invitation materials for the event, or appear as members of a host committee, or be honored at the event.

The Commission received a range of comments on these issues. Some advocated a restrictive approach, arguing that any other construction would undercut the fundraising prohibition. Others noted that it could be almost impossible for a Federal candidate or officeholder not to become involved in at least indirect fundraising, such as thanking people in a rope line for their support, by virtue of the fact that they are appearing and speaking at a fundraising event, which the statutory exemption expressly permits. Some claimed that monitoring every word the speaker said could turn the Commission into “speech police,” raising First Amendment concerns. U.S. CONST. amend. I (“Congress shall make no law \* \* \* abridging the freedom of speech \* \* \*”). Also, the fact that a candidate or officeholder is to be honored at an event implies that his or her name or picture may appear prominently on invitations, flyers, and other material distributed in connection with the event.

The Commission has decided to construe the statutory exemption permitting Federal candidates and officeholders to attend, speak, and appear as a featured guest at State, district or local party committee fundraising events without regulation or

restriction. This conclusion is compelled by the plain language of the section and the structure of the section within BCRA. The structure of the statute requires the Commission to construe the provision as a total exemption to the solicitation prohibition, applicable to Federal candidates and officeholders, when attending and speaking at party fundraising events, because the statutory section is styled as such. To conclude otherwise would require the Commission to read the restrictions itemized in the general prohibition into a statutory exemption that clearly and unambiguously excludes those restrictions by its own terms. It would also require the Commission to regulate and potentially restrict what candidates and officeholders say at political events, which is contrary to the plain meaning of the statutory exemption and would raise serious constitutional concerns. Accordingly, candidates and officeholders are free under the rule to speak at such functions without regulation or restriction. In addition, as several commenters urged, State, district, and local party committees are free within the rule to publicize featured appearances of Federal candidates and officeholders at these events, including references to these individuals in invitations. The Commission concludes, however, that Federal candidates and officeholders are prohibited from serving on “host committees” for a party fundraising event or from personally signing a solicitation in connection with a State, local, or district party fundraising event, on the basis that these pre-event activities are outside the permissible activities described above flowing from a Federal candidate’s or officeholder’s appearance or attendance at the event. The rule, consistent with the statute, places no restriction on the speech of Federal candidates and individuals holding Federal office at these fundraising events.

#### *11 CFR 300.65 Exceptions for Certain Tax-Exempt Organizations*

In 2 U.S.C. 441i(e)(1), BCRA prohibits candidates and officeholders from soliciting, receiving, directing, transferring, or spending funds unless the funds meet the source and amount restrictions of the Act. *See also* new 11 CFR 300.61 and 11 CFR 300.62. BCRA creates two exceptions from that general rule in 2 U.S.C. 441i(e)(4): (1) It allows candidates, officeholders, and individuals who are agents acting on behalf of either to make general solicitations, without source or amount restrictions for a 501(c) organization unless the “principal purpose” of the

organization is to conduct certain Federal election activity, specifically voter registration, voter identification, GOTV activities, or generic campaign activity, so long as the solicitation is not to obtain funds in connection with a Federal election; and (2) it permits Federal candidates and officeholders, and individuals who are agents acting on their behalf, to make a solicitation explicitly to obtain funds for a 501(c) organization whose principal purpose is to conduct Federal election activity as described above or for a 501(c) organization to conduct these activities provided that only individuals are solicited for no more than \$20,000 per calendar year. The final rule at 11 CFR 300.65 implements these exceptions for Federal candidate and officeholder solicitations for 501(c) organizations. It mirrors the final rule at 11 CFR 300.52 contained in subpart C, discussed above.

In response to the NPRM, BCRA’s principal sponsors and a public interest group stated that the proposed rule at 11 CFR 300.52(a)(1) (mirrored in 300.65(a)(1)) could be interpreted to prohibit candidate/officeholder solicitations that were not meant to be prohibited. The proposed rules stated that a Federal candidate or officeholder may make a general solicitation on behalf of a 501(c) organization without regard to source or amount restrictions “only if the solicitation does not specify how the funds will or should be spent,” if the solicitation is not for a 501(c) organization whose principal purpose is to conduct certain enumerated Federal election activity, and if the solicitation is not for that enumerated Federal election activity. These commenters expressed concern that the proposed regulation could be erroneously interpreted as prohibiting Federal candidates or officeholders from making a general or specific solicitation, without source or amount limitations, for an organization such as the Red Cross, which engages in no “electoral activities” whatsoever. BCRA’s principal sponsors also argued that this provision could be interpreted to prohibit specific solicitations, without source or amount limitations, for a 501(c) organization whose principal purpose is not to engage in Federal election activity, but who nonetheless engages in some election activity, provided that the solicitation is not for activity in connection with an election. The sponsors argued that the final rules should permit such specific solicitations. The examples given by the sponsors to illustrate this point included a specific solicitation for the

NAACP College Fund or the NRA firearms training program, even though the NAACP and the NRA engage in certain election activity.

The Commission agrees that 11 CFR 300.65 should not be misinterpreted to prohibit candidates, officeholders, or their agents from soliciting funds for a 501(c) organization that engages in no election activity, such as the Red Cross. Accordingly, the final rule at 11 CFR 300.65 addresses the commenters' concerns by more specifically setting forth the circumstances under which Federal candidates, officeholders, and their agents can make general solicitations on behalf of 501(c) organizations, without regard to source or limitation, and by setting forth in paragraph (b) the circumstances under which they can make specific, limited solicitations to individuals to obtain funds to carry out certain Federal election activities.

In response to a question in the NPRM regarding the scope of the term "agent" in 2 U.S.C. 441i(e), the sponsors stated that it was their intent that the restrictions on candidate/officer holder solicitations apply to an agent "acting on behalf of" either. Accordingly, the final rule states throughout that it applies to an individual who is an agent "acting on behalf of" a Federal candidate or officeholder. BCRA's sponsors and the same public interest commenter also pointed out that proposed 11 CFR 300.52(b)(2) (mirrored in proposed 11 CFR 300.65(b)(2)) did not make clear that the specific solicitations permitted for Federal election activity or organizations principally engaged in such activities applies only to 501(c) organizations and not to other tax exempt organizations, such as section 527 organizations. The Commission agrees. Accordingly, the introductory language in the final rule specifically states that the requirements for solicitations in the rule apply to 501(c) organizations.

Paragraph (c) of the final rule enumerates the specific types of Federal election activity for which a Federal candidate or officeholder can make specific solicitations and incorporates the definitions of those activities at 11 CFR 100.24(a). Because BCRA permits limited solicitations only for specific Federal election activities, new paragraph (d) of the final rule makes clear that solicitations are not permitted for other election activities, including Federal election activity such as public communications promoting or opposing clearly identified Federal candidates. See 11 CFR 100.24(b)(3).

In response to questions raised in the NPRM, BCRA's principal sponsors, a

public interest group, and a non-profit organization agreed that 11 CFR 300.65 should include a safe harbor provision for Federal candidates, officeholders, and their agents, similar to the one for party committees in 11 CFR 300.11 and 11 CFR 300.37. Accordingly, new paragraph (e) provides that a Federal candidate, officeholder, or agent acting on behalf of either, may obtain and rely upon a certification from a section 501(c) organization in determining the scope of the permissible solicitations they may make on behalf of the organization. Paragraph (e) also sets forth the requirements for such a certification: the certification is a written statement signed by an officer or other authorized representative of the organization with knowledge of the organization's activities; the certification states the organization's principal purpose is not to conduct election activities, including Federal election activities described in paragraph (c) of this section; and the certification states that the organization does not intend to pay debts incurred in a prior election cycle for expenditures and disbursements made in connection with an election for Federal office (including for Federal election activity).

A non-profit organization raised several concerns about the restrictions on Federal officeholders soliciting for 501(c) organizations. First, the non-profit group maintained that the regulations should create a presumption that the principal purpose of any 501(c) organization is not to conduct election activity because "under federal tax law, no 501(c) organization may conduct partisan electoral activity as its primary purpose." The commenter was concerned that requiring a candidate or officeholder to verify whether or not an organization engages in election activity as its principal purpose will "result in an unnecessary chilling effect on their assistance" to 501(c) organizations. The commenter was also concerned that IRS Form 990 tax returns and other tax forms mentioned in the NPRM as possible ways to determine an organization's activities or principal purpose would not provide a candidate or officeholder with the necessary information. Second, the commenter urged that any definition of "principal purpose" be based on a multi-year average of an organization's expenditures for Federal election activity to more accurately capture an organization's actual level of electoral activity, which necessarily occurs closer to elections. Finally, the group urged that the regulations include a safe harbor permitting candidates and

officeholders to appear at a Section 501(c) organization's fundraiser or convention as long as no solicitations are made for funds for election activities, or alternatively, for any funds.

Determining whether a particular organization's principal purpose is to conduct election activities, such as voter registration or GOTV, is a fact-based determination that must be made as to a particular organization. Thus, creating a presumption that the principal purpose of any 501(c) organization is not to engage in election activity is inappropriate and could conflict with IRS determinations. As for including a definition of "principal purpose" that is based on a multi-year average of an organization's election expenditures, the Commission lacks sufficient information to establish a particular percentage or average at this time. Finally, the Commission notes that the general and specific solicitations contemplated in 11 CFR 300.65 may take place at a fundraising event conducted by the 501(c) organization.

The Commission agrees with the commenter that IRS Form 990s may not clearly indicate whether or not an organization engages in specific election activities. Therefore, the safe harbor provision in the final rule does not require a Federal candidate or office holder to obtain or rely upon such forms.

As for the concern that Federal candidates and officeholders will be chilled from assisting 501(c) organizations in fundraising, the safe harbor provided in paragraph (e) is intended to ease concerns as to inadvertent violations of the Act, as amended by BCRA. On the other hand, new paragraph (f) of the final rules makes clear that a Federal candidate, Federal officeholder, or individual agents acting on behalf of either may not rely upon a certification obtained from an organization if the individual has actual knowledge that the certification is false. This provision is identical to the provisions applicable to party committees in 11 CFR 300.11 and 300.37.

## **Subpart E—State and Local Candidates**

### *11 CFR 300.70 Scope*

Subpart E implements two provisions of BCRA regarding State and local candidates. 2 U.S.C. 441i(f)(1), (2). Section 300.70 explains that this subpart applies to any candidate for State or local office, individual holding State or local office, or an agent acting on behalf of any such candidate or individual. 2 U.S.C. 441i(f)(1). For example, the subpart applies to an

individual holding Federal office who is a candidate for State or local office. It does not, however, apply to an association or similar group of candidates for State or local office, or of individuals holding State or local office, because they are not addressed in this section of BCRA. The Commission received no comments on this section.

**11 CFR 300.71 Federal Funds Required for Certain Communications**

BCRA prohibits State and local candidates and officeholders from funding certain public communications with non-Federal funds. 2 U.S.C. 441i(f)(1). This prohibition is contained in new 11 CFR 300.71. The prohibition on use of non-Federal funds encompasses *public communications* that refer to a clearly identified candidate for Federal office, if the communication promotes, supports, attacks, or opposes any candidate for that Federal office, regardless of whether the communication expressly advocates voting for or against any candidate. See 2 U.S.C. 431(20)(A)(iii). The section contains a cross reference to section 11 CFR 100.26, which defines the new term *public communication* for purposes of the Act. State and local candidates and officeholders may, however, use Federal funds for these public communications.

No commenters addressed this section.

**11 CFR 300.72 Federal Funds Not Required for Certain Communications**

BCRA contains an exception to the prohibition on the use of Federal funds for certain public communications that permits State and local candidates and officeholders to use non-Federal funds for public communications that refer to Federal candidates but do not promote, support, attack, or oppose any candidate for Federal office. 2 U.S.C. 441i(f)(2). This exception is set forth at new 11 CFR 300.72. Section 300.72 follows the statutory language.

**XI. Part 9034—Entitlements**

**11 CFR 9034.8 Joint Fundraising**

The ban on national party non-Federal fundraising affects the Commission's joint fundraising rules under the Presidential Primary Matching Payment Act at 11 CFR 9034.8. The Commission is, therefore, adding introductory language to this section, advising readers that “[n]othing in this section shall supersede 11 CFR part 300, which prohibits any person from soliciting, receiving, directing, transferring, or spending any non-Federal funds, or from transferring

Federal funds for Federal election activities.”

**Certification of No Effect Pursuant to 5 U.S.C. 605(b) [Regulatory Flexibility Act]**

The Commission certifies that the attached proposed rules, if promulgated, will not have a significant economic impact on a substantial number of small entities. The basis for this certification is that the national, State, and local party committees of the two major political parties are not small entities under 5 U.S.C. 601, and the number of other small entities to which the rules would apply is not substantial.

**List of Subjects**

**11 CFR Part 100**

Elections.

**11 CFR Part 102**

Political committees and parties, reporting and recordkeeping requirements.

**11 CFR Part 104**

Campaign funds, political committees and parties, reporting and recordkeeping requirements.

**11 CFR Part 106**

Campaign funds, political committees and parties, political candidates.

**11 CFR Part 108**

Elections, reporting and recordkeeping.

**11 CFR Part 110**

Campaigns, political parties and committees.

**11 CFR Part 114**

Business and industry, elections, labor.

**11 CFR Part 300**

Campaign funds, nonprofit organizations, political committees and parties, political candidates, reporting and recordkeeping requirements.

**11 CFR Part 9034**

Campaign funds, reporting and recordkeeping requirements.

For reasons set out in the preamble, Chapter I of title 11 of the Code of Federal Regulations is amended as follows:

**PART 100—SCOPE AND DEFINITIONS (2 U.S.C. 431)**

1. The authority citation for 11 CFR part 100 continues to read as follows:

**Authority:** 2 U.S.C. 431; 434(a)(11), 438(a)(8).

2. Section 100.14 is revised to read as follows:

**§ 100.14 State committee, subordinate committee, district, or local committee (2 U.S.C. 431(15)).**

(a) *State committee* means the organization that by virtue of the bylaws of a political party or the operation of State law is part of the official party structure and is responsible for the day-to-day operation of the political party at the State level, including an entity that is directly or indirectly established, financed, maintained, or controlled by that organization, as determined by the Commission.

(b) *District or local committee* means any organization that by virtue of the bylaws of a political party or the operation of State law is part of the official party structure, and is responsible for the day-to-day operation of the political party at the level of city, county, neighborhood, ward, district, precinct, or any other subdivision of a State.

(c) *Subordinate committee of a State, district, or local committee* means any organization that at the level of city, county, neighborhood, ward, district, precinct, or any other subdivision of a State or any organization under the control or direction of the State committee, and is directly or indirectly established, financed, maintained, or controlled by the State, district, or local committee.

3. Sections 100.24, 100.25, 100.26, 100.27, and 100.28 are added to read as follows:

**§ 100.24 Federal election activity (2 U.S.C. 431(20)).**

(a) As used in this section, and in part 300 of this chapter,

(1) *In connection with an election in which a candidate for Federal office appears on the ballot* means:

(i) The period of time beginning on the date of the earliest filing deadline for access to the primary election ballot for Federal candidates as determined by State law, or in those States that do not conduct primaries, on January 1 of each even-numbered year and ending on the date of the general election, up to and including the date of any general runoff.

(ii) In an odd-numbered year, the period beginning on the date on which the date of a special election in which a candidate for Federal office appears on the ballot is set and ending on the date of the special election.

(2) *Voter registration activity* means contacting individuals by telephone, in person, or by other individualized means to assist them in registering to vote. Voter registration activity

acceptable and unacceptable purpose descriptions to be reported by authorized committees. Paragraph (B) requires authorized committees, when itemizing certain disbursements for which reimbursements are required, to provide a brief explanation of the activity for which reimbursement is required. These provisions have been in Title 11 of the **Code of Federal Regulations** since 1980 and 1995, respectively, and were not affected by the recent statutory changes to the election cycle reporting requirements.

#### Need for Correction

As published, the final rules inadvertently omit two paragraphs describing information to be reported by authorized committees of Federal candidates.

All committees must report the purpose of itemized disbursements (i.e., those disbursements aggregating in excess of \$200). Omitted paragraph (A) contains examples of suitably specific purpose descriptions as well as examples of those descriptions that are unacceptably vague. This paragraph is inconsistent with the reporting of rules for unauthorized committees (committees other than candidate committees) in 11 CFR 104.3(b)(3).

Omitted paragraph (B) is used in administering the "personal use" rules in 11 CFR 113.1. Federal candidates are barred from using campaign funds for personal benefit. Paragraph (B) requires authorized committees of Federal candidates itemizing disbursements for which partial or total reimbursement is required under 11 CFR 113.1(g)(1)(iii)(C) or (D) to provide a brief explanation of the activity for which the reimbursement is made.

Section 801 of Title 5 of the United States Code requires Federal agencies to submit regulations to Congress. These regulations were submitted to the Speaker of the House of Representatives and the President of the Senate on November 26, 2001.

#### Certification of No Effect Pursuant to 5 U.S.C. § 605(b) [Regulatory Flexibility Act]

This correction will not have significant economic impact on a substantial number of small entities. The basis of this certification is that this correction only requires political committees to once again add information to the reports they are required to file. These regulations were in 11 CFR since 1980 and 1995, respectively, before being inadvertently omitted in 2000.

#### List of Subjects in 11 CFR Part 104

Campaign funds, Political committees and parties, Reporting and recordkeeping requirements.

Accordingly, 11 CFR part 104 is corrected by making the following correcting amendment:

#### PART 104—REPORTS BY POLITICAL COMMITTEES

1. The authority citation for part 104 continues to read as follows:

**Authority:** 2 U.S.C. 431(1), 431(8), 431(9), 432(i), 434, 438(a)(8), 438(b), 439a.

#### § 104.3 Contents of reports (2 U.S.C. 434(b), 439a).

\* \* \* \* \*

2. In § 104.3 add the following paragraphs (b)(4)(i)(A) and (B):

(b) \* \* \*  
(4) \* \* \*  
(i) \* \* \*

(A) As used in this paragraph, *purpose* means a brief statement or description of why the disbursement was made. Examples of statements or descriptions which meet the requirements of this paragraph include the following: dinner expenses, media, salary, polling, travel, party fees, phone banks, travel expenses, travel expense reimbursement, and catering costs. However, statements or descriptions such as *advance*, *election day expenses*, *other expenses*, *expenses*, *expense reimbursement*, *miscellaneous*, *outside services*, *get-out-the-vote* and *voter registration* would not meet the requirements of this paragraph for reporting the purpose of an expenditure.

(B) In addition to reporting the purpose described in paragraph (b)(4)(i)(A) of this section, whenever an authorized committee itemizes a disbursement that is partially or entirely a personal use for which reimbursement is required under 11 CFR 113.1(g)(1)(ii)(C) or (D), it shall provide a brief explanation of the activity for which reimbursement is required.

\* \* \* \* \*

Dated: November 26, 2001.

**Danny L. McDonald,**  
*Chairman, Federal Election Commission.*  
[FR Doc. 01-29679 Filed 11-29-01; 8:45 am]  
**BILLING CODE 6715-01-P**

#### FEDERAL ELECTION COMMISSION

#### 11 CFR Part 111

#### [Notice 2001-18]

#### Extension to Administrative Fines

**AGENCY:** Federal Election Commission.

**ACTION:** Final rule; revision of the sunset date.

**SUMMARY:** The Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the expiration date in which the Federal Election Commission (hereinafter "the Commission") may assess civil money penalties for violations of the reporting requirements of section 434(a) of the Federal Election Campaign Act (hereinafter "the Act" or "FECA").

**DATES:** Effective on December 31, 2001.

**FOR FURTHER INFORMATION CONTACT:** Ms. Rosemary C. Smith, Assistant General Counsel, or Ms. Mai T. Dinh, Attorney, 999 E Street, NW., Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

#### SUPPLEMENTARY INFORMATION:

#### Explanation and Justification

Section 640 of the Treasury and General Government Appropriations Act, 2000, Pub. L. No. 106-58, 106th Cong., 113 Stat. 430, 476-77 (1999), amended § 309(a)(4) of the FECA, 2 U.S.C. 437g(a)(4), to provide for a modified enforcement process for violations of reporting requirements. Under § 437g(a)(4)(C) of the FECA, the Commission may assess a civil money penalty for violations of the reporting requirements of 2 U.S.C. 434(a). This authority, however, was to sunset on December 31, 2001. Pub. L. No. 106-58, 106th Cong., § 640(c). Recently, § 642 of the Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the sunset date to include all reports that cover activity between January 1, 2000, to December 31, 2003.

The Commission published final rules on May 19, 2000, to implement the amendment contained in the Treasury and General Government Appropriations Act, 2000. Section 111.30 of the regulations reflects the sunset provision of Pub. L. No. 106-58, 106th Cong., § 640(c). Therefore, the Commission is issuing this final rule to amend section 111.30 to extend the application of the administrative fine regulations, 11 CFR part 111, subpart B, to include all violations relating to reports that cover the period between January 1, 2000, to December 31, 2003.

The Commission is promulgating this final rule without notice or opportunity for comment because it falls under the "good cause" exemption of the Administrative Procedures Act, 5 U.S.C. 553(b)(B). The exemption allows

on papayas handled during the 2002–03 fiscal year.

It is hereby determined that the reporting and assessment requirements specified in §§ 928.160 and 928.226, respectively, do not effectuate the declared policy of the Act and should not be applied during the 2002–03 and subsequent seasons. Therefore, these sections are suspended effective August 1. Once the order provisions pertaining to papayas grown in Hawaii have been terminated, these and other regulations under the order will no longer be in effect.

#### Final Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Agricultural Marketing Service (AMS) has considered the economic impact of this action on small entities.

Accordingly, AMS has prepared this final regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order those small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

There are approximately 400 producers of papayas in the production area and approximately 60 handlers subject to regulation under the marketing order. Small agricultural producers are defined as those having annual receipts of less than \$750,000, and small agricultural service firms, which include handlers, are defined by the Small Business Administration (13 CFR 121.201) as those having annual receipts of less than \$5,000,000.

Based on a reported current average f.o.b. price for fresh papayas of \$0.65 per pound, a handler would have to ship in excess of 7.69 million pounds to have annual receipts of \$5 million. Based on a reported current average grower price of \$0.25 per pound, and average annual industry shipments of 40 million pounds since 1996, annual total grower revenues would be \$10 million. Average annual grower revenue would, therefore, be \$25,000. Thus, the majority of handlers and producers of papayas may be classified as small entities, excluding receipts from other sources.

This final rule suspends the reporting and assessment requirements specified in §§ 928.160 and 928.226, respectively. This is consistent with USDA's decision to terminate the provisions of the Hawaii papaya marketing order. The

order is being terminated because in a recently held referendum, papaya producers failed to support continuation of the program.

This action eliminates the cost of assessments. Currently, handlers are required to pay an assessment rate of \$0.008 per pound handled.

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the information collection requirements being suspended by this rule were approved previously by the Office of Management and Budget (OMB) and assigned OMB No. 0581–0189. Suspension of the reporting requirements specified in § 928.160 is expected to reduce the total annual reporting burden on Hawaii papaya handlers by 720 hours (60 handlers × 12 reports per year × 1 hour per report).

USDA has not identified any relevant Federal rules that duplicate, overlap or conflict with this final rule.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: <http://www.ams.usda.gov/fv/moab.html>. Any questions about the compliance guide should be sent to Jay Guerber at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

After consideration of all relevant matter presented, including the results of a recently held producer referendum, it is hereby found that the regulations in effect under the papaya marketing order do not tend to effectuate the declared policy of the Act and, therefore, are being suspended.

It is further found that it is impracticable, unnecessary, and contrary to the public interest to give preliminary notice and that good cause exists for not postponing the effective date of this rule until 30 days after publication in the **Federal Register** (5 U.S.C. 553) because: (1) This action relieves restrictions on handlers by lifting reporting and assessment requirements; (2) this rule should apply to all papayas handled during the 2002–03 fiscal year, which began July 1; (3) handlers were given notice of this action in a press release issued by USDA; and (4) no useful purpose would be served by delaying the effective date.

#### List of Subjects in 7 CFR Part 928

Marketing agreements, Papayas, Reporting and recordkeeping requirements.

For the reasons set forth above, 7 CFR part 928 is amended as follows:

#### PART 928—PAPAYAS GROWN IN HAWAII

1. The authority citation for 7 CFR part 928 continues to read as follows:

**Authority:** 7 U.S.C. 601–674.

2. In part 928, §§ 928.160 and 928.226 are suspended.

Dated: July 31, 2002.

**A.J. Yates,**

*Administrator, Agricultural Marketing Service.*

[FR Doc. 02–19671 Filed 8–2–02; 8:45 am]

**BILLING CODE 3410–02–P**

#### FEDERAL ELECTION COMMISSION

##### 11 CFR Part 100

[Notice 2002–12]

#### Reorganization of Regulations on “Contribution” and “Expenditure”

**AGENCY:** Federal Election Commission.

**ACTION:** Final rules and transmittal of regulations to Congress.

**SUMMARY:** The recently enacted Bipartisan Campaign Reform Act of 2002 (“BCRA”) substantially amended the Federal Election Campaign Act (“FECA” or “the Act”). Among its amendments is the deletion of the office building or facility exception in the definition of “contribution” in section 431(8)(B) of FECA. The Federal Election Commission (“the Commission”) is amending the regulations to reflect this statutory change. As part of this effort, the Commission is also reorganizing the sections defining “contribution” and “expenditure” in its regulations. Further information is provided in the supplementary information that follows.

**EFFECTIVE DATE:** November 6, 2002.

**FOR FURTHER INFORMATION CONTACT:** Ms. Mai T. Dinh, Acting Assistant General Counsel, 999 E Street, NW., Washington DC 20463, (202) 694–1650 or (800) 424–9530.

**SUPPLEMENTARY INFORMATION:** The Bipartisan Campaign Reform Act of 2002, Public Law 107–155, 116 Stat. 81 (March 27, 2002), significantly amends the Federal Elections Campaign Act, as amended, 2 U.S.C. 431 *et seq.*, and directs the Commission to promulgate regulations implementing Title I of BCRA within 90 days of enactment and to promulgate regulations implementing the other titles of BCRA that are under the Commission's jurisdiction within 270 days of enactment. *See* BCRA, section 402(c). One amendment to the definition of “contribution” is in Title I, section 103(b)(1) of BCRA. These final rules address this amendment.

Section 103(b)(1) of BCRA deletes current 2 U.S.C. 431(8)(B)(viii), thus eliminating the office building or facility exception from the definition of "contribution." Congress in BCRA also amended 2 U.S.C. 453 to prescribe that "notwithstanding any other provision of the Act, a State or local committee if a political party may, subject to State law, use exclusively funds that are not subject to the prohibitions, limitations, and reporting requirements of the Act for the purchase or construction of an office building for such State or local committee." In these final rules, the Commission amends the definitions of "contribution" and "expenditure" to comply with these amendments. The Commission has promulgated separate final rules to address the impact of this statutory change on State and local party committees, as well as other changes from BCRA Title I. See Explanation and Justification of "Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money" ("Non-Federal Funds Final Rules"), 67 FR part II (July 29, 2002).

This rulemaking is one in a series of rulemakings that the Commission will undertake to implement the various provisions of BCRA. The other separate rulemakings will address: (1) Electioneering communications; (2) coordinated and independent expenditures; (3) the so-called "millionaires" amendment," which increases contribution limits for congressional candidates facing self-financed candidates on a sliding scale, based on the amount of personal funds the opponent contributes to his or her campaign; (4) the limitations and prohibition on contributions including the increase in contribution limits, and the ban on contributions by minors and foreign nationals; (5) other provisions, including inaugural committees; fraudulent solicitations; disclaimers; personal use of campaign funds; (6) reporting; and (7) BCRA's impact on national nominating conventions.

In addition, the Commission is reorganizing 11 CFR 100.7 and 100.8 to facilitate locating and reading the definitions of "contribution" and "expenditure," and the exceptions to both definitions.

Under the Administrative Procedures Act, 5 U.S.C. 553(d), and the Congressional Review of Agency Rulemaking Act, 5 U.S.C. 801(a)(1), agencies must submit final rules to the Speaker of the House of Representatives and the President of the Senate and publish them in the **Federal Register** at least 30 calendar days before they take effect. The final rules on Reorganization of Regulations on "Contribution" and

"Expenditure" were transmitted to Congress on July 26, 2002.

#### Explanation and Justification

The Notice of Proposed Rulemaking ("NPRM") on which these final rules are based was published in the **Federal Register** on June 14, 2002. 67 FR 40881 (June 14, 2002). The Commission received comments from The Campaign and Media Legal Center; Center for Responsive Politics; Common Cause and Democracy 21 (joint comment); Senators John McCain and Russel D. Feingold, and Representatives Christopher Shays and Marty Meehan; and Ms. Cynthia Minchillo-Synhort, RP. The Commission did not hold a hearing on the NPRM, and none of the commenters requested an opportunity to testify.

#### *Non-Federal Funds Final Rules Effect on 11 CFR 100.7 and 100.8*

The NPRM raised the possibility of the Commission addressing, as part of the Non-Federal Funds Final Rules, changes to the definitions of "contribution" and "expenditure." The NPRM also stated that any changes to these definitions in the Non-Federal Funds Final Rules would be incorporated into these final rules. Several commenters, including the principal Congressional sponsors of BCRA, expressed concern that the Commission had acted "prematurely" in undertaking this reorganization rulemaking at a time when the soft money rulemaking was not completed. These commenters stated that conforming amendments to the definitions of "contribution" and "expenditure" may be substantive in nature or have substantive impact. They argued that the Commission should issue a new NPRM with proposed regulatory text for the conforming amendments and seek comments before promulgating the final rules.

This rulemaking does not make substantive changes to the current definitions of "contribution" and "expenditures" to conform to the Non-Federal Funds Final Rules. The NPRM contemplated that if the Non-Federal Funds Final Rules included amendments to 11 CFR 100.7 and 100.8, those amendments would be included in these final rules, similar to the way in which in the Brokerage Loans and Lines of Credit final rules are being incorporated in this reorganization. See below.

However, because the Commission's regulations in the Non-Federal Funds Final Rules do not change the definitions of "contribution" or "expenditure," the Commission's statements in the NPRM about the

possibility of the soft money rulemaking affecting these final rules are moot. Other than the reorganization and the changes discussed below, these final rules do not amend the substantive definitions of "contribution" and "expenditure."

#### *Other BCRA Provisions That Affect the Definition of "Contribution" and "Expenditure"*

Several commenters noted that other provisions in BCRA affect the definitions of "contribution" and "expenditure." The Commission recognizes that rules implementing the rest of BCRA may require amendments to these definitions. Such changes, however, will be the subject of separate rulemakings described above. The public will receive full notice and an opportunity to comment on the Commission's proposed rules on the implementation of such changes. This final rule, however, makes preparations for the separate rulemakings that may amend the definitions of "contribution" and "expenditure." The structure of current 11 CFR 100.7 and 100.8 is difficult to amend in a clear and comprehensive manner. By reorganizing the rules contained in these two sections into multiple sections, subsequent amendments, in subsequent rulemakings, will be easier for the Commission to incorporate, and easier for the public to identify, comment on, and ultimately use. See discussion about reorganization, below.

#### *"Allocation" Versus "Attribution"*

In the NPRM, the Commission raised the possibility of changing the use of the word "allocation" or any of its derivatives to "attribution" or one of its derivatives, and sought comment on this possibility. The proposed rules did not reflect such proposed change. The comments the Commission received on this suggestion did not support this proposed change. One public interest group questioned what such a change would accomplish. Several commenters stated that the necessity for clarification around "allocation" in the rules requires more than a word change, especially in the area of exempt activities. They argued that the allocation provisions in the Non-Federal Funds Final Rules at 11 CFR parts 100 and 300 have direct impact on this issue. They urged the Commission to amend the definitions to reflect the new allocation rules.

In response to those concerns, the final rules do not replace "allocation" and its derivatives with "attribution" or its derivative. As was emphasized in the new Non-Federal Funds Final Rules and

Explanation and Justification, exempt activities conducted in conjunction with Non-Federal activities that are not Federal election activities are governed by 11 CFR 106.1 and 106.7. To the extent that these activities do constitute Federal election activities, however, they must be allocated between Federal funds and Levin funds pursuant to new 11 CFR part 300. Nothing in this reorganization of the “contribution” and “expenditure” definitions changes the use of Federal, non-Federal, or Levin funds for the payment of any exempt activities. To clarify this, a cross-reference to the new allocation rules in 11 CFR 100.24, 104.17(a), and part 300, subparts B, D, and/ or E has been added in the final rules in 11 CFR 100.80 (slate cards and sample ballots), 100.87 (volunteer activity for party committees), 100.88 (volunteer activity for candidates), 100.89 (voter registration and get-out-the-vote activities for Presidential candidates), 100.140 (slate cards and sample ballots), 100.147 (volunteer activity for party committees), 100.148 (volunteer activity for candidates), and 100.149 (voter registration and get-out-the-vote activities for Presidential candidates).

#### *Reorganization of Current 11 CFR 100.7 and 100.8*

The Commission is reorganizing 11 CFR 100.7 and 100.8 in these final rules. The reorganizing makes it easier to locate and read the definitions of “contribution” and “expenditure” and the detailed exceptions to those definitions. Three commenters, including the principal Congressional sponsors of BCRA, expressed support for, and encouraged, this reorganization to make the rules more “user friendly” and “easier to read and understand.”

The new rules create four new subparts, B through E, within 11 CFR part 100 which contain the definitions of, and exceptions to, “contribution” and “expenditure.” Subpart B contains sections describing items that are contributions; subpart C contains sections describing items that are not contributions; subpart D contains sections describing items that are expenditures; and subpart E contains sections describing items that are not expenditures. The distribution table attached to these final rules lists where the various paragraphs of 11 CFR 100.7 and 100.8 can now be found within these new subparts.

#### *Inclusion of “Brokerage Loans and Lines of Credit”*

The final rules also incorporate another recent change to FECA—the inclusion of a loan of money derived

from an advance on a candidate’s brokerage account, credit card, home equity line of credit, or other line of credit available to the candidate as an item that is not a contribution. The Commission published the final rules, entitled “Brokerage Loans and Lines of Credit,” to amend 11 CFR 100.7(b) and 100.8(b) to include these types of loans as exceptions to the definitions of “contribution” and “expenditure.” See 67 FR 38353 (June 4, 2002). The language in this final rule at 11 CFR 100.83 and 100.144 reflects the language in the “Brokerage Loans and Lines of Credit” final rules. The Commission received no comment on this incorporation of the rules from a previous rulemaking.

#### *Amendments to the Office Building or Facility Exceptions*

Current 11 CFR 100.7(b)(12) and 100.8(b)(13) designate that the construction or purchase of an office building or facility are exceptions to the definitions of “contribution” and “expenditure.” New 11 CFR 100.56 (stating that a contribution to national party committees for the construction or purchase of an office building or facility is a “contribution” under the Act) and 100.114 (stating that an expenditures by a national party committees for the construction or purchase of an office building or facility is an “expenditure” under the Act) make clear that these exceptions no longer apply to national party committees. Similarly, in light of BCRA’s amendment of 2 U.S.C. 453, new 11 CFR 100.84 and 100.144 make clear that the office building or facility exceptions still apply to State, local, and district party committees, subject to the provisions of 11 CFR 300.34. The final rules reflect the language proposed in the NPRM. The Commission received no comment on its proposed changes implementing BCRA’s deletion of the office building or facility exception.

#### *Grammatical and Technical Revisions*

In addition to nonsubstantive grammatical corrections, minor technical revisions have been made to reflect the reorganization structure. Also, a cross-reference in paragraph (f) of section 100.142 has been corrected, now directing the reader to the other bank loan provisions. Other substantive changes to the definitions of “contribution” and “expenditure” will take place in separate rulemakings.

#### *Other Comments*

One commenter criticized the NPRM in general, but made no specific comment or suggestion. Another commenter advocated the complete, or

at least partial, elimination of the exception to the definitions of “contribution” and “expenditure” for recounts and election contests, on the basis that recounts and election contests, which are not Federal elections as defined by the Act, see generally *Federal Election Regulations*, H. R. Doc. No. 44, 95th Cong., 1st Sess. at 40 (1977) (*FEC E&J Compilation* at 38, 42), “serve as an avenue for the use of soft money to influence federal elections,” as evidenced by unregulated contributions used to pay for the 2000 Florida recount. This change is beyond the scope of this rulemaking dealing only with nonsubstantive changes, with the exception of the deletion of the office building or facility exception for national parties.

#### *Distribution Table*

#### 100.7 AND 100.8 DISTRIBUTION TABLE

| Old section            | New section           |
|------------------------|-----------------------|
| 100.7                  | 100.51(a)             |
| 100.7(a)(1)            | 100.52(a)             |
| 100.7(a)(1)(i)         | 100.52(b)             |
| 100.7(a)(1)(i)(A)      | 100.52(b)(1)          |
| 100.7(a)(1)(i)(B)      | 100.52(b)(2)          |
| 100.7(a)(1)(i)(C)      | 100.52(b)(3)          |
| 100.7(a)(1)(i)(D)      | 100.52(b)(4)          |
| 100.7(a)(1)(i)(E)      | 100.52(b)(5)          |
| 100.7(a)(1)(ii)        | 100.52(c)             |
| 100.7(a)(1)(iii)(A)    | 100.52(d)(1)          |
| 100.7(a)(1)(iii)(B)    | 100.52(d)(2)          |
| 100.7(a)(2)            | 100.53                |
| 100.7(a)(3)            | 100.54                |
| 100.7(a)(3)(i)         | 100.54(a)             |
| 100.7(a)(3)(ii)        | 100.54(b)             |
| 100.7(a)(3)(iii)       | 100.54(c)             |
| 100.7(a)(4)            | 100.55                |
| 100.7(b)               | 100.71(a)             |
| 100.7(b)(1)(i)         | 100.72(a)             |
| 100.7(b)(1)(ii)        | 100.72(b)             |
| 100.7(b)(1)(ii)(A)     | 100.72(b)(1)          |
| 100.7(b)(1)(ii)(B)     | 100.72(b)(2)          |
| 100.7(b)(1)(ii)(C)     | 100.72(b)(3)          |
| 100.7(b)(1)(ii)(D)     | 100.72(b)(4)          |
| 100.7(b)(1)(ii)(E)     | 100.72(b)(5)          |
| 100.7(b)(2)            | 100.73                |
| 100.7(b)(3)            | 100.74                |
| 100.7(b)(4)            | 100.75                |
| 100.7(b)(5)            | 100.76                |
| 100.7(b)(6)            | 100.77                |
| 100.7(b)(7)            | 100.78                |
| 100.7(b)(8)            | 100.79                |
| 100.7(b)(9)            | 100.80                |
| 100.7(b)(10)           | 100.81                |
| 100.7(b)(11)           | 100.82(a) through (d) |
| 100.7(b)(11)(i)        | 100.82(e)             |
| 100.7(b)(11)(ii)(A)(1) | 100.82(e)(1)(i)       |
| 100.7(b)(11)(ii)(A)(2) | 100.82(e)(1)(ii)      |
| 100.7(b)(11)(i)(B)     | 100.82(e)(2)          |
| 100.7(b)(11)(i)(B)(1)  | 100.82(e)(2)(i)       |
| 100.7(b)(11)(i)(B)(2)  | 100.82(e)(2)(ii)      |
| 100.7(b)(11)(i)(B)(3)  | 100.82(e)(2)(iii)     |
| 100.7(b)(11)(i)(B)(4)  | 100.82(e)(2)(iv)      |
| 100.7(b)(11)(i)(B)(5)  | 100.82(e)(2)(v)       |
| 100.7(b)(11)(ii)       | 100.82(e)(3)          |
| 100.7(b)(12)           | 100.84                |
| 100.7(b)(13)           | 100.85                |



100.7 AND 100.8 DISTRIBUTION TABLE—Continued

| Old section                   | New section             |
|-------------------------------|-------------------------|
| 100.7(b)(14) .....            | 100.86                  |
| 100.7(b)(15) .....            | 100.87                  |
| 100.7(b)(15)(i) .....         | 100.87(a)               |
| 100.7(b)(15)(ii) .....        | 100.87(b)               |
| 100.7(b)(15)(iii) .....       | 100.87(c)               |
| 100.7(b)(15)(iv) .....        | 100.87(d)               |
| 100.7(b)(15)(v) .....         | 100.87(e)               |
| 100.7(b)(15)(vi) .....        | 100.87(f)               |
| 100.7(b)(15)(vii) .....       | 100.87(g)               |
| 100.7(b)(16) .....            | 100.88(a) and (b)       |
| 100.7(b)(17) .....            | 100.89                  |
| 100.7(b)(17)(i) .....         | 100.89(a)               |
| 100.7(b)(17)(ii) .....        | 100.89(b)               |
| 100.7(b)(17)(iii) .....       | 100.89(c)               |
| 100.7(b)(17)(iv) .....        | 100.89(d)               |
| 100.7(b)(17)(v) .....         | 100.89(e)               |
| 100.7(b)(17)(vi) .....        | 100.89(f)               |
| 100.7(b)(17)(vii) .....       | 100.89(g)               |
| 100.7(b)(18) .....            | 100.90                  |
| 100.7(b)(19) reserved         | Removed                 |
| 100.7(b)(20) .....            | 100.91                  |
| 100.7(b)(21) .....            | 100.92                  |
| 100.7(b)(22) .....            | 100.83                  |
| 100.7(c) .....                | 100.51(b) and 100.71(b) |
| 100.8(a) .....                | 100.110(a)              |
| 100.8(a)(1) .....             | 100.111(a)              |
| 100.8(a)(1)(i) .....          | 100.111(b)              |
| 100.8(a)(1)(ii) .....         | 100.111(c)              |
| 100.8(a)(1)(iii) .....        | 100.111(d)              |
| 100.8(a)(1)(iv)(A) .....      | 100.111(e)(1)           |
| 100.8(a)(1)(iv)(B) .....      | 100.111(e)(2)           |
| 100.8(a)(2) .....             | 100.112                 |
| 100.8(a)(3) .....             | 100.113                 |
| 100.8(b) .....                | 100.130(a)              |
| 100.8(b)(1)(i) .....          | 100.131(a)              |
| 100.8(b)(1)(ii) .....         | 100.131(b)              |
| 100.8(b)(1)(iii)(A) .....     | 100.131(b)(1)           |
| 100.8(b)(1)(iii)(B) .....     | 100.131(b)(2)           |
| 100.8(b)(1)(iii)(C) .....     | 100.131(b)(3)           |
| 100.8(b)(1)(iii)(D) .....     | 100.131(b)(4)           |
| 100.8(b)(1)(iii)(E) .....     | 100.131(b)(5)           |
| 100.8(b)(2) .....             | 100.132                 |
| 100.8(b)(2)(i) and (ii) ..... | 100.132(a) and (b)      |
| 100.8(b)(3) .....             | 100.133                 |
| 100.8(b)(4) .....             | 100.134(a)              |
| 100.8(b)(4)(i) .....          | 100.134(b)              |
| 100.8(b)(4)(ii) .....         | 100.134(c)              |
| 100.8(b)(4)(iii) .....        | 100.134(d)              |
| 100.8(b)(4)(iii)(A)(1) ..     | 100.134(d)(1)(i)        |
| 100.8(b)(4)(iii)(A)(2) ..     | 100.134(d)(1)(ii)       |
| 100.8(b)(4)(iii)(B)(1) ..     | 100.134(d)(2)(i)        |
| 100.8(b)(4)(iii)(B)(2) ..     | 100.134(d)(2)(ii)       |
| 100.8(b)(4)(iii)(B)(3) ..     | 100.134(d)(2)(iii)      |
| 100.8(b)(4)(iii)(B)(4) ..     | 100.134(d)(2)(iv)       |
| 100.8(b)(4)(iii)(C) .....     | 100.134(d)(3)           |
| 100.8(b)(4)(iii)(D) .....     | 100.134(d)(4)           |
| 100.8(b)(4)(iv)(A) .....      | 100.134(e)              |
| 100.8(b)(4)(iv)(A)(1) ..      | 100.134(e)(1)           |
| 100.8(b)(4)(iv)(A)(2) ..      | 100.134(e)(2)           |
| 100.8(b)(4)(iv)(A)(3) ..      | 100.134(e)(3)           |
| 100.8(b)(4)(iv)(A)(4) ..      | 100.134(e)(4)           |
| 100.8(b)(4)(iv)(A)(5) ..      | 100.134(e)(5)           |
| 100.8(b)(4)(iv)(A)(6) ..      | 100.134(e)(6)           |
| 100.8(b)(4)(iv)(B) .....      | 100.134(f)              |
| 100.8(b)(4)(iv)(B)(1) ..      | 100.134(f)(1)           |
| 100.8(b)(4)(iv)(B)(2) ..      | 100.134(f)(2)           |
| 100.8(b)(4)(iv)(B)(3) ..      | 100.134(f)(3)           |
| 100.8(b)(4)(iv)(C) .....      | 100.134(g)              |
| 100.8(b)(4)(iv)(D) .....      | 100.134(h)              |
| 100.8(b)(4)(iv)(E) .....      | 100.134(i)              |

100.7 AND 100.8 DISTRIBUTION TABLE—Continued

| Old section                | New section               |
|----------------------------|---------------------------|
| 100.8(b)(4)(iv)(F) .....   | 100.134(j)                |
| 100.8(b)(4)(v) .....       | 100.134(k)                |
| 100.8(b)(4)(vi) .....      | 100.134(l)                |
| 100.8(b)(4)(vii) .....     | 100.134(m)                |
| 100.8(b)(5) .....          | 100.135                   |
| 100.8(b)(6) .....          | 100.136                   |
| 100.8(b)(7) .....          | 100.137                   |
| 100.8(b)(8) .....          | 100.138                   |
| 100.8(b)(9) .....          | 100.139                   |
| 100.8(b)(10) .....         | 100.140                   |
| 100.8(b)(11) .....         | 100.141                   |
| 100.8(b)(12) .....         | 100.142(a) through (d)    |
| 100.8(b)(12)(i) .....      | 100.142(e)                |
| 100.8(b)(12)(i)(A)(1) ..   | 100.142(e)(1)(i)          |
| 100.8(b)(12)(i)(A)(2) ..   | 100.142(e)(1)(ii)         |
| 100.8(b)(12)(i)(B) .....   | 100.142(e)(2)             |
| 100.8(b)(12)(i)(B)(1) ..   | 100.142(e)(2)(i)          |
| 100.8(b)(12)(i)(B)(2) ..   | 100.142(e)(2)(ii)         |
| 100.8(b)(12)(i)(B)(3) ..   | 100.142(e)(2)(iii)        |
| 100.8(b)(12)(i)(B)(4) ..   | 100.142(e)(2)(iv)         |
| 100.8(b)(12)(i)(B)(5) ..   | 100.142(e)(2)(v)          |
| 100.8(b)(12)(ii) .....     | 100.142(e)(3)             |
| 100.8(b)(13) .....         | 100.144                   |
| 100.8(b)(14) .....         | 100.145                   |
| 100.8(b)(15) .....         | 100.146                   |
| 100.8(b)(16) .....         | 100.147                   |
| 100.8(b)(16)(i) .....      | 100.147(a)                |
| 100.8(b)(16)(ii) .....     | 100.147(b)                |
| 100.8(b)(16)(iii) .....    | 100.147(c)                |
| 100.8(b)(16)(iv) .....     | 100.147(d)                |
| 100.8(b)(16)(v) .....      | 100.147(e)                |
| 100.8(b)(16)(vi) .....     | 100.147(f)                |
| 100.8(b)(16)(vii) .....    | 100.147(g)                |
| 100.8(b)(17) .....         | 100.148                   |
| 100.8(b)(18) .....         | 100.149                   |
| 100.8(b)(18)(i) .....      | 100.149(a)                |
| 100.8(b)(18)(ii) .....     | 100.149(b)                |
| 100.8(b)(18)(iii) .....    | 100.149(c)                |
| 100.8(b)(18)(iv) .....     | 100.149(d)                |
| 100.8(b)(18)(v) .....      | 100.149(e)                |
| 100.8(b)(18)(vi) .....     | 100.149(f)                |
| 100.8(b)(18)(vii) .....    | 100.149(g)                |
| 100.8(b)(19) .....         | 100.150                   |
| 100.8(b)(20) .....         | 100.151                   |
| 100.8(b)(21)(i) .....      | 100.152(a)                |
| 100.8(b)(21)(ii) .....     | 100.152(b)                |
| 100.8(b)(21)(iii) .....    | 100.152(c)                |
| 100.8(b)(21)(iii)(A) ..... | 100.152(c)(1)             |
| 100.8(b)(21)(iii)(B) ..... | 100.152(c)(2)             |
| 100.8(b)(22) .....         | 100.153                   |
| 100.8(b)(23) .....         | 100.154                   |
| 100.8(b)(24) .....         | 100.143                   |
| 100.8(c) .....             | 100.110(b) and 100.130(b) |

**Certification of No Effect Pursuant to 5 U.S.C. 605(b) (Regulatory Flexibility Act)**

The attached final rules do not have a significant economic impact on a substantial number of small entities. This certification is based on that fact that the final rules' only substantive change, eliminating the office building or facility exceptions to the definitions of "contribution" and "expenditure" for national party committees, affects only national party committees. The national

party committees of the two major political parties are not small entities under 5 U.S.C. 601. The other provisions in these final rules have already been certified as not having any significant economic impact on a substantial number of small entities.

**List of Subjects in 11 CFR Part 100**

Elections.

For the reasons set out in the Explanation and Justification, the Commission amends Chapter I of title II of the *Code of Federal Regulations* as follows:

**PART 100—SCOPE AND DEFINITIONS (2 U.S.C. 431)**

1. The authority citation for part 100 continues to read as follows:

**Authority:** 2 U.S.C. 431, 434(a)(11), 438(a)(8).

2. Section 100.7 is removed and reserved.

**§ 100.7 [Removed and reserved].**

3. Section 100.8 is removed and reserved.

**§ 100.8 [Removed and reserved].**

4. Part 100 is amended by adding new subparts B, C, D, and E to read as follows:

**Subpart B—Definition of Contribution (2 U.S.C. 431(8))**

Sec.

- 100.51 Scope.
- 100.52 Gift, subscription, loan, advance or deposit of money.
- 100.53 Attendance at a fundraiser or political event.
- 100.54 Compensation for personal services.
- 100.55 Extension of credit.
- 100.56 Office building or facility for national party committees.

**Subpart C—Exceptions to Contributions**

- 100.71 Scope.
- 100.72 Testing the waters.
- 100.73 News story, commentary, or editorial by the media.
- 100.74 Uncompensated services by volunteers.
- 100.75 Use of a volunteer's real or personal property.
- 100.76 Use of church or community room.
- 100.77 Invitations, food, and beverages.
- 100.78 Sale of food or beverages by vendor.
- 100.79 Unreimbursed payment for transportation and subsistence expenses.
- 100.80 Slate cards and sample ballots.
- 100.81 Payment by corporations and labor organizations.
- 100.82 Bank loans.
- 100.83 Brokerage loans and lines of credit to candidates.
- 100.84 Office building for State, local, or district party committees or organizations.
- 100.85 Legal or accounting services to political party committees.

acceptable and unacceptable purpose descriptions to be reported by authorized committees. Paragraph (B) requires authorized committees, when itemizing certain disbursements for which reimbursements are required, to provide a brief explanation of the activity for which reimbursement is required. These provisions have been in Title 11 of the **Code of Federal Regulations** since 1980 and 1995, respectively, and were not affected by the recent statutory changes to the election cycle reporting requirements.

#### Need for Correction

As published, the final rules inadvertently omit two paragraphs describing information to be reported by authorized committees of Federal candidates.

All committees must report the purpose of itemized disbursements (i.e., those disbursements aggregating in excess of \$200). Omitted paragraph (A) contains examples of suitably specific purpose descriptions as well as examples of those descriptions that are unacceptably vague. This paragraph is inconsistent with the reporting of rules for unauthorized committees (committees other than candidate committees) in 11 CFR 104.3(b)(3).

Omitted paragraph (B) is used in administering the "personal use" rules in 11 CFR 113.1. Federal candidates are barred from using campaign funds for personal benefit. Paragraph (B) requires authorized committees of Federal candidates itemizing disbursements for which partial or total reimbursement is required under 11 CFR 113.1(g)(1)(iii)(C) or (D) to provide a brief explanation of the activity for which the reimbursement is made.

Section 801 of Title 5 of the United States Code requires Federal agencies to submit regulations to Congress. These regulations were submitted to the Speaker of the House of Representatives and the President of the Senate on November 26, 2001.

#### Certification of No Effect Pursuant to 5 U.S.C. § 605(b) [Regulatory Flexibility Act]

This correction will not have significant economic impact on a substantial number of small entities. The basis of this certification is that this correction only requires political committees to once again add information to the reports they are required to file. These regulations were in 11 CFR since 1980 and 1995, respectively, before being inadvertently omitted in 2000.

#### List of Subjects in 11 CFR Part 104

Campaign funds, Political committees and parties, Reporting and recordkeeping requirements.

Accordingly, 11 CFR part 104 is corrected by making the following correcting amendment:

#### PART 104—REPORTS BY POLITICAL COMMITTEES

1. The authority citation for part 104 continues to read as follows:

**Authority:** 2 U.S.C. 431(1), 431(8), 431(9), 432(i), 434, 438(a)(8), 438(b), 439a.

#### § 104.3 Contents of reports (2 U.S.C. 434(b), 439a).

\* \* \* \* \*

2. In § 104.3 add the following paragraphs (b)(4)(i)(A) and (B):

(b) \* \* \*

(4) \* \* \*

(i) \* \* \*

(A) As used in this paragraph, *purpose* means a brief statement or description of why the disbursement was made. Examples of statements or descriptions which meet the requirements of this paragraph include the following: dinner expenses, media, salary, polling, travel, party fees, phone banks, travel expenses, travel expense reimbursement, and catering costs. However, statements or descriptions such as *advance*, *election day expenses*, *other expenses*, *expenses*, *expense reimbursement*, *miscellaneous*, *outside services*, *get-out-the-vote* and *voter registration* would not meet the requirements of this paragraph for reporting the purpose of an expenditure.

(B) In addition to reporting the purpose described in paragraph (b)(4)(i)(A) of this section, whenever an authorized committee itemizes a disbursement that is partially or entirely a personal use for which reimbursement is required under 11 CFR 113.1(g)(1)(ii)(C) or (D), it shall provide a brief explanation of the activity for which reimbursement is required.

\* \* \* \* \*

Dated: November 26, 2001.

**Danny L. McDonald,**  
Chairman, Federal Election Commission.  
[FR Doc. 01-29679 Filed 11-29-01; 8:45 am]  
**BILLING CODE 6715-01-P**

#### FEDERAL ELECTION COMMISSION

#### 11 CFR Part 111

#### [Notice 2001-18]

#### Extension to Administrative Fines

**AGENCY:** Federal Election Commission.

**ACTION:** Final rule; revision of the sunset date.

**SUMMARY:** The Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the expiration date in which the Federal Election Commission (hereinafter "the Commission") may assess civil money penalties for violations of the reporting requirements of section 434(a) of the Federal Election Campaign Act (hereinafter "the Act" or "FECA").

**DATES:** Effective on December 31, 2001.

**FOR FURTHER INFORMATION CONTACT:** Ms. Rosemary C. Smith, Assistant General Counsel, or Ms. Mai T. Dinh, Attorney, 999 E Street, NW., Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

#### SUPPLEMENTARY INFORMATION:

#### Explanation and Justification

Section 640 of the Treasury and General Government Appropriations Act, 2000, Pub. L. No. 106-58, 106th Cong., 113 Stat. 430, 476-77 (1999), amended § 309(a)(4) of the FECA, 2 U.S.C. 437g(a)(4), to provide for a modified enforcement process for violations of reporting requirements. Under § 437g(a)(4)(C) of the FECA, the Commission may assess a civil money penalty for violations of the reporting requirements of 2 U.S.C. 434(a). This authority, however, was to sunset on December 31, 2001. Pub. L. No. 106-58, 106th Cong., § 640(c). Recently, § 642 of the Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the sunset date to include all reports that cover activity between January 1, 2000, to December 31, 2003.

The Commission published final rules on May 19, 2000, to implement the amendment contained in the Treasury and General Government Appropriations Act, 2000. Section 111.30 of the regulations reflects the sunset provision of Pub. L. No. 106-58, 106th Cong., § 640(c). Therefore, the Commission is issuing this final rule to amend section 111.30 to extend the application of the administrative fine regulations, 11 CFR part 111, subpart B, to include all violations relating to reports that cover the period between January 1, 2000, to December 31, 2003.

The Commission is promulgating this final rule without notice or opportunity for comment because it falls under the "good cause" exemption of the Administrative Procedures Act, 5 U.S.C. 553(b)(B). The exemption allows

**FEDERAL ELECTION COMMISSION****11 CFR Parts 100 and 114****[Notice 2002–20]****Electioneering Communications****AGENCY:** Federal Election Commission.**ACTION:** Final rules and transmittal of regulations to Congress.

**SUMMARY:** The Federal Election Commission promulgates new rules regarding electioneering communications, which are certain television and radio communications that refer to a clearly identified Federal candidate and that are publicly distributed to the relevant electorate within 60 days prior to a general election or within 30 days prior to a primary election for Federal office. The final rules implement a portion of the Bipartisan Campaign Reform Act of 2002 (“BCRA”) that adds to the Federal Election Campaign Act (“FECA”) new provisions regarding electioneering communications. BCRA defines “electioneering communications,” exempts certain communications from the definition, provides limited authorization to the Commission to promulgate additional exemptions, and requires public disclosure of specified information regarding who made the electioneering communication and its cost. Additionally, BCRA prohibits corporations and labor organizations from making electioneering communications, and the final rules also implement this prohibition. Further information is provided in the Supplementary Information that follows.

**EFFECTIVE DATE:** November 22, 2002.

**FOR FURTHER INFORMATION CONTACT:** Ms. Mai T. Dinh, Acting Assistant General Counsel, Mr. J. Duane Pugh Jr., Acting Special Assistant General Counsel, or Mr. Anthony T. Buckley, Attorney, 999 E Street, NW., Washington, DC 20463, (202) 694–1650 or (800) 424–9530.

**SUPPLEMENTARY INFORMATION:** The Bipartisan Campaign Reform Act of 2002, Pub. L. 107–155, 116 Stat. 81 (Mar. 27, 2002), contains extensive and detailed amendments to the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. 431 *et seq.* This is one of a series of rulemakings the Commission is undertaking to implement the provisions of BCRA.

Section 402(c)(1) of BCRA establishes a general deadline of 270 days for the Commission to promulgate regulations to carry out BCRA. The President of the United States signed BCRA into law on March 27, 2002, so the 270-day deadline

is December 22, 2002. The final rules will take effect on November 6, 2002, which is the day following the November 5, 2002 general election, except the final rules do not apply to any runoff elections required by the results of the November 2002 general election. 2 U.S.C. 431 note.

Because of the brief time period before the deadline for promulgating these rules, the Commission received and considered public comments expeditiously. The Notice of Proposed Rulemaking (“NPRM”) on which these final rules are based was made publicly available on the FEC’s Website on August 2, 2002 and was published in the **Federal Register** on August 7, 2002. 67 FR 51,131 (Aug. 7, 2002). The written comments were due by August 21, 2002 for those who wished to testify or by August 29, 2002 for all other commenters. The names of commenters and their comments are available at <http://www.fec.gov/register.htm> under “Electioneering Communications.” The Commission held a public hearing on the NPRM on August 28 and 29, 2002, at which it heard testimony from 12 witnesses. Transcripts of the hearing are available at <http://www.fec.gov/register.htm> under “Electioneering Communications.”<sup>1</sup>

Under the Administrative Procedures Act, 5 U.S.C. 553(d), and the Congressional Review of Agency Rulemaking Act, 5 U.S.C. 801(a)(1), agencies must submit final rules to the Speaker of the House of Representatives and the President of the Senate and publish them in the **Federal Register** at least 30 calendar days before they take effect. The final rules on electioneering communications were transmitted to Congress on October 11, 2002.

**Explanation and Justification***Introduction*

BCRA at 2 U.S.C. 434(f)(3) defines a new term, “electioneering communications.” This term includes broadcast, cable, or satellite communications: (1) That refer to a clearly identified Federal candidate; (2) that are transmitted within certain time periods before a primary or general election; and (3) that are targeted to the relevant electorate, which is the relevant Congressional district or State that candidates for the U.S. House of Representatives or the U.S. Senate seek to represent. Those paying for electioneering communications cannot use funds from national banks,

<sup>1</sup> Oral testimony at the Commission’s public hearing and written comments are both considered “comments” in this document.

corporations, foreign nationals,<sup>2</sup> or labor organizations to pay for electioneering communications. See 2 U.S.C. 441b(b)(2) and 441e(a)(2). They must also meet certain disclosure requirements. See 2 U.S.C. 434(f). BCRA’s sponsors have explained in the legislative debates and in their comments on this rulemaking that these new “electioneering communications” provisions, set out at 2 U.S.C. 434(f) and 441b(b)(2), are designed to ensure that such communications are paid for with funds subject to the prohibitions and limitations of FECA. According to the sponsors, “putative ‘issue ads’” have been used to circumvent FECA’s prohibition on the use of labor organization and corporate treasury funds in connection with Federal elections. See 148 Cong. Rec. S2141 (daily ed. Mar. 20, 2002) (statement of Sen. McCain). In the sponsors’ view, this is accomplished by creating and airing advertisements that avoid the specific language that the Supreme Court said expressly advocates the election or defeat of a candidate. See 148 Cong. Rec. at S2140–2141; see also *Buckley v. Valeo*, 424 U.S. 1, 44 n.52 (1976); 11 CFR 100.22.<sup>3</sup>

BCRA’s principal sponsors cited various studies and investigations that they say show that the express advocacy test does not distinguish genuine issue ads from campaign ads. 148 Cong. Rec. at S2140–2141 (statement of Sen. McCain). For example, Senator McCain cited a study by the Brennan Center for Justice, *Buying Time 2000*, that found that “97 percent of the electioneering ads reviewed” did not use the words and phrases cited by the *Buckley* Court, and that more than 99 percent of the “group-sponsored soft money ads” studied were in fact campaign ads. 148 Cong. Rec. at S2141. See also 148 Cong. Rec. S2137 (statement of Sen. Snowe referencing Annenberg Public Policy

<sup>2</sup> The ban on foreign national funds is being addressed in a separate rulemaking. See NPRM on Contribution Limitations and Prohibitions, 67 FR 54,366, 54,372–75 and 54,379 (Aug. 22, 2002).

<sup>3</sup> “Express advocacy” was first defined by the Supreme Court as “communications containing express words of advocacy of election or defeat, such as ‘vote for,’ ‘elect,’ ‘support,’ ‘cast your ballot for,’ ‘Smith for Congress,’ ‘vote against,’ ‘defeat,’ ‘reject.’” *Buckley*, 424 U.S. at 44 n.52. The Supreme Court created the express advocacy test to save the statutory phrase “for the purpose of \* \* \* influencing”—the “critical phrase” within the definitions of “expenditure” and “contribution” at 2 U.S.C. 431(8) and (9)—from unconstitutional vagueness and overbreadth while furthering the goal of Congress “to insure both the reality and the appearance of the purity and openness of the federal election process.” *Buckley*, 424 U.S. at 77–78. The Supreme Court’s express advocacy test marks the dividing line between candidate advocacy regulated by the FECA and issue advocacy. *Id.* at 42, 44, 80.

Center, *Issue Advertising in the 1999–2000 Election Cycle* (2001)). Senators Snowe and Jeffords stated that, because the electioneering communications provisions focus on the key elements of when, how, and to whom a communication is made, rather than relying on the express advocacy test or the intent of the advertiser, they are a clearer, more accurate test of whether an advertisement is campaign-related. *Id.* at S2117–18 (statement of Sen. Jeffords); S2135–37 (statement of Sen. Snowe).

The final rules add a new definition of “electioneering communication,” located at 11 CFR 100.29. The new definition is added to current 11 CFR part 100 because it has general applicability to Title 11 of the Code of Federal Regulations. The final rules also amend 11 CFR 114.2 and 114.10 and create new § 114.14 to address the prohibition on corporations and labor organizations directly or indirectly disbursing funds for electioneering communications. In conjunction with these final rules, the Commission is also issuing Interim Final Rules regarding a Federal Communications Commission database that can be used to determine whether a communication is an electioneering communication.

Please note that the reporting requirements for electioneering communications are not part of the final rules. The Commission intends to incorporate the revised proposed rules into a Consolidated Reporting NPRM as discussed below in connection with 11 CFR part 104. However, it is important to note that the Commission agrees with a commenter who observed that BCRA imposes reporting obligations and fund source limitations and prohibitions on the person making the electioneering communication, not on the broadcaster or satellite or cable system operator who publicly distributes it.

### **I. Definition of “Electioneering Communication”**

#### *A. 11 CFR 100.29(a) Operative Definition of “Electioneering Communication”*

The definition of “electioneering communication” at 11 CFR 100.29(a) largely tracks the definition in BCRA at 2 U.S.C. 434(f)(3). Paragraph (a) defines “electioneering communication” as any broadcast, cable, or satellite communication that: (1) Refers to a clearly identified Federal candidate; (2) is publicly distributed within certain time periods before an election; and (3) is targeted to the relevant electorate, that is, the relevant Congressional district or State that candidates for the U.S. House

of Representatives or the U.S. Senate seek to represent.

Paragraph (a)(2) refers to the “public distribution” of a communication, while BCRA refers to the “making” of a communication. Making a communication could be interpreted to mean any of a number of actions in the process of issuing a communication, from the formulation of a concept for the communication through the public distribution of a communication. The regulation uses a different term than the statute to clarify that the operative event is the dissemination of the communication, rather than the disbursement of funds related to creating a communication. All of the commenters who addressed this provision, including the principal Congressional sponsors of BCRA, agreed with this clarification.

#### *B. Alternative Definition of “Electioneering Communication”*

BCRA at 2 U.S.C. 434(f)(3)(A)(ii) provides an alternative definition of “electioneering communication” that would take effect in the event the definition in 2 U.S.C. 434(f)(3)(A)(i) is held to be constitutionally insufficient “by final judicial decision.” The alternative definition of “electioneering communication” is “any broadcast, cable, or satellite communication which promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate) and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate.” 2 U.S.C. 434(f)(3)(A)(ii). The Commission did not propose regulations to implement this alternative statutory definition in the NPRM. 67 FR 51,132. The Commission, however, did seek comment as to whether it should promulgate an alternative definition as part of these final rules. Specifically, the Commission inquired whether such a regulation should simply reiterate the wording of the statute, or whether it should provide additional guidance as to what types of communications promote, support, attack, or oppose a candidate and suggest no plausible meaning other than an exhortation to vote for or against a candidate.

Most of the commenters who addressed BCRA’s alternative definition of “electioneering communication” agreed with the Commission’s proposed approach to promulgate regulations to implement this alternative definition only when and if it becomes necessary to do so. In the absence of a judicial

decision invalidating the existing definition, regulations related to the alternative definition would be potentially confusing and premature or even entirely unnecessary, according to these commenters. Additionally, some argued that any court decision regarding 2 U.S.C. 434(f)(3)(A) may provide guidance for the appropriate standard that the Commission should use in promulgating regulations under the alternative definition. Two commenters advocated promulgating regulations now so that the pending litigation could be informed by the manner in which the Commission would enforce the alternative definition. They also argued that the period between a final decision in that litigation and the 2004 elections is likely to be too short to permit the Commission to complete a rulemaking in time to provide guidance, if the operative definition is invalidated. They further argued that the alternative definition’s application to the entire election cycle, and not just the 30- or 60-day periods to which the current definition is limited, exacerbates the timing issue.

Because promulgating regulations that implement the alternative definition is premature and may cause confusion, the Commission does not intend to do so unless and until a final judicial decision makes it necessary to do so by holding that 2 U.S.C. 434(f)(3)(A)(i) is constitutionally insufficient. The Commission notes that if such a decision issues, the statutory alternative definition would become effective, and the decision may supplement the statute’s language to provide guidance until the Commission issues implementing regulations.

#### *C. Terms Used in “Electioneering Communication” Definition*

Paragraph (b) of 11 CFR 100.29 defines some of the terms used in paragraph (a)’s definition of “electioneering communication.” It has been reorganized from the NPRM so that the terms are defined in the order in which they appear in paragraph (a).

##### **1. 11 CFR 100.29(b)(1) Definition of “Broadcast, Cable, or Satellite Communication”**

BCRA’s legislative history establishes that electioneering communications are limited to television and radio communications, and not other media. The electioneering communication provisions originated as an amendment to the predecessor of BCRA introduced by Senators Snowe and Jeffords in 1998. That amendment, and all of the subsequent versions of that amendment prior to the 107th Congress, defined an

electioneering communication to include "any broadcast from a television or radio broadcast station." See 144 Cong. Rec. S938 (daily ed. Feb. 24, 1998); see also S.26 (106th Congress), 145 Cong. Rec. S425 (daily ed. Jan. 19, 1999). Likewise, the floor debates on the electioneering communications provision during the 107th Congress frequently referred to television and radio ads. See, e.g., 148 Cong. Rec. S2117 (daily ed. Mar. 20, 2002) (remarks of Sen. Jeffords). During a final explanation of these provisions, Senator Snowe again stated that they would apply to "so-called issue ads run on television and radio only." 148 Cong. Rec. S2135 (daily ed. Mar. 20, 2002). During an early debate on the amendment, Senator Snowe was asked whether the definition of electioneering communication would "apply to the Internet." She replied, "No. Television and radio." See 144 Cong. Rec. S973 and S974 (daily ed. Feb. 25, 1998). Consistent with Congressional intent, new 11 CFR 100.29(b)(1) states that a broadcast, cable, or satellite communication is a communication that is publicly distributed by a television station, radio station, cable television system, or satellite system. This definition limits the scope of electioneering communications to television and radio. (The exclusion of the Internet and other forms of communication is further discussed below in connection with 11 CFR 100.29(c)(1).)

Proposed 11 CFR 100.29(b)(2) would have exempted Low Power FM Radio, Low Power Television, and citizens band radio from inclusion in broadcast, cable, or satellite communication. NPRM, 67 FR 51,133. The commenters were divided on whether these communications media should be included or excluded. While many would probably agree with the commenter who stated that BCRA was primarily aimed at "traditional" radio and television, most who specifically mentioned Low Power FM Radio, Low Power Television, and citizens band radio believed that BCRA provided no authority to exclude these forms of radio and television. Among those opposed to the exemption were the six principal Congressional sponsors of BCRA. Considering BCRA's unqualified language, particularly in light of the comments, the Commission has decided not to exclude these forms of radio and television from the definition of "electioneering communications" in the final rule. In doing so, the Commission notes that any communication over these media would have to be received

by 50,000 persons or more in the relevant Congressional district or State before the communication could be considered an electioneering communication. Additionally, the costs of the communication would have to exceed \$10,000 before disclosure requirements applied. Finally, to the extent a fee for the public distribution of a communication is not charged, the communication is excluded from the definition of "electioneering communication" pursuant to 11 CFR 100.29(b)(3)(i).

#### 2. 11 CFR 100.29(b)(2) Definition of "Refers to a Clearly Identified Candidate"

Section 100.29(b)(2) defines the phrase "refers to a clearly identified candidate." This phrase is already defined in the Commission's rules at 11 CFR 100.17, which states that "clearly identified" means the candidate's name, nickname, photograph, or drawing appears, or the identity of the candidate is otherwise apparent through an unambiguous reference such as "the President," "your Congressman," or "the incumbent," or through an unambiguous reference to his or her status as a candidate such as "the Democratic presidential nominee" or "the Republican candidate for Senate in the State of Georgia." The final rule tracks the language of the current rule in 11 CFR 100.17. This approach appears to be consistent with legislative intent. See 148 Cong. Rec. S2144 (daily ed. Mar. 20, 2002) (statement of Sen. Feingold indicating that a communication "refers to a clearly identified candidate" if it "mentions, identifies, cites, or directs the public to the candidate's name, photograph, drawing or otherwise makes an 'unambiguous reference' to the candidate's identity"). Please note that the definition would not be based on the intent or purpose of the person making the communication. Of the six commenters who addressed this issue, five supported the Commission's proposal, while the sixth found it vague and too broad. Given the well-established body of law construing this term, the Commission does not agree with this latter comment.

#### 3. 11 CFR 100.29(b)(3) Definition of "Publicly Distributed"

##### a. 11 CFR 100.29(b)(3)(i) General definition

Section 100.29(b)(3)(i) defines "publicly distributed" as "aired, broadcast, cablecast or otherwise disseminated for a fee through the facilities of a television station, radio

station, cable television system, or satellite system." Because BCRA applies expressly to "any broadcast, cable, or satellite communication," the Commission intends this definition to include any technological methods of disseminating a communication through the facilities listed above. One commenter cautioned that some telephone calls and e-mail messages can be transmitted, in part, through the facilities of a television station, radio station, cable television system, or satellite system and might therefore meet the definition of "publicly distributed" as proposed in the NPRM. 67 FR 51,145. However, a communication must be available to 50,000 or more persons in a particular Congressional district or State in order to be an electioneering communication, and it is highly unlikely the communications the commenter addressed would be so widely disseminated.

##### b. 11 CFR 100.29(b)(3)(i) "For a fee"

The Commission specifically asked in the NPRM if the definition of "electioneering communication" should be limited to paid advertisements. See 67 FR 51,136. Much of the legislative history and virtually all of the studies cited in legislative history and presented to the Commission in the course of this rulemaking focused on paid advertisements in considering what should be included within electioneering communications. See, e.g., 148 Cong. Rec. S2112, S2114-16, S2117, S2124, S2135, S2140-41, S2154, and S2155 (daily ed. Mar. 20, 2002) (remarks of Sens. Schumer, Levin, Cantwell, Jeffords, McConnell, Snowe, McCain, Feinstein, and Dodd, respectively); Campaign Finance Institute Task Force on Disclosure, *Issue Ad Disclosure: Recommendations for a New Approach* (2001); Annenberg Public Policy Center, *Issue Advertising in the 1999-2000 Election Cycle* (2001); Craig B. Holman and Luke P. McLoughlin, Brennan Center for Justice, *Buying Time 2000: Television Advertising in the 2000 Federal Elections* (2001), Executive Summary reprinted in 148 Cong. Rec. S2118 (daily ed. Mar. 20, 2002); and Jonathan S. Krasno and Daniel E. Seltz, Brennan Center for Justice, *Buying Time: Television Advertising in the 1998 Congressional Elections* (2000).

Many commenters who addressed this specific issue agreed that the legislative history abundantly documents that paid advertisements were the focus of the electioneering communication provisions. One commenter suggested that the electioneering communication

regulations should cover program-length, paid advertisements, known as "infomercials," as well as the shorter paid advertisements, known as commercials. Several other commenters discussed entertainment programming, educational programming, or documentaries and argued that BCRA was not intended to reach these communications.

One commenter argued, however, that limiting electioneering communications to paid programming would permit corporations that operate broadcast, cable, or satellite systems to distribute electioneering communications but for this limitation, and that such a result is plainly inconsistent with BCRA. This commenter also cited the \$10,000 threshold for reporting electioneering communications, which provides partial relief to those who distribute advertisements or programming without paying for distribution costs.

Based on the legislative history of BCRA, the Commission has determined that electioneering communications should be limited to paid programming. The Commission has added an additional element to the definition of "publicly distributed" in the final rules that was not in the definition proposed in the NPRM. The final rule at 11 CFR 100.29(b)(3)(i) includes the qualifier "for a fee" to reflect the Commission's determination that electioneering communications should be limited to paid programming. By including this qualifier, the Commission limits the definition of "electioneering communications" to those communications for which the operator of a broadcast station, cable system, or satellite system seeks or receives payment for the public distribution of the communication.<sup>4</sup> The Commission believes the addition of "for a fee" to the definition of "publicly distributed" implements the well-documented Congressional intent regarding which communications are included within the definition of "electioneering communications." As suggested by the question in the NPRM, the Commission believes this is best accomplished by incorporating the criterion in the definition, rather than creating an exemption from the definition.

A communication's production costs will not be considered fees for this purpose; the fees included in the definition are limited to charges for distribution. Therefore, under this

<sup>4</sup> Thus, the maker of an electioneering communication cannot avoid the definition of "electioneering communications" by failing to pay the distributor's fee.

criterion both program-length paid shows, including infomercials, and commercials are subject to the electioneering communication requirements.

The Commission has carefully considered the concern that corporate-owned broadcast, cable, or satellite systems could evade the prohibition on corporate contributions by providing free airtime for communications. The Commission notes that a broadcaster, or a cable or satellite system operator's judgment to provide free distribution services shares some characteristics of the broadcaster or system operator's editorial judgments involved in the use of the news story exemption, which is recognized in FECA, BCRA, and Commission regulations. 2 U.S.C. 431(9)(B); 2 U.S.C. 434(f)(3)(B)(i); and 11 CFR 100.132. Thus, a broadcaster's decision to provide free airtime for communications will not create liability for the person that produced the communication.

c. 11 CFR 100.29(b)(3)(ii) Additional Definition for Presidential Primaries and Conventions

BCRA defines electioneering communication to include communications that "in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate." 2 U.S.C. 434(f)(3)(A)(i)(III). BCRA then defines "targeting to the relevant electorate," referring to Congressional candidates only. 2 U.S.C. 434(f)(3)(C). Thus, as discussed in the NPRM, a plausible reading of BCRA is that a communication that refers to a presidential or vice-presidential candidate does not need to be targeted to the relevant electorate to qualify as an electioneering communication. 67 FR 51,134. Under this interpretation, a communication that refers to a clearly identified presidential or vice-presidential candidate and that meets the timing and medium requirements for electioneering communications would be considered an electioneering communication, without considering the number or geographic locations of persons receiving the communication. For example, a television ad that clearly identifies a presidential primary candidate that is run anywhere in the United States could be considered an electioneering communication if the ad aired within 30 days of a primary election taking place anywhere in the United States, even if, in the States in which the ad actually aired, the primary election were months away or had already taken place.

The Commission expressed concerns regarding this interpretation in the NPRM. Such a sweeping impact on communications would be insufficiently linked to pending primary elections, may not have been contemplated by Congress, and could raise constitutional concerns.<sup>5</sup> So interpreted, the restrictions on electioneering communications would take effect even if an ad were aired only in a State that has already held its primary, and thus would restrict ads more than 60 days before a general election, arguably in contravention of BCRA.

The Commission invited comment on three different interpretations of BCRA's requirements for an electioneering communication that refers to presidential or vice-presidential primary candidates. The Commission first proposed two alternative regulatory provisions addressing this issue when it defines how a BCRA provision would apply with respect to presidential candidates. 67 FR 51,134. One alternative was linked to BCRA's definition of "electioneering communications" as communications "made within \* \* \* 30 days before a primary \* \* \* election." 2 U.S.C. 434(f)(3)(A)(i)(II)(bb). In contrast to 2 U.S.C. 434(f)(3)(A)(i)(III), which is expressly limited to candidates other than President or Vice President, section 434(f)(3)(A)(i)(I) refers to "candidate[s] for Federal office" without qualification. Thus, candidates for President are included among those contemplated in section 434(f)(3)(A)(i)(I) and (II). Consequently, the express language of the statute permits the Commission to define when a communication that refers to a clearly identified candidate for President is made within 30 days before a primary or national nominating convention.

The Commission proposed that a communication that refers to a clearly identified candidate for President would be "publicly distributed within 30 days before a primary election, preference election, or convention or caucus of a political party," only where and when the communication can be received by 50,000 or more persons within the State holding such election, convention or caucus. (This portion of the "electioneering communication" definition was included as Alternative 1-B in proposed 11 CFR 100.29(b)(4).)

<sup>5</sup> Considering the 2000 calendar, such an interpretation would have resulted in nationwide application of the electioneering communication rules to communications mentioning a presidential or vice-presidential candidate for more than 270 days between late-December of 1999 to the election in November 2000.

As an alternative means of addressing the concerns about the potential sweep of the electioneering communication provisions to presidential primary candidates, the Commission proposed that a communication would be considered an electioneering communication only if it can be received by 50,000 or more persons in either a State in which a presidential primary will occur within 30 days, or nationwide if within 30 days of the national nominating convention of that candidate's party. (This provision appeared in the proposed rules as Alternative 1-A in 11 CFR 100.29(a)(1)(iv).)

Separately, the Commission sought comments on whether BCRA's electioneering communications restrictions as applied to communications depicting presidential and vice-presidential candidates could not be triggered by a primary election, but would be limited to the 30 days before a party's national nominating convention and the 60 days before the general election. 67 FR 51,135. This interpretation was based on the phrasing of BCRA's limitation of electioneering communications to those made "within 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate," 2 U.S.C. 434(f)(3)(A)(i)(II)(bb) (emphasis added). This interpretation viewed the restrictive adjective clause "that has authority to nominate a candidate" as modifying all the preceding objects: Both "a convention or caucus of a political party" and "a primary or preference election." Because the presidential candidates of the two major parties can only be nominated at their party's national nominating convention, no State primary or preference election would satisfy this aspect of the definition. Thus, the only communications that refer to major party presidential candidates that could be considered electioneering communications are those within 30 days of the convention or 60 days of the general election.

Many commenters addressed this issue. Three commenters believe that any effort by the Commission to make the 50,000 person standard applicable to communications that refer to presidential candidates is inconsistent with the plain language of the statute. Twelve commenters rejected this view, supporting either Alternative 1-A or 1-B. Many of the comments discussed the effect of the alternatives on national

addition to the general definition of "electioneering communications," stated that they did so because they approved of its express application to communications 30 days before the national nominating convention. They argued that the national nominating conventions are elections with a national effect, so the relevant base of viewers or listeners for a communication shortly before a convention is nationwide, like the general election. One of those who favored Alternative 1-B, the specification of how "made within 30 days before a primary election" would apply to presidential primaries, suggested that the Commission expand the alternative to cover ads 30 days prior to the conventions. Another commenter who favored Alternative 1-A also stated that Alternative 1-B would be sufficient if expanded to address explicitly national nominating conventions. Only one commenter was opposed to including national nominating conventions. That commenter argued that because only delegates can vote at national nominating conventions, it is inappropriate to require that the communication reach more than 50,000 persons nationally.

Commenters who rejected the interpretation that electioneering communications cannot be related to presidential primaries because none have "the authority to nominate a candidate" described the narrow interpretation as plainly inconsistent with BCRA.<sup>6</sup> In doing so, the comments argued that the clause "that has authority to nominate a candidate," modifies "a convention or caucus of a political party" only, so that "a primary or preference election \* \* \* for the office sought by the candidate" is not modified by the "authority" clause. The enclosure of the "authority" clause in a pair of commas supports this reading of the provision, according to these commenters. The principal Congressional sponsors of BCRA were among those who endorsed this interpretation.

The Commission declines to interpret BCRA to exempt presidential primaries from the electioneering communication provisions. The Commission also rejects the interpretation of BCRA that would lead to a nationwide application of the electioneering communication provisions with respect to presidential primaries. Instead, the Commission has determined that in defining "publicly

distributed," the regulation will further specify how a communication is publicly distributed within 30 days of a presidential primary or preference election or a national nominating convention. Given the number of states that hold presidential primaries over the course of several months using a variety of methods to select delegates to the national nominating conventions, the Commission is issuing clarifying regulations. Similarly, the multiple days over which national nominating conventions generally are conducted also call for specificity as to precisely when the 30-day period begins and ends. New § 100.29(b)(3)(ii) incorporates the language from Alternative 1-A in the NPRM and uses the device of Alternative 1-B, which was defining "publicly distributed" in these circumstances. Thus, under 11 CFR 100.29(b)(3)(ii)(A), in order to qualify as an electioneering communication, a broadcast, cable, or satellite communication that refers to a clearly identified candidate for his or her party's nomination for President or Vice President must be publicly distributed within 30 days before a primary election in such a way that the communication can be received by 50,000 or more persons within the State holding the primary election.

One commenter inquired whether the 30-day period prior to a national nominating convention begins 30 days prior to the first or last day of the convention. A plain language reading of BCRA leads to the conclusion that the period to which the electioneering communication provisions apply begins 30 days prior to the first day of a convention or caucus and continues to the end of the convention or caucus. For each day within this period, at least one day of the convention or caucus will be in the subsequent 30 days. The Commission specifies in the final rule at § 100.29(b)(3)(ii)(B) that the period begins running 30 days before the first day of the national nominating convention.

The Commission notes that a caucus or convention that selects or apportions delegates to a national nominating convention or expresses a preference for the nomination of presidential candidates would be considered a primary election pursuant to 11 CFR 100.2(c)(2), 100.2(c)(3), and 9032.7. In some States, caucuses or conventions that occur prior to the statewide caucus, convention, or primary determine the distribution of the statewide delegation to the national nominating convention among candidates for President or Vice President. In such cases, the Commission would likely consider the

<sup>6</sup> The lone commenter who supported the interpretation preferred it because of the more limited result.



caucus or convention that selects or apportions delegates to a national nominating convention to be the triggering event for purposes of the 30-day period in 11 CFR 100.29(a)(2). In light of the variations in party procedures among the States, and in order to avoid confusion over which event in a political party's nominating process in a particular State will trigger the 30-day electioneering communication period for candidates for President or Vice President who seek that political party's nomination, the Commission will publish on its Web site a list of the one event for each political party in each State that triggers the 30-day period for candidates for President or Vice President who seek that political party's nomination.

The Commission has also determined that a similar clarification for the 60 days preceding the general election is unnecessary because the date of the general election does not vary across the States. Without the ambiguity caused by the multiple dates and jurisdictions of the primary elections, BCRA's plain language clearly establishes the time period for electioneering communications related to the presidential general election. 2 U.S.C. 434(f)(3)(A)(i)(II)(aa).

#### 4. 11 CFR 100.29(b)(4) Clarifying Primary and General Elections

The Commission's current rules at 11 CFR 100.2 contain definitions of "general election," "primary election," "runoff election," "caucus or convention," and "special election" that will be applicable to 11 CFR 100.29. Under 11 CFR 100.2(f), a "special election" can be a primary, general, or runoff election. BCRA, however, groups "special election" with general and runoff elections for purposes of an electioneering communication. In the NPRM, proposed § 100.29(a)(2) would have clarified that, for purposes of section 100.29, "special elections" and "runoff elections" would be treated consistently with 11 CFR 100.2(f); that is, they could be considered primary elections, if held to nominate a candidate; and general elections, if held to elect a candidate. 67 FR 51,132.

Several commenters supported proposed § 100.29(a)(2). The principal Congressional sponsors of BCRA were among the supporters, and they also noted that Title II of BCRA will not apply to any runoff or special election resulting from the 2002 general election. See 2 U.S.C. 431 note (BCRA, § 402(a)(4), 116 Stat. at 112). In order to be consistent with section 100.2(f), the final rules incorporate the language of proposed § 100.29(a)(2). However, the

final rules place the provisions pertaining to special or runoff elections in 11 CFR 100.29(b)(4).

One commenter found the Commission's definition of these terms, both in existing regulations and in the proposed regulations, to be problematic. This commenter argued that the definition of "election" should be restricted to include only elections in which the candidate referred to is running, citing another party's primary as an example that should be excluded. The Commission agrees, and has added language to proposed § 100.29(a)(2) to clarify that a primary, preference election, convention or caucus held by a political party (including those that constitute a special election or a run-off election) triggers a 30-day period that is only applicable to candidates who seek the nomination of that political party. Thus, for example, the date on which the Libertarian Party's candidate for Senate is nominated would have no bearing on communications that refer to a clearly identified candidate who seeks the Democratic Party's nomination for the same Senate seat, unless a candidate were to seek the nomination of both parties for that Senate seat.

The same commenter also stated that no legitimate purpose is served by including elections in which a candidate is unopposed, as required by current 11 CFR 100.2(a). The final rules follow the proposed rules because nothing in BCRA or its legislative history reflects any Congressional intent to distinguish between elections in which a candidate has opposition and those in which he or she does not.

A commenter requested clarification regarding "preference election" as used in 2 U.S.C. 434(f)(3)(A)(i)(II)(bb) and 11 CFR 100.29(a)(2). Section 100.2(c)(2) defines a "preference election" to be a primary election, while, in contrast, BCRA's electioneering communication provision refers separately to primary and preference elections. However, the Commission believes no substantive difference was intended, so the proposed regulation at 11 CFR 100.29(a)(2) follows the statute.

The same commenter also raised the issue of an independent candidate's ability to choose when the primary is considered to occur pursuant to 11 CFR 100.2(a)(4). The final rule text does not specifically state the Commission's intention in this regard, as the Commission decided it was not necessary to address the issue at this time.

This commenter also expressed concern that the dates of non-major parties nominating conventions may not be widely known among members of the

public. BCRA's reference to a convention of a political party that has authority to nominate a candidate for the office sought by the candidate is not limited to major party conventions. Consequently, the Commission does not have the authority under BCRA to exclude non-major parties by regulation.

Finally, the commenter questions the application of the timing requirements for electioneering communications in States that may have precinct, county, district, or regional caucuses or conventions that select delegates to the statewide caucus or convention. As the commenter points out, the statewide caucus or convention has the authority to nominate a candidate, so the statewide caucus or convention satisfies § 100.29(a)(2). If none of the earlier caucuses or conventions has the authority to nominate a candidate, by definition, they would not mark the end of a 30-day period under § 100.29(a)(2). This same analysis also answers the commenter's concern about States that have caucuses or conventions prior to a primary election. For example, Connecticut and Utah have conventions prior to primary elections scheduled for the 2002 Congressional races. BCRA's limitation on "conventions and caucuses" to those "that [have] the authority to nominate a candidate" addresses this situation by excluding convention and caucuses that do not have that authority. As noted above in connection with 11 CFR 100.29(b)(4), a caucus or convention that selects or apportions delegates to a national nominating convention would likely mark the end of a 30-day period of electioneering communications; the Commission will provide guidance on its web site on a State-by-State, party-by-party basis.

#### 5. 11 CFR 100.29(b)(5) Definition of "Targeted to the Relevant Electorate"

BCRA defines "targeted to the relevant electorate" at 2 U.S.C. 434(f)(3)(C) as a communication that can be received by 50,000 or more persons either in the Congressional district the candidate seeks to represent, in the case of a candidate for Representative, Delegate, or Resident Commissioner to the U.S. House of Representatives; or in the State the candidate seeks to represent, in the case of a candidate for the U.S. Senate. The NPRM included proposed § 100.29(b)(3) that followed the statutory language, and that proposal is now made final at 11 CFR 100.29(b)(5). NPRM, 67 FR 51,133. The commenters who addressed this provision agreed with tracking the statutory language in the regulation and focused their comments on the

interpretative questions posed in the NPRM.<sup>7</sup>

The definition of "targeted to the relevant electorate" includes communications that can be received beyond the relevant geographical area. A communication that can be received by large numbers of persons outside the relevant district or State is nonetheless a targeted communication, as long as 50,000 persons in the relevant area can also receive it. Conversely, an electioneering communication would not include a communication that reaches fewer than 50,000 persons in the State or district where the clearly identified candidate is running, even if at the same time it also reaches 50,000 or more persons in a State or district where the clearly identified candidate is not running. The Commission noted this interpretation in the NPRM, and most of the commenters who addressed it supported the interpretation. One commenter suggested that the Commission address in the final rule what it deemed an adjoining market problem. The commenter thought an ad that is broadcast on stations intended for an audience in one State might reach more than 50,000 persons in another State, for example, because media markets may extend beyond State lines. The commenter posited the example of an ad broadcast on Massachusetts television stations that is intended to influence a Member of Congress from Massachusetts with respect to a bill that is supported by the President. Such an ad might be broadcast more than 30 days before the Massachusetts primary, so it would not be an electioneering communication, even if it clearly identified the Member who is seeking reelection. However, because several Massachusetts television stations' broadcast signals reach a large audience in New Hampshire, if the ad also clearly identifies a President seeking reelection, it would constitute an electioneering communication if it is broadcast within 30 days of the New Hampshire presidential primary election. However, BCRA is clear: If a communication can be received in a State or district by 50,000 or more persons, and if it meets the timing, content, and medium requirements related to electioneering

<sup>7</sup> One commenter claimed that BCRA's targeting definition is backward. This commenter argued that targeting should be limited to ads crafted specifically for a particular district or State. Such a focus would ensure that the ad's purpose was to influence the election in a manner objectively discernible, and it would distinguish an electioneering communication from an issue ad, which presumably would seek a broader audience. However, even this commenter recognized at the Commission's hearing that the Commission must use BCRA's targeting definition.

communications, the communication is an electioneering communication, regardless of how many potential audience members or what percentage of the total potential audience reside in another State or district. Therefore, the final rule at § 100.29(b)(5) does not reflect the commenter's suggestion.

#### *D. The Federal Communications Commission and Determining the Size of a Potential Audience*

The subsidiary definitions proposed in the NPRM included a provision at 11 CFR 100.29(b)(5) that addresses how to obtain information about a communication's potential audience. 67 FR 51,134. The proposed provision explained that the Federal Communications Commission's web site would provide information about the number of individuals in Congressional districts or States that can receive a communication publicly distributed by a television station, radio station, cable television system, or satellite system. Based on this proposal and the comments received on the issues raised by it, the Commission is promulgating an Interim Final Rule in a separate rulemaking.

#### *E. Exemptions From Definition of "Electioneering Communication" in BCRA*

BCRA generally defines "electioneering communications" at 2 U.S.C. 434(f)(3)(A) and provides three exceptions to the definition in section 434(f)(3)(B)(i) through (iii). BCRA also provides the Commission with authority to promulgate regulations that exempt additional communications from the definition of "electioneering communications." 2 U.S.C. 434(f)(3)(B)(iv). BCRA also imposes a significant limitation on this authority: the Commission may exempt only communications that do not promote, support, attack, or oppose a Federal candidate. *Id.*

In the Commission's regulations, 11 CFR 100.29(a) and (b) define "electioneering communications," and § 100.29(c) provides for exceptions to the definition. The exceptions in 11 CFR 100.29(c)(1) through (4) are based on the express language of BCRA. The Commission proposed a number of additional exemptions in the NPRM. After carefully considering the extensive written comments and testimony, which highlighted the difficulties involved in crafting permissible exemptions, the Commission has decided to promulgate two exemptions: one for State and local candidates, 11 CFR 100.29(c)(5), and another for certain nonprofit organizations operating under 26 U.S.C.

501(c)(3). The Commission has also decided not to promulgate any further exemptions.

#### *1. 11 CFR 100.29(c)(1) Communications Other Than Broadcast, Cable or Satellite*

BCRA expressly limits electioneering communications to broadcast, cable, or satellite communications. As discussed above in connection with 11 CFR 100.29(b)(1), the legislative history establishes that BCRA's focus was on radio and television ads. Based on the statutory language and the legislative history, the final rule at 11 CFR 100.29(c)(1) provides examples of communications that are *not* included in the definition of electioneering communication. The list of exemptions includes communications appearing in print media, including a newspaper or magazine, handbills, brochures, bumper stickers, yard signs, posters, billboards, and other written materials, including mailings; communications over the Internet, including electronic mail; and telephone communications.

Most of the comments received on proposed 11 CFR 100.29(c)(1) discussed the exemption for the Internet. Those who did comment on the remainder of the paragraph, including the principal Congressional sponsors of BCRA, agreed that it conformed to BCRA.

The Internet is included in the list of exceptions in the final rules in section 100.29(c)(1) because, in most instances, it is not a broadcast, cable, or satellite communication. BCRA's legislative history, which is discussed above in connection with 11 CFR 100.29(b)(1), establishes Congress's intent to exclude communications over the Internet from the electioneering communication provisions. The Commission concludes that Congress did not seek to regulate the Internet in subtitle A of Title II of BCRA. The relatively few commenters who opposed the Internet exemption did not disagree with this conclusion; rather, they argued that as the Internet develops, aspects of it might come to be used in a manner like radio or television. To these commenters, this potential evolution of the Internet calls for a more precise approach and makes the exemption as proposed too broad a treatment of this issue. The Commission has decided to include the exemption in the final rules, rather than attempt to craft a regulation that responds to unknown, future developments.

The NPRM noted that "webcasts" or other communications that are distributed only over the Internet would be excluded from the definition of electioneering communications, but television or radio communications that

are simultaneously “webcast” over the Internet or archived for viewing or listening over the Internet would be included in the definition of electioneering communications. 67 FR 51,133. Some comments on the definition of “broadcast, cable, or satellite communication” in proposed § 100.29(b)(1) and the exemption in proposed § 100.29(c)(1) suggest that a clarification is in order. The discussion in the NPRM was intended to make clear that if a communication meets the content, timing, media, and potential audience criteria for an electioneering communication, webcasting that communication, or archiving it for later viewing via the Internet, will not remove the television or radio aspect of the communication from the definition of “electioneering communication.” Thus, the exemption for communications on the Internet is not so broad that it could inoculate a television and radio communication that otherwise satisfies the electioneering communication criteria from the electioneering communication rules, merely because the communications is also webcast or archived for later viewing or listening over the Internet. The Internet aspect of the communication, including the number of potential recipients, will not be considered in determining whether a communication meets the definition of an “electioneering communication.”

The NPRM also asked how WebTV should be treated. 67 FR 51,133. One commenter stated that WebTV is an alternative means of accessing the Internet, so it would be subject to the Internet exemption in § 100.29(c)(1). Another commenter argued that the regulation should explain that the Internet exemption applies no matter what equipment is used to access the Internet. The Commission agrees that accessing the Internet with WebTV or any other technology is included within the Internet exemption. Because the exemption is not limited to any particular technology to access the Internet, the text of the final rule follows the proposed rule.

Some argued that the exemption in proposed 11 CFR 100.29(c)(1) should be expanded to include public access television and radio channels and digital audio radio satellite. Others argued that because those services are undeniably television, radio, and satellite, any exemption for them would be contrary to the plain language of BCRA. The Commission agrees with the latter viewpoint, so no specific exemption of this nature is included in the final rules.

## 2. 11 CFR 100.29(c)(2) Exemption for a News Story, Commentary or Editorial

The exemption for a news story, commentary or editorial in 11 CFR 100.29(c)(2) closely follows the statutory language from 2 U.S.C. 434(f)(3)(B)(i), which exempts such communications from the definition of “electioneering communication,” unless the facilities distributing the communication are owned or controlled by any political party or committee, or a candidate. The final rule adds that communications distributed by such facilities are exempt from the electioneering communication definition if the communications meet the requirements of 11 CFR 100.132(a) and (b).

The commenters supported a rule that refers to the existing media exemption. The commenters also supported the regulation’s inclusion of broadcast, cable, and satellite communications, in place of the statute’s reference to broadcast communications. The legislative history gives no reason to narrow this particular aspect of electioneering communications, and the commenters, including the principal Congressional sponsors of BCRA, agreed with the consistent use of the broader phrase.

Some of the comments suggested additional exemptions for documentaries, educational programming, or entertainment, which apparently reflects a concern that this exemption would be narrowly interpreted. The Commission interprets “news story commentary, or editorial” to include documentaries and educational programming in this context. Entertainment programming is not mentioned in BCRA, so the final regulation does not include it either. Please note, however, that the limitation of the definition of “electioneering communications” to those in which a fee is charged or paid for a public distribution will likely exempt from the definition of “electioneering communications” nearly all of the entertainment programming discussed by the commenters.

## 3. 11 CFR 100.29(c)(3) Exemption for Expenditures and Independent Expenditures

Title II, subtitle A of BCRA also specifically provides an exemption for communications that constitute expenditures or independent expenditures under the Federal Election Campaign Act. 2 U.S.C. 437(f)(3)(B)(ii). In the NPRM, two alternatives were proposed to implement this provision. 67 FR 51,135–36. The first alternative reiterated the statutory exemption as

proposed in § 100.29(c)(3). Under this alternative, any expenditure of a Federal political committee and any independent expenditure would not be subject to the electioneering communication reporting requirements, but would remain subject to FECA’s other reporting requirements and its prohibitions and limitations on funding sources. The comments from BCRA’s principal sponsors explained that the electioneering communication provisions were “mainly concerned with election-related disbursements that avoided regulation under FECA.” They stated that because expenditures and independent expenditures are subject to regulation under FECA, the statutory exemption from Title II, subtitle A of BCRA ensures that BCRA’s Title II, subtitle A applies to disbursements that are not subject to FECA’s other requirements, prohibitions, and limitations. The exemption’s purpose, the sponsors therefore argue, is to avoid requiring political committees to report the same expenditures twice.

Most who commented on this issue urged the Commission to implement Alternative 2–A, which repeats the statutory language. Only one commenter preferred Alternative 2–B, which would have limited the exemption to “candidate-specific expenditures” that are reportable as an in-kind contribution or a party committee coordinated expenditure, or an independent expenditure. This commenter preferred what it characterized as duplicative reporting required under that alternative to a reporting scheme it considered incomplete. The commenter agreed, however, that the purpose of the exemption for expenditures was to avoid duplicative and potentially conflicting reporting requirements. Because Alternative 2–B would lead to duplicative reporting and because Alternative 2–A includes BCRA’s language, the Commission has decided that the final rule will include Alternative 2–A’s language, with one modification.

It is possible that a group could pay for an ad and claim that the payment is an expenditure because it was for the purpose of influencing a Federal election, as expenditure is defined in 2 U.S.C. 431(9). As such, the group could claim that the ad was exempt from the definition of “electioneering communication” as an expenditure pursuant to 2 U.S.C. 437(f)(3)(B)(ii). However, the group could simultaneously claim that it does not meet the major purpose test, and therefore it is not required to register as a political committee or to report its expenditures. Thus, the group running

an ad could invoke the BCRA exemption for expenditures, which prevents double reporting, and simultaneously claim the expenditure is not subject to FECA reporting requirements because the group is not a political committee under FECA. To prevent such a situation, the Commission has clarified the final rule at 11 CFR 100.29(c)(3) to limit the exemption to expenditures and independent expenditures that are required to be reported as such under the Act and the Commission's regulations. This clarification follows suggestions from several commenters, including the principal Congressional sponsors of BCRA. Under this regulation, the campaign committees of Federal candidates and the national party committees will be totally exempt from the electioneering communications provisions.

#### 4. 11 CFR 100.29(c)(4) Exemption for Candidate Debates or Forums

BCRA includes an exemption at 2 U.S.C. 434(f)(3)(B)(iii) for a communication that "constitutes a candidate debate or forum conducted pursuant to regulations adopted by the Commission, or which solely promotes such a debate or forum and is made by or on behalf of the person sponsoring the debate or forum." The final rules in 11 CFR 100.29(c)(4) implement this provision and refer to 11 CFR 110.13, which contains the Commission's current regulation on candidate debates. All of the commenters that addressed this issue agreed with the proposed rules in 11 CFR 100.29(c)(4), except that one commenter argued that the requirements of § 110.13 should not apply in this context to limit the exemption from the electioneering communication definition. However, BCRA expressly refers to regulations adopted by the Commission in this regard, and 11 CFR 110.13 applies to candidate debates. The Commission finds no reason to adopt a different standard in the electioneering communication exemption. Additionally, pursuant to the operation of §§ 110.13 and § 114.4(f),<sup>8</sup> if the conduct of a debate does not meet the requirements of § 110.13, any corporate or labor organization funding for such a

<sup>8</sup> Nonprofit corporations are permitted by 11 CFR 114.4(f) to use their funds and funds donated by corporations or labor organizations to stage debates in accordance with 11 CFR 110.13. 11 CFR 114.1(a)(2)(x) exempts any activity specifically permitted by 11 CFR part 114 from the definition of "contribution and expenditure."

debate would constitute a prohibited contribution or expenditure.<sup>9</sup>

#### F. Regulatory Exemptions From Definition of "Electioneering Communication"

In addition to the exemptions expressly created by BCRA, the statute also provides that "to ensure the appropriate implementation" of the electioneering communication provisions, the Commission may promulgate regulations exempting other communications from the "electioneering communications" definition. 2 U.S.C. 434(f)(3)(B)(iv). However, the statutory authorization to exempt communications is expressly limited in two ways. The exemption must be promulgated consistent with the requirements of the new electioneering communication provision, and the exempted communication must not be a "public communication" that refers to a clearly identified candidate for Federal office and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office. 2 U.S.C. 434(f)(3)(B)(iv) (referencing 2 U.S.C. 431(20)(A)(iii)).

Some of the commenters argued that the exemption authority provided to the Commission is extremely limited. Relying upon legislative history, the principal Congressional sponsors of BCRA explained the exemption authority would "allow the Commission to exempt communications that 'plainly and unquestionably' are 'wholly unrelated' to an election and do not 'in any way' support or oppose a candidate. In addition, any exemption that applies to entities other than parties and

<sup>9</sup> The Commission received a Petition for Rulemaking from a number of corporations owning and operating news organizations, television stations, newspapers, cable channels, and other media ventures, as well as media trade associations. The petition asked the Commission to amend its regulation on sponsorship of candidate debates to "make clear that it does not apply to the sponsorship of a candidate debate by a news organization or a trade organization composed of, or representing, members of the press." The petition asserts that any regulation of the sponsorship of debates by news organizations or related trade associations is contrary to the clear intent of the U.S. Congress, irreconcilable with other FEC decisions, in conflict with the regulatory decisions of the Federal Communications Commission, and unconstitutional. A Notice of Availability for the petition was published on May 9, 2002. 65 FR 31,164. Two comments were received by the end of the public comment period, on June 10, 2002. Some commenters on the Electioneering Communications rulemaking urged the Commission to accelerate consideration of the petition. However, the Commission intends to defer consideration of whether to issue a Notice of Proposed Rulemaking until after the statutorily required BCRA rulemakings are completed by the end of the year. In the meantime, the Commission's debate regulations remain in effect.

candidates must preserve the 'bright line' quality of the original provision." See 148 Cong. Rec. H410-411 (daily ed. Feb. 13, 2002) (statement of Rep. Shays).

In its consideration of potential exemptions, the Commission has used the express language of the statute as its guide for the extent of its exemption authority. Thus, the Commission acknowledges that the statute limits its exemption authority by providing that the Commission may not exempt communications that promote, support, attack or oppose a candidate. The Commission's exemption authority is also limited by BCRA's use of "bright line" distinctions between electioneering communications and other communications.

In the NPRM, the Commission proposed regulatory text for three exemptions in addition to the statutory exemptions. Proposed 11 CFR 100.29(c)(5) through (7). Among these was a proposed exemption available to State and local candidates. See NPRM, proposed 11 CFR 100.29(c)(7), 67 FR 51,145. Additionally, several commenters suggested an exemption for any communication made by a tax-exempt organization described in 26 U.S.C. 501(c)(3). As described in detail below, the Commission adopted only these two exemptions, one for communications paid for by State or local candidates that is similar to the exemption at proposed 11 CFR 100.29(c)(7), and the other for communications paid for by certain nonprofit organizations operating under 26 U.S.C. 501(c)(3).

#### 1. 11 CFR 100.29(c)(5) Exemption for State and Local Candidates

The Commission proposed an exemption in the NPRM that would cover communications by State and local candidates and officeholders that refer to a clearly identified Federal candidate, provided that mention of a Federal candidate is merely incidental to the candidacy of one or more individuals for State or local office. 67 FR 51,136. For example, under this approach, an ad for a State or local candidate that featured such candidate's views on education would not have been rendered an electioneering communication if the ad were to indicate whether the candidate supported or opposed the President's education policy.

Four commenters thought the Commission's formulation of such an exemption was vague, subject to abuse, not supported by BCRA, and therefore beyond the Commission's exemption authority. Nonetheless, these same commenters supported an alternative

formulation that exempts communications by State or local candidates or State or local political parties that refer to clearly identified Federal candidates, provided the communications do not promote, support, attack or oppose a Federal candidate. By using that standard, the commenters believed the exemption would also serve to harmonize the operation of Title I and subtitle A of Title II of BCRA as they apply to State and local parties and their candidates.

Title I of BCRA permits State, district, or local party committees, organizations, or their candidates to use non-Federal funds for communications that clearly identify a Federal candidate, but do *not* promote, support, attack, or oppose any Federal candidate. See 2 U.S.C. 431(20)(A)(iii) and 11 CFR 100.24(b)(3) (defining Federal election activity to include only those public communications that promote, support, attack or oppose a clearly identified Federal candidate); 2 U.S.C. 441i(b)(1) and 11 CFR 300.32(a)(1) (association of State office candidates or incumbents required to use Federal funds for Federal election activity); 2 U.S.C. 441i(b)(1) and 11 CFR 300.32(a)(2) (same for State, district, and local party committees); 2 U.S.C. 441i(f)(1) and 11 CFR 300.71 (State and local candidates required to use Federal funds for a communication that does promote, support, attack or oppose a Federal candidate). Therefore, according to these commenters, absent an exemption, if a State, district, or local party committee, organization, or a State or local candidate creates and distributes a radio or television communication that refers to a clearly identified Federal candidate, but does *not* promote, support, attack or oppose any Federal candidate, and is not otherwise a contribution or expenditure, Title I of BCRA would permit the use of non-Federal funds to pay for that communication. However, if the same communication were publicly distributed and met the timing and targeting requirements of subtitle A of Title II, then the communication would also be an electioneering communication, so the use of corporate or labor organization funds to pay for it would be prohibited by subtitle A of Title II. According to these commenters, this inconsistent result is contrary to the intention of Title I in permitting the use of non-Federal funds for these purposes. Additionally, the principal Congressional sponsors argue that “effectively tak[ing] state candidates and parties out of the Title II prohibitions and reporting requirements

\* \* \* is consistent with the purposes of BCRA.”

The Commission agrees that an exemption for State and local candidates that is within the parameters of 2 U.S.C. 434(f)(3)(B)(iv) is appropriate in order to harmonize Title I and subtitle A of Title II of BCRA. Accordingly, the final rules include an exemption from the definition of “electioneering communication” for communications that are not described in 2 U.S.C. 431(20)(A)(iii) and that are paid for by State or local candidates in connection with an election to State or local office. See 11 CFR 100.29(c)(5). Thus, this exemption covers public communications by State and local candidates that do *not* promote, support, attack, or oppose federal candidates. See new 11 CFR 300.72 exempting these communications from certain requirements of Title I of BCRA.

In contrast, however, State and local candidates making public communications that satisfy the description set forth in 2 U.S.C. 431(20)(A)(iii) (i.e. public communications by State and local candidates that promote, support, attack, or oppose Federal candidates), are governed by Title I of BCRA and not by subtitle A of Title II of BCRA. Thus, under 2 U.S.C. 441i(f), 11 CFR 100.5(a), and 11 CFR 300.71, these communications must be paid for with Federal funds meeting the limits, prohibitions, and reporting requirements of the Act, including the contribution limits set forth at 2 U.S.C. 441a(a)(1)(C) applicable to political committees that are not the authorized campaign committees of Federal candidates. The reporting obligations of State and local candidates making communications promoting, supporting, attacking, or opposing federal candidates are governed by a number of provisions depending on the exact nature of the communications and the persons making them. See, e.g., 11 CFR 300.36(a) (associations and groups of State and local candidates that are not political committees), 11 CFR 300.36(b) (associations and groups of State and local candidates that are political committees), 11 CFR 300.71 (individuals who are State or local candidates), and 2 U.S.C. 434(g) (any person who makes an independent expenditure).

2. 11 CFR 100.29(c)(6) Exemption for 501(c)(3) Organizations

The Commission received comment from members of the non-profit community expressing concern that subtitle A of Title II of BCRA could inadvertently stifle the ability of

charitable organizations to carry out their core functions by limiting or prohibiting their advertising on television and radio. One commenter wrote that a broad reading of BCRA could mean that “[c]harities would be prohibited from broadcasting fundraising appeals or public service announcements that feature people who are candidates if the appeals run within 30 days of a primary or 60 days of a general election. Documentaries and other educational programming featuring individuals who are candidates would also be banned.”

Several commenters requested that the Commission exercise its authority to craft exemptions for communications that do not promote, support, attack, or oppose a candidate for federal office when made by corporations organized under 26 U.S.C. 501(c)(3). These commenters pointed out that the tax code expressly prohibits organizations described in section 501(c)(3) from “participat[ing] in, or interven[ing] in \* \* \* any political campaign on behalf of (or in opposition to) any candidate for public office.” 26 U.S.C. 501(c)(3). As such, noted another commenter, because “501(c)(3) organizations are absolutely prohibited by the [Internal Revenue Code] from engaging in or funding any activity that even insinuates support or opposition to a candidate for public office, they are held to a demonstrably higher regulatory standard than other corporations.” Therefore, the commenter concluded, “BCRA’s application to 501(c)(3)s [would] prohibit [ ] activity that is already forbidden,” and the activities the Internal Revenue Service permits 501(c)(3) organizations to engage in are activities “that BCRA was not intended to reach.”

Many commenters noted that the penalties for violating the Internal Revenue Code prohibitions are severe, viz., “revocation of tax-exempt status [and] other potential penalties \* \* \* including substantial taxes on the electioneering activity and penalties that personally apply to managers of an organization that knowingly violate the prohibition.”

Some supporters of BCRA submitted comments discouraging the creation of a categorical exemption for 501(c)(3) organizations. Many such commenters referred to statements made by Representative Shays, a chief sponsor of the BCRA legislation, as definitive evidence that Congress did not intend BCRA to give the Commission authority to create such an exemption. See 148 Cong. Rec. H411 (daily ed. Feb. 13, 2002) (Statement of Rep. Shays). In written comments to the Commission,

however, the congressional sponsors, including Representative Shays, drew a distinction between Congress' decision not to include a statutory exemption and the Commission's discretion to create a regulatory exemption, based upon the Commission's understanding of the needs of these organizations balanced against the past practices of non-profits in this area. "(W)hile the issues of Public Service Announcements and ads created by 501(c)(3) charities were raised during the drafting of Title II, Congress did not create statutory exemptions for these types of ads. Before doing so, the Commission must be convinced that such ads have been run in the past during the pre-election windows and that exempting them will not create opportunities for evasion of the statute."

Testimony on these issues was elicited in a public hearing, specifically, as to whether there is a history of ads run by 501(c)(3) organizations close to elections and whether these organizations tend to violate the Internal Revenue Service prohibitions against political activity. Witnesses agreed that this activity was rare, but also that 501(c)(3) corporations make extraordinary efforts to avoid Internal Revenue Service prohibitions against political activity when ads are run. The representative of one non-profit organization testified that "(t)here's no demonstrated record of abuse by public charities in terms of electioneering. That's not the group that the campaign finance laws were meant to address. \* \* \*." The Commission also notes that all of the examples mentioned in testimony as the type of ads that Congress meant to limit were based on ads run by 501(c)(4) or other types of organizations, not 501(c)(3) organizations.

More compelling, however, was the testimony of one non-profit organization as to the effect on charitable organizations that could arise should the Commission fail to provide an exemption. One witness testified that, "already the tax rules are complicated enough. If you throw in election law on top of that, there are many groups that will just throw up their hands and say we're not going to get involved (in grassroots lobbying activity), it's just too risky, it's too much to take on."

Second, many commenters expressed concern that investigations under BCRA, even when a complaint is without merit, could have a disastrous effect on a charitable organization. One witness stated, "(w)e've already seen some evidence of people on different sides of issues reporting the groups that have opposed them on the issues to

various authorities looking for an investigation, and even if a non-profit had in no way violated campaign finance laws, especially if it were a public charity, just being investigated by the FEC would have a devastating effect on the organization." The same witness also noted that the Commission's advisory opinion process would not be a satisfactory alternative, as too many organizations would fear that any request they direct to the Commission would only raise with the Internal Revenue Service the issue of whether they are contemplating electoral activity. Other non-profit organizations testified that they did not have the financial resources to retain legal counsel and seek an advisory opinion from the Commission, although legal counsel is not required to seek an advisory opinion. The Commission also notes that the rationale for exempting 501(c)(3) organizations applies to all such organizations, which makes a regulatory exemption more appropriate than an exemption granted in an advisory opinion, which is necessarily limited to the particular facts and circumstances of the request and is granted on a case-by-case basis.

Section 501(c)(3) of the Internal Revenue Code exempts from taxation certain trusts and corporations organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition, or for the prevention of cruelty to children or animals. It is the communications of these organizations that the Commission exempts from Title II, subtitle A of BCRA at 11 CFR 100.29(c)(6).

Section 501(c)(3) organizations are barred as a matter of law from being involved in partisan political activity. The Commission believes the purpose of BCRA is not served by discouraging such charitable organizations from participating in what the public considers highly desirable and beneficial activity, simply to foreclose a theoretical threat from organizations that has not been manifested, and which such organizations, by their very nature, do not do.

In exempting 501(c)(3) organizations from Title II, subtitle A of BCRA, the Commission is not delegating enforcement of the electioneering communication provisions to the Internal Revenue Service. Rather the Commission anticipates that the Internal Revenue Service will continue to review the activities of 501(c)(3) organizations to make sure those organizations comply with the tax code, without

reference to Title II of BCRA. Should the Internal Revenue Service determine, under its own standards for enforcing the tax code, that an organization has acted outside its 501(c)(3) status, the organization would be open to complaints that it has violated or is violating Title II of BCRA. Additionally, under 2 U.S.C. 438(f), the Commission and the Internal Revenue Service must work together to promulgate rules that are mutually consistent. The final rules, including new 11 CFR 100.29(c)(6), therefore, do not permit any activity that is prohibited under the Internal Revenue Code and regulations prescribed thereunder.

#### *G. Other Exemptions Considered*

In the NPRM, the Commission proposed for an exemption related to the popular name of legislation. Proposed 11 CFR 100.29(c)(5). Four alternatives, designated Alternative 3-A through 3-D, were included for another exemption related to grass-roots lobbying. 11 CFR 100.29(c)(6). Additionally, the Commission sought comment on several other potential exemptions. 67 FR 51,136. As described in detail below, the Commission has concluded that none of these exemptions is consistent with the limited authority provided to the Commission by the statute to make exemptions for communications that do not promote, support, attack or oppose a Federal candidate. Consequently, the Commission is not promulgating any of the other exemptions to the definition of "electioneering communication" proposed in the NPRM.

##### 1. Proposed 11 CFR 100.29(c)(5) Popular Name of Legislation

In the NPRM, the Commission proposed an exemption at 11 CFR 100.29(c)(5) that would have exempted a communication that refers to a bill or law by its popular name where that name happens to include the name of a Federal candidate, if the popular name is the sole reference made to a Federal candidate. 67 FR 51,136. Many commenters were opposed to this exemption.

The argument most frequently cited in opposition to this exemption is the absence of an objective standard for the popular name of a bill or law. This lack of an objective standard would make the proposed exemption an easy means of evading the electioneering communication provisions, because a constructed popular name could be used to link a candidate to a popular or unpopular position. In the view of these commenters, such communications could easily promote, support, attack or

oppose a Federal candidate, which would make an exemption for these communications beyond the Commission's authority.

Even some of the supporters of this exemption acknowledged the problem of the lack of an objective standard as to what constitutes a popular name of a bill or law. Three supporters proposed responses: one suggested that the Commission limit its exemption to only the original sponsors of the legislation, which would exclude co-sponsors. Another suggested that the Commission limit the exemption to "the unique name generally used by the media." A third suggested that the exemption be limited to communications publicly distributed nationwide. According to this commenter, if such communications use a candidate's name as the popular name of a bill, the nationwide audience would demonstrate the purpose of the communication is truly related to the legislation, and not the particular candidate's election because only a small portion of the audience for a nationwide communication could vote for or against the candidate. This rationale for this proposal applies only to non-presidential candidates.

Opponents of this proposed exemption also argued it was unnecessary. They observed that speakers who wished to communicate about a bill or legislation could use the candidate's name and simply avoid that candidate's particular State or Congressional district during the narrow time period covered by the definition of "electioneering communication." Additionally, even during that time and in that district, the commenters pointed out that the legislation could be discussed without mentioning the particular candidate. Thus, to these commenters, the absence of the exemption would have a limited impact on speakers, but the presence of an exemption would provide the opportunity for significant abuse.

The Commission is persuaded by the examples cited by the commenters and other examples from its own history of enforcement actions that communications that mention a candidate's name only as part of a popular name of a bill can nevertheless be crafted in a manner that could reasonably be understood to promote, support, attack or oppose a candidate. Furthermore, this type of exemption is not necessary because communications can easily discuss proposed or pending legislation without including a Federal candidate's name by using a variety of other means of identifying the legislation. In addition, the Commission

recognizes that there are valid concerns as to which names to include in a bill's popular name, which are not necessarily resolved by the mechanical use of the name of only the original sponsors. Nor would this approach adequately address the names of the sponsors of amendments to the legislation. Consequently, the final rules do not include an exemption for such communications.

## 2. Proposed 11 CFR 100.29(c)(6) Exemption for Lobbying Communications

The Commission proposed four alternatives designated Alternatives 3-A through 3-D in the NPRM that would exempt communications that are devoted to urging support for or opposition to particular pending legislation or other matters, where the communications request recipients to contact various categories of public officials regarding the issue. 67 FR 51,136.

Alternative 3-A would have excluded any communication devoted exclusively to urging support for or opposition to particular pending legislation or executive matters, where the communication only requests recipients to contact an official without promoting, supporting, attacking, or opposing a candidate or indicating the candidate's position on the legislation in question. Alternative 3-B would have excluded any communication concerning only a pending legislative or executive matter, in which the only reference to a Federal candidate is a brief suggestion that the candidate be contacted and urged to take a particular position, and no reference to a candidate's record, position, statement, character, qualifications, or fitness for an office or to an election, candidacy, or voting is included. Alternative 3-C would have excluded any communication that does not include express advocacy, and that refers either to a specific piece of legislation or to a general public policy issue and contains contact information for the person whom the communication urges the audience to contact. Alternative 3-D would have excluded any communication that urges support of or opposition to any legislation or policy proposal and only refers to contacting a clearly identified incumbent candidate to urge the legislator to support or oppose the matter, without referring to any of the legislator's past or present positions.

A wide range of commenters addressed these alternatives, and none of the alternatives was favorably received. The most frequently expressed comments were that each of the

alternatives could be easily evaded so that a communication that met the requirements for an exemption nonetheless would also promote, support, attack, or oppose a Federal candidate. Each of the alternatives included terms that commenters found vague. The "promote, support, attack, or oppose" standard was considered inappropriate by some for this context, which will apply to entities other than candidates and political party committees. Alternative 3-C's exemption of all communications was singled out by some commenters who argued it would completely undermine BCRA's requirement because it would exempt virtually all of the ads that led Congress to enact the electioneering communication provisions; however, this alternative was also supported by other commenters who found it the least objectionable of the four alternatives. Several commenters argued that the apparent distinction between incumbent legislators and all other candidates in Alternative 3-D could raise constitutional issues.

Some commenters urged the Commission to promulgate another proposal that shares most of the elements of Alternative 3-B. With disagreement about only one issue, these commenters proposed an exemption for communications that contain the following elements: (A) The communication is devoted exclusively to a pending legislative or executive branch matter and (B) its only reference to a clearly identified Federal candidate is a statement urging the public to contact the Federal candidate or a reference that asks the candidate to take a particular position on the pending legislative or executive branch matter. The proposed formulation of the exemption advocated by these commenters would *not* extend to any communication that included any reference to any of the following: any political party, the candidate's record or position on any issue, or the candidate's character, qualifications or fitness for office or to the candidate's election or candidacy. Other commenters went further than this proposal and also required that the candidate not be named or appear in the communication; the candidate could only be identified as "Your Congressman" or a similar reference that does not include the candidate's name.

The Commission concludes that communications exempted under any of the alternatives for this proposal could well be understood to promote, support, attack, or oppose a Federal candidate. Although some communications that are devoted exclusively to pending public



policy issues before Congress or the Executive Branch may not be intended to influence a Federal election, the Commission believes that such communications could be reasonably perceived to promote, support, attack, or oppose a candidate in some manner. The Commission has determined that all of the alternatives for this proposed exemption, including those proposed by the commenters, do not meet this statutory requirement.

### 3. Exemption for Business Advertisements

In the NPRM, the Commission invited suggestions on whether to promulgate an exemption for communications that refer to a clearly identified candidate in the context of promoting a candidate's business, including a professional practice, for example. 67 FR 51,136. However, no draft exemption was included in the proposed rules.

The commenters who addressed this issue urged the Commission to adopt an exemption for such advertisements, arguing that candidates who use television or radio to promote their commercial interests have an interest in continuing to do so during the relevant periods before elections. One commenter suggested that a narrowly drawn exemption would be appropriate and that it should be limited to ads that promote the business's product or service and that identify the candidate only by stating his or her name as part of the name of the business. This commenter believed that if the candidate appeared or spoke in such ads, they would constitute electioneering communications.

The Commission has determined that a narrow exemption for such ads is not appropriate and cannot be promulgated consistent with the Commission's authority under 2 U.S.C. 434(f)(3)(B)(iv). Based on past experience, the Commission believes that it is likely that, if run during the period before an election, such communications could well be considered to promote or support the clearly identified candidate, even if they also serve a business purpose unrelated to the election.

### 4. Ballot Initiatives and Referenda

In the NPRM, the Commission invited specific suggestions on whether communications that promote a ballot initiative or referendum should be exempt from the definition of "electioneering communications." 67 FR 51,136. The NPRM did not, however, include regulatory language for this potential exemption.

The comments received on this issue were divided. Supporters of this

exemption argued that the subject matters of these communications and the purpose of those who sponsor these ads make them an unlikely vehicle to be used to promote, support, attack, or oppose a Federal candidate. One of the commenters argued that disbursements promoting or opposing a ballot initiative or referendum represent "the type of speech indispensable to decisionmaking in a democracy" and are therefore entitled to the highest degree of First Amendment protection. See *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978). Opponents of the exemption argued that such an exemption would be subject to abuse because communications that promote, support, attack, or oppose a Federal candidate could be tailored easily to qualify for any such exemption. In fact, one commenter directly challenged the argument that communications about ballot initiatives or referenda are unlikely to relate to Federal candidates. This commenter stated: "Increasingly, political consultants have been putting initiatives \* \* \* on the ballot specifically to [affect] candidate races. It is too easy to imagine an initiative designed to provoke a backlash against a targeted candidate for the House or Senate." This commenter distinguished *Bellotti's* protections as applying to communications about referenda, but not necessarily communications that clearly identify a Federal candidate.

No such exemption is included in the final rules. The Commission believes that communications qualifying for a ballot initiative or referendum exemption could well be understood to promote, support, attack, or oppose Federal candidates. As ballot initiatives or referenda become increasingly linked with the public officials who support or oppose them, communications can use the initiative or referenda as a proxy for the candidate, and in promoting or opposing the initiative or referendum, can promote or oppose the candidate. Consequently, it would be quite difficult to exempt such communications without violating the limited exemption authority provided to the Commission by BCRA in 2 U.S.C. 434(f)(3)(B)(iv).

### 5. Public Service Announcements

The NPRM asked whether public service announcements should be exempted. Generally speaking, public service announcements (or "PSAs") can be communications for which the broadcaster or satellite or cable system operator does not charge a fee for publicly distributing. 67 FR 51,136. As such, these communications would not meet the definition of "electioneering communications" pursuant to the

operation of 11 CFR 100.29(b)(3)(i). However, broadcasters, and satellite and cable system operators do sometimes charge fees for publicly distributing other communications commonly known as PSAs and either the person who produced the PSA or some third party pays for its public distribution. Because of this fee, these PSAs would be subject to the definition of "electioneering communications," unless exempted. In support of an exemption for all PSAs, several commenters pointed to the many worthy causes that use PSAs to accomplish their missions and not to influence Federal elections. Other commenters, however, did not dispute the existence of PSAs that are not related to Federal elections, but instead pointed to the possibility that such an exemption could be easily abused by using a PSA to associate a Federal candidate with a public-spirited endeavor in an effort to promote or support that candidate. Other commenters explained that historically PSAs have been used for "electorally related purposes" and that such communications are "at the very heart of what the statute is trying to get to."

While the Commission acknowledges that many worthy causes use PSAs for purposes wholly unrelated to Federal elections, the Commission nonetheless concludes that television and radio communications that include clearly identified candidates and that are distributed to a large audience in the candidate's State or district for a fee are appropriately subject to the electioneering communications provisions in BCRA. Even without such an exemption, an enormous array of communications could still promote PSA subject matters during the periods before elections, so long as Federal candidates are not clearly identified. Consequently, a PSA exemption is not included in the final rules.

### 6. Local Tourism

The NPRM asked if communications that use Federal candidates to encourage local tourism should be exempted from the "electioneering communications" definition. 67 FR 51,136. Only a few commenters addressed this issue, and they supported such an exemption. However, the Commission believes that these communications could serve two purposes: promoting local tourism, but doing so in a way that also could be reasonably perceived to promote or support the Federal candidate appearing in the communication. Because such an exemption may encompass communications that could be viewed to promote, support, attack, or oppose a

Federal candidate, the Commission has decided not to include such an exemption in the final rules.

## II. Ban on the Use of Corporate and Labor Organization Funds

BCRA amends 2 U.S.C. 441b by extending the prohibition on the use of corporate and labor organization treasury funds to the financing, directly or indirectly, of electioneering communications. The NPRM proposed to implement this restriction in several ways: through the amendment of 11 CFR 114.2 to reflect the stated restriction; through the amendment of 11 CFR 114.10 to allow qualified non-profit corporations ("QNCs") to make not only independent expenditures, but also electioneering communications; and through the creation of 11 CFR 114.14 to restrict the indirect use of corporate and labor organization treasury funds to finance electioneering communications.

### A. 11 CFR 114.2 Prohibitions on Contributions and Expenditures by Corporations and Labor Organizations.

In the NPRM, the Commission proposed to revise 11 CFR 114.2(b) by restructuring the current provisions into paragraphs (b)(1) and (b)(2)(i) and (ii). The proposed rule would also add a new paragraph (b)(2)(iii) that would address electioneering communications by corporations and labor organizations. For the reasons stated below, the Commission has adopted the language of proposed section 114.2(b) in the final rules. Therefore, paragraph (b)(1) states the general prohibition on corporations and labor organizations making contributions; paragraph (b)(2)(i) provides for the corresponding prohibitions on corporate and labor organization expenditures; paragraph (b)(2)(ii) restricts express advocacy by corporations and labor organizations to those outside the restricted class; and paragraph (b)(2)(iii) prohibits electioneering communications by corporations and labor organizations to those outside the restricted class. Additionally, paragraph (b)(2)(iii) does not apply to State party committees and State candidate committees that incorporate under 26 U.S.C. 527(e)(1) and are not political committees. The additional language to this paragraph is to ensure that these incorporated State party and candidate committees are permitted to engage in electioneering communications in the same manner as unincorporated State party committees and candidate committees that are not political committees. The prohibitions in paragraph (b)(2) do not apply to qualified nonprofit corporations

("QNCs") as described in 11 CFR 114.10.

### 1. Qualified Nonprofit Corporations

Several commenters addressed the application of 11 CFR part 114 to QNCs. The Commission received three comments regarding the overall revisions to section 114.2, one of which was from the sponsors of BCRA. All three sets of comments agreed with the revisions that implement BCRA's changes to 2 U.S.C. 441b, and specifically agreed with the proposed rules permitting QNCs to make electioneering communications. Several other commenters addressed only the provision that allows QNCs to make electioneering communications. These commenters supported the proposal, viewing this as a correct application of the Supreme Court's decision in *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) ("*MCFL*").

Two commenters responded in favor of a proposal in the NPRM that the Wellstone amendment, which establishes rules for "targeted communications," should not be read to apply to communications that refer to a clearly identified candidate for President or Vice President. See 2 U.S.C. 441b(c)(6). Under this interpretation, incorporated 501(c)(4) organizations that do not qualify as QNCs, and incorporated section 527 organizations that are not political committees registered with and reporting to the Commission, would be able to make electioneering communications that refer to a clearly identified candidate for President or Vice President, as long as they did not use impermissible funds, because such communications are not "targeted." These commenters both argued that this interpretation can be supported by the language of the statute and that it would mitigate constitutional concerns about the statute's application.

Two other commenters argued specifically against this view, one of whom noted that this is an incorrect interpretation of 2 U.S.C. 441b(c)(6) and that this section is properly interpreted to cover all communications that mention candidates for President or Vice President. The second commenter stated that, to the extent that the Commission proposes to construe presidential primary elections to be subject to a targeting requirement for purposes of the definition of "electioneering communication," it should also construe the Wellstone amendment to apply to such targeted communications. A third commenter argued that the Wellstone provision is directly contrary to *MCFL*, and that, as a result, this commenter supported in

principle the application of the QNC exception.

Three commenters argued that the ban on corporate expenditures is unconstitutional under the *MCFL* ruling. According to one of these commenters, Congress was aware of the *MCFL* ruling when it passed BCRA, and could have made an exemption for *MCFL* corporations if it had wanted to. Because Congress did not create such an exemption, the Commission has no legal ability to do so, according to this commenter. This commenter also stated that the Commission should "follow a policy of non-enforcement with regard to qualified non-profits." The other commenters presented similar arguments. They argued that it was clear that "the purpose of the provision was to close a 'loophole' that would allow all 'interest groups,' regardless of their status, to run 'sham issue ads.'" See, e.g., 147 Cong. Rec. S2846 (daily ed. Mar. 26, 2001) (statement of Sen. Wellstone). These commenters further argued that, "even supporters of BCRA recognized that the Wellstone amendment would present constitutional problems in the wake of the Supreme Court's decision in *MCFL*." See, e.g., 147 Cong. Rec. S2883 (Mar. 26, 2001) (statement of Sen. Edwards)." According to these commenters, it is undeniable from the text of BCRA that Congress intended to ban even *MCFL* corporations from making expenditures for electioneering communications, and the Commission cannot save the statute from facial invalidity by promulgating contradictory regulations.

With respect to the argument that the Commission cannot allow QNCs to make electioneering communications because to do so would violate BCRA, the Commission notes that, during the final passage of BCRA, additional statements were made regarding the prohibition on corporate expenditures. At that time, one of the principal sponsors of BCRA stated that, "[t]he legislation does not purport in any way, shape or form to overrule or change the Supreme Court's construction of the Federal Election Campaign Act in *MCFL*. Just as an *MCFL*-type corporation, under the Supreme Court's ruling, is exempt from the current prohibition on the use of corporate funds for expenditures containing 'express advocacy,' so too is an *MCFL*-type corporation exempt from the prohibition in the Snowe-Jeffords amendment on the use of its treasury funds to pay for 'electioneering communications.' Nothing in the bill purports to change *MCFL*." 148 Cong. Rec. S2141 (daily ed. Mar. 20, 2002) (statement of Sen. McCain).

Although Senator McCain referred to "Snowe-Jeffords" without mentioning the Wellstone amendment, he clearly explained that under the proposed legislation, an *MCFL* corporation would be allowed to use its treasury funds to pay for electioneering communications. He specifically referred to that part of the Snowe-Jeffords amendment that prohibits the "use of (a corporation's) treasury funds to pay for 'electioneering communications,'" the main provision of this amendment that remains unaltered by the passage of the Wellstone amendment. *See id.*

In addition, the original Snowe-Jeffords amendment applied to all section 501(c)(4) and 527 corporations, not just *MCFL* corporations. Senator McCain's statement thus recognizes that *MCFL* will have the same effect under BCRA for electioneering communications as it did under the FECA for independent expenditures, which must contain express advocacy.

Further, the original Snowe-Jeffords amendment would not have allowed the use of treasury funds that came from corporations and labor organizations; rather, entities that accept corporate and labor organization funds would have been required to pay for electioneering communications exclusively with funds provided by individuals who are United States citizens or nationals or lawfully admitted for permanent residence, 2 U.S.C. 441b(c)(2), and unless a section 501(c)(4) corporation deposited these funds into a separate account, the statute would have considered that 501(c)(4) corporation to have paid for the electioneering communication with impermissible corporate or labor organization funds. 2 U.S.C. 441b(c)(3)(B). Senator McCain's reference to treasury funds, therefore, manifests an understanding that the *MCFL* protections are built into the Snowe-Jeffords and Wellstone amendments.

Thus, the Commission concludes that the legislative history indicates that the intent of BCRA was to treat electioneering communications in a similar manner as independent expenditures. Part of that treatment is the application of *MCFL* to electioneering communications made by these QNCs.

## 2. Affiliation of Entities Permitted To Make Electioneering Communications With Those Entities That Are Not Permitted; Effect of Prior Incorporation

The Commission sought comments on whether an entity prohibited from making an electioneering communication, *i.e.* a labor organization or a corporation that is not a QNC, may

be affiliated with an entity that is permitted to make electioneering communications, provided that the entity permitted to make such communications received no prohibited funds from the entity prohibited from doing so.

Several commenters offered interpretations of section 441b(c)(3)(A), which treats an electioneering communication as made by a prohibited entity if the prohibited entity "directly or indirectly disburses any amount" for the cost of the communication. One commenter interpreted this to mean that a permitted entity may not receive any funds or financial support from a prohibited entity if the permitted entity intends to make electioneering communications. Another commenter stated that Congress expressly determined that corporate and union funds may not be used by any person to make electioneering communications, but that Congress stopped short of prohibiting "affiliated" organizations from using funds from individuals to make electioneering communications. That commenter also stated that it would be inappropriate for the Commission to consider unilaterally imposing restrictions that are not required by statutory language, particularly when Congress expressly included provisions addressing closely related entities elsewhere. *See, e.g.* 2 U.S.C. 323(d).

Other commenters, including BCRA's sponsors, did not specifically refer to the affiliation question, but stated that corporations and labor organizations must be prohibited from setting up, operating, or controlling unincorporated accounts that are not federal political committees. However, BCRA's sponsors and other commenters agreed that BCRA does not prohibit corporations or labor organizations from using their separate segregated funds to pay for electioneering communications, even though corporate treasury funds may be used for the establishment, administration, and solicitation of contributions to these separate segregated funds. *See* 11 CFR 114.5(b). BCRA's sponsors noted that this situation was specifically discussed during the Senate debate concerning BCRA. *See, e.g.*, 148 Cong. Rec. S2141 (daily ed. Mar. 20, 2002) (statement of Sen. McCain) ("Under the bill, corporations and labor unions could no longer spend soft money on broadcast, cable or satellite communications that refer to a clearly identified candidate for federal office during the 60 days before a general election and the 30 days before a primary, and that are targeted to the candidate's electorate. These entities

could, however, use their PACs to finance such ads. This will ensure that corporate and labor campaign ads proximate to Federal elections, like other campaign ads, are paid for with limited contributions from individuals and that such spending is fully disclosed.")

Several commenters argued that nothing in BCRA prevents an organization that is prohibited from making an electioneering communication from affiliating with an organization that can. One pointed out that organizations that are not permitted to make electioneering communications may be affiliated with a QNC, which is expressly permitted to make electioneering communications.

One commenter supporting this position argued that, on at least one occasion, the Supreme Court has "allowed Congress to restrict constitutionally protected speech while noting that the organization subject to the restriction was permitted to create an affiliate organization that was not subject to the restriction," citing *Regan v. Taxation With Representation*, 461 U.S. 540 (1983) (where the Supreme Court upheld statutory limits on lobbying by charitable organizations, but noted that such organizations had the option of creating an affiliated section 501(c)(4) organization to engage in unlimited lobbying). This commenter also argued that *MCFL* demonstrated the Supreme Court's "reluctance to burden protected speech, and, at the very least, suggests that the Court would reject any restriction on organizations affiliating to expand the scope of permissible communications."

The Commission has concluded that section 441b(c)(3)(A) and its legislative history support the determination that the general treasury funds of a corporation or labor organization may not be used to establish, administer, or solicit funds for, an affiliated organization that would accept funds from individuals to pay for electioneering communications. This is because the establishment, administration, or solicitation of funds for, the affiliate would result in the indirect payment of impermissible funds for electioneering communications. Senator McCain's statement above reflects Congressional intent that communications meeting the timing, content and audience elements of an electioneering communication must be financed with permissible funds contributed by individuals to separate segregated funds, and not with corporate or labor organization funds. Such communications are considered expenditures, not electioneering

communications. See 11 CFR 100.29(c)(3). As expenditures, they are paid for by an entity, the SSF, which is permitted under section 441b of the FECA to use corporate or labor organization funds for its establishment, administration, and for the solicitation of contributions. However, BCRA provides no comparable opportunity for a corporation or labor organization to establish, administer, or solicit for an entity that makes electioneering communications.

The Commission does not, however, see any statutory basis for creating restrictions on electioneering communications by a permitted entity whose affiliation with a prohibited entity is based on non-financial factors (e.g., overlapping officers or members). See 11 CFR 100.5(g). So long as such entities maintain separate finances, the permitted entity's electioneering communications would not be treated as having been made by the prohibited entity, because there would be no direct or indirect disbursement by the prohibited entity. Likewise, the Commission does not see any basis for restricting individuals who work for entities barred from making electioneering communications from pooling their own funds to finance electioneering communications, provided no corporate or labor organization funds are used.

The Commission also sought comment on whether a 501(c)(4) organization or a 527 organization that was previously incorporated and has changed its status to become a limited liability company or similar type of entity under State law would be permitted to pay for electioneering communications with funds that were donated by individuals to the organization during the time it was incorporated. One commenter who addressed this question argued that these funds should be considered corporate funds that cannot be used to pay for electioneering communications. The Commission agrees.

#### B. 11 CFR 114.10 Exemption for Qualified Nonprofit Corporations

MCFL's exemption for QNCs to make independent expenditures is codified in 11 CFR 114.10.<sup>10</sup> In the NPRM, the

<sup>10</sup> In filing for QNC status, a corporation certifies that it meets five qualifications: (1) That it is a social welfare organization as described in 26 U.S.C. 501(c)(4); (2) that its only purpose is issue advocacy, election influencing activity or research, training or educational activities tied to the corporation's political goals; (3) that the corporation does not engage in business activities; (4) that the corporation has no shareholders or persons, other than employees and creditors, who either have an equitable or similar interest in the corporation or

Commission proposed revising 11 CFR 114.10 to set out standards for establishing QNC status for those section 501(c)(4) corporations wishing to make electioneering communications as well as independent expenditures. For the reasons stated below, the Commission has decided to incorporate the language of the proposed rules, with certain modifications for filing certification of QNC status, into the final rules. Therefore, the title of § 114.10 is redrafted to reflect its application to electioneering communications, as is the discussion of the scope of § 114.10 found in paragraph (a). The title of § 114.10 is slightly different from what was proposed in the NPRM. There are no changes to paragraphs (b) and (c). Paragraph (d) is redesignated as "Permitted corporate independent expenditures and electioneering communications." Paragraph (d)(1) remains unchanged substantively, but contains a correction to the citation of the definition of "independent expenditure." Paragraph (d)(2) tracks the language of paragraph (d)(1), except that it substitutes "electioneering communication" for "independent expenditure," and it references the definition of "electioneering communication" at 11 CFR 100.29. Former paragraph (d)(2) is redesignated as paragraph (d)(3), with an additional reference to paragraph (d)(2).

#### 1. Certifying QNC Status

The NPRM also proposed that the procedures for the certification of qualified nonprofit corporation status be revised to provide separate procedures for those making electioneering communications. The Commission has decided to adopt the proposed rules pertaining to these procedures. Thus, the procedures for corporations making independent expenditures, which were found at 11 CFR 114.10(e)(1)(i) and (ii), are now redesignated as 11 CFR 114.10(e)(1)(i)(A) and (B). Paragraphs (e)(1)(ii)(A) and (B) are added to describe the procedures for demonstrating qualified nonprofit corporation status when making electioneering communications. These provisions are similar to the provisions for qualified nonprofit corporations making independent expenditures, except that the threshold for certification is \$10,000. Further,

who receive a benefit that they lose if they end their affiliation; and (5) that the corporation was not established by a corporation or labor organization, does not accept direct or indirect donations from such organizations and, if unable to demonstrate that it has not accepted such donations, has a written policy against accepting donations from them. See 11 CFR 114.10(c)(1) through (5).

corporations are not required to submit certifications prior to making independent expenditures or electioneering communications. The pre-BCRA rules are being modified to permit corporations that have received a favorable judicial ruling concerning their QNC status, in litigation in which the same corporation was a party, to certify that application of that ruling to the corporation's activities in subsequent years confers QNC status. Advance certifications are not necessary given that the Commission anticipates that reporting will be tied to the date that the independent expenditure is publicly disseminated or the electioneering communication is publicly distributed. The Explanation and Justification for the Commission's decision to adopt the proposed revisions to 11 CFR 114.10 are discussed in further detail below.

Several commenters asserted that the threshold for certifying QNC status should be lower, and they specifically mentioned setting it at the same level as that for QNCs that wish to make independent expenditures. One commenter argued that setting the level at \$10,000 would only make sense if a corporation could only spend \$10,000 of its treasury funds on electioneering communications before encountering the 2 U.S.C. 441b prohibition. Another commenter stated that the level for certifying should be set at \$250 for the QNC "to establish its right to spend any corporate funds on electioneering communications," and that "an MCFL corporation can spend its funds on electioneering communications only if it establishes it is qualified to do so, even if its spending never reaches the \$10,000 threshold amount." The sponsors of BCRA also argued that the threshold for certifying QNC status should be \$250, using the same reasoning as above.

Certain commenters suggested that the Commission should establish a different QNC standard for corporations that wish to make electioneering communications than the standard for those that wish to make independent expenditures, noting, in one instance, that "the MCFL exemption must be expanded \* \* \* in response to the greater speech burden at issue in the context of 'electioneering communications' versus express advocacy." According to this commenter, "[w]ith respect to express advocacy, the Government's regulatory interest (however weak) is at its zenith, and the category of speech that is burdened is strictly defined. 'Electioneering communications,' however, constitute a much larger

category of political expression that is further removed from advocating for a particular candidate; the Government's regulatory interest is therefore even more attenuated and the burden upon political speakers' expression is heightened." Another commenter argued that "the regulatory regime managing any exemption from coverage should be tailored to reflect the much weaker interests at stake." This commenter also stated that, under the proposed regulations, groups can never know in advance whether their QNC certification will be accepted, thus leaving them to "speak at their peril."

Several commenters, as noted above, argued that the Commission could not create an exception for *MCFL* corporations. By extension, these commenters opposed the certification procedure at 11 CFR 114.10.

The Commission concludes that the proposed rule is better left intact in the final rules. Several reasons lead to this conclusion. First, the Commission is aware of nothing suggesting that Congress intended a threshold lower than \$10,000 for filing the certification, and setting the certification threshold at the level that first triggers reporting under the statute minimizes the burden on QNCs. In this respect, the certification threshold for electioneering communications is comparable to the certification threshold for independent expenditures. Further, as noted above, the Commission has concluded that statements of electioneering communications need not be filed until the communication is publicly distributed, because until such time as the communication can be received by 50,000 persons, it is not an "electioneering communication." Likewise, until a person makes an electioneering communication, the Commission has no reason to seek certification of QNC status. Further, the threshold provides a clear rule that is easy to follow.

Moreover, while one commenter argued that "an *MCFL* corporation can spend its funds on electioneering communications only if it establishes it is qualified to do so," this misconstrues the certification of QNC status. Corporations may spend funds for electioneering communications as long as they meet the requirements of qualified non-profit corporation status. If they spend \$10,000 or more, they must certify to the Commission that they meet this status. However, they need not obtain prospective approval of QNC status prior to making electioneering communications or, for that matter, independent

expenditures.<sup>11</sup> Further, if a corporation does not qualify for QNC status, it is not permitted to use any general treasury funds for electioneering communications, and there was nothing in the proposed rules, nor is there anything in the final rules, to suggest otherwise.

Further, the commenters advancing the argument that the Commission should create an entirely different standard for QNC status with respect to electioneering communications, than the standard for QNC status with respect to independent expenditures, miss a central point that concerned the sponsors of BCRA: that certain communications that do not necessarily expressly advocate for a candidate's election or defeat, may nevertheless have an impact on an election. There is no indication that Congress intended the *MCFL* exception to apply differently to groups making electioneering communications than to those making independent expenditures. The qualifications for QNC status in pre-BCRA 11 CFR 114.10(c) are objective qualifications that would be apparent to any corporation contemplating whether to make an electioneering communication.

Nevertheless, the Commission recognizes that certain courts have held that organizations incorporated under 26 U.S.C. 501(c)(4) that do not meet all of the strictures contained in the Commission's regulations at 11 CFR 114.10(c)(1) through (c)(5) may still make independent expenditures without violating the prohibition at 2 U.S.C. 441b(a). It is appropriate for the Commission to allow the prevailing organization to certify its status based on the court ruling. Accordingly, the Commission is modifying pre-BCRA 11 CFR 114.10(e)(1) (new § 114.10(e)(1)(i)(B)), to allow organizations that prevail in litigation to certify their QNC status based on the favorable ruling. This modification to the rules does not require any modification to the current certification on the Commission's Form 5 for independent expenditures, and on the new form the Commission intends to create for electioneering communications, Form 9. On Form 5, that certification reads, in relevant parts: "(If the independent expenditures are reported herein were made by a corporation, I certify that the corporation is a (QNC) under the Commission's regulations." This

<sup>11</sup> Of course, corporations are free to file for QNC status before making electioneering communications if they are concerned about "speaking at their peril."

statement would remain true regardless of the reason for QNC status: either compliance with the Commission's standards in § 114.10(c) of the regulations, or pursuant to judicial decision, as contemplated by new paragraph (e)(1)(i)(B) of § 114.10. Because paragraph (e)(1)(i)(B) is referenced by the paragraph that addresses certification for QNCs making electioneering communications, paragraph (e)(1)(ii)(B), this holds equally for electioneering communications.

## 2. Disclaimers

Section 11 CFR 114.10(g) is revised to require qualified nonprofit corporations to comply with the requirements of 11 CFR 110.11 regarding non-authorization notices ("disclaimers") when making electioneering communications. The final rule mirrors the proposed rule. BCRA amended 2 U.S.C. 441d to require disclaimers for electioneering communications. No comments were received regarding this provision.

## 3. Segregated Bank Account

Identical in substance to the proposed rule, § 114.10(h) states that qualified nonprofit corporations may establish a segregated bank account for the purpose of depositing funds to be used to pay for electioneering communications, as identified in 11 CFR part 104. The one revision is a change to correct the citation to where the rules address the segregated bank account. This proposal met with general approval by the commenters.

Proposed § 114.10(i) would track the language in 2 U.S.C. 441b(c)(5), which states that nothing in 2 U.S.C. 441b(c) shall be construed to authorize an organization exempt from taxation under 26 U.S.C. 501(a) to carry out any activity that is prohibited under the Internal Revenue Code. No comments were received regarding this paragraph; this paragraph appears in the final rules.

## 4. "De Minimis" Standard

The Commission also sought comment on whether a provision should be added to the rules incorporating a *de minimis* standard for QNCs, in light of court decisions such as *Minnesota Citizens Concerned for Life, Inc. v. FEC*, 936 F. Supp. 633 (D. Minn. 1996), *aff'd*, 113 F.3d 129 (8th Cir. 1997) ("*MCCL*"). *MCCL* allowed QNCs to engage in a certain amount of business activity, accept a *de minimis* amount of funds from corporations and labor organizations, and still qualify for QNC status. In making this ruling, the court of appeals relied on its previous ruling in *Day v. Holahan*, 34 F.3d 1356 (8th

Cir. 1994), in which the court addressed a Minnesota statute that had been based on the Supreme Court's *MCFL* ruling, and which was similar to the Commission's rules at 11 CFR 114.10. In *Day*, the court noted that the key issue was "the amount of for-profit corporate funding a nonprofit receives, rather than the establishment of a policy not to accept significant amounts. . . . (T)he facts before us in this case present no risk of 'the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas.' The state, far from having shown that MCCL is amassing great wealth as a result of corporate donations, implicitly concedes that MCCL has not received any significant contributions from for-profit corporations." *Day*, 34 F.3d at 1364 (citation omitted).

Several commenters opposed a *de minimis* exception. One of these commenters cited the Supreme Court's language in *MCFL* regarding the policy of the organization against accepting contributions from corporations or labor organizations. The second commenter argued that the Commission does not have the authority to write a *de minimis* standard, suggesting it could only do so if BCRA is unconstitutional, and further asserting that only the courts may pass on the constitutionality of legislation passed by Congress. This commenter further argued that there has been no court case that has addressed whether a *de minimis* standard is required for electioneering communications. Further, this commenter stated that *MCFL* did not contemplate such an exception. BCRA's principal sponsors also argued that no section 501(c)(4) organization that accepts even a *de minimis* amount of corporate or labor organization funds can meet the definition of a QNC. They argue that this position is consistent with *MCFL*, and nothing in the legislative history of BCRA suggests a contrary intent.

Other commenters supported a *de minimis* exception. One commenter argued that the Commission should apply the *MCCL* standards. This commenter maintained that *MCCL* expands the reach of *MCFL*, but is constitutionally consistent with it. The commenter further argued that, without such an allowance, organizations that accept a small amount of corporate or labor organization funding would face uncertainty about their status as QNCs and their ability to make electioneering communications.

Another commenter also supported allowing corporations that accept "a

modest or incidental or *de minimis* amount" of corporate or labor organization funds to qualify for QNC status, stating that many organizations that accept such funds remain overwhelmingly supported by individual members and contributors who subscribe to the views and advocacy of the organization. Other commenters argued that the failure to adopt such a provision would result in a failure to cure the unconstitutionality of the electioneering communications provisions. Another commenter argued that the consensus view of the courts of appeals that have considered the question is that there should be a *de minimis* standard. This commenter further argued that the Commission should adopt the standard articulated in *North Carolina Right to Life v. Bartlett*, 168 F.3d 705 (4th Cir. 1999) (where the court determined that the acceptance of up to eight percent of overall revenues did not preclude North Carolina Right to Life from qualifying for a state *MCFL* exemption because the corporate funds were "but a fraction of its overall revenue" and were not "of the traditional form").

The final rules maintain the prohibition against QNCs accepting any funds from corporations or labor organizations and do not allow them to accept a *de minimis* amount. The Commission has previously considered the issue of whether to allow QNCs to accept a *de minimis* amount of corporate or labor organization funding. See *Explanation and Justification for Regulations on Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures*, 60 FR 35,292 (July 6, 1995). At that time, the Commission noted that "(t)he *MCFL* Court was concerned that business corporations and labor organizations could improperly influence qualified nonprofit corporations and use them as conduits to engage in political spending," and that "the Court saw *MCFL*'s policy of not accepting business corporation or labor organization donations as the way to address these concerns." 60 FR at 35,301. Further, the Commission cited the Supreme Court's decision in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), to support a complete ban on the acceptance of corporate or labor organization funds, noting the Court's concerns that "the danger of 'unfair deployment of wealth for political purposes' exists whenever a business corporation or labor organization is able to funnel donations through a qualified nonprofit corporation." 60 FR at 35,301.

Accordingly, the Commission determined that qualified nonprofit corporations should not be allowed to accept any funds from corporations or labor organizations.

The Commission recognizes that certain courts of appeals have recognized a *de minimis* exception permitting the acceptance by QNCs of corporate and labor organization funds. These circuit courts, however, have not defined the exception in the same terms, and therefore, two circuits would not necessarily apply the *de minimis* exception to the same set of circumstances. Compare *MCCL*, 936 F. Supp 633 (D. Minn. 1996) (*MCFL*-corporation status allowed where organization has not received "any significant contributions from for-profit corporations") with *NCRL*, 168 F.3d 705 (4th Cir. 1999) (*MCFL*-corporation status allowed where up to eight percent of the organization unspecified overall revenues came from corporations, where such corporate payments were "not of the traditional form"). Although the Commission does not believe it is appropriate to establish a *de minimis* exception at this time, the Commission retains the discretion to revisit this issue in a subsequent rulemaking proceeding or otherwise. See 62 FR 65,040 (Dec. 10, 1997) (pending *MCFL* Petition for Rulemaking). Court rulings regarding the effect of *de minimis* corporate funding on QNC certifications for specific organizations are discussed, above, and are addressed in the final rules at 11 CFR 114.10(e)(1)(i)(B).

#### C. 11 CFR 114.14 Further Restrictions on the Use of Corporate and Labor Organization Funds for Electioneering Communications

In the NPRM, the Commission proposed a new rule, 11 CFR 114.14, to implement the provisions in 2 U.S.C. 441b(b)(2), (c)(1) and (c)(3) prohibiting corporations and labor organizations from directly or indirectly disbursing any amount from general treasury funds for any of the costs of an electioneering communication. Proposed 11 CFR 114.14(a) would have contained the prohibition that applies to corporations and labor organizations generally. The rule is meant to eliminate any instance of a corporation or labor organization providing funds out of their general treasury funds to pay for an electioneering communication, including through a non-Federal account. This met with general approval from the commenters and remains in the final rule as paragraph (a)(1). As noted in the NPRM, the Commission does not view BCRA as in any way prohibiting or restricting payments for electioneering

communications from otherwise lawful funds raised and spent by the Federal account of a separate segregated fund.

#### 1. Contributor Liability by Corporations and Labor Organizations

The NPRM also sought comments on the standards to be employed to determine liability of the corporation or labor organization providing the funds. One commenter stated that the standard should be whether the corporation or labor organization intends that the person to whom it supplies the funds will use them for an electioneering communication, or whether it knows or should know that the funds will be used for an electioneering communication. Another commenter suggested that, if the funds are provided for another purpose, that should, absent evidence to the contrary, lead to the conclusion that this regulation has not been violated. Further, if the funds are provided subject to a prohibition against their use to pay for electioneering communications, that should, absent evidence to the contrary, lead to the same conclusion. Another commenter suggests that a corporation or labor organization should be liable if it "specifically directs" or "suggests" that the funds be used for electioneering communications, or if it knows or should know that the funds will be used for electioneering communications. The sponsors of BCRA also suggested this latter standard.

Paragraph (a)(2) sets forth the standards to be applied in determining whether the knowledge requirement exists by providing three alternative ways, any one of which would establish that a corporation or labor organization has knowingly given, disbursed, donated, or otherwise provided, funds used to pay for an electioneering communication.

The first knowledge standard is that of actual knowledge. The second standard requires awareness on the part of the corporation or labor organization of certain facts that would lead a reasonable person to conclude that there is a substantial probability funds will be used to pay for an electioneering communication. This second standard is in effect a "reason to know" standard, and is different from a "should have known" standard. Restatement (Second) of Agency, sec. 9, cmts. d and e (1958). The third standard addresses situations in which the corporation or labor organization is or becomes aware of facts that should have led any reasonable person to inquire about the intent of the person receiving the funds for their use, however, the corporation or labor organization failed to so

inquire. This third alternative is in effect a willful blindness standard covering situations in which a known fact may not equal a substantial probability of illegality but at least should prompt an inquiry.

The final rules at new 11 CFR 114.14(b), like the proposed rule, prohibit any person who accepts corporate or labor organization funds from using those funds to pay for an electioneering communication, or to provide those funds to any other person who would subsequently use those funds to pay for all or part of the costs of an electioneering communication. The rule is intended to effectuate BCRA's treatment of an electioneering communication as being made by a corporation or labor organization if such an entity indirectly disburses any amount for the cost of the communication from their general treasury funds. 2 U.S.C. 441b(c)(3)(A). No commenter addressed this rule.

Proposed paragraph (c) of 11 CFR 114.14 would have provided certain limited exceptions to allow corporations or labor organizations to provide funds that might subsequently be used for electioneering communications. These exceptions are salary, royalties, or other income earned from *bona fide* employment or other contractual arrangements, including pension or other retirement income; interest earnings, stock or other dividends, or proceeds from the sale of the person's stocks or other investments; or receipt of payment representing fair market value for goods or services rendered to a corporation or labor organization. No commenter suggested any other instances of corporate or labor organization general treasury funds that might properly be used to pay for electioneering communications other than those listed at paragraphs (c)(1) through (3), and the proposed exceptions received general support from the commenters. These exceptions are being included in the final rules.

#### 2. Accounting of Funds To Ensure That No Funds Received From Corporations or Labor Organizations Are Used for Electioneering Communications

Section 114.14(d)(1), like the proposed rules, requires persons who receive funds from a corporation or a labor organization that do not meet the exceptions of paragraph (c) to demonstrate through a reasonable accounting method that no such funds were used to pay for any portion of an electioneering communication. The Commission sought comment on whether a specific accounting method should be required, such as first-in-first-

out, last-in-first-out, or any other method. Several commenters did not propose specific methods, but urged the Commission to require "a more specific and stringent accounting method," or "a higher standard of accounting than 'reasonable' methods." The principal sponsors of BCRA stated that the Commission "should insist on a high level of certainty in any accounting method used to make this demonstration."

Further, commenting on the special account available to QNCs at 11 CFR 114.10(h), several commenters suggested that this option be available to all persons who make electioneering communications. One commenter stated that it interpreted paragraph (h) to permit non-QNC entities to set up such an account. Likewise, the sponsors of BCRA noted that QNCs are not the only entities that might want to set up such accounts.

While the Commission did not intend to exclude non-QNCs from establishing segregated bank accounts similar to those described at paragraph (h), the proposed rules were not explicit that non-QNCs may do so. Moreover, as § 114.10 applies only to QNCs, some non-QNCs may not realize that such an account would be available to them.

Accordingly, the Commission has added a provision to 11 CFR 114.14(d) that specifically allows any person who wishes to make electioneering communications to establish a separate bank account from which it pays for electioneering communications. 11 CFR 114.14(d)(2). This account must only contain funds contributed directly to it by individuals who are United States citizens or nationals or lawfully admitted for permanent residence. If persons use only funds from such an account to pay for an electioneering communication, then they will have demonstrated against any charge to the contrary that they did not use funds from a corporation or labor organization to pay for the communication, and their disclosure of their contributors will be limited to the names and addresses of those persons who donated or otherwise provided funds to the account. However, if a person uses any other funds from outside of this account to pay for the electioneering communication, then it will have to disclose the names and addresses of all persons who contributed to the entity, as required by 11 CFR 104.171(c)(8), and will have to provide a more detailed accounting to demonstrate that the funds used did not come from a corporation or labor organization. The ability to establish this segregated bank account is also intended to address, in



part, the concerns of those commenters who objected to disclosing their entire donor base.

### III. Reporting Requirements

In the NPRM, the Commission stated that one of the other BCRA-related rulemaking projects is reporting. 67 FR 51,131. This reporting rulemaking is intended to consolidate all of the proposed amendments to 11 CFR part 104 included in the various BCRA-related NPRMs into one NPRM. Because public disclosure is one of the most important aspects of the FECA, the Commission concluded that a consolidated rulemaking on reporting would allow the public, especially those required to file reports and statements under the FECA and BCRA, to review, understand, and comment on the new and revised reporting requirements as the result of BCRA in a comprehensive manner.

Consequently, the final rules on electioneering communications do not include the changes to 11 CFR 100.19, 104.19, and 105.2 that were part of the proposed rules. Rather, a brief discussion of the major issues and comments relating to the reporting of electioneering communications is included in this Explanation and Justification. *See below.* The Consolidated Reporting NPRM will include revised proposed rules for electioneering communications reporting that will take into consideration the comments that the Commission received in response to the Electioneering Communications NPRM.

#### A. Disclosure Date

BCRA requires persons who make electioneering communications to file disclosure statements with the FEC within 24 hours of the disclosure date. 2 U.S.C. 434(f)(1). In the previously published NPRM, proposed § 104.19(a)(1)(i) and (ii) would define “disclosure date” as the date on which “a person has made one or more disbursements, or has executed one or more contracts to make disbursements, for the direct costs of producing or airing electioneering communications aggregating in excess of \$10,000.” NPRM, 67 FR at 51,145. The NPRM, however, sought comment on whether the disclosure date should be the date on which the electioneering communications are publicly distributed. Thus, under this scenario, an organization could make disbursements or enter into a contract to make disbursements that exceed \$10,000 but would not be required to disclose the disbursements or contract until the electioneering communication

is aired, broadcast or otherwise disseminated by television, radio, cable, or satellite.

All nine commenters who addressed this issue disagreed with the proposed rule and advocated adopting a final rule that would define “disclosure date” as the date of the airing of the electioneering communication. They argued that there is no electioneering communication, and therefore no reporting requirement, until the communication is actually aired or otherwise publicly distributed. One witness at the hearing did acknowledge that in some cases it may be difficult to ascertain when an electioneering communication airs for purposes of triggering the 24-hour reporting period because some contracts may not specify a time that the communication will be aired or because in some instances the broadcaster may fail to air the communication during the block of time specified in the contract. This issue will be further explored in the consolidated reporting NPRM.

#### B. Direction or Control

The previously published NPRM included two proposed alternatives, identified as Alternative 4–A and Alternative 4–B, to implement the BCRA requirement to disclose “any person sharing or exercising direction or control over the activities” of the person making the disbursement for electioneering communications. *See* 2 U.S.C. 434(f)(2)(A); 67 FR 51,146 (Aug. 7, 2002). Many of the commenters expressed the belief that both alternatives are vague and could encompass a large number of people, especially if the communications are made by membership organizations. Some of the commenters were also concerned that disclosing this information may reveal sensitive or confidential information and the decision-making process of organizations, especially non-profit organizations, thereby placing them at a competitive disadvantage. For these reasons, these commenters argued that the Commission should require limited, if any, disclosure of persons who share or exercise direction or control over the person who makes disbursements for electioneering communications or the activities involved in making electioneering communications.

In contrast, several commenters, including the Congressional sponsors of BCRA, disagreed with both alternatives, arguing that neither would disclose sufficiently the information required by BCRA. *See id.* They argued that the purpose of this disclosure requirement in 2 U.S.C. 434(f)(2)(A) is to reveal not

only those who have direction or control over the electioneering communications but also those who have direction or control over the organization that makes the electioneering communications.

This issue will be further explored in the consolidated reporting NPRM.

#### C. Identification of Candidates and Elections

Under 2 U.S.C. 434(f)(2)(D), candidates clearly identified in the electioneering communications, and the elections to which the electioneering communications pertain, must be disclosed in 24-hour statements filed with the Commission. The previously published NPRM provided two alternatives to proposed 11 CFR 104.19(b)(5), identified as Alternative 5–A and Alternative 5–B, that would implement this statutory provision. 67 FR 51,146. Both alternatives would require disclosure of the election and each clearly identified candidate that would be referred to in the electioneering communication, but contain different language. Commenters preferred the language of Alternative 5–B because it would be easier to read and would be more consistent with 2 U.S.C. 434(f)(2)(D). This will be further explored in the consolidated reporting NPRM to follow.

#### D. Disclosure of Contributors and Donors

BCRA requires persons who make electioneering communications and who establish segregated bank accounts for electioneering communications to disclose the names and addresses of contributors who contribute an aggregate of \$1,000 or more to that segregated bank account. 2 U.S.C. 434(f)(2)(E).<sup>12</sup> If the organization that makes electioneering communications does not use a segregated bank account, then BCRA requires it to disclose the names and addresses of all contributors who contribute an aggregate of \$1,000 or more to that organization from the beginning of the preceding year through the disclosure date. 2 U.S.C. 434(f)(2)(F). In reading these two sections of BCRA together with 2 U.S.C. 441b(c)(3)(B), the Commission stated in the NPRM that these disclosure requirements for segregated bank accounts appear to apply only to qualified nonprofit corporations organized under 26 U.S.C. 501(c)(4). *See* 67 FR 51,143. Therefore,

<sup>12</sup> Please note that this discussion uses the terms “contributors” and “contribute.” However, in certain circumstances, it may be more appropriate to refer to “donors” and “donations.” This distinction will be addressed in more detail in the consolidated reporting NPRM to follow.

previously proposed 11 CFR 104.19(b)(6) would have required only QNCs to disclose their contributors for purposes of electioneering communications.

The NPRM explained that proposed section 104.19(b)(7) would clearly state that all persons who are permitted to make electioneering communications under BCRA, including QNCs that do not use segregated bank accounts, would be required to disclose their contributors who contribute an aggregate of over \$1,000 during the given time period. 67 FR 51,143. Nevertheless, some commenters interpreted proposed § 104.19(b)(7) to apply only to QNCs and objected to limiting the disclosure requirements to only QNCs. They argued that BCRA does not limit the requirements of 2 U.S.C. 434(f)(2)(E) and (F) to just QNCs. Consequently, they recommended that all persons who may make electioneering communications should be required to disclose their contributors under proposed § 104.19(b)(7), and that the option for segregated bank accounts in proposed § 104.19(b)(6) should be extended to all persons who may make electioneering communications. This topic will also be addressed in the consolidated reporting NPRM to be published shortly.

One commenter argued that the members of the organizations it represented could be subject to negative consequences if their names are disclosed in connection with an electioneering communication. As a preliminary matter, the Commission notes that any group may opt to use a separate bank account under 11 CFR 114.14(d)(2), which would provide limited disclosure. The FECA provides for an advisory opinion process concerning the application of any of the statutes within the Commission's jurisdiction or any regulations promulgated by the Commission, and such a group could also seek an advisory opinion from the Commission to determine if the group would be entitled to an exemption from disclosure that would be analogous to the exemption provided to the Socialist Workers Party in Advisory Opinions 1990-13 and 1996-46 (both of which allowed the Socialist Workers Party to withhold the identities of its contributors and persons to whom it had disbursed funds because of a reasonable probability that the compelled disclosure of the party's contributors' names would subject them to threats, harassment, or reprisals from either government officials or private parties). BCRA's legislative history recognizes the need for limited

exceptions in these circumstances. See 148 Cong. Rec. S2136 (daily ed. Mar. 20, 2002) (remarks of Sen. Snowe).

#### *E. NPRM on Consolidated Reporting*

As stated above, the Consolidated Reporting NPRM will include revised proposed rules for reporting electioneering communications. The Commission appreciates the comments that it received and anticipates that they will prove useful in revising the proposed rules. The Commission encourages the commenters, as well as others who did not comment on the initial proposed rules, to review the revised proposed rule that will be part of the Consolidated Reporting NPRM and to submit comments at the appropriate time.

#### **Certification of No Effect Pursuant to 5 U.S.C. 605(b) (Regulatory Flexibility Act)**

The Commission certifies that the attached final rules do not have a significant economic impact on a substantial number of small entities. The bases of this certification are several. First, the only burden the final rules impose is on persons who make electioneering communications, and that burden is a minimal one, requiring persons who make such communications to provide the names and addresses of those who made donations to that person, when the costs of the electioneering communication exceed \$10,000. If that person is a corporation that qualifies as a QNC, then it must also certify that it meets that status. The number of small entities affected by the final rules is not substantial.

The Commission has adopted several rules that seek to reduce any burden that might accrue to persons who must file reports. First, the Commission has interpreted the reporting requirement such that no reporting is required until after an electioneering communication is publicly distributed. In many cases, this will only require that person to file one report with the Commission. Also, the Commission has allowed all persons paying for electioneering communications to establish segregated bank accounts, and to report the names and addresses of only those persons who contributed to those accounts. Further, the Commission has interpreted the statute to not require that a certification of QNC status be filed until the person is also required to file a disclosure report. These are significant steps the Commission has taken to reduce the burden on those who would make electioneering communications. The overall burden on the small entities

affected by the final rules will not amount to \$100 million on an annual basis.

Furthermore, because the Commission has interpreted BCRA to mean that political committees do not, by definition, make disbursements for electioneering communications, neither BCRA nor the final rules require any additional reports by any type of Federal political committee. Moreover, the requirements of these final rules are no more than what is strictly necessary to comply with the new statute enacted by Congress.

#### **List of Subjects**

##### *11 CFR Part 100*

Elections.

##### *11 CFR Part 114*

Business and industry, Elections, Labor.

For the reasons set out in the preamble, subchapter A of chapter I of title 11 of the Code of Federal Regulations is amended as follows:

#### **PART 100—SCOPE AND DEFINITIONS (2 U.S.C. 431)**

1. The authority citation for 11 CFR part 100 is revised to read as follows:

**Authority:** 2 U.S.C. 431, 434, 438(a)(8).

2. New § 100.29 is added to read as follows:

##### **§ 100.29 Electioneering communication (2 U.S.C. 434(f)(3)).**

(a) *Electioneering communication* means any broadcast, cable, or satellite communication that:

- (1) Refers to a clearly identified candidate for Federal office;
- (2) Is publicly distributed within 60 days before a general election for the office sought by the candidate; or within 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate, and the candidate referenced is seeking the nomination of that political party; and
- (3) Is targeted to the relevant electorate, in the case of a candidate for Senate or the House of Representatives.

(b) For purposes of this section—

(1) *Broadcast, cable, or satellite communication* means a communication that is publicly distributed by a television station, radio station, cable television system, or satellite system.

(2) *Refers to a clearly identified candidate* means that the candidate's name, nickname, photograph, or drawing appears, or the identity of the

acceptable and unacceptable purpose descriptions to be reported by authorized committees. Paragraph (B) requires authorized committees, when itemizing certain disbursements for which reimbursements are required, to provide a brief explanation of the activity for which reimbursement is required. These provisions have been in Title 11 of the **Code of Federal Regulations** since 1980 and 1995, respectively, and were not affected by the recent statutory changes to the election cycle reporting requirements.

#### Need for Correction

As published, the final rules inadvertently omit two paragraphs describing information to be reported by authorized committees of Federal candidates.

All committees must report the purpose of itemized disbursements (i.e., those disbursements aggregating in excess of \$200). Omitted paragraph (A) contains examples of suitably specific purpose descriptions as well as examples of those descriptions that are unacceptably vague. This paragraph is inconsistent with the reporting of rules for unauthorized committees (committees other than candidate committees) in 11 CFR 104.3(b)(3).

Omitted paragraph (B) is used in administering the "personal use" rules in 11 CFR 113.1. Federal candidates are barred from using campaign funds for personal benefit. Paragraph (B) requires authorized committees of Federal candidates itemizing disbursements for which partial or total reimbursement is required under 11 CFR 113.1(g)(1)(iii)(C) or (D) to provide a brief explanation of the activity for which the reimbursement is made.

Section 801 of Title 5 of the United States Code requires Federal agencies to submit regulations to Congress. These regulations were submitted to the Speaker of the House of Representatives and the President of the Senate on November 26, 2001.

#### Certification of No Effect Pursuant to 5 U.S.C. § 605(b) [Regulatory Flexibility Act]

This correction will not have significant economic impact on a substantial number of small entities. The basis of this certification is that this correction only requires political committees to once again add information to the reports they are required to file. These regulations were in 11 CFR since 1980 and 1995, respectively, before being inadvertently omitted in 2000.

#### List of Subjects in 11 CFR Part 104

Campaign funds, Political committees and parties, Reporting and recordkeeping requirements.

Accordingly, 11 CFR part 104 is corrected by making the following correcting amendment:

#### PART 104—REPORTS BY POLITICAL COMMITTEES

1. The authority citation for part 104 continues to read as follows:

**Authority:** 2 U.S.C. 431(1), 431(8), 431(9), 432(i), 434, 438(a)(8), 438(b), 439a.

#### § 104.3 Contents of reports (2 U.S.C. 434(b), 439a).

\* \* \* \* \*

2. In § 104.3 add the following paragraphs (b)(4)(i)(A) and (B):

(b) \* \* \*

(4) \* \* \*

(i) \* \* \*

(A) As used in this paragraph, *purpose* means a brief statement or description of why the disbursement was made. Examples of statements or descriptions which meet the requirements of this paragraph include the following: dinner expenses, media, salary, polling, travel, party fees, phone banks, travel expenses, travel expense reimbursement, and catering costs. However, statements or descriptions such as *advance*, *election day expenses*, *other expenses*, *expenses*, *expense reimbursement*, *miscellaneous*, *outside services*, *get-out-the-vote* and *voter registration* would not meet the requirements of this paragraph for reporting the purpose of an expenditure.

(B) In addition to reporting the purpose described in paragraph (b)(4)(i)(A) of this section, whenever an authorized committee itemizes a disbursement that is partially or entirely a personal use for which reimbursement is required under 11 CFR 113.1(g)(1)(ii)(C) or (D), it shall provide a brief explanation of the activity for which reimbursement is required.

\* \* \* \* \*

Dated: November 26, 2001.

**Danny L. McDonald,**  
Chairman, Federal Election Commission.  
[FR Doc. 01-29679 Filed 11-29-01; 8:45 am]  
**BILLING CODE 6715-01-P**

#### FEDERAL ELECTION COMMISSION

#### 11 CFR Part 111

#### [Notice 2001-18]

#### Extension to Administrative Fines

**AGENCY:** Federal Election Commission.

**ACTION:** Final rule; revision of the sunset date.

**SUMMARY:** The Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the expiration date in which the Federal Election Commission (hereinafter "the Commission") may assess civil money penalties for violations of the reporting requirements of section 434(a) of the Federal Election Campaign Act (hereinafter "the Act" or "FECA").

**DATES:** Effective on December 31, 2001.

**FOR FURTHER INFORMATION CONTACT:** Ms. Rosemary C. Smith, Assistant General Counsel, or Ms. Mai T. Dinh, Attorney, 999 E Street, NW., Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

#### SUPPLEMENTARY INFORMATION:

#### Explanation and Justification

Section 640 of the Treasury and General Government Appropriations Act, 2000, Pub. L. No. 106-58, 106th Cong., 113 Stat. 430, 476-77 (1999), amended § 309(a)(4) of the FECA, 2 U.S.C. 437g(a)(4), to provide for a modified enforcement process for violations of reporting requirements. Under § 437g(a)(4)(C) of the FECA, the Commission may assess a civil money penalty for violations of the reporting requirements of 2 U.S.C. 434(a). This authority, however, was to sunset on December 31, 2001. Pub. L. No. 106-58, 106th Cong., § 640(c). Recently, § 642 of the Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the sunset date to include all reports that cover activity between January 1, 2000, to December 31, 2003.

The Commission published final rules on May 19, 2000, to implement the amendment contained in the Treasury and General Government Appropriations Act, 2000. Section 111.30 of the regulations reflects the sunset provision of Pub. L. No. 106-58, 106th Cong., § 640(c). Therefore, the Commission is issuing this final rule to amend section 111.30 to extend the application of the administrative fine regulations, 11 CFR part 111, subpart B, to include all violations relating to reports that cover the period between January 1, 2000, to December 31, 2003.

The Commission is promulgating this final rule without notice or opportunity for comment because it falls under the "good cause" exemption of the Administrative Procedures Act, 5 U.S.C. 553(b)(B). The exemption allows

accordance with paragraph (e)(1)(i)(B) of this section, that it is eligible for an exemption from the prohibitions against corporate expenditures contained in 11 CFR part 114.

(A) This certification is due no later than the due date of the first independent expenditure report required under paragraph (e)(2)(i) of this section.

(B) This certification may be made either as part of filing FEC Form 5 (independent expenditure form) or, if the corporation is not required to file electronically under 11 CFR 104.18, by submitting a letter in lieu of the form. The letter shall contain the name and address of the corporation and the signature and printed name of the individual filing the qualifying statement. The letter shall also certify that the corporation has the characteristics set forth in paragraphs (c)(1) through (c)(5) of this section. A corporation that does not have all of the characteristics set forth in paragraphs (c)(1) through (c)(5) of this section, but has been deemed entitled to qualified nonprofit corporation status by a court of competent jurisdiction in a case in which the same corporation was a party, may certify that application of the court's ruling to the corporation's activities in a subsequent year entitles the corporation to qualified nonprofit corporation status. Such certification shall be included in the letter submitted in lieu of the FEC form.

(ii) If a corporation makes electioneering communications under paragraph (d)(2) of this section that aggregate in excess of \$10,000 in a calendar year, the corporation shall certify, in accordance with paragraph (e)(1)(ii)(B) of this section, that it is eligible for an exemption from the prohibitions against corporate expenditures contained in 11 CFR part 114.

(A) This certification is due no later than the due date of the first electioneering communication statement required under paragraph (e)(2)(ii) of this section.

(B) This certification must be made as part of filing FEC Form 9 (electioneering communication form).

(2) *Reporting independent expenditures and electioneering communications.* (i) Qualified nonprofit corporations that make independent expenditures aggregating in excess of \$250 in a calendar year shall file reports as required by 11 CFR part 104.

(ii) Qualified nonprofit corporations that make electioneering communications aggregating in excess of \$10,000 in a calendar year shall file

statements as required by 11 CFR 104.14.

\* \* \* \* \*

(g) *Non-authorization notice.* Qualified nonprofit corporations making independent expenditures or electioneering communications under this section shall comply with the requirements of 11 CFR 110.11.

(h) *Segregated bank account.* A qualified nonprofit corporation may, but is not required to, establish a segregated bank account into which it deposits only funds donated or otherwise provided by individuals, as described in 11 CFR part 104, from which it makes disbursements for electioneering communications.

(i) *Activities prohibited by the Internal Revenue Code.* Nothing in this section shall be construed to authorize any organization exempt from taxation under 26 U.S.C. 501(a), including any qualified nonprofit corporation, to carry out any activity that it is prohibited from undertaking by the Internal Revenue Code, 26 U.S.C. 501, *et seq.*

6. Section 114.14 is added to read as follows:

**§ 114.14 Further restrictions on the use of corporate and labor organization funds for electioneering communications.**

(a)(1) Corporations and labor organizations shall not give, disburse, donate or otherwise provide funds, the purpose of which is to pay for an electioneering communication, to any other person.

(2) A corporation or labor organization shall be deemed to have given, disbursed, donated, or otherwise provided funds under paragraph (a)(1) of this section if the corporation or labor organization knows, has reason to know, or willfully blinds itself to the fact, that the person to whom the funds are given, disbursed, donated, or otherwise provided, intended to use them to pay for an electioneering communication.

(b) Persons who accept funds given, disbursed, donated or otherwise provided by a corporation or labor organization shall not:

(1) Use those funds to pay for any electioneering communication; or

(2) Provide any portion of those funds to any person, for the purpose of defraying any of the costs of an electioneering communication.

(c) The prohibitions at paragraphs (a) and (b) of this section shall not apply to funds disbursed by a corporation or labor organization, or received by a person, that constitute—

(1) Salary, royalties, or other income earned from bona fide employment or other contractual arrangements,

including pension or other retirement income;

(2) Interest earnings, stock or other dividends, or proceeds from the sale of the person's stocks or other investments; or

(3) Receipt of payments representing fair market value for goods provided or services rendered to a corporation or labor organization.

(d)(1) Persons who receive funds from a corporation or a labor organization that do not meet the exceptions of paragraph (c) of this section must be able to demonstrate through a reasonable accounting method that no such funds were used to pay any portion of an electioneering communication.

(2) Any person who wishes to pay for electioneering communications may, but is not required to, establish a segregated bank account into which it deposits only funds donated or otherwise provided by individuals, as described in 11 CFR part 104. Use of funds exclusively from such an account to pay for an electioneering communications shall satisfy paragraph (d)(1) of this section. Persons who use funds exclusively from such a segregated bank account to pay for an electioneering communication shall be required to only report the names and addresses of those individuals who donated or otherwise provided an amount aggregating \$1,000 or more to the segregated bank account, aggregating since the first day of the preceding calendar year.

Dated: October 11, 2002.

**David M. Mason,**

*Chairman, Federal Election Commission.*

[FR Doc. 02-26482 Filed 10-22-02; 8:45 am]

**BILLING CODE 6715-01-P**

**FEDERAL ELECTION COMMISSION**

**11 CFR Part 100**

**[Notice 2002-21]**

**FCC Database on Electioneering Communications**

**AGENCY:** Federal Election Commission.

**ACTION:** Interim final rules with requests for comments.

**SUMMARY:** The Federal Election Commission is promulgating interim final rules regarding electioneering communications, which are certain television and radio communications that refer to a clearly identified Federal candidate and that are targeted to the relevant electorate within 60 days before a general election or within 30 days

before a primary election for Federal office. These interim final rules implement a portion of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), which adds to the Federal Election Campaign Act new provisions regarding "electioneering communications." BCRA defines electioneering communications to mean certain communications that can be received by 50,000 or more persons in the State or district that a candidate seeks to represent. The interim final rules: Identify the Web site of the Federal Communications Commission ("FCC") as the appropriate place to acquire information as to whether a communication will be capable of being received by 50,000 persons; allow those who make communications to rely on information on the FCC's Web site to determine whether their communications will be capable of being received by 50,000 or more persons in a given area; set out the formulae to be used to determine whether a communication can be received by 50,000 or more persons; and specify three ways that a person can demonstrate that a communication did not reach 50,000 persons in a particular Congressional district or State, if the FCC database is silent on the matter. Further information is provided in the Supplementary Information that follows.

**DATES:** These rules are effective on November 22, 2002. Comments must be received on or before January 21, 2003.

**ADDRESSES:** All comments should be addressed to Ms. Mai T. Dinh, Acting Assistant General Counsel, and must be submitted in either electronic or written form. Electronic mail comments should be sent to [FCCdatabase@fec.gov](mailto:FCCdatabase@fec.gov) and must include the full name, electronic mail address, and postal service address of the commenter. Electronic mail comments that do not contain the full name, electronic mail address, and the postal service address of the commenter will not be considered. Faxed comments should be sent to (202) 219-3923, with printed copy follow-up to ensure legibility. Written comments and printed copies of faxed comments should be sent to Federal Election Commission, 999 E Street, NW., Washington, DC 20463. Commenters are strongly encouraged to submit comments electronically to ensure timely receipt and consideration. The Commission will make every effort to post public comments on its Web site within ten business days of the close of the comment period.

**FOR FURTHER INFORMATION CONTACT:** Ms. Mai T. Dinh, Acting Assistant General

Counsel, or Mr. Anthony T. Buckley, Attorney, 999 E Street, NW., Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

**SUPPLEMENTARY INFORMATION:** The Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155, 116 Stat. 81 (Mar. 27, 2002), contains extensive and detailed amendments to the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. 431 *et seq.* Among these amendments are provisions in Title 2 of BCRA that address electioneering communications. The Commission published a Notice of Proposed Rulemaking ("NPRM") on which these interim final rules are based in the **Federal Register** on August 7, 2002. 67 FR 51,131 (Aug. 7, 2002). Written comments were due by August 21, 2002 for those who wished to testify or by August 29, 2002 for all other commenters. The names of commenters and their comments are available at <http://www.fec.gov/register.htm> under "Electioneering Communications." The Commission held a public hearing on the NPRM on August 28 and 29, 2002, at which it heard testimony from 12 witnesses. Transcripts of the hearing are available at <http://www.fec.gov/register.htm> under "Electioneering Communications."<sup>1</sup>

The Electioneering Communications NPRM had several components, including the definition of "electioneering communication"; the prohibitions on corporations and labor organizations from making disbursements for electioneering communications, with limited exceptions; the reporting requirements; and the database that will be developed and maintained by the Federal Communications Commission ("FCC") to determine whether a communication reaches 50,000 persons in the relevant Congressional district or State.

Throughout this rulemaking, the Commission and the FCC have recognized that the creation of the FCC database will be a difficult and complicated undertaking, given the statutory deadline for promulgation of rules implementing BCRA.<sup>2</sup> For the Commission, the difficulties reside not in the development of the database, but in determining the various ways that

<sup>1</sup> Oral testimony at the Commission's public hearing and written comments are both considered "comments" in this document.

<sup>2</sup> Section 402(c)(1) of BCRA establishes a general deadline of 270 days for the Commission to promulgate regulations to carry out BCRA. The President of the United States signed BCRA into law on March 27, 2002, so the 270-day deadline is December 22, 2002. The interim final rules do not apply to any runoff elections required by the results of the November 5, 2002 general election. 2 U.S.C. 431 note.

communications can be distributed and the options for measuring how many persons can receive them. Therefore, the Commission is separating the final rules addressing the FCC database from the final rules on Electioneering Communications so that it may continue to receive and consider comments and information on the FCC database.

Under the Administrative Procedures Act, 5 U.S.C. 553(d), and the Congressional Review of Agency Rulemaking Act, 5 U.S.C. 801(a)(1), agencies must submit final rules to the Speaker of the House of Representatives and the President of the Senate and publish them in the **Federal Register** at least 30 calendar days before they take effect. The interim final rules on the FCC database on electioneering communications were transmitted to Congress on October 11, 2002.

## Explanation and Justification

### Introduction

BCRA at 2 U.S.C. 434(f)(3) defines a new term, "electioneering communications." This term includes broadcast, cable, or satellite communications: (1) That refer to a clearly identified Federal candidate; (2) that are transmitted within certain time periods before a primary or general election; and (3) that are "targeted to the relevant electorate," that is, the relevant Congressional district or State. A communication is "targeted to the relevant electorate" if it can be received by 50,000 or more persons in the Congressional district or State.<sup>3</sup>

Pursuant to section 201(b) of BCRA,<sup>4</sup> the FCC "shall compile and maintain any information (that this Commission) may require to carry out [the electioneering communications disclosure requirements of BCRA,] and shall make such information available to the public on the (FCC's) Web site." These requirements are necessary to promote compliance with the disclosure and funding requirements in the new law regarding electioneering communications. Those who wish to make communications that meet the content, timing, and medium requirements of the electioneering communication definition must be able to easily determine whether the radio or television stations, cable systems, or satellite systems on which they wish to publicly distribute their communications will reach 50,000 or more persons in the State (U.S. Senate

<sup>3</sup> See the Electioneering Communications Final Rules, which are promulgated in conjunction with these interim final rules, for the implementation of the definition of "electioneering communication."

<sup>4</sup> This section of BCRA has not been codified.

candidates or presidential primary candidates) or Congressional district (U.S. House of Representatives candidates) in which the candidate mentioned in the communication is running.

11 CFR 100.29(b)(6)—Information Available on the FCC Web Site

In the NPRM, the Commission described some of the search capabilities that will be necessary and some features that would be helpful on the FCC's Web site, as well as some contemplated for the Commission's own Web site. The Commission also posed a number of questions related to the techniques for determining whether a communication will reach 50,000 or more persons in a Congressional district or State. The NPRM invited comments on what additional information, Web site features, or search options should be made available. Finally, the NPRM stated that the final rule would list the types of information that the FCC determines it will provide on its Web site.

The Media Bureau of the Federal Communications Commission provided comments on these issues, as did ten other commenters. The FCC acknowledges that BCRA requires it to create, maintain and make available to the public on its Web site a database of information necessary to determine if a communication can be received by 50,000 or more persons in any Congressional district or State. The FCC emphasized that "this undertaking could be extraordinarily complex and will require the expenditure of substantial resources in terms of time, money, and personnel." The FCC cautioned that, at a minimum, this database will involve the integration of information regarding the population and the geography of Congressional districts and State boundaries, and that it could also require the FCC to examine "more detailed information relating to the specific programming services transmitted or carried by each broadcast station, cable system, and satellite system in the country."

The FCC also stated that the "creation and maintenance of a database that complies with \* \* \* BCRA will be, no matter what the details, a large and difficult undertaking." The FCC provided numerical data that underscore the magnitude of its task, noting that, as of June 30, 2002, there are 8450 FM radio stations, 4811 AM radio stations, and 1712 full-power analog television stations operating in the United States, and that as of August 27, 2002, there are 516 digital television stations, 10,500 cable systems, and

several satellite providers. Because of the nature of this task, the FCC asked this Commission to craft rules that will simplify the task to the extent possible. The FCC sought flexibility and discretion to implement the database based upon its expertise and available data, so that it will be able to provide the public with the information as quickly and accurately as possible.

One commenter argued that the proposal in the NPRM regarding what information should be available on the FCC Web site was not sufficient. This commenter suggested that the Commission also require the FCC "to compile and maintain a database, available on the World Wide Web, of certain information that has to be collected anyway under section 504 of the BCRA." Section 504 of BCRA, amends the Communications Act of 1934 to require broadcast licensees to maintain certain records regarding requests to purchase broadcast time for the purpose of communicating a message of a political nature. *See* 47 U.S.C. 315(e).

Eight commenters either stated specifically that they supported the database concept as described in the NPRM, or by their comments, appeared to support it. One commenter urged the Commission to defer to the FCC's determination of the specifics of how the database should operate.

In order to provide the FCC with the most flexibility possible, the Commission has decided not to include in the final rule any additional requirements as to the types of information to be made available on the FCC's Web site. Instead, the interim final rule lists only what is required by BCRA: the FCC's Web site will provide information that will permit those who wish to make communications to determine easily whether the radio or television stations, cable systems, or satellite systems through which they wish to publicly distribute their communications will reach 50,000 or more persons in a particular State or Congressional district, and, therefore, whether they are required to file statements of electioneering communications with the Federal Election Commission. Due to the stated challenge the FCC is facing in creating this Web site database, and because section 504 of BCRA includes information unrelated to electioneering communications, the Commission does not believe it is appropriate to require the FCC to include such information in its database.

The Commission also received comments on the statement in the proposed rule at § 100.29(b)(5) that

reliance on the FCC information will be a complete defense to a charge that a communication was capable of being received by 50,000 or more persons, and that as a result, the communication met the definition of an "electioneering communication." All of the commenters who addressed this topic agreed that reliance on the information provided on the FCC Web site should be sufficient, and many of them believed it should be a complete defense to any liability arising under BCRA. One commenter argued that the Commission should permit challenges to the information provided on the FCC Web site. Another commenter argued that, if the database cannot state whether a communication transmitted over a particular outlet reaches 50,000 or more persons, then it should be presumed to not reach 50,000 or more persons. Another commenter argued that the Commission should announce that it will not entertain complaints of violations until the technological issues are resolved and the targeting information is available as proposed.

Under the interim final rules at 11 CFR 100.29(b)(6)(i), if the FCC database indicates that a communication cannot be received by 50,000 or more persons in a particular Congressional district or State, then such information shall be a complete defense against any charge that such communication constitutes an electioneering communication with respect to that particular district or State, as long as such information is posted on the FCC's Web site on or before the date the communication is publicly distributed.

The proposed rule in the NPRM would have stated that a defense involving the information on the FCC Web site would be available if the person making the communication relied on the information prior to the public distribution of the communication. The interim final rule removes the reliance requirement. The information on the FCC Web site is intended to state objective facts regarding the reach of broadcast systems and networks, and cable and satellite systems. These facts are true regardless of whether the person making the communication knew of them or intended to make an electioneering communication.

However, the Commission is concerned that the FCC database may not be able to provide information for every possible system or network, or may not be operational in time for any special elections in 2003 when such information might be necessary. In those situations, paragraphs (b)(6)(ii)(A) through (C) set out three ways a person

can establish a defense to a charge that a communication reached 50,000 or more persons in a particular district or State.

The first method is if the person reasonably relied on written documentation obtained from the entity publicly distributing the communication, stating that the communication cannot be received by 50,000 or more persons in the specified Congressional district (for U.S. House of Representatives candidates) or State (for U.S. Senate candidates or presidential primary candidates).

The second method is if the communication is not publicly distributed on a broadcast station, radio station or cable system located, in whole or in part, in any Metropolitan Area (MA). For many years, the Commission has used the Office of Management and Budget's (OMB) definition of MA in other portions of the Commission's regulations governing national convention host committee financing. See 11 CFR 9008.52(c)(2) ("For purposes of this section, any business (including any branch of a national or regional chain, a franchise, or a licensed dealer) or labor organization or other organization with offices or facilities located within the Metropolitan Area (MA) of the convention city shall be considered local.") See also Explanation and Justification, 59 FR 33,610 (June 29, 1994). Because MAs contain at least 50,000 inhabitants under OMB's definition, a communication aired or transmitted by an entity outside of any such areas in the specified district or State will not be presumed to reach 50,000 persons.

The third method is if the person making the communication reasonably believes that the communication cannot be received by 50,000 or more persons in the relevant Congressional district or State. Such belief must be reasonably based on information in possession of the maker of the communication prior to or at the time the communication is made. For example, if a person engaged a media buyer to secure broadcast time, and that media buyer reasonably informed that person that the communication would not reach 50,000 persons in the relevant Congressional district or State, then that would result in a reasonable belief as to the reach of the communication.

To assure persons that the information on the FCC Web site is reliable, the Commission encourages the FCC to establish a date by which all information on the Web site will be considered correct and unchangeable for a coming election cycle, and to post that date on its Web site.

#### 11 CFR 100.29(b)(7)—Determining Whether a Communication Can Be Received by 50,000 or More Persons

In the NPRM, the Commission also sought comments on how the term "persons" should be interpreted for purposes of determining the required potential audience for electioneering communications. See 2 U.S.C. 434(f)(3)(C). The term "person" is defined in 2 U.S.C. 431(11) and in current Commission regulations at 11 CFR 100.10 to mean an individual, partnership, association, corporation, labor organization and any other organization or group of persons. The NPRM suggested that persons other than individuals should be excluded because partnerships and other legal entities are, by definition, not part of the "relevant electorate." Therefore, limiting "persons" to individuals or natural persons was proposed.

All nine commenters who addressed this issue favored construing "persons" to mean natural persons or individuals. Several commenters thought the term should be further limited to include only persons who are, as described by the commenters, either voting-age citizens, registered voters, eligible voters, or those entitled to vote.

In reviewing what this provision is intended to accomplish, the Commission has determined that attempting to define "person" by itself is not the best approach. Rather, the Commission has determined that the more appropriate course is to define the term "can be received by 50,000 or more persons," because this phrase is a more accurate reflection of the concept Congress sought to address in BCRA. This approach enables the Commission, with the assistance of the FCC, to employ varying factors to determine whether a communication has the necessary audience for it to be considered an electioneering communication. Due to the nature of the technologies involved, precision is not always feasible in measuring how many persons in a particular Congressional district or State can receive a television or radio communication. Nor is it required by BCRA, which only employs a more or less than 50,000 persons standard.

In adopting this approach, the Commission is, in effect, assessing the number of individuals without attempting to determine how many of them may be registered voters or eligible voters. The Commission is concerned that to attempt to further define the universe of individuals is not required by BCRA and could seriously and

unnecessarily complicate the effort to provide information in a timely manner.

The Commission has identified several methodologies that are included in the interim final rules in 11 CFR 100.29(b)(7)(i)(A) through (H) to determine whether a communication meets BCRA's audience standard in a particular Congressional district or State. While these methodologies cannot achieve complete precision, the Commission believes they could aid in reliably and objectively determining whether a communication can be received by 50,000 or more persons in a Congressional district or State, as required by BCRA.

The Commission has ascertained that there are a number of different situations that will involve various calculations and configurations to make this determination. Some communications are broadcast by television stations, radio stations, or networks. These broadcast signals may also be redistributed by cable or satellite systems. Other communications appear on a single cable system, which may involve more than one cable franchise. Still other communications appear on cable networks (CNN, FOX News, USA, for example) that are publicly distributed via cable and satellite. Because Congressional districts are the most problematic, the discussion of the methodologies herein will address them specifically. Points made in this discussion can be extrapolated to apply statewide for Senate and presidential primary elections.

For over-the-air television broadcasters, broadcast contours appear to be the best way to gauge viewership. Thus, if a Congressional district lies entirely within a Grade B broadcast contour, the potential viewership of that station would be the population of that district.

A broadcast contour is the geographic line within which the broadcast signal is at a particular strength. For example, the line demarcating the Grade B contour represents the area where fifty percent of the population can receive the signal, and fifty percent cannot. The Commission understands that the FCC is capable of comparing the geographic sweep of broadcast contours, state boundaries and Congressional districts. Contours are a construction, not a geographic certainty; use of contours will both under- and over-count an audience. Nevertheless, based on the technology, contours are the most reliable, readily available measure of audiences that "can receive" a broadcast signal and, according to the FCC, are regularly relied upon in that agency and in the telecommunications industry.



Using population figures is consistent with the Commission's previously stated proposal, and was supported by a number of commenters, who agreed that "persons" should mean natural persons. Subscribers of cable or satellite television within the broadcast contour are not counted in the interim final rules at 11 CFR 100.29(b)(7)(i)(E), as that would result in the double-counting of certain persons. If a communication is simultaneously broadcast on a network, where multiple stations broadcasting the same material each reach a portion of the Congressional district, the populations within those portions must be combined to determine whether a communication reaches 50,000 or more persons. This method is found in the interim final rules at 11 CFR 100.29(b)(7)(i)(F)(1).

For a broadcast station with Grade B broadcast contours that do not cover an entire Congressional district, one way to determine the relevant viewership is to first ascertain the population within that portion of the district within the broadcast contour. With respect to the remaining portion of the district, a calculation must be made of the viewership of cable and satellite television that retransmit the broadcast station, and that result is added to the first number to determine whether the 50,000-person threshold is met. This method is found in the interim final rules at 11 CFR 100.29(b)(7)(i)(F)(2).

When determining viewership of a cable system or satellite system, the number of subscribers to each system provides a baseline. However, it is unlikely that the number of subscribers exactly equals viewership—inevitably, in many households where one person is the subscriber, there will be several people who are viewers. Accordingly, the interim rules in 11 CFR 100.29(b)(7)(ii) use a multiplier to account for this fact. One multiplier that could be used is the current average U.S. household size, which at present is 2.62 persons. See Jason Fields and Lynne M. Casper, *America's Families and Living Arrangements: March 2000*, Current Population Reports, P20-537, U.S. Census Bureau, Washington, DC, 2001. All cable and satellite systems carrying the broadcast channel and operating within the district or State must be considered.

Thus, in the hypothetical described above, if the Congressional district is served by a cable system, and it is determined that 10,000 of the cable system's subscribers reside outside of the broadcast contour but within the Congressional district, then 26,200 (2.62 × 10,000) persons are added to the population within the contour to

determine if the communication can be received by 50,000 or more persons.

With respect to communications publicly distributed solely on cable or satellite systems, the same sort of calculations described above must be made under the interim final rules at 11 CFR 100.29(b)(7)(i)(G) and (H). With respect to cable television networks, the Commission notes that not all cable systems carry all cable networks. Nevertheless, for the sake of simplicity, the interim final rules assume that every cable and satellite system carries every cable network, and calculations are based on this assumption. This creates a rebuttable presumption as to the reach of a particular cable network, which may be overcome by demonstrating that the cable system in question did not carry that network at the time a communication was transmitted. This rebuttable presumption is set forth in the interim final rules at 11 CFR 100.29(b)(7)(iii).

With respect to communications publicly distributed via AM or FM radio stations, each of these media have their own terminology for the reach of over-the-air signals, which are reflected in the interim final rules at 11 CFR 100.29(b)(7)(i)(A) through (D). The analysis involved with these communications is similar to that for over-the-air only television broadcast stations. Information regarding the term used for FM stations, "primary service contour," can be found on the FCC's Web site at: <http://www.fcc.gov/mb/audio/fmclasses.html>. With respect to AM stations, the FCC's rules at 47 CFR part 73 describe the various classes of radio stations and the types of service areas (primary and/or secondary) that are applicable to them. The Commission's rules at 11 CFR 100.29(b)(7)(i)(C) and (D) use the phrase "outward service area" to address the fact that some stations may have a reach further than a primary service area.

Several commenters addressed whether the regulations should require aggregation of recipients of the same communication from multiple outlets and, if so, whether the regulations should aggregate substantially similar communications for this purpose. Theoretically, one communication could be publicly distributed via several small outlets, each of which reaches fewer than 50,000 persons in the relevant area, but in the aggregate reach 50,000 or more persons in the relevant area. The commenters agreed that the size of radio and television audiences might eliminate this concern as a practical matter. The commenters generally favored a potential audience measure that considers the viewers or

listeners of each station separately and does not aggregate those figures, except in one instance. For example, the commenters argued that if the identical television advertisement is separately broadcast on three broadcast stations, each of which reaches slightly fewer than 50,000 distinct individuals in the relevant area, no electioneering communication should result. (This example assumes the broadcast stations are not also distributed on a cable or satellite system serving the relevant area.)

Similarly, some of the commenters argued that if a cable system has 45,000 viewers in the relevant area and if it distributes an ad on several of the channels under its control—a news channel, a sports channel, and a lifestyle channel, for example—no electioneering communication could result as none of these distributions would be available to 50,000 or more persons in the relevant area. The only instance in which audience aggregation was supported by the commenters was if a television communication is simultaneously distributed by a network programming provider on multiple broadcast stations, then the combined potential audiences of all the broadcast stations along with any individuals who can receive the stations on a cable or satellite system should be analyzed to determine if 50,000 or more individuals in the relevant area can receive the communication. If so, then an electioneering communication would result, assuming the timing and content requirements are also met. The interim final rules take this approach.

These interim final rules represent an initial effort by the Commission to provide clear guidance to the Federal Communications Commission and to those who would make electioneering communications, as to how to determine whether a communication can be received by 50,000 or more persons. The Commission seeks comments on whether this approach is appropriate. Additionally, the Commission seeks comments on whether it should defer to the Federal Communications Commission to determine whether a communication can be received by 50,000 or more persons within a Congressional district or State. The Commission also seeks comments on whether the various formulae it has adopted for making these calculations are reasonable. The Commission is especially interested in comments addressing any alternative means of accomplishing the same task.

**Certification of No Effect Pursuant to 5 U.S.C. 605(b) (Regulatory Flexibility Act)**

The Commission certifies that these interim final rules do not have a significant economic impact on a substantial number of small entities. The basis of this certification is that these rules do not require any small entity to take any action or incur any cost.

**List of Subjects in 11 CFR Part 100**

Elections.

For the reasons set out in the preamble, subchapter A of chapter I of title 11 of the Code of Federal Regulations is amended as follows:

**PART 100—SCOPE AND DEFINITIONS (2 U.S.C. 431)**

1. The authority citation for part 100 continues to read as follows:

**Authority:** 2 U.S.C. 431, 434, and 438(a)(8).

2. Section 100.29 is amended by adding paragraphs (b)(6) and (b)(7) to read as follows:

**§ 100.29 Electioneering communication (2 U.S.C. 437(f)).**

\* \* \* \* \*

(b) \* \* \*

(6) (i) Information on the number of persons in a Congressional district or State that can receive a communication publicly distributed by a television station, radio station, a cable television system, or satellite system, shall be available on the Federal Communications Commission's Web site, <http://www.fcc.gov>. A link to that site is available on the Federal Election Commission's Web site, <http://www.fec.gov>. If the Federal Communications Commission's Web site indicates that a communication cannot be received by 50,000 or more persons in the specified Congressional district or State, then such information shall be a complete defense against any charge that such communication constitutes an electioneering communication, so long as such information is posted on the Federal Communications Commission's Web site on or before the date the communication is publicly distributed.

(ii) If the Federal Communications Commission's Web site does not indicate whether a communication can be received by 50,000 or more persons in the specified Congressional district or State, it shall be a complete defense against any charge that a communication reached 50,000 or more persons when the maker of a communication:

(A) Reasonably relies on written documentation obtained from the broadcast station, radio station, cable system, or satellite system that states that the communication cannot be received by 50,000 or more persons in the specified Congressional district (for U.S. House of Representatives candidates) or State (for U.S. Senate candidates or presidential primary candidates);

(B) Does not publicly distribute the communication on a broadcast station, radio station, or cable system, located in any Metropolitan Area in the specified Congressional district (for U.S. House of Representatives candidates) or State (for U.S. Senate candidates or presidential primary candidates); or

(C) Reasonably believes that the communication cannot be received by 50,000 or more persons in the specified Congressional district (for U.S. House of Representatives candidates) or State (for U.S. Senate candidates or presidential primary candidates).

(7) (i) *Can be received by 50,000 or more persons* means—

(A) In the case of a communication transmitted by an FM radio broadcast station or network, where the Congressional district or State lies entirely within the station's or network's protected or primary service contour, that the population of the Congressional district or State is 50,000 or more; or

(B) In the case of a communication transmitted by an FM radio broadcast station or network, where a portion of the Congressional district or State lies outside of the protected or primary service contour, that the population of the part of the Congressional district or State lying within the station's or network's protected or primary service contour is 50,000 or more; or

(C) In the case of a communication transmitted by an AM radio broadcast station or network, where the Congressional district or State lies entirely within the station's or network's most outward service area, that the population of the Congressional district or State is 50,000 or more; or

(D) In the case of a communication transmitted by an AM radio broadcast station or network, where a portion of the Congressional district or State lies outside of the station's or network's most outward service area, that the population of the part of the Congressional district or State lying within the station's or network's most outward service area is 50,000 or more; or

(E) In the case of a communication appearing on a television broadcast station or network, where the

Congressional district or State lies entirely within the station's or network's Grade B broadcast contour, that the population of the Congressional district or State is 50,000 or more; or

(F) In the case of a communication appearing on a television broadcast station or network, where a portion of the Congressional district or State lies outside of the Grade B broadcast contour—

(1) That the population of the part of the Congressional district or State lying within the station's or network's Grade B broadcast contour is 50,000 or more; or

(2) That the population of the part of the Congressional district or State lying within the station's or network's broadcast contour, when combined with the viewership of that television station or network by cable and satellite subscribers within the Congressional district or State lying outside the broadcast contour, is 50,000 or more; or

(G) In the case of a communication appearing exclusively on a cable or satellite television system, but not on a broadcast station or network, that the viewership of the cable system or satellite system lying within a Congressional district or State is 50,000 or more; or

(H) In the case of a communication appearing on a cable television network, that the total cable and satellite viewership within a Congressional district or State is 50,000 or more.

(ii) Cable or satellite television viewership is determined by multiplying the number of subscribers within a Congressional district or State, or a part thereof, as appropriate, by the current national average household size, as determined by the Bureau of the Census.

(iii) A determination that a communication can be received by 50,000 or more persons based on the application of the formula at paragraph (b)(7)(i)(G) or (H) of this section shall create a rebuttable presumption that may be overcome by demonstrating that—

(A) One or more cable or satellite systems did not carry the network on which the communication was publicly distributed at the time the communication was publicly distributed; and

(B) Applying the formula to the remaining cable and satellite systems results in a determination that the cable network or systems upon which the communication was publicly distributed could not be received by 50,000 persons or more.

\* \* \* \* \*

acceptable and unacceptable purpose descriptions to be reported by authorized committees. Paragraph (B) requires authorized committees, when itemizing certain disbursements for which reimbursements are required, to provide a brief explanation of the activity for which reimbursement is required. These provisions have been in Title 11 of the **Code of Federal Regulations** since 1980 and 1995, respectively, and were not affected by the recent statutory changes to the election cycle reporting requirements.

#### Need for Correction

As published, the final rules inadvertently omit two paragraphs describing information to be reported by authorized committees of Federal candidates.

All committees must report the purpose of itemized disbursements (i.e., those disbursements aggregating in excess of \$200). Omitted paragraph (A) contains examples of suitably specific purpose descriptions as well as examples of those descriptions that are unacceptably vague. This paragraph is inconsistent with the reporting of rules for unauthorized committees (committees other than candidate committees) in 11 CFR 104.3(b)(3).

Omitted paragraph (B) is used in administering the "personal use" rules in 11 CFR 113.1. Federal candidates are barred from using campaign funds for personal benefit. Paragraph (B) requires authorized committees of Federal candidates itemizing disbursements for which partial or total reimbursement is required under 11 CFR 113.1(g)(1)(iii)(C) or (D) to provide a brief explanation of the activity for which the reimbursement is made.

Section 801 of Title 5 of the United States Code requires Federal agencies to submit regulations to Congress. These regulations were submitted to the Speaker of the House of Representatives and the President of the Senate on November 26, 2001.

#### Certification of No Effect Pursuant to 5 U.S.C. § 605(b) [Regulatory Flexibility Act]

This correction will not have significant economic impact on a substantial number of small entities. The basis of this certification is that this correction only requires political committees to once again add information to the reports they are required to file. These regulations were in 11 CFR since 1980 and 1995, respectively, before being inadvertently omitted in 2000.

#### List of Subjects in 11 CFR Part 104

Campaign funds, Political committees and parties, Reporting and recordkeeping requirements.

Accordingly, 11 CFR part 104 is corrected by making the following correcting amendment:

#### PART 104—REPORTS BY POLITICAL COMMITTEES

1. The authority citation for part 104 continues to read as follows:

**Authority:** 2 U.S.C. 431(1), 431(8), 431(9), 432(i), 434, 438(a)(8), 438(b), 439a.

#### § 104.3 Contents of reports (2 U.S.C. 434(b), 439a).

\* \* \* \* \*

2. In § 104.3 add the following paragraphs (b)(4)(i)(A) and (B):

(b) \* \* \*

(4) \* \* \*

(i) \* \* \*

(A) As used in this paragraph, *purpose* means a brief statement or description of why the disbursement was made. Examples of statements or descriptions which meet the requirements of this paragraph include the following: dinner expenses, media, salary, polling, travel, party fees, phone banks, travel expenses, travel expense reimbursement, and catering costs. However, statements or descriptions such as *advance*, *election day expenses*, *other expenses*, *expenses*, *expense reimbursement*, *miscellaneous*, *outside services*, *get-out-the-vote* and *voter registration* would not meet the requirements of this paragraph for reporting the purpose of an expenditure.

(B) In addition to reporting the purpose described in paragraph (b)(4)(i)(A) of this section, whenever an authorized committee itemizes a disbursement that is partially or entirely a personal use for which reimbursement is required under 11 CFR 113.1(g)(1)(ii)(C) or (D), it shall provide a brief explanation of the activity for which reimbursement is required.

\* \* \* \* \*

Dated: November 26, 2001.

**Danny L. McDonald,**  
Chairman, Federal Election Commission.  
[FR Doc. 01-29679 Filed 11-29-01; 8:45 am]  
**BILLING CODE 6715-01-P**

#### FEDERAL ELECTION COMMISSION

#### 11 CFR Part 111

#### [Notice 2001-18]

#### Extension to Administrative Fines

**AGENCY:** Federal Election Commission.

**ACTION:** Final rule; revision of the sunset date.

**SUMMARY:** The Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the expiration date in which the Federal Election Commission (hereinafter "the Commission") may assess civil money penalties for violations of the reporting requirements of section 434(a) of the Federal Election Campaign Act (hereinafter "the Act" or "FECA").

**DATES:** Effective on December 31, 2001.

**FOR FURTHER INFORMATION CONTACT:** Ms. Rosemary C. Smith, Assistant General Counsel, or Ms. Mai T. Dinh, Attorney, 999 E Street, NW., Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

#### SUPPLEMENTARY INFORMATION:

#### Explanation and Justification

Section 640 of the Treasury and General Government Appropriations Act, 2000, Pub. L. No. 106-58, 106th Cong., 113 Stat. 430, 476-77 (1999), amended § 309(a)(4) of the FECA, 2 U.S.C. 437g(a)(4), to provide for a modified enforcement process for violations of reporting requirements. Under § 437g(a)(4)(C) of the FECA, the Commission may assess a civil money penalty for violations of the reporting requirements of 2 U.S.C. 434(a). This authority, however, was to sunset on December 31, 2001. Pub. L. No. 106-58, 106th Cong., § 640(c). Recently, § 642 of the Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the sunset date to include all reports that cover activity between January 1, 2000, to December 31, 2003.

The Commission published final rules on May 19, 2000, to implement the amendment contained in the Treasury and General Government Appropriations Act, 2000. Section 111.30 of the regulations reflects the sunset provision of Pub. L. No. 106-58, 106th Cong., § 640(c). Therefore, the Commission is issuing this final rule to amend section 111.30 to extend the application of the administrative fine regulations, 11 CFR part 111, subpart B, to include all violations relating to reports that cover the period between January 1, 2000, to December 31, 2003.

The Commission is promulgating this final rule without notice or opportunity for comment because it falls under the "good cause" exemption of the Administrative Procedures Act, 5 U.S.C. 553(b)(B). The exemption allows

**FEDERAL ELECTION COMMISSION****11 CFR Parts 102 and 110**

[Notice 2002–22]

**Contribution Limitations and Prohibitions****AGENCY:** Federal Election Commission.**ACTION:** Final rules and transmittal of regulations to Congress.

**SUMMARY:** The Federal Election Commission is issuing these final rules to implement amendments made by the Bipartisan Campaign Reform Act of 2002 (“BCRA”) to the contribution limitations and prohibitions of the Federal Election Campaign Act of 1971, as amended (“FECA” or “the Act”). These rules increase the limits on contributions made by individuals and political committees; index certain contribution limits for inflation; prohibit contributions by minors to candidates, authorized committees and committees of political parties and donations by minors to committees of political parties; and prohibit contributions, donations, expenditures, independent expenditures and disbursements by foreign nationals. These rules also revise the Commission’s rules for designating contributions to particular elections and attributing contributions to particular donors. Further information is provided in the Supplementary Information that follows.

**EFFECTIVE DATE:** January 1, 2003.

**FOR FURTHER INFORMATION CONTACT:** Ms. Mai T. Dinh, Acting Assistant General Counsel, Mr. J. Duane Pugh, Acting Special Assistant General Counsel (redesignations and reattributions), or Attorneys Mr. Michael G. Marinelli (contribution limitations), Ms. Dawn M. Odrowski (contributions by minors) or Ms. Anne A. Weissenborn (foreign nationals), 999 E Street, NW., Washington, DC 20463, (202) 694–1650 or (800) 424–9530.

**SUPPLEMENTARY INFORMATION:** The Bipartisan Campaign Reform Act of 2002, Public Law 107–155, 116 Stat. 81 (Mar. 27, 2002), contains extensive and detailed amendments to the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. 431 *et seq.* This is one of a series of rulemakings the Commission is undertaking to implement the provisions of BCRA.

Section 402(c)(1) of BCRA establishes a general deadline of 270 days for the Commission to promulgate regulations to carry out BCRA. The President of the United States signed BCRA into law on

March 27, 2002, so the 270-day deadline is December 22, 2002.

Because of the brief period before the deadline for promulgating these rules, the Commission received and considered public comments expeditiously. The Notice of Proposed Rulemaking (“NPRM”) on which these final rules are based was published in the **Federal Register** on August 22, 2002. 67 FR 54,366 (Aug. 22, 2002). The written comments were due by September 13, 2002. The names of commenters and their comments are available at <http://www.fec.gov/register.htm> under “Contribution Limitations and Prohibitions.” The NPRM stated that the Commission would hold a hearing on the proposed rules if it received a sufficient number of requests to testify. After reviewing the comments received and in light of the relatively small number of requests to testify, the Commission decided not to hold a public hearing on this rulemaking. A notice canceling the proposed hearing was published on the Commission’s website on October 2, 2002 (<http://www.fec.gov/press/20021002cancel.html>) and in the **Federal Register** on October 7, 2002, 67 FR 62,410 (Oct. 7, 2002).

Under the Administrative Procedures Act, 5 U.S.C. 553(d), and the Congressional Review of Agency Rulemaking Act, 5 U.S.C. 801(a)(1), agencies must submit final rules to the Speaker of the House of Representatives and the President of the Senate and publish them in the **Federal Register** at least 30 calendar days before they take effect. The final rules on contribution limitations and prohibitions were transmitted to Congress on November 8, 2002.

**Introduction**

The final rules address five major topics: (1) Increased limits on contributions made by certain persons to candidates, by political party committees to Senate candidates, and by individuals in a 2-year period; (2) indexing of certain contributions limits for inflation; (3) prohibition on contributions, donations, expenditures, independent expenditures and disbursements by foreign nationals; (4) prohibition on contributions by minors to candidates, authorized committees, and committees of political parties and on donations by minors to committees of political parties; and (5) designating contributions to particular elections and attributing contributions to particular contributors.

Four of the five topics involve implementing specific provisions of BCRA. BCRA’s amendments to 2 U.S.C.

441a(a) that increase contribution limits for individuals and political committees are implemented by amending 11 CFR 110.1, 110.2 and 110.5 and adding new § 110.17 on indexing the contributions limits for inflation. BCRA’s amendments to 2 U.S.C. 441e to strengthen and expand the ban on campaign contributions and donations by foreign nationals is implemented by removing and reserving 11 CFR 110.4(a), the former regulation addressing foreign nationals, and adding new § 110.20. BCRA’s ban on contributions by minors to Federal candidates and contributions and donations by minors to committees of political parties at 2 U.S.C. 441k is implemented by removing 11 CFR 110.1(i)(2), the former regulation addressing contributions by minors, and adding new § 110.19.

In light of BCRA’s focus on contribution limits, the Commission has also decided to streamline its rules for redesignating contributions for a particular election and reattributing contributions to particular contributors. These changes are reflected in amendments to 11 CFR 110.1(b)(5) and 110.1(k)(3).

**Explanation and Justification***11 CFR 102.9 Accounting for Contributions and Expenditures*

Recordkeeping requirements play a crucial role in ensuring compliance with FECA’s and BCRA’s contributions limitations, as noted in the NPRM. 64 FR at 54,372. Accordingly, the Commission sought comment on a variety of proposals to modify the recordkeeping requirements in 11 CFR 102.9. Two commenters were opposed to any change; one noted that electronic records should be sufficient, provided they are in readable form. Another commenter supported the Commission’s proposal to require political committees to maintain photocopies or electronic copies of contributors’ checks. The Commission has determined that requiring retention of photocopies or electronic copies of contributors’ checks will facilitate audits that determine compliance with contribution limits. Therefore, 11 CFR 102.9(a) is amended to require political committee treasurers to maintain either a full-size photocopy or a digital image of each check or written instrument by which a contribution is made. If a political committee elects to retain digital images, it must be prepared to provide the Commission with the computer equipment and software needed to retrieve and read the digital images at no cost to the Commission. New 11 CFR 102.9(a)(4).

Additionally, the Commission is also amending the supporting evidence requirements for redesignations and reattributions in connection with other changes made to redesignations and reattributions, as explained below in the discussion of 11 CFR 110.1(l).

Paragraph (e)(1) of 11 CFR 102.9 is amended to clarify that its requirements apply to contributions designated in writing by the contributor pursuant to 11 CFR 110.1(b)(2)(i), contributions treated as such pursuant to 11 CFR 110.1(b)(2)(ii), contributions redesignated in writing by the contributor pursuant to new 11 CFR 110.1(b)(5)(ii)(A), or contributions designated by presumption pursuant to new 11 CFR 110.1(b)(5)(ii)(B). New paragraph (e)(2) makes the standard for acceptable accounting methods explicit by stating that the committee's records must demonstrate that, prior to the primary election, recorded cash on hand was at all times equal to or in excess of the sum of general election contributions received less the sum of general election disbursements made. Additionally, a technical change is made to recodify existing regulatory text as new paragraph (e)(3) in order to clarify that the requirement for candidates not in the general election to refund any contributions designated or treated as contributions for the general election applies to all candidates and authorized committees.

#### *11 CFR 110.1 Contributions by Persons Other Than Multi-Candidate Political Committees*

##### 1. 11 CFR 110.1(a) Scope

Section 110.1(a) sets out the scope of the regulations in 11 CFR 110.1. The final rules in this paragraph contain amended citations to the provisions concerning minors and foreign nationals. This final rule is substantially identical to the proposed rule, and the Commission did not receive any comments concerning paragraph (a).

##### 2. 11 CFR 110.1(b)(1) Increases in Limitations on Contributions to Candidates

The Act limits the amount that individuals and certain other persons may contribute to candidates and political committees, including political party committees with respect to Federal elections. 2 U.S.C. 441a(a)(1). The pre-BCRA provisions of the Act permitted persons to contribute up to \$1,000 to Federal candidates per election and up to \$20,000 per calendar year to political committees established and maintained by national political parties. For contributions made on or

after January 1, 2003, BCRA amends 2 U.S.C. 441a(a)(1)(A) to increase the amount persons may contribute to Federal candidates to \$2,000 per election. Section 110.1(b)(1), which contains the contribution limitation of 2 U.S.C. 441a(a)(1)(A), is therefore, being amended to incorporate the new increased \$2,000 contribution limit. Paragraph (b)(1) in the final rules, with some minor revisions, is substantially identical to proposed paragraph (b)(1) in the NPRM. The Commission did not receive any comments on this provision.

FECA also permits certain persons to contribute up to \$5,000 per year to any other political committees. 2 U.S.C. 441a(a)(1)(C). This contribution limit was left unchanged by BCRA. However, BCRA did revise 2 U.S.C. 441a(a)(1) by adding paragraph (D), which permits persons to make up to \$10,000 in contributions to a political committee established and maintained by a State committee of a political party in a calendar year. This statutory provision was implemented by the addition of new paragraph (c)(5) to § 110.1. *See Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money Final Rules*, 67 FR 49,063 (July 29, 2002).

BCRA mandates that the limit for contributions by individuals and other persons under 2 U.S.C. 441a(a)(1)(A) be increased every odd-numbered year by the percentage difference in the price index between the current year and the base year of 2001. 2 U.S.C. 441a(c)(1)(B). The mechanics of the indexing are set forth in 11 CFR 110.17, which is discussed below. However, in order to alert the reader that the contribution limits are adjusted every two years, § 110.1(b)(1)(i) contains a cross reference to section 110.17. Additionally, paragraph (b)(1)(ii) sets forth the 2-year time period in which the increased contribution limits are to be in effect. That 2-year period starts the day after the previous general election and ends on the day of the next regularly scheduled general election.

Because the contribution limits may change every two years, depending upon the consumer price index, paragraph (b)(1)(iii) states that the Commission will publish the new contribution limits in effect in the **Federal Register** every odd-numbered year and maintain that information on its website. One commenter supported this change.

##### 3. 11 CFR 110.1(b)(3) Net Debts Outstanding

The NPRM raised the issue of the effect of the increase on contribution limits due to the inflation adjustment on contributions made after an election that

are used to satisfy the net debts outstanding of a candidate's authorized committees related to that previous election. The NPRM sought comment on the following hypothetical: If the contribution limit were to be increased from \$2,000 to \$2,100, effective November 3, 2004, and contributor X makes a \$2,000 contribution to candidate Y in October of 2004, could contributor X make a \$100 contribution after November 3, 2004 designated for that general election, provided that candidate Y's principal campaign committee still has net debts outstanding?

The Commission received several comments concerning this issue. All the commenters who addressed this, including the Congressional sponsors of BCRA, argued against permitting the increase in the contribution limits to apply to contributions made to pay off net debts outstanding from any election held prior to the increase in the contribution limits. Instead, these commenters proposed that any increased contribution limits should only apply to elections held after the date on which the indexing triggers a higher contribution limit. Several of these commenters noted the confusion that would ensue for both contributor and recipient committees if multiple contribution limits applied to the same election. The Commission agrees with this reasoning. In addition, it finds no evidence that Congress intended candidates in a deficit position after an election to have the benefit of accepting larger contributions than candidates who have no debts outstanding for that election. Consequently, the Commission is persuaded that the increase in the contribution limits should not be applied to previous elections. This interpretation will reduce the occurrence of multiple changes to the contribution limits for elections. The Commission also notes that the retroactive application of 2 U.S.C. 441a(c)(1)(C) specifically begins on the date after the previous general election, and can thus be construed to mean that the increase in the contribution limits does not apply to any previous election.

To make clear that the increase in contribution limits cannot be used to retire net debts outstanding from previous elections, the Commission is amending § 110.1(b)(3)(iii). This regulation sets forth the conditions under which candidates may accept contributions to retire net debts outstanding after the date of a previous primary or general election. The Commission is renumbering the two existing conditions as paragraphs (b)(3)(iii)(A) and (B) and is adding the

additional requirement at paragraph (b)(3)(iii)(C) that contributions received for net debts outstanding arising from previous elections do not exceed the contribution limitations in effect on the date of such election.

#### 4. 11 CFR 110.1(b)(5)(ii) Redesignations

##### A. Introduction

In the NPRM, the Commission stated that BCRA's renewed focus on contribution limits coincided with the Commission's consideration of updating and streamlining its rules for designating contributions for a particular election or attributing contributions to particular contributors. See NPRM, 67 FR at 54,371. Under existing regulations, all contributions are either designated in writing by the contributor, 11 CFR 110.1(b)(2)(i), or treated as contributions for the next election after the contribution is made. 11 CFR 110.1(b)(2)(ii). This is in order to ensure that no person contributes more than the individual contribution limit to any candidate with respect to a particular election. 2 U.S.C. 441a(a)(1)(A). Commission regulations permit political committees in certain circumstances to obtain a written redesignation signed by the contributor. 11 CFR 110.1(b)(5)(ii). The Commission presented proposed rules in the NPRM that would permit the authorized committees of candidates to redesignate contributions pursuant to a presumption in certain circumstances. NPRM, 67 FR at 54,376. Additionally, the NPRM proposed amending the rules pertaining to reattribution of contributions similar to the rules on redesignation. This proposal is addressed in the Explanation and Justification for 11 CFR 110.1(k)(3)(ii), discussed below.

One commenter applauded the Commission's consideration of the contribution redesignation regulations that it characterized as "confusing and burdensome both for committees and contributors." In contrast, several commenters noted that BCRA neither requires nor anticipates a reexamination of the redesignation rules. BCRA's silence on these issues led one commenter to the conclusion that these issues would be more appropriately addressed in a separate rulemaking that does not arise from BCRA, while another found the Commission's reexamination well-timed, as an effort to simplify FECA compliance generally, which will improve the ability of political committees to comply with the new requirements of BCRA. In light of the new contribution limits and other statutory changes in BCRA, the Commission has concluded that this

rulemaking provides an appropriate vehicle for simplifying the rules governing redesignation.

##### B. 11 CFR 110.1(b)(5)(ii)(A) Existing Redesignation Rule

Because the Commission has decided to provide for an alternative method for redesignation of contributions, 11 CFR 110.1(b)(5)(ii) requires a technical amendment in order to incorporate the new provision within this section. Thus, this rulemaking redesignates former 110.1(b)(5)(ii)(A) and (B) as 110.1(b)(5)(ii)(A)(1) and (2), respectively. This rulemaking does not amend the regulatory language of these provisions.

##### C. 11 CFR 110.1(b)(5)(ii)(B) Redesignation of Certain Excessive Primary Contributions

Current 11 CFR 110.1(b)(5) sets forth the procedure for the redesignation of excessive contributions to candidates and authorized committees from any person, except multicandidate committees and those persons prohibited from making contributions. See 11 CFR 110.1(a). When seeking a redesignation of an excessive contribution, a committee treasurer must offer the contributor a refund and obtain a signed, written redesignation from the contributor within 60 days of the treasurer's receipt of the contribution. See 11 CFR 110.1(b)(5)(ii). These requirements apply to excessive contributions that were designated in writing by the contributor, 11 CFR 110.1(b)(5)(i)(A) and (B), or that were not designated in writing by the contributor, 11 CFR 110.1(b)(5)(i)(C) and (D), in which case 11 CFR 110.1(b)(2)(ii) treats the contributions as made for the next election for that Federal office after the contributions are made.<sup>1</sup> In addition to written redesignations, the Commission is amending 11 CFR 110.1(b)(5) to permit authorized committees to redesignate contributions that would otherwise be excessive without obtaining a signed, written document under certain circumstances, as discussed below.

As proposed in the NPRM, the Commission is amending these regulations to include a mechanism to simplify redesignation procedures for

<sup>1</sup> These requirements apply whether the contributions are excessive on their face or in aggregation with other contributions, 11 CFR 110.1(b)(5)(i)(A) and (C), or were designated for an election and were made after the election, but cannot be accepted because the contributions exceed net debts outstanding from the past election, 11 CFR 110.1(b)(5)(i)(B), or were received after an election but undesignated, and the authorized committee has net debts outstanding from the previous election. 11 CFR 110.1(b)(5)(i)(D).

certain excessive primary contributions by using a presumption. See NPRM, 67 FR at 54,371, new 11 CFR 110.1(b)(5)(ii)(B). This presumption applies only when a contributor makes an excessive contribution to a candidate's authorized committee before a primary election that is not designated in writing for a particular election. In such circumstances, a candidate's authorized committee may presume that the contributor intended to contribute any excessive amount to that candidate's general election, without obtaining written permission from the contributor to treat the excess as a general election contribution. This presumption should not be inferred, however, in instances where the contributor has expressly designated a contribution in writing for a different election.

The Commission agrees with the commenter who noted the reasonableness of a presumption that a contributor of a large contribution to a primary election campaign would also support the general election campaign of the same candidate. That commenter reasoned that the primary and general elections occur in the same year and are two stages of one process to elect a candidate to a particular office. However, the Commission disagrees with another commenter who argued that written redesignations most often serve as barriers to contributor intent, which in the commenter's view is generally to support the candidate to the maximum extent possible. The Commission retains its rules on written redesignations in all other situations described in 11 CFR 110.1(b)(5)(i)(A) through (D). Only in the specific circumstance presented in new 11 CFR 110.1(b)(5)(ii)(B) will the presumption suffice to replace a written redesignation.

Thus, the Commission is revising § 110.1(b)(5)(ii)(B) to permit an authorized committee to redesignate excessive contributions to the general election if the following conditions are satisfied. First, the contribution must be made before the primary election. Second, the contribution must not have been designated in writing for another election. Third, the contribution would be excessive if treated as a contribution made for the primary election, and fourth, the redesignation does not cause the contributor to exceed any other contribution limit. These conditions are set forth in paragraphs (b)(5)(ii)(B)(1) through (4), respectively. The committee must be permitted to accept general election contributions in order to designate contributions by presumption. Therefore, if a presidential candidate's

authorized committee accepts public funding in the general election, the presumption is available to any such committees only to the extent they are permitted to accept contributions to a general election legal and accounting compliance fund. The final rule also requires that the authorized committee notify the contributor of the redesignation. This requirement is discussed in further detail below.

#### D. 11 CFR 110.1(b)(5)(ii)(B)(5) and (6) Notice to Contributors

With respect to the redesignation of certain primary contributions, the NPRM included two alternatives, Alternatives 1-A and 1-B. See proposed 11 CFR 110.1(b)(5)(ii)(B), NPRM, 67 FR at 54,371 and 54,376. The alternatives differed in whether an authorized committee employing the presumption to redesignate a contribution would be required to notify the contributor that such action is being taken. Alternative 1-A would not have required any notification to the contributor, while Alternative 1-B would have required notification through the addition of paragraphs (b)(5)(ii)(B)(5) and (6). See NPRM, 67 FR at 54,371 and 54,376.

Alternative 1-A was designed to minimize the administrative burden on authorized committees when a contributor's intent could be reasonably inferred. See *id.* at 54,371. Some commenters preferred this approach. One viewed it as a better balance between the Commission's need to ensure that committees follow procedures and the committees' need for flexibility. Greater flexibility for the committees was the basis for another commenter's support. Another found Alternative 1-A to be consistent with contributor intent and with BCRA's change in the individual aggregate contribution limit from an annual to an election cycle basis. See 2 U.S.C. 441a(a)(3). The Commission notes, however, that BCRA changes the individual aggregate contribution limit to a bi-annual basis that only approximates the election cycle for the U.S. House of Representatives. More importantly, Congress did not change the per candidate contribution limits from a per-election to an election-cycle basis.

Alternative 1-B in the Commission's proposal would have required that the authorized committee inform the contributor that a portion of the contribution is being redesignated to the general election, and that the contributor may request a refund instead. As with Alternative 1-A, no confirmation from the contributor would have been required.

This alternative attracted the support of several commenters, as well. One commenter found that the presumption combined with notice to the contributor reasonably approximates contributor intent, with notice ensuring that any other contributor intent can be honored. Similarly, another argued Alternative 1-B strikes the appropriate balance between the administrative burden imposed on authorized committees and the need to honor contributor intent, noting that some primary election contributors might plan to support a different candidate in the general election. Another commenter supported the notice required under Alternative 1-B because it would provide an opportunity for the contributor to "opt-out" and receive a refund, instead of permitting the redesignation, and because it is more likely to prevent the contributor from inadvertently making an excessive contribution to the general election.

The Commission has determined that notifying contributors is necessary when authorized committees redesignate excessive contributions that were initially considered primary contributions by operation of 11 CFR 110.1(b)(2)(ii) to be general election contributions. The Commission has therefore adopted Alternative 1-B as proposed in the NPRM, with clarification to the notice procedure as described below. See NPRM, 67 FR at 54,371 and 54,376. The Commission believes that, in the precise circumstances discussed, it is reasonable to infer that the contributor of an otherwise excessive primary contribution would likely not object to redesignating a portion of that contribution to the general election campaign. The contributor's check establishes the contributor's intent to contribute the funds to the candidate's authorized committee. The contribution limits in FECA prohibit the excessive contributions at issue, so the presumption permits the authorized committee to honor the contributor's intent in a manner that avoids a violation of law by both the recipient committee and the contributor.

The notice and refund procedure serves to confirm the presumption that a contributor of an excessive, undesignated contribution to the primary election would consent to a redesignation of the excessive portion of the contribution to the general election. The authorized committee may assume acquiescence on the part of the contributor if the contributor does not respond to the notification. However, if the contributor does not want the contribution to be redesignated, the

notice provides a mechanism by which the contributor may object to the redesignation and request a refund or a reattribution under 11 CFR 110.1(k)(3)(ii). Additionally, the Commission notes that the trigger for a committee's use of the presumption—an undesignated excessive contribution—suggests the contributor may benefit from information about the contribution limits in FECA. Contributors need to know if a contribution was redesignated or reattributed so that they can avoid an inadvertent excessive contribution. Any authorized committee that seeks to retain a contribution that would otherwise constitute a violation of law can fairly be required to notify the contributor of the means by which it has remedied the violation of law. Thus, new paragraph (b)(5)(ii)(B)(5) requires the treasurer to notify the contributor of the redesignation and provide an opportunity to the contributor to request a refund. In such a notice, the committee may, if it wishes, also seek a written reattribution under 11 CFR 110.1(k)(3)(ii)(A); however, authorized committees are not required to include this information in the notice pursuant to 11 CFR 110.1(b)(5)(ii)(B)(5).

Authorized committees may notify contributors by paper mail, email, fax, or any other written method. The authorized committee must do so within sixty days of the treasurer's receipt of the contribution. See new 11 CFR 110.1(b)(5)(ii)(B)(6). The notice must be written in order to avoid opportunities for fraud, so the option to communicate orally has been deleted from paragraph (b)(5)(ii)(B)(6). The sixty-day requirement protects contributor intent by providing notice on a reasonably contemporaneous basis.

#### E. 11 CFR 110.1(b)(5)(ii)(C) Redesignation of Certain Excessive General Election Contributions

The Commission sought comment on whether to permit backward-looking presumptions, so that excessive general election contributions received after a primary election could be designated by an authorized committee to pay off primary debt. See NPRM, 67 FR at 54,371. Three commenters favored a backward-looking presumption in certain circumstances. One supported the presumption in the situation described, provided that the authorized committee has net debts outstanding for the primary election. Another supported the presumption, provided that it is limited to elections in the same election cycle. A third supported the presumption, provided that the contributor receives notice. Finally, one commenter argued against such a



backward-looking presumption because it would require more complex considerations by the contributors. However, the Commission notes that the burden of calculating net debts outstanding for the primary election falls on the authorized committees, not on the contributors.

The Commission has determined that the backward-looking presumption, in limited circumstances, should apply subject to the same conditions as the redesignation presumption in 11 CFR 110.1(b)(5)(ii)(B). The Commission notes that current 11 CFR 110.1(b)(3)(iv) permits a candidate in the general election to pay primary election debts and obligations with general election contributions. Thus, if a contributor designates in writing that a non-excessive contribution should be considered for the general election, the recipient committee may nonetheless use those funds to pay primary debts, pursuant to 11 CFR 110.1(b)(3)(iv). In this situation, it would be incongruous if a recipient committee had less flexibility with contributions that are *not* designated in writing than it would have with those that are designated in writing.

Consequently, the Commission has incorporated such a presumption in new 11 CFR 110.1(b)(5)(ii)(C). The presumption can be applied to an excessive contribution that is made after the primary election date, but before the general election and that was not designated in writing by the contributor. 11 CFR 110.1(b)(5)(ii)(C)(1) and (2). The committee must have more net debts outstanding as calculated under 11 CFR 110.1(b)(3)(ii) from the primary than the excessive portion of the contribution. 11 CFR 110.1(b)(5)(ii)(C)(5). The conditions in 11 CFR 110.1(b)(5)(ii)(C)(3), (4), (6), and (7) are similar or identical to the conditions set forth in 11 CFR 110.1(b)(5)(ii)(B)(3), (4), (5), and (6), respectively. It is important to note, however, that if a contributor makes an excessive contribution and designates the contribution in a signed writing for the general election, then the authorized committee would be required to obtain a signed writing from the contributor to redesignate any portion of the contribution to the primary. *See* new 11 CFR 110.1(b)(5)(ii)(C)(2).

#### 5. 11 CFR 110.1(c) Contributions to Political Party Committees

The pre-BCRA provisions of the Act permitted persons to contribute up to \$20,000 per calendar year to the political committees established and maintained by the national political parties. BCRA amends 2 U.S.C. 441a(a)(1)(B) to increase the amount that

may be contributed by individuals and certain other persons to political committees established and maintained by national political parties to \$25,000 per calendar year. Consequently, the Commission is amending 11 CFR 110.1(c)(1) to increase the amount that may be contributed by those covered by 2 U.S.C. 441a(a)(1)(B) to committees established and maintained by national political parties to \$25,000 per year. No comments were received on this change. Paragraph (c)(2) of this section provides that these committees consist of the national committees, and the House and Senate campaign committees.

The Commission is adding new paragraphs (c)(1)(i), (ii) and (iii) to § 110.1. These paragraphs parallel new paragraphs (b)(1)(i), (ii) and (iii) discussed above. Paragraph (c)(1)(i) provides for application of the indexing provisions at 11 CFR 110.17 to the contribution limitation for contributions to national party committees. New paragraph (c)(1)(ii) establishes the two-year period in which the indexing is applied. New paragraph (c)(1)(iii) provides for the periodic publication by the Commission of the increased contribution limits. When proposed in the NPRM, the new paragraphs (c)(1)(i) and (c)(1)(iii) received no comments. These paragraphs are left substantially unchanged from the NPRM in the final rules. The comments relating to paragraph (c)(1)(ii) regarding the timing of the increase in the contribution limit due to the application of the indexing provisions are addressed below in the Explanation and Justification for new § 110.17.

#### 6. 11 CFR 110.1(i) Contributions by Spouses

As explained below in the Explanation and Justification for new 11 CFR 110.19, 2 U.S.C. 441k prohibits contributions made by minors to Federal candidates and contributions and donations to committees of political parties, but it does not prohibit contributions or donations to other types of political committees such as corporate and labor organization separate segregated funds and non-connected political committees (often referred to as "PACs").

The proposed rules would have amended the pre-BCRA provision governing contributions by minors at former 11 CFR 110.1(i)(2) to reflect this point. The Commission has decided instead to move the pre-BCRA minors provision to new 11 CFR 110.19 so that all of the provisions regarding minors are addressed in one section of the regulations. Therefore, the final rules move the minors provision at former 11

CFR 110.1(i)(2) to new 11 CFR 110.19(d). As a result of this move, § 110.1(i) addresses only contributions by spouses, a provision that is unchanged. Therefore the final rules amend the title of paragraph (i) to "Contributions by Spouses" to reflect the remaining focus of this paragraph.

#### 7. 11 CFR 110.1(k)(3)(ii) Reattribution

##### A. Introduction

In connection with the proposed amendments to the redesignation rules, the NPRM also included a similar proposal to amend the reattribution rules. Current 11 CFR 110.1(k)(3) sets forth the procedures for the reattribution of excessive contributions to other joint contributors. Contributions from more than one person must include each contributor's signature, and each such contributor is attributed an equal share of the contribution unless other instructions are provided. 11 CFR 110.1(k)(1) and (2). A committee may ask a contributor who made an excessive contribution if a joint contribution was intended. 11 CFR 110.1(k)(3)(i). In order to reattribute a contribution in such a situation, a committee treasurer must offer the contributor a refund and must obtain within sixty days of the contribution a written reattribution signed by each of the contributors. 11 CFR 110.1(k)(3)(ii). (Unlike redesignation, which is limited to authorized committees because of the relationship of the contribution to particular elections pursuant to 2 U.S.C. 441a(a)(1)(A), the reattribution procedure is available to all political committees, any of which could receive joint contributions.) The commenters who supported the Commission's proposal to amend the redesignation rules also supported the proposal to amend the reattribution rules for the same reasons. Likewise, commenters who did not favor the Commission's proposal regarding redesignation also did not support amending the reattribution rules at this time.

##### B. The Proposal and Comments

The Commission proposed a presumption related to reattribution in the NPRM. When funds are contributed by a check or other written instrument with two or more names imprinted on the check, but with only one signature, the entire contribution is attributed to the individual whose signature appears on the check. *See* 11 CFR 104.8(c) and 110.1(k)(1). Alternatives 2-A and 2-B in proposed 11 CFR 110.1(k)(3)(ii)(B) in the NPRM both included a presumption that with respect to such contributions that are excessive, a committee would

be permitted to presume that the contribution should be attributed equally among those whose names appeared on the check or other instrument. *See* NPRM, 67 FR at 54,371 and 54,377. Like the redesignation alternatives, Alternative 2-B would have required the recipient committee to notify the contributors, while Alternative 2-A would not have required any notice. *See id.*

Three commenters opposed both Alternatives 2-A and 2-B. The three agreed that inferring a non-signer's intent to contribute in the absence of any indication from that individual is extremely unreliable and carries a greater risk of error than the redesignation presumption. One commenter observed that the non-signer might not support the same candidates and political committees that the signer supports. Even if he or she does support the same candidates, if the non-signer is unaware of the contribution, he or she may inadvertently make an excessive contribution to the same committee. Another of the three found Alternative 2-B unacceptable because the burden of "opting-out," that is, choosing to request a refund instead of permitting the reattribution, would be on the contributor, whereas the commenter believed the burden should be on the recipient committee. A fourth commenter agreed with the presumption, arguing that contributors do not generally believe more than one signature would be required because usually only one person signs a particular check. This commenter also argued that any indication of intent to make a joint contribution should suffice, citing examples of accompanying correspondence, a donor card, or a notation on a check. Under such circumstances, this commenter would not require notification. In the absence of any indication of such an intent, this commenter supports the approach of Alternative 2-B, which would require the recipient committee to notify the contributors of the reattribution.

#### C. 11 CFR 110.1(k)(3)(ii)(A) Existing Reattribution Rule

Because the Commission has decided to provide for an alternative method for reattribution of contributions, 11 CFR 110.1(k)(3)(ii) requires a technical amendment in order to incorporate the new provision within this section. Thus, this rulemaking redesignates former § 110.1(k)(3)(ii)(A) and (B) as § 110.1(k)(3)(ii)(A)(1) and (2), respectively. This rulemaking does not amend the regulatory language of these provisions.

#### D. 11 CFR 110.1(k)(3)(ii)(B) Presumption of a Reattribution

The Commission has concluded that the changes required by BCRA provide an appropriate occasion to promulgate regulations that will provide authorized committees with additional means of reattributing certain contributions. Thus, it has adopted Alternative 2-B with two modifications. Under paragraph (k)(3)(ii)(B)(1), if an excessive contribution is made with a written instrument with more than one individual's name imprinted upon it, but only one signature, the permissible portion of the contribution will be attributed to the signer, and the committee may reattribute any excessive portion of the contribution to any other individual whose name is imprinted on the written instrument. Thus, the final rule differs from the proposed rule in that the proposed rule would have divided excessive contributions equally among the names listed on the check. The final rule takes a different approach in order to attribute the maximum permissible amount to the signer because that contributor's intent is clear. Only excessive funds would be reattributed pursuant to the presumption to another contributor whose name appears preprinted on the check, and only to the extent that this reattribution would not cause that other individual to exceed his or her contribution limit.

The Commission has determined that notice to the contributors is essential to make any presumption in this situation reasonable. The political committee employing this presumption is required to notify all contributors and offer the signer contributor a refund under paragraph (k)(3)(ii)(B)(2).

As noted in the NPRM, the Commission and political committees have devoted significant resources to ensure compliance with the reattribution requirements. The Commission agrees with the commenter who noted that joint contributors often indicate their intention to jointly contribute in some fashion other than by both signing one personal check. However, the Commission also agrees that a presumption based only on an individual's name appearing on a check is not reliable standing alone. Consequently, the Commission is adopting the requirement that political committees notify all of the joint contributors to whom any portion of the contribution is reattributed. The committee may make the notice in any written form and must do so within sixty days of the treasurer's receipt of the contribution. *See* new 11 CFR

110.1(k)(3)(ii)(B)(3). The sixty-day requirement protects contributor intent by providing notice on a reasonably contemporaneous basis. Like the redesignation notice provision, section 110.1(k)(3)(ii)(B)(3) has been clarified to permit notice by any written method, including email. Authorized committees may, if they choose, provide contributors with a single notice as to any permissible redesignation and any permissible reattribution.

#### E. Other Proposals Relating to Redesignation and Reattribution for Which No Changes to the Rule Are Being Made

##### (1) 11 CFR 110.2 Multicandidate Contributions

Current 11 CFR 110.2(b)(5) sets forth the procedure for redesignation of excessive contributions made by multicandidate committees. In the NPRM, the Commission asked commenters to address whether excessive contributions from multicandidate committees should be subject to any form of redesignation by presumption. Only one commenter supported any such application, while two opposed it. These two argued that a signed writing should be required from multicandidate committees because these committees are likely to be sufficiently familiar with the existing Commission requirements so that the higher standard of specificity required from them is not burdensome. The Commission agrees that the redesignation presumption is inappropriate for multicandidate committees, so no change has been made to 11 CFR 110.2.

##### (2) Expanding the Redesignation Presumption Beyond the Election Cycle

The Commission also asked in the NPRM if presumptions that would permit authorized committees to redesignate contributions beyond the current election cycle to either earlier or subsequent cycles were appropriate. *See* NPRM, 67 FR at 54,371. Only one commenter supported any presumption that reaches beyond a current cycle; that commenter argued that redesignations to elections in future cycles were acceptable if the contributors were notified. The other commenters argued that any presumptions should be limited to the current cycle. One said inferring donative intent would be difficult as the extent to which a contributor supports a candidate can vary significantly from one election cycle to another. Another noted that this might be so because candidates' positions on issues can change, and

candidates are likely to face different opponents in previous or subsequent cycles. Another noted that recordkeeping would be complicated for the committees (which may change from one election to the next), the contributors, and the Commission if such a presumption were adopted. The Commission agrees with many of these comments and has decided to limit the redesignation and reattribution presumptions to within one election cycle.

### (3) Separate Accounts for Redesignated Contributions

The Commission asked in the NPRM if it should revise 11 CFR 102.9 to require that an authorized committee maintain a separate account for general election contributions accepted before the primary election occurs. *See* NPRM, 67 FR at 54,371–72. Three commenters addressed this proposal. Two commenters who opposed the requirement stated that separate accounts are unnecessary. One argued that the public record consists of all of a candidate committee's accounts combined, even if the funds are in fact in separate accounts. Consequently, they argued that the public record, which specifies to which election contributions are designated, would not be augmented by a committee's maintenance of separate accounts. Should an authorized committee be subject to a Commission audit, this commenter argued that the Audit Division is capable of calculating whether a committee spent general election funds on the primary election campaign. Another commenter noted that separate accounts do not “specifically aid in compliance” and that separate accounts are not required by BCRA. One commenter supported the requirement, arguing that the Commission has a valid concern regarding the use of general election funds in a primary election campaign, which could permit the contributor and the committee to effectively double the contribution limit with respect to the primary election. This commenter also argued that separate accounts are a modest burden for committees and may be preferable to maintaining separate books and records.

Although the Commission believes maintaining a separate account is the best way for an authorized committee to show its compliance with the prohibition on spending general election contributions in connection with a primary election, the Commission is reluctant to require that authorized committees maintain separate accounts when other means of

accounting, which may be better suited to an organization, will suffice to prevent the use of general election contributions in connection with a primary election. Consequently, the Commission declines to amend 11 CFR 102.9 in this regard.

### (4) Eliminating the Signature Requirements

The Commission sought comment on whether it should eliminate the signature requirement for all redesignations and reattributions under 11 CFR 110.1 and 110.2, and instead permit authorization from the contributor by email or through oral communications with the contributor when the recipient committee creates and maintains a contemporaneous signed record of the conversation. *See* NPRM, 67 FR at 54,371.

All of the commenters who addressed this issue thought an email should suffice, instead of a writing signed by the contributor. Some commenters were opposed to permitting committees to memorialize conversations to serve as documentation of redesignations or reattributions, as discussed above in connection with 11 CFR 110.1(l).

In adopting the new means of redesignation and reattribution in 11 CFR 110.1(b)(5)(ii)(B), 110.1(b)(5)(ii)(C), and 110.1(k)(3)(ii)(B), the Commission has concluded that no contributor response is required for the reattributions and redesignations pursuant to the new presumptions, so no contributor signature is required. However, the designation and attribution regulations require contributor signatures in other instances. *See, e.g.*, 11 CFR 110.1(b)(4)(ii), new 110.1(b)(5)(ii)(A)(2), 110.1(k)(1), and new 110.1(k)(3)(ii)(A)(2). In these situations, the regulations require a response from the contributor, and thus require the response to be in writing and signed by the contributor in order to prevent fraud and to clearly indicate who is contributing. *Cf.* 11 CFR 104.8(c) (requiring contributions to be reported as made by the last person signing the instrument). While email may be an appropriate vehicle for contacting contributors such as new 11 CFR 110.1(b)(5)(ii)(B)(6) and (C)(7) or for contributor responses in some instances, it may raise complicating issues that have not been addressed in this rulemaking. For example, with respect to reattributions, how could a committee determine whether both contributors have consented to the reattribution? The Commission has concluded that permitting email to replace a contributor's signature should

be undertaken in connection with a rulemaking that considers all of the instances in Commission regulations in which this issue is present, rather than making that change in some instances, but not others, and in the absence of a full consideration of issues similar to the one raised above. Therefore, the Commission has concluded that existing rules should not be amended in this rulemaking to eliminate the signature requirements across the board or to permit email messages to take the place of signed written redesignations or reattributions under revised 11 CFR 110.1(b)(5)(ii)(A)(2) or 11 CFR 110.1(k)(3)(ii)(A)(2). Consequently, no further changes to the regulations are being made in this rulemaking.

### 8. 11 CFR 110.1(l)(4) and (5) Supporting Evidence

As noted in the NPRM, the adoption of the notification approach requires 11 CFR 110.1(l)(4) to be amended to specify the supporting evidence required to be retained under such an approach. *See* NPRM, 67 FR at 54,371. A full-size copy of the check or written instrument, any signed writings from the contributors that accompanied the contribution, and the political committee's notices required for redesignations under 11 CFR 110.1(b)(5)(ii)(B) or (C) or reattributions under 11 CFR 110.1(k)(3)(ii)(B) are included among the supporting evidence that must be retained for the redesignation or reattribution to be effective. *See* new 11 CFR 110.1(l)(4)(ii). Paragraph (l)(5) has also been revised to state that if a political committee fails to retain the notices, then the presumptions for the redesignations or the reattributions will not be effective.

Some commenters supported the proposal that would have permitted committees to orally notify contributors and write a memorandum regarding the conversation to document it. Others opposed this aspect of the proposal as an inherently unreliable process that would provide too great an opportunity for fraud and abuse. The Commission agrees with the latter comments, so the final rules with regard to the redesignation and reattribution presumptions require the notice to be in writing, including by email. *See* new 11 CFR 110.1(b)(5)(ii)(B)(6); 110.1(b)(5)(ii)(C)(7); and 110.1(k)(3)(ii)(B)(3).

One technical correction is included in 11 CFR 110.1(l)(5) as well. The citation to paragraph (l)(2) in the first sentence should be to paragraph (l)(1) instead.

### 11 CFR 110.2 Contributions by Multicandidate Political Committees

Section 110.2 sets forth the dollar limits on contributions made by multicandidate committees, as generally established by 2 U.S.C. 441a(a)(2). BCRA substantially amended the contribution limit for certain types of multicandidate committees specified in 2 U.S.C. 441a(h), which is addressed in § 110.2. As a result, the Commission is amending the regulations to reflect the new limits set forth in more detail below.

Under pre-BCRA 2 U.S.C. 441a(h), the Republican and Democratic Senatorial campaign committees or the national committee of a political party or any combination of such committees were permitted to contribute up to \$17,500 to a candidate for election or nomination for election to the U.S. Senate during the year of the election. BCRA amends this section of the Act to increase the amount that may be contributed by these committees to Senatorial candidates to \$35,000 on or after January 1, 2003. Consequently, 11 CFR 110.2(e), which contains this contribution limit, is being amended to increase the limit to \$35,000.

New paragraph (e)(1) sets forth the amended contribution limit. The Commission did not receive any comment on its proposal to amend paragraph (e)(1). New paragraph (e)(2) parallels the provisions in § 110.1(c)(1)(i), (ii) and (iii) and 110.1(b)(1)(i), (ii) and (iii). New paragraph (e)(2) provides for the application of the indexing provisions at 11 CFR 110.17 to this contribution limitation and establishes the two-year period in which the increased contribution limits are in effect. New paragraph (e)(2) also provides for the periodic publication by the Commission of the increased contribution limit. When first proposed in the NPRM, this paragraph received one comment supporting the intention to publish information regarding the adjusted contribution limit. The comments relating to paragraph (e)(2) that concern the timing of the increase in the contribution limit due to the application of the indexing provisions are addressed in the Explanation and Justification for new § 110.17, below.

### 11 CFR 110.4 Contributions in the Name of Another; Cash Contributions

Previously, 11 CFR 110.4(a) set forth regulations implementing the prohibitions on contributions and expenditures by foreign nationals codified at 2 U.S.C. 441e. In light of the amendments to 2 U.S.C. 441e contained

in BCRA, § 110.4(a) is being removed and reserved, and new 11 CFR 110.20 is being created to implement BCRA's prohibition on contributions, donations, expenditures, independent expenditures, and disbursements by foreign nationals.

In addition, the section heading has been changed to cover the two topics addressed in this section: (1) Contributions made in the name of another and (2) cash contributions.

### 11 CFR 110.5 Aggregate Bi-Annual Contribution Limitations for Individuals

Aside from the limits on the dollar amounts that individuals may contribute to candidates and political committees, 2 U.S.C. 441a(a)(3) also contains aggregate limits on the amount that individuals may give within a specified period of time. These contribution limits are set forth in the Commission's regulations at 11 CFR 110.5. However, as with §§ 110.1 and 110.2 discussed above, BCRA substantially amended the FECA by restructuring the aggregate contribution limits. As a result, the Commission is amending the regulations in § 110.5 to reflect the new contribution limits in BCRA.

#### 1. 11 CFR 110.5(a) Scope

Section 110.5(a) sets forth the scope of the regulations in 11 CFR 110.5. The final rules in this paragraph contain amended citations to the provisions concerning minors and foreign nationals. This final rule is identical to the proposed rule, on which the Commission received no comments.

#### 2. 11 CFR 110.5(b) Bi-Annual Limitations

BCRA amends the provisions in FECA that establish the total amount of contributions that may be made by individuals within the prescribed time periods. Under former 2 U.S.C. 441a(a)(3), individuals were permitted to make no more than \$25,000 in aggregate contributions per calendar year. This section was revised by BCRA to establish new bi-annual aggregate limits that permit individuals to make up to \$95,000 in contributions, including up to \$37,500 in contributions to candidates and their authorized committees, and up to \$57,500 in contributions to any other political committees. 2 U.S.C. 441a(a)(3)(A) and (B). The \$57,500 aggregate contribution limit contains a further restriction in that no more than \$37,500 of this amount may be given to political committees that are not the political committees of national political parties. 2 U.S.C. 441a(a)(3)(B).

Current 11 CFR 110.5(b) is being amended to incorporate the increased bi-annual aggregate contribution limits, which are effective on January 1, 2003. New paragraph (b)(1)(i) contains the new bi-annual aggregate limit for contributions to candidates and their authorized committees. New paragraph (b)(1)(ii) contains the new bi-annual aggregate limit for contributions to other political committees. The Commission received no comments on the changes to paragraphs (b)(1)(i) and (ii) of this section.

Sections 441a(i)(1)(C) and 441a-1(a)(1)(B) of FECA contain an exception to the bi-annual contribution limits for individuals. Under these new provisions of BCRA, the individual contribution limits to candidates for the U.S. House of Representatives and U.S. Senate are increased during certain limited time periods if the candidate is opposing another candidate who makes expenditures from his or her personal funds above a certain threshold. Contributions made under these increased dollar limits do not apply to the individual contributor's bi-annual aggregate limits. 2 U.S.C. 441a(i)(1)(C) and 441a-1(a)(1)(B). Accordingly, new § 110.5(b)(2) reflects this exception, which will be addressed in greater detail in a separate rulemaking concerning the so-called "millionaires" amendment." One commenter, while agreeing generally with proposed paragraph (b)(1)(iii), suggested that the language in the draft rule was not direct enough in making this point. The Commission agrees and thus, new paragraph (b)(2) states more precisely the circumstances under which the individual bi-annual limits on contributions do not apply to contributions coming under 2 U.S.C. 441a(i)(1)(C) or 441a-1(a)(1)(B).

Section 110.5(b)(3) provides for the increase, if necessary, in the bi-annual aggregate contribution limits by the percent difference in the price index, as described in 11 CFR 110.17. The issues relating to the relationship of the statutory time frame for aggregating contributions and the inflation adjustment time frame are discussed below regarding 11 CFR 110.17(b). New paragraph (b)(4) states the Commission's intention to publish information regarding the adjusted contribution limits in the **Federal Register** and on the Commission's Web site. One commenter supported publishing the adjusted contribution limits. New paragraphs (b)(3) and (b)(4) contain provisions parallel to that found in 11 CFR 110.1(b) and (c) and 110.2(e). These paragraphs of the final rules contain minor wording revisions but are nearly identical to the

proposed versions, on which the Commission received no comments.

#### 11 CFR 110.9 Violations of Limitations

The final rules at 11 CFR 110.9, formerly entitled, "Miscellaneous provisions," are being amended to address only violations of the contribution and expenditure limitations. Other provisions in 11 CFR 110.9 addressing fraudulent misrepresentations, the price index increase, and the voting age population are being or will be amended and moved in this rulemaking and other BCRA rulemaking projects.<sup>2</sup> The title of section 110.9 is also being changed to "Violations of limitations" to reflect these changes. Finally, the final rules add the word "knowingly" in two places pertaining to the acceptance of contributions in violation of the limitations and prohibitions set forth in 11 CFR part 110. This revision mirrors the knowledge requirement in 2 U.S.C. 441a(f) and 441f. No comments were received on this revision or the reorganization of these provisions.

The prohibition on contributions by minors is contained in 2 U.S.C. 441k and not in 2 U.S.C. 441a of the Act. Therefore, the Commission notes that in instances where a candidate, an authorized committee, or a committee of a political party knowingly accepts a contribution from a minor, it would be in violation of § 110.9 only if the contribution is made in the name of another, but not if the contribution was made with the minor's own funds. See 2 U.S.C. 441a(f) ("no candidate or political committee shall knowingly accept any contribution \* \* \* in violation of the provisions of this section").

#### 11 CFR 110.17 Price Index Increase

Pre-BCRA 2 U.S.C. 441a(c) mandated yearly indexing to inflation of the expenditure limitations established by 2 U.S.C. 441a(b) (the limits on expenditures by candidates for nomination and election to the office of President of the United States who accept public funding) and 2 U.S.C. 441a(d) (the limits on expenditures by national party committees, State party committees, or their subordinate committees in connection with the general election campaign of candidates for Federal office). BCRA amends 2

U.S.C. 441a(c) to extend the inflation indexing to: (1) The limitations on contributions made by persons under 2 U.S.C. 441a(a)(1)(A) (contributions to candidates) and 441a(a)(1)(B) (contributions to national party committees); (2) the bi-annual aggregate contribution limits applicable to individuals now found at 2 U.S.C. 441a(a)(3); and (3) the limitation on contributions made to U.S. Senate candidates by certain political party committees at 2 U.S.C. 441a(h). 2 U.S.C. 441a(c)(1)(B). Under the statute, the adjustments for inflation for 2 U.S.C. 441a(a)(1)(A), 441a(a)(1)(B), 441a(a)(3) and 441a(h) are to be made only in odd-numbered years and such increases are to be in effect for the 2-year period beginning on the first day following the date of the general election in the preceding year and ending on the date of the next regularly scheduled general election. 2 U.S.C. 441a(c)(1)(C).

Former 11 CFR 110.9(c), which described the expenditure limits subject to inflation indexing, did not include any of the new inflation indexing discussed above. In order to address the price indexing for the new contributions and expenditures limitations in a comprehensive manner, the Commission is adding new § 110.17 to track the changes to 2 U.S.C. 441a(c).

#### 1. 11 CFR 110.17(a) Price Index Increases for Party Committee Expenditure and Presidential Candidate Expenditure Limitations

New § 110.17(a) replaces and restates, with some minor rewording, former section 110.9(c) regarding the price index increases that apply to the political party committee and Presidential candidate spending limits established by 11 CFR 110.7 and 110.8. However, paragraph (a) contains one important change from former section 11 CFR 110.9(c). Section 110.9(c) had incorrectly stated that the expenditure limitations established by §§ 110.7 and 110.8 would be increased by the annual percent difference of the price index, as certified to the Commission by the Secretary of Labor. Section 441a(c) of the Act does not use an annual percent difference of the price index to calculate the increases. Instead, it requires the use of the percent difference between the price index for the 12 months preceding the beginning of the calendar year in which the change is made and the base period. For the party committee expenditures limitations and the Presidential candidate expenditures limitations, the base period is calendar year 1974, with each change remaining in effect for a calendar year. Consequently, paragraph (a) of new 11

CFR 110.17 correctly states the standard to be applied and deletes the term "annual" from the regulation. The Commission received no comment on this change.

#### 2. 11 CFR 110.17(b) Price Index Increases for Contributions by Persons, by Political Party Committees to Senatorial Candidates, and the Bi-Annual Aggregate Contribution Limitation for Individuals

As noted above, BCRA increased the number of contribution limitations now subject to price index increases. 2 U.S.C. 441a(c)(1)(B). New 11 CFR 110.17(b) tracks BCRA by providing that the following contribution limits will be indexed to inflation: 11 CFR 110.1(b)(1) (limits for persons contributing to candidates and authorized political committees); 11 CFR 110.1(c)(1) (limits for contributions made to national party committees); 11 CFR 110.2(e) (limits for contributions made by party committees to Senatorial candidates); and 11 CFR 110.5 (bi-annual aggregate contribution limits for individuals). New § 110.17(b)(1) specifies that these contribution limitations will be increased during odd-numbered years and that the increased limit would be in effect for a two-year period.

The NPRM raised the issue of the interaction between the statutory provision that indexes certain contribution limits, 2 U.S.C. 441a(c)(1)(C), and the various contribution limits themselves. Particular focus was centered on the retroactive effective date in the indexing provision as it relates to the two calendar year-based aggregate contribution limit of 2 U.S.C. 441a(a)(3).

In the NPRM, the Commission proposed at 11 CFR 110.5(b)(3) to interpret the statute in a way that required donors to aggregate contributions using the two-year period referenced in the effective date language of the indexing provision, rather than the 'January 1 of odd year through December 31 of even year' time frame of Section 441a(a)(3).

Several commenters, including the Congressional sponsors of BCRA, urged that the Commission not adopt the proposed approach and instead apply the calendar year approach set forth in the statutory provision setting out the contribution limit itself. The commenters noted that the inflation adjustment language was confusing and its effective date language stems largely from an intention to assure that the revised 'per election' limit on giving to candidates was revised after each general election. They urged, in essence, that the Commission simplify

<sup>2</sup> The BCRA rulemaking project entitled "Other Provisions" will address the fraudulent misrepresentation provisions. See Notice of Proposed Rulemaking ("NPRM") at 67 FR 55,348, 55,356 (Aug. 29, 2002). The BCRA rulemaking project entitled "Coordination and Independent Expenditures" will address the voting age population provisions. See NPRM at 67 FR 60,042, 60,060 (Sept. 24, 2002).

application of the inflation adjustment provision so that for affected limits based on calendar year aggregations, the effective date would only affect the next upcoming calendar year-based period. This would mean that the inflation adjustments on the limit on contributing to national parties (2 U.S.C.

441a(a)(1)(B)), the limit on national party contributions to Senate candidates (2 U.S.C. 441a(h)), and the two-year limit on aggregate contributions (2 U.S.C. 441a(a)(3)) would only affect the next calendar-year based period, not the calendar year-based period when the effective date period technically begins under section 441a(c)(1)(B).

The Commission has decided to adopt the approach suggested by the commenters. It would be somewhat confusing if the calendar year-based contribution limits were to be increased in the midst of the calendar year period involved. Accordingly, the Commission is adopting final rules that delete the language at proposed 11 CFR 110.5(b)(3), and is modifying the language at proposed 11 CFR 110.1(c)(1)(ii), 110.2(e)(2), and 110.5(b)(2) and 110.17(b)(1) to clarify that for the calendar year-based limits, the indexing changes will only affect the calendar year-based periods that follow. Please note that the indexing changes for the 'per election' limit at 11 CFR 110.1(b)(1) will still take effect, pursuant to 11 CFR 110.1(b)(1)(ii), on the day after the general election and will only affect elections held after that general election. See discussion above regarding 11 CFR 110.1(b)(3) and Net Debts Outstanding.

New paragraph (b)(2) of 11 CFR 110.17 establishes that 2001 is the base year for the calculation of the price index difference. No comments were received regarding this paragraph. One commenter noted that while the contribution limits may be increased due to indexing to inflation, the exact amount of the increase may not be precisely known or formally published until after January of the odd-numbered year. The commenter urged that the Commission establish a "safe harbor" to deal with these circumstances. This commenter suggested allowing political committees to receive contributions in excess of previous contributions limits while granting a period of time after the publication of the new limits to refund "*de minimis* excessive contributions" without triggering enforcement consequences.

The Commission believes that the creation and implementation of this approach would be problematic. Determining or defining what amounts should be treated as *de minimis* poses

difficulties. In the discussion regarding net debts outstanding and increased contribution limits, the Commission noted the confusion that would exist if multiple contribution limits attached to the same election. Similarly, allowing political committees to determine what amounts to accept in anticipating the indexing adjustments would also create confusion and, in effect, multiple contribution limits. The operation of a safe harbor would, therefore, be administratively challenging and could also undermine the contribution limits. Also, during times when inflation is low, it is possible that there would be no increase in certain limits due to the operation of the rounding provisions. See the Explanation and Justification for new 11 CFR 110.17(c) below. For these reasons, the Commission has determined that the acceptance of "*de minimis*" excessive contributions is not appropriate and is not included in the final rules.

#### 3. 11 CFR 110.17(c) Rounding of Price Index Increases

A further change in 2 U.S.C. 441a(c) is the introduction of a rounding provision for all the amounts that are increased by the indexing to inflation in 2 U.S.C. 441a (including the Presidential expenditure limits at 2 U.S.C. 441a(b) and coordinated party spending limits at 2 U.S.C. 441a(d)). If the inflation—adjusted amount is not a multiple of \$100, it is rounded to the nearest multiple of \$100. 2 U.S.C. 441a(c)(1)(B)(iii). New section 110.17(c) implements the new rounding provision found at 2 U.S.C. 441a(c)(B)(iii). This final rule, which is identical to the proposed rule, did not draw any comments.

#### 4. 11 CFR 110.17(d) Definition of Price Index

New § 110.17(d) tracks 2 U.S.C. 441a(c)(2)(A) by specifically defining the "price index" as the average over a calendar year of the Consumer Price Index (all items—United States city average) published by the Bureau of Labor Statistics. The Department of Labor computes the CPI using two population groups: All Urban Consumers (CPI-U) and Clerical Workers (CPI-W). The CPI-U represents approximately 87% of the total United States population while the CPI-W, a subset of the CPI-U, represents 32% of the total United States population.<sup>3</sup> While neither the FECA nor BCRA specifies which population group is to be used, the Commission has

historically used the more inclusive CPI-U since that appears to be the best method to calculate changes in the affected limitations. The Commission received one comment supporting the use of the CPI-U and no comments supporting the use of the CPI-W. Therefore, for the reasons identified above, the Commission will continue to use the CPI-U when calculating the percent change in the Consumer Price Index.

#### 5. 11 CFR 110.17(e) Publication of Price Index Increases

New § 110.17(e) in the final rules states that the Commission will announce the amount of the adjusted expenditure and contribution limitations in the **Federal Register** and on the Commission's Web site. The Commission received one comment supporting this provision and none opposing it.

#### 6. Application of the First Increase Due to Percent Changes in the Price Index

The increased contribution limits of 2 U.S.C. 441a(a)(1)(A) and (B), 441a(a)(3), and 441a(h) apply to contributions made on or after January 1, 2003. However, under the interpretation outlined above, 2 U.S.C. 441a(c)(1)(C) requires that these same contribution limits be increased through indexing for inflation in odd-numbered years with the increase in effect starting with the day following the last general election in the previous year. This could imply that the initial contribution limits authorized by BCRA to take legal effect on January 1, 2003 should also be increased by the difference in the price index. Several comments, including one from the Congressional sponsors of BCRA, disagreed with this interpretation and instead urged that the first increase in the limits should occur in 2005 and take effect in November 3, 2004, which is the day after the general election.

One comment noted that it was legally impossible for the indexing provision to be given their full effect in 2003. According to the commenter, the new contribution limits are effective on or after January 1, 2003. For the indexing provisions to be given a full effect in 2003, any increase in the contribution limit would be retroactively applied, making the effective date November 6, 2002, rather than the statutorily mandated effective date of January 2, 2003. Even though the legislative history is otherwise silent on this point, this legal impossibility strongly implies that these provisions were intended to be applied first in 2005. After considering these

<sup>3</sup> The CPI published by the Department of Labor may be found at <http://www.bls.gov/cpi/home.htm>.

comments, the Commission agrees that the indexing provisions should be first applied in 2005.

### 11 CFR 110.19 Contributions and Donations by Minors

#### 1. Introduction

BCRA prohibits individuals who are 17 years old and younger (minors) from making contributions to Federal candidates and contributions and donations to committees of political parties. See 2 U.S.C. 441k. Senator McCain, a primary sponsor of BCRA, stated during the Senate debate on the legislation that the prohibition on contributions by minors “restores the integrity of the individual contribution limits by preventing parents from funneling contributions through their children, many of whom are simply too young to make such contributions knowingly.” 148 Cong. Rec. S2145–2146 (daily ed. March 20, 2002).

The final rules at new 11 CFR 110.19 implement BCRA’s prohibitions on contributions and donations by minors at 2 U.S.C. 441k. Because 2 U.S.C. 441k expressly prohibits only contributions by minors to candidates and contributions and donations by minors to committees of political parties, contributions by minors to other types of political committees, such as separate segregated funds and non-connected political committees, will continue to be governed by the provisions of the pre-BCRA regulations. These regulations are being moved from former 11 CFR 110.1(i)(2) to 11 CFR 110.19(d).

#### 2. 11 CFR 110.19(a) Contributions to Candidates

Paragraph (a) of 11 CFR 110.19 prohibits contributions by minors to Federal candidates. The paragraph specifies that the prohibition on contributions by minors to Federal candidates includes contributions to a candidate’s principal campaign committee, to any other authorized committee of that candidate, and to any entity directly or indirectly established, financed, maintained or controlled by one or more Federal candidates.

The Commission sought comment on whether prohibiting contributions by minors to entities directly or indirectly established, financed, maintained or controlled by one or more Federal candidates is within the scope of 2 U.S.C. 441k. The only commenter to address this issue supported prohibiting minors’ contributions to such entities, opining that the prohibition would further BCRA’s purpose of ensuring that contribution limits are not evaded by a

parent funneling money through a child. The Commission agrees.

The Commission also sought comment in the NPRM as to whether the regulations should make clear that the relevant time for determining whether a minor has made a prohibited contribution or donation is the age of the minor at the time he or she makes a contribution. No comments were received on this issue. The final rules do not include a separate provision addressing this point because reference in the rules to 11 CFR 110.1(b)(6), which addresses when a contribution is made, provides sufficient clarification.

#### 3. 11 CFR 110.19(b) Contributions and Donations to Committees of Political Parties

New 11 CFR 110.19(b) implements BCRA’s prohibition on contributions and donations by minors to “a committee of a political party.” The proposed rules at 11 CFR 110.19(b) interpreted this provision as a prohibition on contributions and donations to national, State, district, and local party committees. In light of BCRA’s language prohibiting donations as well as contributions to political party committees, the Commission proposed to interpret 2 U.S.C. 441k to prohibit minors from making any donations whatsoever to State, district, and local party committees, including to their non-Federal accounts. In the alternative, the Commission sought comment on whether a narrower construction of BCRA’s prohibition on donations to State, district, and local party committees was warranted. Specifically, the Commission sought comment on prohibiting donations by minors to the extent such amounts are used to conduct activities affecting Federal elections but to permit these donations if used for exclusively non-Federal purposes to the extent permitted by State law.

Two commenters addressed this issue. One commenter stated that BCRA’s prohibition should not extend to minors’ contributions to State, district, and local party committees because the purpose of the provision is to prevent parents from evading federal contribution limits by funneling contributions to their children. The commenter argued that aside from limits on Levin funds, which can be used to finance certain “Federal election activities” by State, district, and local parties, BCRA does not limit funds given to State, district, and local parties. The same commenter also rejected the narrower construction described in the NPRM that would prohibit minors’ donations to State, district, and local

party committees only to the extent that they were to finance activities affecting Federal elections. The commenter argued that concerns that minors’ contributions might be used as Levin funds should be addressed in a rulemaking addressing those funds.

A second commenter stated that though contributions by minors to State, district, and local party committees do not risk circumvention of federal contribution limits “since there are no such limits,” the statutory language at 2 U.S.C. 441k does not limit the prohibition on contributions or donations by minors to federal accounts of State, district, and local party committees. Other commenters, including the Congressional sponsors of BCRA, did not directly address the issue of minors’ donations to political party committees but noted that minors may continue to make donations directly to State and local candidates to the extent permitted under State law.

The final rule at 11 CFR 110.19(b)(1) follows the proposed rule by prohibiting contributions and donations by minors to national, State, district, and local committees of a political party. Further, the Commission believes that interpreting the prohibition on donations to encompass both non-Federal accounts and Federal accounts of political party committees is appropriate. Interpreting the phrase “committee of a political party” to encompass only national party committees would render the prohibition on “donations” meaningless because national party committees must no longer accept non-Federal funds under 2 U.S.C. 441i. Similarly, the prohibition on “donations” would have no meaning if the minor’s prohibition encompassed only Federal accounts of party committees since funds accepted by Federal accounts, used for the purpose of influencing Federal elections, are considered to be “contributions” not “donations.” Thus, BCRA preempts State law to the extent that State law permits minors to make donations to State, district, and local party committees.

Prohibiting donations by minors to all committees of State, district, and local parties also has a Federal purpose because donations of non-Federal funds to State parties could otherwise be used, in part, to finance Federal election activities, as defined at 2 U.S.C. 431(20). See also, 11 CFR 100.24(a) and (b) in Final Rules for Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 FR 49,064, 49,110–49,111 (July 29, 2002). These activities, including voter registration and get-out-the vote activities conducted within a



specific time frame, are required under BCRA to be funded either wholly with Federal funds or with a combination of Federal funds and another category of funds regulated by BCRA known as "Levin funds." See 67 FR at 49,098 and 49,125–49,126 (11 CFR 300.32(c) and 300.33(a) and accompanying Explanation and Justification). Although Levin funds may be raised from sources permitted under State law, BCRA limits the amount of such funds to \$10,000 per donor. Thus, to the extent that donations to State, district, and local party committees may be used for such activities, BCRA limits those donations. Prohibiting minors from making donations serves to prevent parents from circumventing those donation limits through minor children, just as the prohibition on contributions by minors serves to prevent evasion of the contribution limits.

The Commission has decided not to include in the final rules the alternative suggested in the NPRM that would permit minors to make donations to non-Federal accounts of State, district, and local party committees if the recipient committee can show by establishing separate accounts or through a reasonable accounting method that the donation is used for exclusively non-Federal purposes. As discussed above, the statutory language is broad and does not distinguish between Federal and non-Federal accounts of party committees. Additionally, this approach would require State, district, and local party committees to track yet another type of donation or establish another account in addition to those it already tracks or maintains, thereby resulting in an additional administrative burden to those groups. See, e.g., 67 FR at 49,093 (Explanation and Justification for 11 CFR 300.30).

Accordingly, as interpreted by the final rules, BCRA preempts State law to the extent that State law permits individuals under 18 years of age to donate funds to State, district, and local party committees. This preemption may have little practical effect in some states. As pointed out in the NPRM, many states treat contributions by minors as contributions by their parent(s) or guardian(s). See for example, Kan. Stat. Ann. 25–4153(c) and Okla. Stat. t. 74, 257:10–1–2(a)(1) and (h)(2).

Paragraph (b)(2) of the final rules is unchanged from the proposed rules. It prohibits contributions and donations by minors to entities directly or indirectly established, financed, maintained or controlled by a committee of a national, State, district or local political party. No comments were received on this provision.

As discussed above in the Explanation and Justification for paragraph (b)(1), the Commission interprets the prohibition on contributions and donations by minors to committees of political parties to include accounts of party committees and entities established, financed, maintained or controlled by these party committees, including their Federal and non-Federal accounts. Consequently, new paragraph (b)(3) of the final rules makes clear that the prohibition on contributions and donations by minors encompasses donations to any account of a committee or entity described in paragraphs (b)(1) and (b)(2) of this section.

#### 4. Contributions and Donations by Minors for Certain Runoffs, Recounts and Election Contests

BCRA provides that its prohibition on contributions and donations by minors to candidates and political parties does not apply with respect to runoff elections, recounts or election contests resulting from elections held prior to November 6, 2002. See 2 U.S.C. 431 note. Proposed 11 CFR 110.1(i)(3) addressed this provision. No comments were received on it. The final rules do not address 2 U.S.C. 431 note because the Commission has concluded that regulatory provisions for it are unnecessary.

#### 5. 11 CFR 110.19(c) Contributions to Political Committees That Are Not Authorized Committees or Committees of Political Parties

Because 2 U.S.C. 441k specifically prohibits contributions by minors to candidates and political party committees and not to other types of unauthorized committees, proposed 11 CFR 110.19(c) contemplated that minors could continue to make unearmarked contributions to unauthorized political committees except political party committees, in accordance with the requirements of 11 CFR 110.1(i)(2), the prior rules governing contributions by minors. The Commission sought comment in the NPRM as to whether 2 U.S.C. 441k could be interpreted to also prohibit contributions by minors to other political committees such as separate segregated funds and non-connected political committees. None of the commenters addressed this issue.

The final rules adhere to the plain language of 2 U.S.C. 441k in permitting minors to continue to make contributions to these other political committees under the existing rules. Thus, the final rules at 11 CFR 110.19(c)(1) through (c)(3) restate the regulations governing contributions by

minors, which are being moved from 11 CFR 110.1(i)(2) and amended to reflect that they now govern unearmarked contributions by minors to unauthorized political committees other than political party committees. Paragraph (c) provides that an individual under 18 years of age may make contributions in accordance with the contribution limits set out at 11 CFR 110.1 and 110.5, if all of the following conditions are satisfied: (1) The minor voluntarily and knowingly makes the decision to contribute; (2) the funds, goods or services contributed are owned or controlled exclusively by the minor; (3) the contribution is not made from the proceeds of a gift given to the minor to make a contribution or is not in any way controlled by an individual other than the minor; and (4) the contribution is not earmarked or otherwise directed to one or more Federal candidates or political committees or organizations described in §§ 110.19(a) and (b).

The reorganization of the final rule clarifies that the types of committees to which a minor may continue to contribute are political committees not described in §§ 110.19(a) and (b), provided that the contribution is not earmarked to a candidate, committee or organization described in §§ 110.19(a) and (b). The final rules also clarify that non-earmarked contributions to these other political committees will continue to be governed by the existing regulations governing contributions by minors. No comments were received on this provision.

#### 6. 11 CFR 110.19(d) Volunteer Services

Paragraph (d) of the final rules makes clear that minors are not prohibited from volunteering their services to Federal candidates, political party committees or other political committees, in accordance with legislative intent. See 148 Cong. Rec. S2146 (daily ed. March 20, 2002) (statement of Senator McCain). The final rule is identical to proposed 11 CFR 110.19(d). The Commission received one comment addressing volunteer services. The commenter agreed that under 2 U.S.C. 441k minors could continue to participate in any type of political campaign by volunteering.

#### 7. 11 CFR 110.19(e) Definition of Directly or Indirectly Establish, Maintain, Finance, or Control

The final rule at 11 CFR 110.19(e) is similar to the language of the proposed rule in 11 CFR 110.19(e). It refers the reader to 11 CFR 300.2(c) for the definition of "directly or indirectly establish, maintain, finance, or control." For the definition, see Final Rules for

Excessive and Prohibited Contributions: Non-Federal Funds or Soft Money, 67 FR at 49,121. The Commission believes that it is preferable to use the same definition of a term throughout the BCRA regulations to promote consistency and avoid confusion where, as here, doing so would not undermine the purpose of the statute. One commenter expressed support for using the same definition of the term throughout the BCRA regulations, although the same commenter noted that it had disagreed with the definition of “directly or indirectly establish, maintain, finance, or control” contained in 11 CFR 300.2(c) in its comments on the NPRM on Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money.

#### 8. Proposed Exemption for Emancipated Minors

The Commission also sought comment in the NPRM as to whether minors who are emancipated under State law should be exempt from the prohibition. Under many State laws, a petition for a judicial declaration or order of emancipation requires consideration as to whether a minor manages his or her own financial affairs or is financially self-supporting. Emancipation also has the effect, in most cases, of conferring upon a minor the rights and responsibilities of an adult, and relieving a child of parental control, thereby diminishing the possibility that a parent would funnel contributions or donations through an emancipated minor child.

Five commenters addressed this issue. Four commenters, including the congressional sponsors of BCRA, expressed support for such an exemption. These commenters agreed that the risk of parental evasion of the contribution limits through an emancipated minor was either not present or diminished. The fifth commenter agreed that the risk of parental circumvention of contribution limits was less of a concern in the case of an emancipated minor. However, this commenter argued that the statutory language clearly prohibited contributions by minors based solely on age.

The Commission has decided not to include an exemption for emancipated minors in the final rules given the plain language of 2 U.S.C. 441k, which prohibits certain contributions and donations by minors on the basis of age alone and not on a minor’s legal or financial independence from a parent.

#### 11 CFR 110.20 Prohibition on Contributions, Donations, Expenditures, Independent Expenditures and Disbursements by Foreign Nationals

As indicated by the title of section 303 of BCRA, “Strengthening Foreign Money Ban,” Congress amended 2 U.S.C. 441e to further delineate and expand the ban on contributions, donations, and other things of value by foreign nationals. BCRA expressly applies the ban to contributions and donations solicited, accepted, received, or made directly or indirectly in connection with State and local, as well as Federal office. 2 U.S.C. 441e(a)(1)(A) and (a)(2). Furthermore, the prohibition applies to: (1) Contributions and donations to committees of political parties; (2) donations to Presidential inaugural committees; (3) donations to party committee building funds; (4) disbursements for electioneering communications; (5) expenditures; and (6) independent expenditures. 2 U.S.C. 441e(a)(1)(B) and (C); 36 U.S.C. 510. Consequently, the Commission is amending 11 CFR part 110 to implement the revised statutory provision. The final rules remove and reserve 11 CFR 110.4(a), the former regulation that addressed foreign nationals. New § 110.20 implements BCRA’s prohibition on contributions, donations, expenditures, independent expenditures, and disbursements by foreign nationals. This new section also implements the provision in 2 U.S.C. 441e(a)(2) that prohibits persons from knowingly soliciting, accepting, or receiving contributions and donations from foreign nationals, and adds prohibitions against the knowing provision of substantial assistance with foreign national contributions or donations, including, but not limited to, serving as a conduit or intermediary. “Foreign national” and “knowingly” are defined for purposes of this section.

#### 1. 11 CFR 110.20(a)(1) and (2) Definitions of “Disbursement” and “Donation”

New § 110.20(a) defines for purposes of this section several words or phrases that are either not defined in other sections of the Act or that are defined elsewhere so as to cover only Federal elections. Two of these, namely “disbursement” and “donation” were not defined in the proposed rules; however, comments were sought as to whether the final rules should include definitions of these terms.

Although the Commission did not receive any comments regarding a definition of “disbursement,” it believes additional guidance to be necessary in

light of the use of “disbursement” in BCRA in the context of the foreign national prohibition, and its corresponding and repeated use in new § 110.20. Thus, the final rule at 11 CFR 110.20(a)(1) incorporate the definition of this term in new 11 CFR 300.2(d). One commenter urged the Commission to import the definition of “donation” in 11 CFR 300.2(e) into § 110.20(a). For the same reason that the Commission considers it necessary to provide guidance as to “disbursement” in § 110.20, it agrees that § 110.20(a) should also include a definition of “donation.” Consequently, paragraph (a)(2) incorporates the definition of “donation” at 11 CFR 300.2(e) into § 110.20.

#### 2. 11 CFR 110.20(a)(3) Definition of “Foreign National”

Section 110.20(a)(3), which defines “foreign national,” generally follows the definition at former 11 CFR 110.4(a)(4). Section 110.20(a)(3)(i) incorporates “foreign principal” as defined in 22 U.S.C. 611(b) within the definition of “foreign national.” Paragraph (a)(3)(ii) includes non-citizens but excludes permanent residents of the United States as defined in 8 U.S.C. 1101(a)(20). Paragraph (a)(3)(iii) narrows the definition of “foreign national” by excluding both citizens of the United States and, in keeping with BCRA, United States nationals pursuant to 8 U.S.C. 1101(a)(22).<sup>4</sup> The final rule is the same as the language in proposed 11 CFR 110.20(i). No comments addressing this definition were received.

#### 3. 11 CFR 110.20(a)(4) and (a)(5) Definition of “Knowingly”

Both the former and the current foreign national prohibitions in 2 U.S.C. 441e are silent as to what degree of knowledge, if any, a person soliciting, accepting, or receiving a contribution or donation must have regarding the foreign national status of the contributor or donor to establish a violation of the statute. In contrast, some other prohibitions in FECA and BCRA expressly provide that knowledge is an element of the violation.<sup>5</sup>

The Commission in recent years has addressed the issue of required knowledge in a number of enforcement matters arising under former 2 U.S.C.

<sup>4</sup> “National of the United States” is defined as “(A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States.” 8 U.S.C. 1101(a)(22). The addition of (B) covers residents of American Samoa.

<sup>5</sup> E.g., 2 U.S.C. 441a(f) “No candidate or political committee shall knowingly accept any contribution \* \* \* in violation of the provisions of this section \* \* \*.” (Emphasis added).

441e(a). *See*, for example, Matter Under Review ("MUR") 4530, *et al.* In this and related matters, the Commission confronted questions of whether the statute or the First Amendment requires a person to have knowledge of a contributor or donor's foreign national status in order to be in violation of the foreign-national prohibition, and, if so, what degree of knowledge is required.

The Commission considered, for example, whether actual knowledge at the time of a solicitation or receipt is a prerequisite for a violation, or whether the person has a duty of inquiry when circumstances would raise the suspicions of an objective observer. Another alternative with regard to the level of knowledge required would be to assume, given the silence in both FECA and BCRA on this question, that Congress intended this to be a strict liability statute. The fact that Congress has used "knowingly" in other provisions of FECA and BCRA, but did not include this standard with regard to the solicitation, acceptance, or receipt of foreign national contributions and donations, could be construed as intent not to require knowledge in this regard.

The U.S. Supreme Court has found that "the meaning of the statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, \* \* \* the sole function of the courts is to enforce it according to its terms'." Sutherland Statutory Construction 40:01, *quoting Caminetti v. U.S.*, 242 U.S. 470, 485 (1917). However, one exception to this "plain meaning rule" is that the rule should not be applied when an injustice would result. Sutherland Statutory Construction 47:25. Based upon its prior enforcement experience with political committees, and, in particular, with the frequent involvement of volunteers in the solicitation and receipt of contributions and donations, the Commission has determined that a knowledge requirement may produce a less harsh result than a strict liability standard.

The final rules at 11 CFR 110.20(a)(4), like the proposed rules, contain three standards of knowledge, any one of which would satisfy the knowledge requirements: (1) Actual knowledge; (2) reason to know; and (3) the equivalent of willful blindness. Additionally, both the proposed rules and the final rules in paragraph (a) contain a list of facts that would lead a reasonable person to conclude that, or inquire as to whether, a contribution or donation was made by a foreign national.

The NPRM sought comments as to whether the additions of a knowledge requirement and of specific standards of knowledge were appropriate and

whether there were other potential facts that should be added to those proposed as circumstances that should trigger an inquiry. Further, comments were requested as to whether the regulation should expressly require that recipient candidates, political committees and other organizations actively seek information as to the citizenship of contributors and donors whenever one of the factors listed is at issue.

Several of the commenters opposed a strict liability standard, but supported the inclusion of explicit knowledge requirements in the rules. However, some commenters opposed as too high the standard in proposed paragraph (g)(4)(ii) that would find knowledge when a person was aware of facts that would lead a reasonable person to conclude that there is "a substantial probability" the source of certain funds is a foreign national; one of these commenters suggested that a "preponderance of the evidence" or "more likely than not" standard would be more appropriate. Divergent views were expressed as to the inclusion of a duty to inquire about the nationality of a donor, with one commenter urging reliance upon current 11 CFR 103.3 rather than upon the addition of an affirmative duty to inquire,<sup>6</sup> and another arguing that a "reasonable inquiry" should include asking "directly" whether or not a donor is a foreign national.

As is also discussed below with regard to new section 110.20(g) and (h), the final rules make knowledge an element of any violation of 2 U.S.C. 441e arising from the solicitation, acceptance, or receipt of foreign national contributions and donations, or that results from the substantial provision of assistance in the solicitation, making, acceptance, or receipt of such contributions and donations. The final rules at 11 CFR 110.20(a)(4) provide a definition of "knowingly," whereby satisfaction of any one of three standards will establish knowledge for purposes of 11 CFR 110.20(g) and (h). Section 110.20(a)(5) contains a list of facts that would lead a reasonable person to conclude, or inquire as to whether, a contribution or

donation was made by a foreign national, as discussed below.

In the final rules, the first standard of knowledge at paragraph (a)(4)(i) is that of actual knowledge of the source of funds solicited, accepted, or received. The second standard at paragraph (a)(4)(ii) requires awareness on the part of the person soliciting, accepting, or receiving a contribution or donation of certain facts that would lead a reasonable person to conclude that there is a substantial probability that the contribution or donation comes from a foreign source. Substantial probability means that there is a considerable likelihood that the donor is a foreign national. *See* Black's Law Dictionary, Fifth Edition, 1979, and the Random House Dictionary of the English Language, 1987. This is, in effect, a "reason to know" standard under which a person should have acted as though a fact existed until it could be proven otherwise. *See* Restatement (Second) of Agency, sec. 9, cmt. d (1958).

The third standard of knowledge at paragraph (a)(4)(iii) is satisfied when the person soliciting, accepting, or receiving a contribution or donation is, or becomes aware of, facts that would lead a reasonable person to inquire as to whether the source of the funds solicited, accepted, or received is a foreign national. This third standard is in effect willful blindness, which is applicable to situations in which a known fact should have prompted a reasonable inquiry, but did not.

Each of the three paragraphs focus on the source of the funds at issue. The source of funds may or may not be the putative contributor or donor who provides a check or other negotiable instrument to a candidate or committee; rather, the source would be the person or persons who originated the contribution or donation, even if it passed through the hands or accounts of a U.S. citizen or permanent resident.

Paragraph (a)(5) sets forth categories of facts that are intended to be illustrative of the types of information that should lead a recipient to question the origin of a contribution or donation under paragraphs (a)(4)(ii) or (iii). These consist of: (i) The use of a foreign passport or passport number; (ii) the provision of a foreign address; (iii) the use of a check or other written instrument drawn on a foreign bank or a wire transfer from a foreign bank; or (iv) contributors or donors who reside abroad. Failure to conduct a reasonable inquiry in the face of any of these facts constitutes evidence of a knowing violation of the Act.

<sup>6</sup> The Commission's regulations at 11 CFR 103.3(b) require that political committee treasurers examine all contributions received for evidence of illegality. If a contribution presenting genuine questions as to legality is deposited, the treasurer has an affirmative duty to investigate the contribution and use best efforts to determine the legality of the contribution. 11 CFR 103.3(b)(1). If, despite such due diligence, the treasurer is unable to determine the legality of the contribution within 30 days of receipt, the treasurer is required to refund the contribution to the contributor. *Id.*

#### 4. 11 CFR 110.20(a)(6) Definition of "Solicit"

The NPRM sought comments as to whether the Commission should incorporate into the regulations at 11 CFR 110.20 the definition of "solicit" at 11 CFR 300.2(m), whether it should leave the term undefined, or whether it should give the term a more expansive or a narrower reading in this context. The term "to solicit" is defined in 11 CFR 300.2(m) as "to ask another person to make a contribution or donation, or transfer of funds, or to provide anything of value, including through a conduit or intermediary." Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money; Final Rule, 67 FR 49,064–49,122 (July 29, 2002).

Two of the comments received strongly urged the Commission not to incorporate the definition of "solicit" at 11 CFR 300.2(m), deeming it too narrow. One such commenter characterized the definition as "radically underinclusive" and inferred that it would allow "a broad range of solicitations to escape [regulation,]" and, if adopted in part 110, would allow candidates and officials to "suggest or request that foreign nationals make contributions to their campaigns." In promulgating 11 CFR 300.2(m), however, the Commission was advised of the need for clear definitions to avoid ambiguity, vagueness and confusion as to what activities or conversations would constitute solicitations. 67 FR at 49,086–49,087 (July 29, 2002). By using the term "ask," the Commission defined "solicit" to require some affirmative verbalization or writing, thereby providing members of Congress, candidates and committees with an understandable standard. It is the impressionistic or subjective aspects of the term "suggest" and "request" that the Commission rejected in the Title I rulemaking. The Commission also notes that while the terms "suggest" or "request" recommended by one commenter encompass a wide array of activity, it is not clear that they would cover more direct verbalizations or writings captured by terms such as "demand," "instruct," or "tell," which the Commission believes are captured by the term "ask."

The Commission is aware that the decision to define "solicit" as "ask" rather than as "request, suggest or recommend" (proposed by the Commission staff) was controversial. The Commission notes that "request" and "ask" are essentially synonymous. (See American Heritage College Dictionary, 34d Edition: "request" is defined as "1. To express a desire for; ask for. 2. To "ask" (a person) to do

something;" "ask" is defined as "\* \* \* 4. To make a request of or for.") The Commission was unwilling to use the far more expansive term "suggest," for concern that such a vague term could subject persons to investigation and prosecution based on highly subjective judgments about whether a particular remark or action constituted a "suggestion." The definition of "solicit" is intended to include "a palpable communication intended to, and reasonably understood to, convey a request for some action \* \* \*" The Democratic National Committee, the Democratic Senatorial Campaign Committee, and the Democratic Congressional Campaign Committee, Comments on Coordinated and Independent Expenditures, 3 (Oct. 11, 2002).

In addition, the basic canons of statutory construction argue strongly against using the phrase "request or suggestion" to define "solicit." BCRA, and FECA prior to passage of BCRA, use the term "request or suggestion" in the definition of "independent expenditure" (See BCRA section 211, 2 U.S.C. 431(17)) and in the reciprocal definition of "coordination" (See BCRA section 213, 2 U.S.C. 441a(a)(7)(B)). "We find the contrasting language to be particularly telling. Where Congress includes particular language in one section of a statute but omits it in another \* \* \* it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (*FEC v. NRA Political Victory Fund*, 513 U.S. 88, 95 (1994) quoting *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (internal quotations and citation omitted)).

The Commission believes that the need to craft clear and understandable definitions marking the boundary between permissible and impermissible solicitations by candidates, parties, or their agents in the realm of non-Federal funds, applies equally to the realm of foreign national funds. A single definition has the added benefit of reducing confusion among those who solicit campaign funds often, and from a variety of individuals. Accordingly, the term "solicit" in the final rules at 11 CFR part 110.20 has the same meaning as in 11 CFR 300.2(m).

#### 5. 11 CFR 110.20(a)(7) Safe Harbor for Knowledge Standard

The Commission in the NPRM also sought comment on whether it should create safe harbors within which political committees would be deemed to have satisfied their duty to investigate contributions or donations in order to confirm that they do not come from

foreign sources. One commenter requested that the Commission expressly create such a safe harbor if "reasonable efforts" have been made to follow guidelines in the regulations.

Whether a person has the requisite knowledge under 11 CFR 110.20(a)(4) and whether a contributor or donor is a foreign national are often fact-intensive determinations. Given the wide range of factual situations that could arise, and the likelihood that some foreign donors or contributors will take steps to conceal the illegal nature of their actions, it is not possible in all circumstances to craft appropriate safe harbors to safeguard recipient committees who do not and cannot know of the illegality while at the same time holding accountable those who do or should know.

However, the Commission is adopting one narrowly tailored safe harbor. Under 11 CFR 103.3(b)(1), with respect to contributions that present "enuine questions" that they may come from a foreign source, political committee treasurers have an affirmative duty to investigate the contributions and use best efforts to determine the legality of the contribution. If, despite such due diligence, the treasurer is unable to determine the legality of the contribution within 30 days, the treasurer is required to refund the contribution to the contributor. *Id.* During the last several years, many political committees and other organizations, out of an abundance of caution, have adopted a policy of requesting and keeping on file copies of U.S. passport papers from all their contributors who reside outside the United States, or who list a foreign address, or who make a contribution through a foreign bank. The Commission believes such prudent practices are appropriate and satisfy a political committee's affirmative duty to investigate such questionable contributions. Accordingly, the Commission is creating a safe harbor at 11 CFR 110.20(a)(7) whereby any person shall be deemed to have conducted a reasonable inquiry under 11 CFR 110.20(a)(4)(iii) if he or she seeks and obtains copies of current and valid U.S. passport papers for U.S. citizens who are contributors or donors who (i) use a foreign passport or passport number for identification purposes, (ii) provide a foreign address, (iii) make a contribution or donation by means of a check or other written instrument drawn on a foreign bank or by a wire transfer from a foreign bank, or (iv) reside abroad. See 11 CFR 110.20(a)(5)(i) through (iv). Under those circumstances, the political committee shall also be deemed to have satisfied its

affirmative duty to investigate such contributions under 11 CFR 103.3(b)(1).

Current 11 CFR 103.3(b)(2) provides the steps necessary for a treasurer who discovers that an illegal contribution has been deposited to fully remedy the situation; this provision applies "to contributions from foreign nationals \* \* \* when there is no evidence of illegality on the face of the contributions themselves." Explanation and Justification, 52 FR 760, 768-69 (Jan. 9, 1987). In light of 11 CFR 103.3(b)(2), the Commission has concluded that no additional safe harbor is necessary in this area.

#### 6. 11 CFR 110.20(b) "Indirectly"

BCRA amends 2 U.S.C. 441e by banning foreign national contributions and donations, or express or implied promises to make such contributions or donations, that are made "directly or indirectly." Previously, 2 U.S.C. 441e(a) banned foreign national contributions made directly "or through any other person." The legislative history of BCRA does not reveal whether Congress intended "indirectly" to have a broader meaning than "through any other person," the language used in pre-BCRA 2 U.S.C. 441e(a).

The Commission solicited comments in the NPRM as to whether "indirectly" should be construed to have a broader meaning than "through any other person" and if so, whether the rules should explicitly reflect this interpretation by defining "indirectly." Several of the commenters urged the Commission not to interpret "indirectly" as having a broader meaning, arguing that there is nothing in the legislative history to support such a reading, and that to do so would invite speculation as to Congressional intent.

The NPRM further solicited comments as to whether "indirectly" should be interpreted to cover U.S. subsidiaries of foreign corporations that make non-Federal donations with corporate funds or that have a separate segregated fund that makes Federal contributions. Specifically, the Commission sought comment on whether BCRA's new statutory language prohibits a foreign-controlled U.S. corporation, including a U.S. subsidiary of a foreign corporation, from making corporate donations, or from making Federal contributions from a separate segregated fund, or both.

Numerous comments were received addressing the involvement in elections of U.S. subsidiaries of foreign corporations, all of which strongly urged the Commission not to extend the prohibition on foreign national

involvement to the activities of foreign-owned U.S. subsidiaries. The comment submitted by the BCRA sponsors stated that Congress in this legislation did not address "contributions by foreign-owned U.S. corporations, including U.S. subsidiaries of foreign corporations." A number of the other commenters cited the absence, in BCRA and in its legislative history, of express Congressional intent to reach either donations by such corporate entities in state elections, where permitted by state law, or the involvement of their separate segregated funds in Federal elections. They stressed the significance of such silence given the series of Commission advisory opinions over more than two decades that have affirmed the participation of such subsidiaries in elections in the United States, either directly in states where state law permits, or through separate segregated funds with regard to Federal elections, so long as there is no involvement of foreign nationals in decisions regarding such participation and so long as foreign nationals are not solicited for the funds to be used. See Advisory Opinions 2000-17, 1999-28, 1995-15, 1992-16, 1992-07, 1990-08, 1989-29, 1982-34, 1981-36, 1980-100, and 1978-21. Several commenters asserted further that the impetus for Congress to amend 2 U.S.C. 441e in 2002 was the involvement of individual foreign nationals in the financing of the 1996 presidential election campaign, not the activities of foreign-owned U.S. subsidiaries.

A number of commenters argued that the use of "indirectly" in BCRA with regard to foreign national contributions and donations represented only a codification of the Commission's earlier use of this word in advisory opinions and regulations to prohibit the direct or indirect involvement of individual foreign nationals in decisions concerning either corporate donations at the State or local level or Federal contributions made by separate segregated funds. See Advisory Opinions 2000-17, 1995-15, 1992-16, 1990-08, and 1989-29, and 11 CFR 110.4(a)(3). A joint comment stressed that Congress had earlier addressed and rejected a ban on U.S. subsidiary participation, the House of Representatives in 1998 and the Senate earlier in 1992, and that this legislative history showed that the use of "indirectly" in BCRA addresses only foreign national involvement in corporate decision-making.<sup>7</sup> These

<sup>7</sup> These legislative references are to the histories of the Congressional Campaign Spending Limit and Election Reform Act of 1992, which was vetoed by

comments, plus one received from two members of the U.S. Senate, argued that, because Congress was thus very familiar with the U.S. subsidiary issue, any Congressional intent to prohibit such activity in the context of BCRA would have been addressed in debate and made explicit in the legislation.

Several commenters questioned the constitutionality of prohibiting U.S. employees of foreign-owned subsidiaries from participation in U.S. elections. They argued that such a ban would discriminate against these employees on the basis of their employers' parent companies. One commenter noted that, by definition, U.S. subsidiaries are U.S. companies. Another asserted that a ban on U.S. subsidiary election-related activity would be counter to the globalization of financial activity; yet another argued that it would be counter to NAFTA and other treaties. One commenter noted possible negative effects upon U.S. trade associations if certain of their member corporations could not form separate segregated funds.

The Commission agrees with those who have argued that "indirectly" should not be deemed to cover U.S. subsidiaries of foreign corporations. This agreement is based upon the lack of evidence of Congressional intent to broaden the prohibition on foreign national involvement in U.S. elections to cover such entities, and upon the

the President, and of the Bipartisan Campaign Reform Act, H.R. 2183, when it was considered by the House of Representatives in 1998. In 1992, Senator Bentsen offered an amendment to prohibit federal contributions by the separate segregated funds of U.S. subsidiaries when such a subsidiary is more than 50% owned or controlled by a foreign corporation. The amendment would have changed the definition of "foreign national" to include 50% owned or controlled subsidiaries, and would also have applied the foreign national prohibition to the separate segregated funds of such subsidiaries.

In response, Senator Breaux offered a substitute amendment that would have codified (1) the right of U.S. subsidiary employees to participate in elections through separate segregated funds and (2) the prohibition in the Commission's regulations against the participation of foreign nationals, "directly or indirectly," in decision-making regarding contributions or expenditures made in connection with elections at all levels and in the administration of a political committee. The Senate voted to substitute the Breaux amendment. The commenters stressed the use of "indirectly" in the Breaux amendment and argued that its use in BCRA was for the same purpose; *i.e.*, the codification of the regulation prohibiting the participation of foreign nationals in decision-making.

In 1998, the House voted with no opposition for an amendment introduced by Representative Gillmor and Representative Tanner to assure the right of a U.S. subsidiary of a foreign owned or controlled corporation to maintain a separate segregated fund ("SSF"). An amendment proposed by Representative Kaptur to prohibit Federal contributions or expenditures by such SSFs was later modified to address only reporting by U.S. subsidiaries.

substantial policy reasons set forth in the long line of Commission advisory opinions that have permitted U.S. subsidiaries to administer separate segregated funds and to make corporate donations for State and local elections where they are allowed to do so by state law.

The Commission has determined that the activities of U.S. subsidiaries of foreign corporations are governed by new § 110.20(i), which prohibits involvement of foreign nationals in the decision-making of separate segregated funds, and of corporations that plan to make donations in connection with State and local elections where they are permitted to do so. (See further discussion below.) Thus, the final rules do not define “indirectly” or contain additional rules pertaining to U.S. subsidiaries of foreign corporations.

#### 7. 11 CFR 110.20(b) Addition of “Donation” in the Foreign National Ban

In BCRA, Congress added the “donation” of funds by foreign nationals to the existing ban on contributions by foreign nationals. In 1999, 2000, and 2001 the Commission included in its legislative recommendations to Congress a proposal that 2 U.S.C. 441e be amended to clarify that the statutory prohibition on foreign national contributions extends to State and local elections. The Commission noted, *inter alia*, that this could be accomplished by changing “contribution” to “donation.”

Congress chose to retain “contribution” and to add “donation” in BCRA as a prohibited activity. Congress also revised 2 U.S.C. 441e to delete references to “elections” and “candidates” for “any political office,” and substituted the broader phrase “Federal, State, or local election.” 2 U.S.C. 441e(a)(1)(A). Through this two-fold approach, Congress left no doubt as to its intention to prohibit foreign national support of candidates and their committees and political organizations and foreign national activities in connection with all Federal, State, and local elections.

The legislative history indicates that the revision to 2 U.S.C. 441e “prohibits foreign nationals from making any contribution to a committee of a political party or any contribution in connection with Federal, State or local elections, including any electioneering communications. This clarifies that the ban on contributions [by] foreign nationals applies to soft money donations.” Statement of Sen. Feingold, 148 Cong. Rec. S1991–1997 (daily ed. Mar. 18, 2002). The NPRM proposed a definition of “election,” based to some extent on the definition in 11 CFR

100.2, which drew no comments. This proposed definition is not included in the final rules. Instead, the wording of new 11 CFR 110.20 tracks the statutory language in BCRA.

As discussed above, the definition of “donation” in 11 CFR 300.2(e) applies to paragraph 110.20(b). Under this provision, both contributions and donations by foreign nationals are prohibited.

#### 8. 11 CFR 110.20(c) Contributions and Donations to Committees and Organizations of Political Parties

BCRA expressly extends the prohibition on foreign national contributions and donations to those made to committees of political parties. 2 U.S.C. 441e(a)(1)(B). The particular committees covered include the national party committees; the national congressional campaign committees; and all State, district, local, and subordinate committees, including the non-Federal accounts of State, district, and local party committees.

In light of BCRA’s addition of “donation” to the statutory language, the proposed rules further extended the foreign national prohibition to organizations of political parties, whether or not they are political committees under the Act and 11 CFR 100.5. Because many party organization activities affect Federal, State, and local elections, this extension to all party organizations reinforces the prohibition at 2 U.S.C. 441e(a)(1)(A) on foreign national contributions and donations in connection with elections at all levels. Two commenters on the proposed rules agreed with this interpretation, and no commenters objected. Because of the interaction between 2 U.S.C. 441e(a)(1)(A) and (B), the final rule at 11 CFR 110.20(c) adopts this extension to all political party organizations.

#### 9. 11 CFR 110.20(d) Contributions and Donations to Building Funds

BCRA prohibits foreign nationals from making any contribution or donation to national party committees, including donations for the purchase or construction of an office building. See 2 U.S.C. 441e. In addition, new 11 CFR 300.35(a) explicitly provides that the prohibitions in BCRA against contributions and donations by foreign nationals do not permit party committees to spend funds contributed or donated by foreign nationals for the purchase or construction of State or local party committee office buildings. Final Rule and Explanation and Justification, 67 FR 49,101, 49,127 (July 29, 2002). The Explanation and Justification for 11 CFR 300.35 indicates

that this prohibition on foreign national funding also extends to in-kind contributions or donations.

Consistent with new 11 CFR 300.35(a), new 11 CFR 110.20(d) explicitly states that foreign nationals are prohibited from making contributions or donations directly or indirectly to committees or organizations of a political party for the construction or purchase of any office building. This final rule is identical to the language in proposed § 110.20(f). The only two commenters who addressed this topic agreed with this addition to the regulations.

#### 10. 11 CFR 110.20(e) and (f) Expenditures, Independent Expenditures, and Disbursements

BCRA prohibits a foreign national from making “an expenditure, independent expenditure, or disbursement for an electioneering communication.” 2 U.S.C. 441e(a)(1)(C). The Commission in the NPRM interpreted the prohibitions against an “expenditure” or an “independent expenditure” by a foreign national as being general in scope, and the phrase “for an electioneering communication” at 2 U.S.C. 441e(a)(1)(C) as modifying only “disbursement.” This interpretation is based upon the fact that BCRA expressly exempts from the definition of “electioneering communication” “a communication which constitutes an expenditure or an independent expenditure under this Act \* \* \*.” 2 U.S.C. 434(f)(3)(B)(ii).<sup>8</sup> This exemption apparently left “disbursement” as the sole transaction category applicable to electioneering communications. Several commenters agreed with this interpretation. The final rule at § 110.20(e) specifically prohibits disbursements for electioneering communications by foreign nationals.

Section 431(9)(A)(1) of FECA defines “expenditure” as “any purchase, payment, \* \* \* or anything of value made for the purpose of influencing any election for Federal office,” and 2 U.S.C. 431(17) defines “independent expenditure” as “an expenditure by a person expressly advocating the election or defeat of a clearly defined candidate which is made without cooperation or

<sup>8</sup> BCRA defines “electioneering communication” as a “broadcast, cable, or satellite communication” that “refers to a clearly identified candidate for Federal office,” that is made within particular time frames, and that is targeted to the relevant electorate if it refers to a candidate other than those for the office of President or Vice-President. 2 U.S.C. 434(f)(3)(A)(i)(I). For a more extensive discussion of electioneering communications, see the Final Rules on “Electioneering Communications,” 67 FR 65190 (Oct. 23, 2002).

consultation with any candidate \* \* \*." Thus, the terms "expenditure" and "independent expenditure" apply only to amounts spent with respect to Federal elections. In contrast, "disbursement," a term used in both FECA and BCRA but not defined in the statutes, is defined in 11 CFR 300.2 as "any purchase or payment made by any person that is subject to the Act." As discussed above, this definition of "disbursement" covers payments beyond those that constitute "expenditures," and "independent expenditures," such as those made in connection with non-Federal elections.

BCRA does not contain an express prohibition against foreign national disbursements for activities other than electioneering communications. This omission left in question the status of disbursements by foreign nationals in connection with State and local elections that are by definition not "expenditures" or "independent expenditures" because they are not made in connection with Federal elections. The Commission's treatment of a similar issue in the past has, however, provided guidance on this question.

Previously, 2 U.S.C. 441e contained no express prohibition against expenditures by foreign nationals. Nevertheless, the Commission revised 11 CFR 110.4(a) in 1989 to state that foreign nationals were prohibited from making expenditures as well as contributions. The Explanation and Justification for that amendment stated: "The FECA generally prohibits expenditures when it prohibits contributions by a specific category [of] persons, thereby ensuring that the persons cannot accomplish indirectly what they are prohibited from doing directly." 54 FR 4858 (Nov. 24, 1989). The Explanation and Justification continued: "Nothing in section 441e's legislative history suggests that Congress intended to deviate from the FECA's general pattern of treating contributions and expenditures in parallel fashion." *Id.*

As discussed above, BCRA added "donations" to the activities prohibited to foreign nationals, this being one way in which the reach of the statute is extended to State and local elections to which the term "contributions" does not apply. As was the case earlier with the FECA, there is nothing in BCRA that would indicate an intent on the part of Congress to treat disbursements for State or local elections any differently than it now treats expenditures for Federal elections, or any intent to not consider donations and disbursements to be parallel concepts. The addition of

"disbursements" also serves to strengthen even more the ban on foreign money.

The proposed rule treated "donations" and "disbursements" in the same fashion as "contributions" and "expenditures" have been addressed in the past, by prohibiting at proposed paragraph (d) all disbursements for elections by foreign nationals, not just the disbursements made for electioneering communications that were explicitly prohibited at proposed 11 CFR 110.20(e). Three commenters affirmed the Commission's approach. No commenters were opposed.

Consequently, while the final rule at § 110.20(e) prohibits any disbursement for an electioneering communication by foreign nationals, the final rule at paragraph (f) prohibits all expenditures, independent expenditures, and disbursements by foreign nationals in connection with Federal, State and local elections for the reasons stated above.

#### 11. 11 CFR 110.20(g) Solicitation, Acceptance or Receipt of Contributions and Donations From Foreign Nationals

BCRA prohibits any person from soliciting, accepting, or receiving from a foreign national a contribution or donation made in connection with a Federal, State, or local election, or made to a party committee. 2 U.S.C. 441e(a)(2). Proposed § 110.20(g)(1) sought to prohibit the knowing solicitation, acceptance or receipt of contributions or donations from foreign nationals. As noted above, the final rule at § 110.20(g) contains the same prohibition. The Commission's additions of a knowledge requirement and of knowledge standards with regard to the solicitation, acceptance or receipt of foreign national contributions and donations are discussed above in connection with 11 CFR 110.20(a)(4) and (5).

#### 12. 11 CFR 110.20(h) Assisting Foreign National Contributions or Donations

The foreign national prohibition at 2 U.S.C. 441e as amended by BCRA also raised issues concerning the liability of persons who knowingly assist foreign nationals in making contributions or donations. The proposed rules included a prohibition on the assisting of foreign national contributions and donations. Section 441e of the Act does not explicitly address those who assist others to violate its prohibition on foreign national contributions, donations, expenditures, independent expenditures, and disbursements. Recently, however, the Commission has addressed in the enforcement context a number of situations in which there

arose questions about the liability of individuals who had provided substantial assistance to a foreign national or to a recipient committee with regard to a foreign national contribution or donation. These individuals had functioned as conduits or intermediaries for the funds involved. *See* MUR 4530, *et al.* The Commission concluded in these enforcement matters that, because the wording of 2 U.S.C. 441e at the time prohibited foreign nationals from making contributions directly or through any other person, and because the statute also prohibited persons from soliciting, accepting or receiving such contributions from a foreign national, the activities of conduits and intermediaries of foreign national funds were prohibited when the funds involved had been passed on for the purpose of making contributions. It is also worth noting that, in some instances, the foreign national making a prohibited contribution can easily evade U.S. jurisdiction, while a U.S. citizen serving as a conduit or rendering substantial assistance can be more easily reached.

The Commission has now concluded that, in light of Congressional intent in BCRA to strengthen the foreign money ban, nothing in amended 2 U.S.C. 441e should be construed to alter the Commission's pre-BCRA determinations in this respect. Additionally, the Commission has broad rulemaking authority in 2 U.S.C. 437d(a)(8) to make rules that are "necessary to carry out the provisions of the Act." *See also* BCRA, Public Law 107-155, sec. 402(c). It has determined that a rule that prohibits persons from knowingly providing substantial assistance to foreign nationals to circumvent the FECA is necessary to effectuate one of the key purposes of BCRA, that is, to prevent foreign national funds from influencing elections. One commenter expressed agreement with extending the prohibition to those who assist foreign national contributions and donations.

For purposes of paragraphs (h)(1) and (2), "substantial assistance" means active involvement in the solicitation, making, receipt or acceptance of a foreign national contribution or donation with an intent to facilitate successful completion of the transaction. *See, e.g., IIT, An International Investment Trust v. Cornfield*, 619 F.2d 909, 922, 925-926, (2nd Cir. 1980), *citing, inter alia, Rolf v. Blyth, Eastman Dillon & Co., Inc.*, 570 F.2d 38, 47-48 (2nd Cir.), *cert. denied*, 438 U.S. 1030 (1978); and *U.S. v. Peoni*,



100 F.2d 401 (2nd Cir. 1938).<sup>9</sup> “Substantial assistance” does not include strictly ministerial activity undertaken pursuant to the instructions of an employer, manager or supervisor.

The final rule at paragraph (h)(1) combines proposed paragraphs (h)(3) and (4) by prohibiting any person from knowingly providing substantial assistance in the solicitation, making, receipt, or acceptance of a contribution or donation from a foreign national. This provision covers, but is not limited to, those persons who act as conduits or intermediaries for foreign national contributions or donations and who thus would also violate the statutory prohibition against receiving contributions or donations from a foreign national. The final rule at paragraph (h)(2) extends the prohibition on knowingly providing substantial assistance to assisting foreign nationals in the making of expenditures, independent expenditures and disbursements in connection with Federal or non-Federal elections.

The three standards of knowledge set forth at § 110.20(a)(4) are applicable to anyone who provides the kinds of assistance prohibited by paragraph (h).

13. 11 CFR 110.20(i) Prohibition on Participation by Foreign Nationals in Decisions Related to Election Activities

Section 110.20(i) retains the prohibition at former 11 CFR 110.4(a)(3) on participation by foreign nationals in decisions made by any person, including entities such as corporations, labor organizations or political committees, that are related to Federal and non-Federal elections. The only changes involve the addition of “political organization” to the listing of decision-making entities and of “donations” and “disbursements” to the list of transactions about which decisions are made; all of these additions are needed to address fully the prohibition on the funding of State and local elections. Foreign nationals are prohibited from taking part in decisions about contributions and donations to any Federal, State, or local candidates or to, or by, any political committees or political organizations, and in decisions about expenditures and disbursements made in support of, or in opposition to, such candidates, political

committees or political organizations. Foreign nationals also are prohibited from involvement in the management of a political committee, including a separate segregated fund, a non-connected committee or the non-Federal accounts of these committees.

Numerous comments received regarding the proposed rules supported this provision as the appropriate way to prevent foreign nationals from engaging in election-related activities, particularly in the context of U.S. subsidiaries of foreign-owned corporations. No commenter opposed the proposed regulation.

14. Donations to Presidential Inaugural Committees

In the NPRM the Commission proposed to include a BCRA-related rule prohibiting knowing acceptance by Presidential inaugural committees of donations from foreign nationals. Proposed 11 CFR 110.20(c), 67 FR at 54,379. The Commission had stated in the NPRM entitled “Disclaimers, Fraudulent Solicitations, Civil Penalties, and Personal Use of Campaign Funds,” that it would address rules pertaining to inaugural committees in a future rulemaking. 67 FR 55, 348 (Aug. 29, 2002). The Commission has determined that the rules concerning inaugural committees should be addressed in a comprehensive manner. Therefore, donations by foreign nationals to Presidential inaugural committees will also be part of this future rulemaking and are not included in these final rules.

*Certification of No Effect Pursuant to 5 U.S.C. 605(b) (Regulatory Flexibility Act)*

The Commission certifies that the attached final rules do not have a significant economic impact on a substantial number of small entities. The entities affected by these rules are political committees, minors, foreign nationals and U.S. nationals. The basis of this certification is that the national, State, and local party committees of the two major political parties are not small entities under 5 U.S.C. 601 because they are not small businesses, small organizations, or small governmental jurisdictions.

Minors and many foreign nationals are individuals, and therefore, not small entities. Furthermore, the final rules, which are based on statutory language, clarify and describe in further detail the already existing ban on contributions by foreign nationals. Additionally, to the extent that there may be foreign nationals that may fall within the definition of “small entities,” their numbers are not substantial, particularly

the number that would make a donation, expenditure, independent expenditure, or disbursement in connection with a Federal, State, or local election.

In addition, to the extent that the rules apply to any small entities, they are not unduly burdened by the increased contribution limitations, which give such small entities more latitude in the amount they contribute. Furthermore, the new rules for redesignating contributions for a particular election and reattributing contributions to particular donors provide political committees with flexibility and additional means to ensure compliance with FECA and BCRA, thereby reducing any economic costs they may have incurred under the previous rules.

**List of Subjects**

*11 CFR Part 102*

Political committees and parties, Reporting and recordkeeping requirements.

*11 CFR Part 110*

Campaign funds, Political committees and parties.

For the reasons set out in the preamble, Subchapter A of Chapter I of title 11 of the Code of Federal Regulations is amended as follows:

**PART 102—REGISTRATION, ORGANIZATION, AND RECORDKEEPING BY POLITICAL COMMITTEES (2 U.S.C. 433)**

1. The authority citation for part 102 continues to read as follows:

**Authority:** 2 U.S.C. 432, 433, 434(a)(11), 438(a)(8), 441d.

2. Section 102.9 is amended by adding paragraph (a)(4) and revising paragraph (e) to read as follows:

**§ 102.9 Accounting for contributions and expenditures (2 U.S.C. 432(c)).**

\* \* \* \* \*

(a) \* \* \*

(4) In addition to the account to be kept under paragraph (a)(1) of this section, for contributions in excess of \$50, the treasurer of a political committee or an agent authorized by the treasurer shall maintain:

- (i) A full-size photocopy of each check or written instrument; or
- (ii) A digital image of each check or written instrument. The political committee or other person shall provide the computer equipment and software needed to retrieve and read the digital images, if necessary, at no cost to the Commission.

\* \* \* \* \*

<sup>9</sup> As stated in *IIT*, Judge Learned Hand observed in *Peoni*, a criminal case involving possession of counterfeit money, that for centuries courts had required that an accessory to an activity be a person who must “in some sort associate himself with the venture, that he participate in it as something that he wishes to bring about, that he seek by his action to make it succeed. All the words used [by courts] \* \* \* carry an implication of purposive attitude towards it.” 100 F.2d at 402.

acceptable and unacceptable purpose descriptions to be reported by authorized committees. Paragraph (B) requires authorized committees, when itemizing certain disbursements for which reimbursements are required, to provide a brief explanation of the activity for which reimbursement is required. These provisions have been in Title 11 of the **Code of Federal Regulations** since 1980 and 1995, respectively, and were not affected by the recent statutory changes to the election cycle reporting requirements.

#### Need for Correction

As published, the final rules inadvertently omit two paragraphs describing information to be reported by authorized committees of Federal candidates.

All committees must report the purpose of itemized disbursements (i.e., those disbursements aggregating in excess of \$200). Omitted paragraph (A) contains examples of suitably specific purpose descriptions as well as examples of those descriptions that are unacceptably vague. This paragraph is inconsistent with the reporting of rules for unauthorized committees (committees other than candidate committees) in 11 CFR 104.3(b)(3).

Omitted paragraph (B) is used in administering the "personal use" rules in 11 CFR 113.1. Federal candidates are barred from using campaign funds for personal benefit. Paragraph (B) requires authorized committees of Federal candidates itemizing disbursements for which partial or total reimbursement is required under 11 CFR 113.1(g)(1)(iii)(C) or (D) to provide a brief explanation of the activity for which the reimbursement is made.

Section 801 of Title 5 of the United States Code requires Federal agencies to submit regulations to Congress. These regulations were submitted to the Speaker of the House of Representatives and the President of the Senate on November 26, 2001.

#### Certification of No Effect Pursuant to 5 U.S.C. § 605(b) [Regulatory Flexibility Act]

This correction will not have significant economic impact on a substantial number of small entities. The basis of this certification is that this correction only requires political committees to once again add information to the reports they are required to file. These regulations were in 11 CFR since 1980 and 1995, respectively, before being inadvertently omitted in 2000.

#### List of Subjects in 11 CFR Part 104

Campaign funds, Political committees and parties, Reporting and recordkeeping requirements.

Accordingly, 11 CFR part 104 is corrected by making the following correcting amendment:

#### PART 104—REPORTS BY POLITICAL COMMITTEES

1. The authority citation for part 104 continues to read as follows:

**Authority:** 2 U.S.C. 431(1), 431(8), 431(9), 432(i), 434, 438(a)(8), 438(b), 439a.

#### § 104.3 Contents of reports (2 U.S.C. 434(b), 439a).

\* \* \* \* \*

2. In § 104.3 add the following paragraphs (b)(4)(i)(A) and (B):

(b) \* \* \*

(4) \* \* \*

(i) \* \* \*

(A) As used in this paragraph, *purpose* means a brief statement or description of why the disbursement was made. Examples of statements or descriptions which meet the requirements of this paragraph include the following: dinner expenses, media, salary, polling, travel, party fees, phone banks, travel expenses, travel expense reimbursement, and catering costs. However, statements or descriptions such as *advance*, *election day expenses*, *other expenses*, *expenses*, *expense reimbursement*, *miscellaneous*, *outside services*, *get-out-the-vote* and *voter registration* would not meet the requirements of this paragraph for reporting the purpose of an expenditure.

(B) In addition to reporting the purpose described in paragraph (b)(4)(i)(A) of this section, whenever an authorized committee itemizes a disbursement that is partially or entirely a personal use for which reimbursement is required under 11 CFR 113.1(g)(1)(ii)(C) or (D), it shall provide a brief explanation of the activity for which reimbursement is required.

\* \* \* \* \*

Dated: November 26, 2001.

**Danny L. McDonald,**  
Chairman, Federal Election Commission.  
[FR Doc. 01-29679 Filed 11-29-01; 8:45 am]  
**BILLING CODE 6715-01-P**

#### FEDERAL ELECTION COMMISSION

#### 11 CFR Part 111

#### [Notice 2001-18]

#### Extension to Administrative Fines

**AGENCY:** Federal Election Commission.

**ACTION:** Final rule; revision of the sunset date.

**SUMMARY:** The Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the expiration date in which the Federal Election Commission (hereinafter "the Commission") may assess civil money penalties for violations of the reporting requirements of section 434(a) of the Federal Election Campaign Act (hereinafter "the Act" or "FECA").

**DATES:** Effective on December 31, 2001.

**FOR FURTHER INFORMATION CONTACT:** Ms. Rosemary C. Smith, Assistant General Counsel, or Ms. Mai T. Dinh, Attorney, 999 E Street, NW., Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

#### SUPPLEMENTARY INFORMATION:

#### Explanation and Justification

Section 640 of the Treasury and General Government Appropriations Act, 2000, Pub. L. No. 106-58, 106th Cong., 113 Stat. 430, 476-77 (1999), amended § 309(a)(4) of the FECA, 2 U.S.C. 437g(a)(4), to provide for a modified enforcement process for violations of reporting requirements. Under § 437g(a)(4)(C) of the FECA, the Commission may assess a civil money penalty for violations of the reporting requirements of 2 U.S.C. 434(a). This authority, however, was to sunset on December 31, 2001. Pub. L. No. 106-58, 106th Cong., § 640(c). Recently, § 642 of the Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the sunset date to include all reports that cover activity between January 1, 2000, to December 31, 2003.

The Commission published final rules on May 19, 2000, to implement the amendment contained in the Treasury and General Government Appropriations Act, 2000. Section 111.30 of the regulations reflects the sunset provision of Pub. L. No. 106-58, 106th Cong., § 640(c). Therefore, the Commission is issuing this final rule to amend section 111.30 to extend the application of the administrative fine regulations, 11 CFR part 111, subpart B, to include all violations relating to reports that cover the period between January 1, 2000, to December 31, 2003.

The Commission is promulgating this final rule without notice or opportunity for comment because it falls under the "good cause" exemption of the Administrative Procedures Act, 5 U.S.C. 553(b)(B). The exemption allows

**FEDERAL ELECTION COMMISSION****11 CFR Parts 100, 110, 111, and 113****[Notice 2002–25]****Disclaimers, Fraudulent Solicitation, Civil Penalties, and Personal Use of Campaign Funds****AGENCY:** Federal Election Commission.**ACTION:** Final rules and transmittal of regulations to Congress.

**SUMMARY:** The Federal Election Commission is issuing final rules regarding disclaimers in political communications, fraudulent solicitations, civil penalties, personal use of campaign funds, and a technical amendment under the Federal Election Campaign Act of 1971, as amended (“FECA” or “the Act”). The final rules implement portions of the Bipartisan Campaign Reform Act of 2002 (“BCRA”) that govern new requirements for disclaimers accompanying radio, television, print, and other campaign communications, expand the FECA’s fraudulent misrepresentation prohibition, increase the FECA’s civil penalties for violating the prohibition on contributions made in the name of another, and codify the “irrespective” test regarding the personal use of campaign funds by candidates and Federal office holders.

The Commission had planned to address BCRA-related rules for inaugural committees in this rulemaking; however, inaugural committees will now instead be addressed in a future rulemaking. Further information is provided in the supplementary information that follows.

**EFFECTIVE DATES:** January 13, 2003.

**FOR FURTHER INFORMATION CONTACT:** Mr. John C. Vergelli, Acting Assistant General Counsel, or Attorneys, Ms. Ruth Heilizer (personal use), Ms. Dawn Odrowski (fraudulent solicitations and civil penalties), or Mr. Richard Ewell (disclaimers), 999 E Street, NW., Washington, DC, 20463, (202) 694–1650 or (800) 424–9530.

**SUPPLEMENTARY INFORMATION:** The Bipartisan Campaign Reform Act of 2002 (“BCRA”), Pub. L. 107–155, 116 Stat. 81 (March 27, 2002), contains extensive and detailed amendments to the Federal Election Campaign Act of 1971 (“FECA” or “the Act”), as amended, 2 U.S.C. 431 *et seq.* This is one in a series of rulemakings the Commission is undertaking to implement the provisions of BCRA and to meet the rulemaking deadlines set out in BCRA.

Section 402(c)(1) of BCRA establishes a general deadline of 270 days for the

Commission to promulgate regulations to carry out BCRA, which is December 22, 2002. The final rules do not apply with respect to runoff elections, recounts, or election contests resulting from the November 2002 general election. 2 U.S.C. 431 note.

Because of the brief period before the statutory deadline for promulgating these rules, the Commission received and considered public comments expeditiously. The Notice of Proposed Rulemaking (“NPRM”), on which these final rules are based, was published in the **Federal Register** on August 29, 2002. 67 FR 55348 (Aug. 29, 2002). Thirteen written comments were received. The names of the commenters and their comments are available at <http://www.fec.gov/register.htm> under “Disclaimers, Fraudulent Solicitation, Civil Penalties, and Personal Use of Campaign Funds.” A public hearing was not held.

Under the Administrative Procedures Act, 5 U.S.C. 553(d), and the Congressional Review of Agency Rulemaking Act, 5 U.S.C. 801(a)(1), agencies must submit final rules to the Speaker of the House of Representatives and the President of the Senate, and publish them in the **Federal Register** at least 30 calendar days before they take effect. The final rules on disclaimers, fraudulent solicitation, civil penalties, and personal use of campaign funds were transmitted to Congress on December 9, 2002.

**Explanation and Justification***Introduction*

These final rules address changes to: disclaimer requirements for campaign communications (2 U.S.C. 441d); fraudulent misrepresentations for purposes of soliciting contributions or donations (2 U.S.C. 441h); civil penalties for a particular knowing and willful violation of FECA (2 U.S.C. 437g); permissible uses of campaign funds by candidates and officeholders (2 U.S.C. 439a); and a technical amendment to the definition of “Act” to include BCRA amendments to FECA.

*11 CFR 100.18 Act (2 U.S.C. 431(19))*

Pre-BCRA, 11 CFR 100.18 defined “Act” to mean the Federal Election Campaign Act as amended by the 1974, 1976, and 1980 amendments. The final rules amend this definition to include the amendments to FECA within the Bipartisan Campaign Reform Act.

*11 CFR 110.11 Communications; advertising; disclaimers (2 U.S.C. 441d)*

Under 2 U.S.C. 441d, certain communications must include

disclaimers identifying who paid for and, where applicable, who authorized the communication. In BCRA, Congress added new specificity to these requirements, expanded the disclaimer requirement to reach disbursements to finance “any communication” made by political committees through any type of general public political advertising, and required that “electioneering communications” include disclaimers. See 2 U.S.C. 441d. Congress also enacted “stand by your ad” requirements for certain radio and television communications. 2 U.S.C. 441d(d).

The Commission is implementing these statutory changes by deleting pre-BCRA 11 CFR 110.11 in its entirety, and adopting a new section 110.11 that is organized into a more easily understandable rule. As explained in detail below, revised section 110.11 incorporates many substantive provisions from the pre-BCRA version of the section.

**11 CFR 110.11(a) Scope**

Paragraph (a) sets out the scope of the section by specifying which communications must carry disclaimers. Under 2 U.S.C. 441d(a), as amended by Congress through BCRA section 311, disclaimers are required whenever a person makes a disbursement for an electioneering communication, whenever a political committee makes a disbursement for the purpose of financing “any communication through any broadcasting station, newspaper, magazine, outdoor advertising facility, mailing, or any other type of general public political advertising,” or whenever any person makes a disbursement for the purpose of financing “communications expressly advocating the election or defeat of a clearly identified candidate, or solicits any contribution through any broadcasting station, newspaper, magazine, outdoor advertising facility, mailing, or any other type of general public political advertising.” The descriptive list of “through any broadcasting station, newspaper, magazine, outdoor advertising facility, mailing, or any other type of general public political advertising” is similar to the language used by Congress in BCRA to describe a “public communication,” as defined in 2 U.S.C. 431(22). See also 11 CFR 100.26 (67 FR 49111 (July 29, 2002)). The two descriptive lists differ in three respects. First, a “public communication” covers “any broadcast, cable, or satellite transmission,” whereas section 441d(a) refers only to communications through “any broadcasting station.” Second, a

“public communication” includes a “telephone bank to the general public,” as defined in 2 U.S.C. 431(24), whereas telephone banks are not specifically mentioned in section 441d(a). Third, a “public communication” includes a “mass mailing,” which is defined as more than 500 pieces of substantially similar mail. 2 U.S.C. 431(22), (23). Section 441d(a) refers to a “mailing,” without any numerical minimum. Congress, through BCRA, removed the pre-BCRA reference to a “direct mailing” (emphasis added).

The Commission noted in the NPRM that the 2 U.S.C. 441d(a) references to “communication” share a fundamental similarity with the definition of “public communication” (2 U.S.C. 431(22)) in that both contain the virtually identical and broadly inclusive phrase, “or any other type [form] of general public political advertising,” to describe what is encompassed by the respective definitions.<sup>1</sup> Because of the inclusion of this virtually identical phrase, the Commission interprets each term listed in the definition of “public communication” or in 2 U.S.C. 441d(a) as a specific example of one form of “general public political advertising.” In other words, the universe of “general public political advertising,” as it has been functionally defined by Congress through both the definition of “public communication” and in section 441d(a), encompasses all the terms explicitly included by Congress, in addition to other potential forms of general public political advertising not specifically listed.

The Commission sought comment on whether the description of “communication” in 2 U.S.C. 441d(a) should be equated with the term “public communication,” as defined in 2 U.S.C. 431(22). The Commission noted that one effect of using the consistent terminology of “public communication” to describe the 2 U.S.C. 441d(a) communications would be that “telephone banks to the general public” would be subject to the disclaimer requirements. Another effect of using the consistent terminology of “public communication” would be to harmonize the meaning of “mailing” with “mass mailing,” and the coverage of “any broadcasting station” with “any broadcast, cable, or satellite transmission.”

The Commission received two comments on this issue. Both commenters argued that the terms

<sup>1</sup> Section 431(22) uses the word “form,” while section 441d(a) uses the word “type;” the Commission discerns no substantive differences arising from the choice of synonyms.

“public communication” and “communication,” as used in the section 441d(a) context, should be treated as distinct terms with separate definitions. One commenter, advised against any interpretation that would have the effect of making the disclaimer requirements applicable to telephone banks. That commenter asserted that the existence of several state laws limiting or prohibiting taped phone messages are already sufficient to deter abuse in this area, and disclaimer requirements would only serve to chill speech.

The Commission does not agree with this commenter that state laws regarding taped calls are sufficient to supplant the statutory disclaimer requirement, even in those few states that do have laws limiting taped calls. Requiring a caller to identify himself or herself serves important disclosure functions consistent with Congressional intent to broaden the reach of the previous laws regarding disclaimers and would likely complement state laws limiting the use of taped calls.

The other commenter stated that treating the term “communication” in 2 U.S.C. 441d(a) the same as “public communication” would “conflate and confuse two separate concepts that Congress established to meet two distinct purposes.” That commenter also asserted that the inclusion of other forms of “general public political advertising” does not indicate that the two terms share the same meaning. The commenter supported this assertion by citing to the Commission’s previous explanation that “general language following a listing of specific terms \* \* \* does not evidence Congressional intent to include a separate and distinct term that is not listed \* \* \*.” See Final Rules and Explanation and Justification, “Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money,” 67 FR 49072 (July 29, 2002).

The Commission notes that its prior statement cited by the commenter was made in the context of a decision not to include Internet communications within the definition of “public communication.” Unlike the term “telephone bank to the general public” and the other terms listed in the BCRA definition of “public communication,” communications over the Internet were not specifically listed as one of the forms of “general public political advertising.” But while general language following a list of specific terms may not, by itself, provide sufficient evidence of Congressional intent, the Commission believes that such intent can be found where Congress has provided additional guidance as to the

proper interpretation of that general language elsewhere in the same statute. In the Commission’s judgment, the use of the phrase “or any other type [form] of general public political advertising,” which is used in BCRA only in the two locations specified above,<sup>2</sup> should be interpreted in a virtually identical manner. Therefore, each form of communication specifically listed in the definition of “public communication,” as well as each form of communication listed with reference to a “communication” in 2 U.S.C. 441d(a), must be a form of “general public political advertising.” To include the term “telephone bank to the general public” within the meaning of “general public political advertising” in one part of the statute but not the other would be to provide two different meanings to the term “general public political advertising.” Rather than conflating and confusing two separate concepts, the Commission, when appropriate, is establishing a consistent meaning from the repeated use of a single statutory phrase in order to promote simplicity and symmetry between the various statutory provisions and within the regulations.

This approach also incorporates Congressional intent, apparent in 2 U.S.C. 441d(d), to regulate communications by radio and television, and the Commission’s judgment that it would be unsupported to require a disclaimer for a television communication that was broadcast, while not requiring a disclaimer for the same communication merely because it was carried on cable or satellite. It is also consistent with other uses (or proposed uses) of the term “public communication” in its regulations. The Commission has used the term “public communication” to clarify the definition of “generic campaign activity,”<sup>3</sup> see 11 CFR 100.25, and has proposed the use of “public communication” in a separate and ongoing rulemaking to describe communications that may be coordinated with a candidate, authorized committee, or political party committee. See proposed 11 CFR 109.21(c) and 109.37(a)(2), Notice of Proposed Rulemaking on Coordinated and Independent Expenditures, 67 FR

<sup>2</sup> See the definition of “public communication” in BCRA section 101 (2 U.S.C. 431(22)) and with reference to the scope of the disclaimer provisions in BCRA section 311 (2 U.S.C. 441d(a)).

<sup>3</sup> Congress defined “generic campaign activity” in BCRA as a “campaign activity” that promotes a political party and does not promote a candidate or non-Federal candidate. Pub. L. 107-155, sec. 101 (March 27, 2002) emphasis added.

60042, 60065 and 60068 (Sept. 24, 2002).

In addition, by employing the term "public communication" in the section 110.11 disclaimer rules, the Commission avoids assigning different meanings to the term "mailing" in 2 U.S.C. 441d(a) and "mass mailing," the term used in the definition of "public communication" and defined by Congress in BCRA as more than 500 pieces of substantially similar mail. *See* 2 U.S.C. 431(23). In BCRA, Congress amended 2 U.S.C. 441d(a)(1) by removing the adjective "direct" from the pre-BCRA term "direct mailing," thereby removing a term that had been defined differently than the BCRA definition of "mass mailing." In the NPRM in this rulemaking, however, the Commission proposed a definition of the term "mailing" for purposes of the disclaimer requirements that would have treated "mailing" differently than the term "mass mailing." The Commission has reconsidered this separate definition of "mailing" in light of its efforts to promote simplicity and symmetry within its regulations. Both "mass mailing" and "mailing" are examples of "general public political advertising," as set forth in the definition of "public communication" at 2 U.S.C. 431(22) and at 2 U.S.C. 441d(a). Congress did not provide a separate definition of "mailing." Therefore, in the Commission's judgment, the statutory term "mailing" used in 2 U.S.C. 441d(a) should not be given a separate meaning from "mass mailing" in the Commission's regulations. As a result, disclaimers would not be required for mailings unless the mailings are comprised of more than 500 pieces of substantially similar mail. *See* 2 U.S.C. 431(23).

While the term "public communication" serves generally to describe the proper reach of the disclaimer rules, the Commission has decided that certain Internet-based communications also should be covered. The Commission has for years interpreted the statute to require disclaimers on electronic mail and Internet website communications. *See, e.g.,* Advisory Opinions 1995-9 and 1999-37. In view of the widespread use of this technology in modern campaigning, and the relatively non-intrusive nature of disclaimer requirements, the Commission has concluded that the interests served by prompt public disclosure warrant application of the disclaimer provisions.

Nonetheless, to avoid overreaching in this area, and to maintain some symmetry with the definition of "public communication," the Commission is

limiting the coverage of electronic mail to situations involving more than 500 substantially similar unsolicited communications. This approach would not require a disclaimer on electronic mail where the recipients have taken some affirmative step to be on a list used by the sender, such as responding positively to a request to be on such list. Moreover, regarding websites, the Commission is extending the disclaimer requirements only to political committee websites. This will assure, for example, that a website created and paid for by an individual will not have to include a disclaimer. At the same time, arguably, the most significant use of electronic mail and websites to conduct campaign activity will have to provide the public notice of who is responsible.

In order to incorporate the foregoing Internet-based applications in the final disclaimer rules, 11 CFR 110.11(a) provides that for purposes of the section, the term "public communication" also covers more than 500 unsolicited electronic mail communications and websites of political committees. This is the Commission's only divergence from the 11 CFR 100.26 definition of "public communication."

The Commission notes that it has initiated a separate rulemaking regarding several Internet-related issues. The disclaimer provisions may be revisited in that rulemaking.

Paragraphs (a)(1) through (4) of the final rules in 11 CFR 110.11 enumerate the particular types of such communications to which the disclaimer requirements apply. For the reasons described above and unless otherwise specified, the term "communications" is used in the preceding sentence and the remainder of the narrative below as a shorthand reference that encompasses both "public communications" and "electioneering communications." Throughout revised section 110.11, the word "type" is used, rather than "form," as in the pre-BCRA version of the regulation. This change has no substantive effect and only serves to conform the regulation to the language of the statute. *See* 2 U.S.C. 441d; *see also* 11 CFR 100.27.

In BCRA, Congress provided that "any communication" for which a political committee makes a disbursement must include a disclaimer, expanding the scope of the disclaimer requirement for political committees beyond communications constituting express advocacy and communications soliciting contributions. Compare pre- and post-BCRA versions of 2 U.S.C. 441d(a). Revised paragraph (a)(1) of

section 110.11 reads, "[a]ll public communications for which a political committee makes a disbursement."

In contrast, revised paragraph (a)(2) of section 110.11 requires that "[a]ll public communications by any person that expressly advocate the election or defeat of a clearly identified candidate" must include a disclaimer. 2 U.S.C. 441d(a). The revised rule does not substantively change the disclaimer requirement for express advocacy communications from the pre-BCRA version of the regulation because BCRA does not alter the reach of the disclaimer requirements for persons that are not political committees, except with regard to electioneering communications (*see below*).

Similarly, paragraph (a)(3) of section 110.11 requires "[a]ll public communications by any person" that solicit a contribution must include a disclaimer. 2 U.S.C. 441d(a). Here, too, the revised rule does not change the disclaimer requirement for solicitations from the pre-BCRA version of the rule because BCRA makes no changes in this regard.

Congress amended 2 U.S.C. 441d(a) to require that "electioneering communications" include disclaimers. In paragraph (a)(4) of section 110.11, the Commission requires that "[a]ll electioneering communications by any person" include a disclaimer. The term "electioneering communication" is defined in 11 CFR 100.29(a). *See* Electioneering Communications Final Rules and Explanation and Justification 67 FR 65190 (Oct. 23, 2002).

The Internal Revenue Service ("IRS") commented generally on the scope of the Commission's proposed rules and found no direct conflict with the Internal Revenue Code or the regulations thereunder. The IRS noted that the Commission proposed at 11 CFR 110.11(a)(1)(iii) to require a disclaimer statement for all types of "general public political advertising" by any person soliciting contributions. The IRS also requested that for the benefit of tax-exempt organizations the Commission should restate certain requirements of section 6113 of the Internal Revenue Code (26 U.S.C. 6113). The IRS stated that section 6113 provides that certain tax-exempt organizations that are not eligible to receive tax deductible charitable contributions, and whose gross annual receipts normally exceed \$100,000, must disclose in an "express statement (in a conspicuous and easily recognizable format)" that contributions to the organization are not deductible for Federal income tax purposes as charitable contributions. This provision

applies to organizations that are not eligible to receive deductible charitable contributions and are described in section 501(c), section 501(d), or section 527. The Internal Revenue Service issued Notice 88-120 to provide safe harbors for meeting the requirements of section 6113.

#### *11 CFR 110.11(b) General Content Requirements*

Paragraph (b) of section 110.11 sets out the general content requirements for disclaimers, depending on who paid for the communication and, where applicable, who authorized the communication. Pre-BCRA paragraphs (a)(1)(i) and (ii) of section 110.11, which applied to communications authorized and paid for by a candidate and communications authorized by a candidate but paid for by another person, respectively, are redesignated as paragraphs (b)(1) and (2) in the revised regulation, respectively, without substantive revision.

Paragraph (b)(3) of section 110.11 applies to a communication, including any solicitation, that is not paid for or authorized by a candidate. The provisions of pre-BCRA 11 CFR 110.11(a)(1)(iii) are replaced with paragraph (b)(3), with one substantive change. In BCRA, Congress provided that a covered communication not authorized by a candidate, his or her authorized committees or agents must have a disclaimer that includes the "permanent street address, telephone number, or World Wide Web address" of the person who paid for the communication. 2 U.S.C. 441d(a)(3). Similar language is being added in paragraph (b)(3).

The Commission is not including pre-BCRA 11 CFR 110.11(a)(1)(iv) in revised section 110.11. This paragraph applied to "solicitations directed to the general public on behalf of a political committee which is not an authorized committee of a candidate" and required that these solicitations only state the name of the person who paid for the communication. In the NPRM the Commission proposed deleting paragraph (a)(1)(iv). Given that Congress amended 2 U.S.C. 441d(a) to extend the disclaimer requirements to apply "whenever a political committee makes a disbursement for the purpose of financing any communication" through any type of general public political advertisement, and given that Congress did not create a specific exception for authorization language in solicitations by unauthorized committees, the Commission is not retaining pre-BCRA 11 CFR 110.11(a)(1)(iv).

#### *11 CFR 110.11(c) Disclaimer Specifications*

##### A. Specifications for All Disclaimers

In BCRA, Congress created a number of specific requirements for disclaimers to be included in communications covered by the statute. These statutory requirements vary, depending on whether the communication is printed or broadcast through radio or television, and on whether a candidate or another person pays for the communication. 2 U.S.C. 441d(c), (d). Paragraph (c) combines the disclaimer requirements in pre-BCRA 11 CFR 110.11(a)(5) with the new requirements Congress added in BCRA.

Paragraph (c)(1) sets forth a general, "clear and conspicuous" requirement applicable to all disclaimers, regardless of the medium in which the communication is transmitted. Paragraph (c)(1) is a slightly revised version of the "clear and conspicuous" requirement in pre-BCRA 11 CFR 110.11(a)(5). The final sentence of paragraph (c)(1) provides that a disclaimer is not clear and conspicuous if it is difficult to read or hear, or if its placement is easily overlooked. This modifies the corresponding pre-BCRA provision, which was focused on print communications only, by generalizing it to apply to communications made through other media as well. This generalization is justified by BCRA's revision to section 441d, which broadened the scope of the statute. No commenters addressed this paragraph.

##### B. Specific Requirements for Printed Communications

Several of the specific disclaimer requirements added by BCRA apply only to printed communications. 2 U.S.C. 441d(c)(1). Paragraph (c)(2) of section 110.11 implements the new statutory specifications, and also incorporates three of the print-specific provisions of pre-BCRA 11 CFR 110.11.

One commenter suggested that the pre-BCRA disclaimer regulations work well and should not be changed except where required under BCRA. For the most part, the Commission agrees, but with the recognition that Congress has in fact required a number of changes in the disclaimer provisions through BCRA. For example, the pre-BCRA requirement that a disclaimer be "clear and conspicuous" was limited to printed communications. In BCRA, Congress added a new requirement that the disclaimer in a printed communication be of "sufficient type-size to be clearly readable by the recipient of the communication." 2 U.S.C. 441d(c)(1). Given the specificity

of the statutory requirements added by BCRA, new paragraph (c)(2)(i) restates the "sufficient type size" requirement verbatim, while new paragraphs (c)(2)(ii) and (c)(2)(iii) also precisely track 2 U.S.C. 441d(c)(2) and (3), respectively.

The Commission sought comment on whether the term "sufficient type size" requires additional clarification or a "safe harbor" provision. Three commenters responded and each stated that the Commission should provide some additional guidance or "safe harbor" in the form of an "objective" standard for type size. One commenter advocated a type-size requirement related to the smallest font size of a communication, but a different commenter warned that such a requirement could be easily circumvented by reducing the type-size of one sentence, or even one word, in the communication. Two commenters also expressed concerns that a type-size requirement based on the size of the largest font size in the communication would be "unworkable" or "overly complex." One commenter supported an approach that would set a fixed minimum type size.

The Commission shares the concerns expressed by the commenters regarding formulas fixed to the smallest or largest type size in a communication's core message text. However, the Commission is also reluctant to set one fixed minimum type size for all communications because a type size that can be easily read in a newspaper might be completely unreadable when included on a billboard or other large, printed communication. Therefore, in 11 CFR 110.11(c)(2)(i), the Commission is creating a "safe harbor" provision that establishes a fixed, twelve-point type size as a sufficient size for disclaimer text in newspapers, magazines, flyers, signs and other printed communications that are no larger than the common poster size of 24 inches by 36 inches. However, no specific safe harbor provision would apply to larger printed communications because the Commission concludes that the vast differences in the potential size and manner of display of larger printed communications would render fixed type-size examples ineffective and inappropriate. Whether a disclaimer on a larger printed communication is of sufficient type size to be clearly readable is therefore to be determined on a case-by-case basis, taking into account the vantage point from which the communication is intended to be seen or read as well as the actual size of the disclaimer text.

Paragraph (c)(2)(ii) of section 110.11 specifies that the disclaimer included in printed communications must be contained within a printed box set apart from the other contents of the communication. 2 U.S.C. 441d(c)(2). Paragraph (c)(2)(iii) specifies that the text of the disclaimer must be printed with a reasonable degree of color contrast between the background and the printed statement. 2 U.S.C. 441d(c)(3). Both of these requirements apply regardless of the size of the printed material under paragraph (c)(2)(i).

In the NPRM, the Commission sought comment on whether the statutory phrase “reasonable degree of color contrast” should be further defined, and specifically whether the color contrast for the disclaimer notice should be related to the color contrast of the core message text. One commenter drew a distinction between the statutory requirement of color contrast between the “background and printed statement,” 2 U.S.C. 441d(c)(3), and the Commission’s suggestion in the narrative of the NPRM that a color contrast is required between the disclaimer text and the core message text. The Commission notes that color contrast between the disclaimer text and the core message text is not required by the statute, and is not required by the final rules. This should alleviate the commenter’s concern that such an additional requirement might require three different colors (a background color, a core message text color, and a disclaimer text color), thereby effectively prohibiting simple black and white communications and possibly raising the cost for the communication. Therefore, paragraph (c)(2)(iii) addresses only the contrast between the text and background of a communication, and provides two “safe harbor” examples that, when followed, comply with the color-contrast requirement. First, paragraph (c)(2)(iii) specifies that the color contrast requirement is met if the disclaimer is printed in black text on a white background. Second, paragraph (c)(2)(iii) specifies that the color contrast requirement is met if the degree of contrast between the background color and the disclaimer text color is at least as great as the degree of contrast between the background color and the color of the largest text in the communication. Please note that these two examples do not constitute the only ways to satisfy the color contrast requirements, and that they are safe harbors, not mandatory requirements. This approach is intended to provide a clear, flexible safe harbor that will

ensure that the disclaimer does not blend in with the background of the communication any more than a headline or other key part of the core message text, and thereby providing certainty to persons making communications needing disclaimers.

Paragraphs (c)(2)(iv) and (v) incorporate pre-BCRA regulatory provisions specific to print communications. Paragraph (c)(2)(iv), to which the provisions of pre-BCRA paragraph (a)(5)(i) are redesignated without substantive revision, states that a disclaimer need not appear on the front or cover page of a communication, except for communications that only contain a front face, such as billboards. Paragraph (c)(2)(v), to which the provisions of pre-BCRA paragraph (a)(5)(ii) are redesignated without substantive change, states that a communication that would require a disclaimer if distributed separately, and that is included in a package of materials, must contain the required disclaimer.

#### C. Specific Requirements for Radio and Television Communications That Are Authorized by Candidates

In BCRA, Congress added new requirements for disclaimers in radio and television communications paid for by candidates or persons authorized by candidates. 2 U.S.C. 441d(d)(1). Paragraph (c)(3) implements these specific statutory requirements as described below.

Paragraph (c)(3)(i) tracks the new statutory language requiring that a communication that is paid for or authorized by a candidate or the candidate’s authorized committee and transmitted through radio must include an audio statement spoken by the candidate himself or herself. 2 U.S.C. 441d(d)(1)(A). The statement must identify the candidate, and state that the candidate has approved the communication. *Id.*

Likewise, paragraphs (c)(3)(ii) tracks the new statutory language requiring that a communication that is paid for or authorized by a candidate or the candidate’s authorized committee and transmitted through television have an oral disclaimer spoken by the candidate himself or herself. 2 U.S.C. 441d(d)(1)(B). The provision requires the candidate to identify himself or herself, and to state that he or she has approved the communication. In addition, Congress specified that the candidate must convey that message in one of two ways: through a full-screen view of the candidate making the statement or through a “clearly identifiable photographic or similar

image of the candidate” that appears during the candidate’s voice-over statement. Paragraph (c)(3)(ii)(A) sets forth the first option, while paragraph (c)(3)(ii)(B) sets forth the second option and provides additional guidance regarding the meaning of “clearly identifiable.” The only commenter who specifically addressed this issue suggested that the picture of the candidate should only be considered “clearly identifiable” if it is displayed in a full-screen view. However, the Commission notes that although Congress specifically required a full-screen view when the candidate is shown making the statement, Congress did not require a full-screen view for the still picture. The Commission views this as an intentional distinction that contemplated an alternative to the full-screen view. Therefore, the Commission is establishing a safe harbor provision whereby a still picture of the candidate shall be considered “clearly identifiable” if it occupies at least 80% of the vertical screen height. That size is, in the Commission’s judgment, a meaningful alternative to the full-screen requirement, and complies with Congress’s mandate that the picture be “clearly identifiable.”

Congress also established a third disclaimer requirement for communications paid for or authorized by a candidate and transmitted through television. In addition to the oral statement described above, each television communication must contain a “clearly readable” written statement that appears at the end of the communication “for a period of at least four seconds” with a “reasonable degree of color contrast” between the background and the disclaimer statement. *See* 2 U.S.C. 441d(d)(2)(B)(ii). These statutory requirements are implemented in new 11 CFR 110.11(c)(3)(iii).

The pre-BCRA regulations provided that a written disclaimer appearing on the screen of a television communication “shall be considered clear and conspicuous if [it] appear[s] in letters equal to or greater than four (4) percent of the vertical picture height for not less than four (4) seconds.” Pre-BCRA 11 CFR 110.11(a)(5)(iii). Two commenters urged the Commission to retain the four-percent height provision as a “safe harbor.” However, the new Congressional color-contrast requirement in 2 U.S.C. 441d(d)(2)(B)(ii) renders the pre-BCRA “safe harbor” incomplete because the four-percent-for-four-seconds provision does not address color contrast.

The Commission is therefore setting forth the statutory “clearly readable”



requirement in paragraph 11 CFR 110.11(c)(3)(iii) and is employing the same four percent height provision and the four-second duration provision as two of the three specific criteria that will determine whether a statement is "clearly readable." Rather than providing a "safe harbor," paragraphs 11 CFR 110.11(c)(3)(iii)(A), (B), and (C) provide, respectively, that the statement will not be considered "clearly readable" unless it appears in letters equal to or greater than four percent of the vertical picture height, it appears for at least four seconds, and the statement contains a reasonable degree of color contrast with the background.

Paragraph (c)(3)(iii)(B) sets forth the four-second duration requirement in accordance with the BCRA language. 2 U.S.C. 441d(d)(1)(B).

Paragraph 11 CFR 110.11(c)(3)(iii)(C) addresses the new color contrast requirement in BCRA, which is the third criterion used to determine whether a statement is clearly readable. Because the statute did not define "reasonable degree of color contrast," the Commission requested comment on several different approaches. To continue the same "safe harbor" approach of pre-BCRA paragraph (a)(5)(iii), the regulations would have to describe "reasonable degree of color contrast" in an objective manner. The same commenter who addressed the color contrast issue in the context of printed communications also suggested that the Commission avoid overly complicated or cost-incurring definitions of "reasonable degree of color contrast" in the context of television communications. For the same reasons stated above with reference to the color contrast requirements for printed communications, the Commission is providing "safe harbors" for disclaimers that are printed in black text on a white background, as well as disclaimers that have at least the same degree of contrast with the background color as the degree of contrast between the background color and the color of the largest text used in the communication. 11 CFR 110.11(c)(3)(iii)(C). Either of these disclaimer formats would satisfy the color-contrast requirement, which is the third criterion used to determine whether the statement is "clearly readable."

The Commission received no comments on the two proposed examples of spoken disclaimers that, if used by a candidate, will satisfy the requirements of paragraphs (c)(3)(i), (ii) and (iii). These examples, located in paragraph (c)(3)(iv), are not mandatory and are not the only acceptable

disclaimers. Paragraph (c)(3)(iv) is intended to provide a clear "safe harbor" for candidates, authorized committees, and others required to include disclaimers in communications.

#### D. Specific Requirements for Radio and Television Communications Paid for by Other Persons and Not Authorized by Candidates

In BCRA, Congress set forth a scripted audio statement required for disclaimers in communications transmitted through radio or television and paid for by persons other than candidates or persons authorized by candidates. 2 U.S.C. 441d(d)(2). New paragraph (c)(4) tracks the statutory language by requiring the name of the political committee or other person responsible for the communication and any connected organization to be included in the communication. "Connected organization" is defined in 11 CFR 100.6. Paragraph (c)(4) also requires that communications transmitted through a telephone bank, as defined in 11 CFR 100.28, carry the same statement. See discussion regarding the inclusion of telephone banks within the term "public communication," above, and the discussion of specific requirements for radio, telephone bank, and television communications authorized by candidates, above. The scripted statement is: "XXX is responsible for the content of this advertising." 2 U.S.C. 441d(d)(2).

Furthermore, in the case of a television transmission, Congress required that the statement be conveyed by a "full-screen view of a representative of the political committee or other person making the statement," or in a "voice-over" by such representative. 2 U.S.C. 441d(d)(2). The Commission sought comment on whether the regulation should specify who may represent the payor for this purpose. One commenter urged the Commission to require an officer of the organization to make the statement, rather than a volunteer or paid celebrity. In contrast, another commenter argued that any restriction on who could make the statement "would far exceed the scope of BCRA," which allows a "representative of the committee or other person" to make the statement. See 2 U.S.C. 441d(d)(2) (emphasis added). The Commission agrees with the latter commenter that the statute does not appear to contemplate any additional restrictions on the choice of the person making the disclaimer statement. Furthermore, the Commission sees no reason to remove additional flexibility where the plain emphasis of the relevant statutory

provision is the content and conspicuousness of the disclaimer, not the individual speaking those words. The Commission also notes that where Congress clearly intended that a specific person convey the disclaimer message for an authorized radio or television communication, it did so explicitly by providing that the candidate must make the statement. Compare 2 U.S.C. 441d(d)(1) with 2 U.S.C. 441d(d)(2). Thus, 11 CFR 110.11(c)(4)(ii) does not include any specific limitation regarding who must speak the required message. In addition, unlike the requirements for television communications authorized by candidates, the audio statement required for television communications that are not authorized by candidates can be accomplished through voice-over without any requirement of a photograph or similar representation of the speaker.

Finally, as with authorized television communications, the disclaimer statement for a television communication that is not authorized by any candidate must also appear in writing at the end of the communication in a clearly readable manner with a reasonable degree of color contrast between the background and the printed statement for a period of at least four seconds. 2 U.S.C. 441d(d)(2). Paragraphs 11 CFR 110.11(c)(4)(iii)(A), (B), and (C) are therefore identical to 11 CFR 110.11(c)(3)(iii)(A), (B), and (C). See above explanation of 11 CFR 110.11(c)(3)(iii).

#### 11 CFR 110.11(d) Coordinated and Independent Expenditures by Political Party Committees

Paragraph (d) of section 110.11 covers disclaimers for communications that constitute coordinated party expenditures and independent expenditures by national, state, district, and local political party committees. The relevant pre-BCRA provisions of 11 CFR 110.11(a)(2) are being redesignated as paragraph (d)(1), with one minor grammatical change and without substantive change.

Although the Commission did not propose any significant substantive changes for disclaimer requirements related to coordinated party expenditures, one commenter expressed concern that a communication paid for by a political party committee with funds subject to the 2 U.S.C. 441a(d) coordinated expenditure limits would, solely by virtue of being a 2 U.S.C. 441a(d) coordinated expenditure, be considered to be "authorized" communications subject to the requirements of 11 CFR 110.11(c)(3).

The Commission does not intend such a result and believes that such an interpretation would be contrary to its longstanding policy of permitting political party committees to avail themselves of the 2 U.S.C. 441a(d) limits, both before and after a party's primary, without any showing of candidate authorization or actual "coordination" with a candidate. See "Party Expenditures vs. Contributions: Similarities," *Campaign Guide for Political Party Committees* at p.16 (1996) ("It is up to the party committee to decide.") Therefore, the Commission is adding new paragraph (d)(2) to 11 CFR 110.11 to make it clear that a communication paid for by a political party committee through a section 441a(d) expenditure will not be considered to be authorized by a candidate solely by virtue of using the funds subject to the section 441a(d) limits. 11 CFR 110.11(d)(3). Please note, however, that while this clarification recognizes a political party committee's freedom to characterize its payment as a "coordinated expenditure" even when no actual coordination occurred, the communication would be considered authorized by the candidate (and would therefore require an authorization statement to that effect) if the candidate approves the communication. The Commission is also making clear that communications made by a political party committee pursuant to 2 U.S.C. 441a(d) that are distributed prior to the date the party committee's candidate is nominated need not carry disclaimers indicating that the communication was authorized by any candidate, but only must indicate who paid for the communication. 11 CFR 110.11(d)(1)(ii).

Paragraph (d)(3) covers communications that constitute independent expenditures by political party committees. It states that the disclaimer provisions apply to such communications, and that a "non-authorization notice" is required, as with any other independent expenditure communication. See pre-BCRA 11 CFR 109.3 and proposed 11 CFR 109.10(e) (as proposed in a separate Notice of Proposed Rulemaking on Consolidated Reporting, 67 FR 64555 (October 21, 2002).)

#### 11 CFR 110.11(e) Exempt Activities

The Commission is redesignating the provisions of pre-BCRA 11 CFR 110.11(a)(4), pertaining to communications that qualify as "exempt activities," as paragraph (e) of section 110.11. In the NPRM, the Commission proposed to make only minor, non-substantive revisions. 67 FR 55351. Although not so expressly stated in the

NPRM, the Commission based this proposal on the tentative conclusion that Congress did not intend, in BCRA, to overturn the Commission's longstanding approach to disclaimers for exempt activities. The Commission received no comments on this proposal.

The Commission has concluded that no substantive revisions are necessary. The Commission has, however, rewritten the paragraph to make it clear that public communications that constitute exempt activities are covered by the requirements of paragraphs (a), (b), (c)(1), and (c)(2) of section 110.11, but are not subject to the new "stand by your ad" requirements in paragraphs (c)(3) and (c)(4) of section 110.11. This revision is not intended to change the rule substantively; rather, it is only intended to clarify the rule in light of the new provisions added by BCRA.

#### 11 CFR 110.11(f) Exceptions

Exceptions to the disclaimer requirements are set out in paragraph (f). The exceptions in pre-BCRA paragraphs (a)(6)(i), (ii), and (iii) are being redesignated as paragraphs (f)(1)(i), (ii), and (iii), respectively, with only grammatical, non-substantive revision.

The Commission is incorporating the provisions of pre-BCRA 11 CFR 110.11(a)(7), regarding certain communications by a separate segregated fund or its connected organization, in paragraph (f)(2), because this provision is essentially an exception. In addition, in paragraph (f)(2), the word "form" is being changed to "type." This change has no substantive effect, and is being done only to conform to the language of the statute. See 2 U.S.C. 441d(a). In addition, the reference "general public political advertising" in pre-BCRA 11 CFR 110.11(a)(7) is replaced with a reference to a "public communication." 11 CFR 110.11(f)(2). No commenters addressed this provision.

#### 11 CFR 110.11(g) Comparable Rate for Campaign Purposes

Paragraph (g) of section 110.11 continues the pre-BCRA rule pertaining to comparable rates for print advertising. That is, the contents of pre-BCRA 11 CFR 110.11(b) are being redesignated as paragraph (g). Other than the addition of a heading for the paragraph, there are no revisions to the pre-BCRA rule. Paragraph (g) tracks 2 U.S.C. 441d(b), as did its pre-BCRA predecessor. No commenters addressed this provision.

#### 11 CFR 110.16 Prohibitions on Fraudulent Misrepresentations

BCRA adds a subsection to the fraudulent misrepresentation statute at 2 U.S.C. 441h. The new provision, 2 U.S.C. 441h(b), prohibits a person from fraudulently misrepresenting that the person is speaking, writing or otherwise acting for, or on behalf of, a Federal candidate or political party, or an employee or agent of either, for the purpose of soliciting contributions or donations. It also prohibits persons from participating in, or conspiring to participate in, plans, schemes, or designs to make such fraudulent misrepresentations in soliciting contributions and donations. BCRA also non-substantively amends the existing fraudulent misrepresentation statute by redesignating it as subsection (a) of 2 U.S.C. 441h. The regulation implementing this provision, together with the pre-BCRA fraudulent misrepresentation regulation formerly found at 11 CFR 110.9(b),<sup>4</sup> is combined in new 11 CFR 110.16.

The pre-BCRA fraudulent misrepresentation provision, now codified at 2 U.S.C. 441h(a), is aimed at fraudulent misrepresentation of campaign authority. For additional background, see *Legislative History of Federal Election Campaign Act Amendments of 1974* at 521. The statute prohibits a candidate, his or her employee or agent, or an organization under the candidate's control, from purporting to speak, write, or act for another candidate or political party on a matter that is damaging to the other candidate or party. Section 441h(a) encompasses, for example, a candidate who distributes letters containing statements damaging to an opponent and who fraudulently attributes them to the opponent. The Commission has determined that "on a matter that is damaging" includes actions or spoken or written communications that are intended to suppress votes for the candidate or party who has been

<sup>4</sup> Another BCRA rulemaking amended 11 CFR 110.9, formerly entitled "Miscellaneous Provisions," to address only violations of the contribution limits and was re-titled accordingly. See Final Rules and Explanation and Justification for Contribution Limitations and Prohibitions, 67 FR 69928 (Nov. 19, 2002). Other provisions previously addressed in 11 CFR 110.9 include fraudulent misrepresentation, price index increase and voting age population. This rulemaking redesignates and amends the fraudulent misrepresentation provision. The "Contribution Limitations and Prohibitions" rulemaking redesignates and amends the price index increase provision. See *id.* A third BCRA rulemaking project entitled "Coordination and Independent Expenditures" proposes to redesignate and amend the voting age population provision. See NPRM at 67 FR 60042, 60060 (Sept. 24, 2002).

fraudulently misrepresented. A violation of section 441h(a) does not depend on whether the candidate or party who is fraudulently represented goes on to win an election. While the precise harm may be difficult to quantify, harm is presumed from the nature of the communication. Proof of financial damages is unnecessary.

Because the language and purpose of the pre-BCRA misrepresentation statute encompasses only misrepresentations by a candidate or the candidate's employee or agent, the Commission has historically been unable to take action in enforcement matters where persons unassociated with a candidate or candidate's authorized committee have solicited funds by purporting to act on behalf of a specific candidate or political party. Candidates have complained that contributions that contributors believed were going to benefit the candidate were diverted to other purposes, harming both the candidate and contributor. Consequently, the Commission has frequently included in its annual legislative recommendations to Congress a recommendation that 2 U.S.C. 441h be amended to specifically prohibit any person from fraudulently misrepresenting a candidate or political party in solicitations. See *Federal Election Commission Annual Reports* for 2000 at 39, for 1999 at 47-48, for 1998 at 52, and 1997 at 47. BCRA's prohibition on fraudulent solicitations of contributions and donations implements those legislative recommendations. 2 U.S.C. 441h(b); see 148 Cong. Rec. S3122 (daily ed. March 29, 2001) (statement of Sen. Nelson).

The Commission received one comment on the proposed rules to implement BCRA's fraudulent solicitation provision and to redesignate the pre-BCRA fraudulent misrepresentation rule. The commenter expressed support for combining these two provisions in a new rule. The commenter agreed that an anti-fraud provision aimed at fraudulent fundraising and applicable to a broader range of persons was needed.

The final rule at 11 CFR 110.16(a) remains unchanged from the proposed rule in the NPRM. Paragraph (a) amends the pre-BCRA fraudulent misrepresentation regulation, formerly found at 11 CFR 110.9(b), by adding the title, "In general." This change follows BCRA, which added a similar heading to section (a) of 2 U.S.C. 441h. Technical amendments also make the wording of paragraph (a) gender-neutral. Finally, paragraph (a)(2) has been amended from the pre-BCRA rule to

include the word "scheme" so that it tracks the statute.

The final rule at 11 CFR 110.16(b) tracks the statutory language in BCRA. No changes are being made from the proposed rule. Paragraph (b)(1) prohibits a person from fraudulently misrepresenting that the person speaks, writes, or otherwise acts for or on behalf of a candidate, political party, or an employee or agent of either, in soliciting contributions or donations. As used in section 110.16(b)(1), "donation" has the same meaning as in 11 CFR 300.2(e). See Final Rules for Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 FR 49064, 49122 (July 29, 2002). Paragraph (b)(2) prohibits a person from willfully and knowingly participating in, or conspiring to participate in, any plan, scheme, or design to violate proposed paragraph (b)(1).

The Commission notes that the fraudulent misrepresentations prohibited in both 11 CFR 441h(a) and (b) and 11 CFR 110.16(a) and (b) differ from common law fraud. Unlike common law fraudulent misrepresentation, section 441h gives rise to no tort action. Section 441h is part of a Federal statute designed to address campaign finance abuses, not common law fraud. See generally *Buckley v. Valeo*, 424 U.S. 1, 26-27 (1976).

The Supreme Court has recognized that statutes that address schemes to defraud, such as sections 441h(a)(2) and (b)(2), do not require proof of the common law requirements of "justifiable reliance" and "damages." *Neder v. United States*, 527 U.S. 1, 24-25 (1999) ("The common law requirements of 'justifiable reliance' and 'damages,' for example, plainly have no place in federal fraud statutes \* \* \*"). "By prohibiting the 'scheme to defraud' rather than the completed fraud, the elements of reliance and damage would clearly be inconsistent with the statutes Congress enacted", citing *United States v. Stewart*, 872 F.2d 957, 960 (10th Cir. 1989).

Another indication that the fraudulent misrepresentations prohibited by section 441h differ from common law fraud is that section 441h(a) states that the fraudulent misrepresentation must be "on a matter which is damaging to [the misrepresented] candidate or political party." If the statute were to require proof of damage in common law fraudulent misrepresentation, then the phrase "on a matter which is damaging" is superfluous. Courts construe statutes so "as to avoid rendering superfluous any parts thereof." *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104

(1991); see also *Federal Election Commission v. Arlen Specter '96*, 150 F. Supp.2d 797, 806 (2001), quoting *Bennett v. Spear*, 520 U.S. 154, 173 (1997).

11 CFR 111.24 Civil Penalties (2 U.S.C. 437g(a)(5), (6), (12), 28 U.S.C. 2461 nt.).

The Act imposes civil penalties on anyone violating any portion of FECA or the Presidential Election Campaign Fund Act ("Fund Act") or the Presidential Primary Matching Payment Account Act ("Matching Payment Act"). The Act's civil penalties, found at 2 U.S.C. 437g(a)(5), (6), and (12), are organized into two tiers of monetary penalties; one tier of penalties for violations of the Act, and a second tier of penalties for "knowing and willful" violations of the Act.

BCRA amends sections 437g(a)(5)(B) and 437g(a)(6)(C) by separating out and increasing the penalties for a subset of knowing and willful violations, namely, contributions that are made in the name of another. See 2 U.S.C. 441f. Such contributions are often made through a conduit to circumvent the contribution limits. The amendment to 2 U.S.C. 437g(a)(5)(B) increases the civil penalties for such violations to "not less than 300 percent of the amount involved in the violation" and "not more than the greater of \$50,000 or 1,000 percent of the amount involved in the violation."

Section 437g(a)(6)(C) of FECA, authorizing a court to impose civil penalties on a person who knowingly and willfully violates the Act, has been similarly amended by BCRA. Accordingly, the Commission amends 11 CFR 111.24 to implement these amendments to FECA.

Specifically, the Commission is dividing 11 CFR 111.24(a) into paragraphs (a)(1), and (a)(2)(i) and (ii). Paragraph (a)(1) contains the unchanged language of the pre-BCRA regulation for civil penalties for violations of the Act or the Fund Act or Matching Payment Act. Paragraph (a)(2) addresses "knowing and willful" violations and is further divided into paragraphs (a)(2)(i) and (ii). Paragraph (a)(2)(i) contains the unchanged language of the pre-BCRA regulation for civil penalties for knowing and willful violations of FECA or the Fund Act or the Matching Payment Act. 11 CFR 111.24(a)(2)(ii) implements BCRA's amendments to FECA increasing civil penalties for knowing and willing violations involving contributions made in the name of another. In the case of a knowing and willful violation of the prohibition on contributions in the name of another, the civil penalty is not

less than an amount that is equal to 300 percent of the amount of the violation, and the civil penalty is not more than \$50,000 or an amount equal to 1,000 percent of the amount of the violation, whichever is greater. The Commission received no comments on these amended rules, which are identical to the proposed rules, previously published.

*11 CFR Part 113 Use of Campaign Accounts for Non-Campaign Purposes (2 U.S.C. 439a)*

Introduction

In BCRA, Congress deleted 2 U.S.C. 439a in its entirety, and replaced it with an entirely new section. Subsection (a) of the amended section sets forth the following four categories of “permitted uses” of campaign funds: (1) Otherwise authorized expenditures in connection with a candidate’s campaign for Federal office; (2) ordinary and necessary expenses incurred in connection with a Federal officeholder’s duties; (3) contributions to certain tax-exempt organizations; and (4) transfers, without limitation, to national, state or local political party committees. 2 U.S.C. 439a(a)(1) through (4). Congress also included a list of non-exhaustive, *per se* prohibited personal uses of campaign funds, including home mortgage, rent or utility payments, clothing purchases, noncampaign-related automobile expenses, country club memberships, vacations or other noncampaign-related trips, household food items, tuition payments, noncampaign-related admissions to entertainment events, such as sporting events, concerts, and theatres, and health club dues. 2 U.S.C. 439a(b)(2)(A) through (I).

Former 2 U.S.C. 439a was the statutory basis for the Commission’s pre-BCRA “personal use” rules. It allowed candidates and Federal officeholders to use excess campaign funds to pay for ordinary and necessary expenses incurred in connection with their duties as Federal officeholders, certain contributions to tax-exempt organizations, and other lawful purposes, including transfers, without limitation, to national, state or local political party committees. The former section 439a also generally prohibited candidates and Federal officeholders from converting their excess campaign funds to personal uses.

Two pre-BCRA regulations implemented the statutory conversion-to-personal-use prohibition. 11 CFR 113.1(g)(1)(i) set out a non-exhaustive list of *per se* prohibited personal uses, and 11 CFR 113.1(g)(1)(ii) described uses that the Commission evaluated on

a case-by-case basis. In addition, the latter regulation stated that uses that would exist “irrespective” of a candidate’s campaign or a Federal officeholder’s duties constitute personal use. Finally, another pre-BCRA regulation, which described the permissible uses of excess campaign funds, included the “any other lawful purpose” language from former section 439a. 11 CFR 113.2(d).

In the NPRM, the Commission proposed regulations that would implement amended section 439a. The Commission also requested comments on several issues. With regard to the personal use regulations, the Internal Revenue Service commented that it saw no direct conflict between the Commission’s proposals and the Internal Revenue Code or the regulations thereunder. Other comments are addressed below.

Unchanged Provisions of 11 CFR 113.1(e) and 11 CFR 113.2

1. *Per se* Personal Uses

The pre-BCRA version of 2 U.S.C. 439a contained a general prohibition against the personal use of campaign funds, but did not specify any particular impermissible uses. In contrast, the Commission’s pre-BCRA personal use regulations specifically defined certain uses of campaign funds or donations as *per se* prohibited personal uses. 11 CFR 113.1(g)(1)(i).

When Congress enacted BCRA, it amended 2 U.S.C. 439a(b) to include a non-exhaustive list of prohibited personal uses of campaign funds. As one of BCRA’s principal sponsors explained, amended section 439a “[c]odifies FEC regulations relating to the personal use of campaign funds by candidates” (emphasis added). 148 *Cong. Rec.* S1993–4 (daily ed. March 18, 2002) (statement of Sen. Feingold). However, the Commission noted in the NPRM that several of the personal use provisions in amended section 439a were not adopted verbatim, but were instead summaries of pre-BCRA personal use regulations. For example, the statute now prohibits the use of campaign contributions for “a clothing purchase” (2 U.S.C. 439a(b)(2)(B)); whereas the pre-BCRA corresponding regulation at 11 CFR 113.1(g)(1)(i)(C) prohibited the personal use of “[c]lothing, other than items of *de minimis* value that are used in the campaign, such as campaign ‘T-shirts’ or caps with campaign slogans.” In addition, amended section 439a did not incorporate all of the pre-BCRA *per se* personal use rules in their entirety. *Compare* post-BCRA 2 U.S.C.

439a(b)(2)(A) through (I) with pre-BCRA 11 CFR 113.1(g)(1)(i). In the NPRM, the Commission stated that it interpreted new subsection (b) of 2 U.S.C. 439a to provide an even firmer statutory foundation for the *per se* rules at 11 CFR 113.1(g)(1)(i) than did the pre-BCRA version of section 439a. No commenters opposed this interpretation, and two commenters supported it. Accordingly, aside from the exceptions noted below, the Commission is retaining its pre-BCRA *per se* personal use regulations.

2. Irrespective test

As the Commission noted in the NPRM, pre-BCRA section 113.1(g)(1)(ii) stated that a use that would exist “irrespective” of a candidate’s campaign or a Federal officeholder’s duties would constitute a prohibited personal use. In BCRA, Congress codified the “irrespective” test as part of new section 439a(b)(2) (“For the purposes of paragraph (1), a contribution or donation shall be considered to be converted to personal use if the contribution or amount is used to fulfill any commitment, obligation, or expense of a person that would exist irrespective of the candidate’s election campaign or individual’s duties as a holder of Federal office \* \* \*”). As the Commission explained in the NPRM, BCRA’s “irrespective” test is virtually identical to the language in section 113.1(g)(1)(ii). The Commission proposed to continue to apply the “irrespective” test as it had done prior to BCRA. No comments were received specifically on this issue, although one commenter cited BCRA’s “irrespective” language in the context of the commenter’s analysis of the “noncampaign-related trip” language in proposed 11 CFR 113.1(g)(i)(K). (Noncampaign-related trips are discussed below.) Therefore, in the final rule, the Commission is not revising the “irrespective” test.

Amended Provisions of 11 CFR 113.1

1. 11 CFR 113.1(b) and (e)—Excess Campaign Funds

In BCRA, Congress deleted the phrase “in excess of any amount necessary to defray” campaign expenses from section 439a. Former section 113.1(e) defined “excess campaign funds” to mean “amounts received by a candidate as contributions which he or she determines are in excess of any amount necessary to defray his or her campaign expenditures.” In the NPRM, the Commission proposed not to change section 113.1(e), but raised the issue of whether Congress intended to eliminate the discretion of candidates and Federal

officeholders to use these excess campaign funds “for ordinary and necessary expenses incurred in connection with duties of the individual as a holder of Federal office.” 2 U.S.C. 439a(a)(2). No commenters opposed the Commission’s proposal to leave section 113.1(e) unchanged, and one commenter supported leaving the “excess campaign funds” phrase intact.

To ensure that 11 CFR part 113 is consistent with the plain language of BCRA, the Commission has decided that the term “excess campaign funds” should be dropped. Accordingly, the title of part 113, (formerly “Excess Campaign Funds and Funds Donated to Support Federal Officeholder Activities”) now reads “Campaign Funds and Funds Donated to Support Federal Officeholder Activities.” In addition, the references to the term “excess campaign funds” throughout part 113 are being deleted.

The Commission is also deleting 11 CFR 113.1(e), which previously defined “excess campaign funds” as “amounts received by a candidate as contributions which he or she determines are in excess of any amount necessary to defray his or her campaign expenditures.”

The Commission is also making the following conforming amendments. In paragraphs (e)(1)(i), (e)(5), and (f), the term “campaign funds” is being substituted for “excess campaign funds.” Lastly, the Commission is also changing “excess campaign funds” to “campaign funds” in paragraph (b), which defines “office accounts.”

## 2. 11 CFR 113.1(g)(1)(i)(B)—Funeral Expenses

Notwithstanding a principal sponsor’s statement that the BCRA codifies the Commission’s personal use regulations, amended section 439a failed to include two *per se* examples of personal use contained in 11 CFR 113.1(g). One of these, funeral, cremation or burial expenses, is being retained with significant exceptions. These would include such expenses for a candidate, employee or volunteer of authorized committees whose death arises out of, or in the course of, campaign activity. While there is no legislative history pertaining to this particular category of personal uses, it is at least a permissible construction of the BCRA to conclude that Congress deliberately excluded funeral expenses from its list of excluded uses of campaign funds. Norman J. Singer, *Statutes and Statutory Construction* § 47.23 (6th ed. 2000) (“When ‘include’ is utilized, it is generally improper to conclude that entities not specifically enumerated are

excluded. \* \* \* It has also been assumed that when the legislature expresses things through a list, the court assumes that what is not listed is excluded.”).

In any event, limiting the use of campaign funds for funeral expenses resulting from a death that arises out of, or in the course of, campaign activity meets the Commission’s “irrespective” test now codified in 2 U.S.C. 439a(b)(2). The phrase, “arises out of, or in the course of,” is a term of art employed in workers’ compensation statutes and insurance contracts and would cover, for instance, deaths resulting from injuries suffered during campaign activity.

In addition, with respect to funeral expenses for authorized committee staff and volunteers who die in the course of campaign activity, public policy considerations counsel the permission of the payment of such expenses from campaign funds as campaign volunteers and staff, unlike officeholders and their staff, generally do not receive any fringe benefits that would cover the cost of funeral expenses.

## 3. 11 CFR 113.1(g)(1)(i)(I)—Using Contributions To Pay Salaries to Candidates

In the NPRM, the Commission proposed adding a new rule, 11 CFR 113.1(g)(1)(i)(I), which would prohibit candidates from using campaign funds to pay themselves salaries or otherwise compensate themselves for income lost as a result of campaigning for Federal office. In AO 1999–1, the Commission banned the use of campaign funds to pay candidate salaries, in part because candidates would otherwise be able to spend campaign funds received as salaries for prohibited personal uses such as food, clothing, utilities, mortgages and other prohibited uses. Also, although the Commission noted that one of BCRA’s principal sponsors stated that BCRA was intended to codify the Commission’s current regulations but not its advisory opinions (148 *Cong. Rec.* S2143 (daily ed. March 20, 2002) (statement of Sen. Feingold)), the Commission preliminarily concluded that this proposed addition to its regulations would be consistent with the non-exhaustive list of prohibited personal uses in amended 2 U.S.C. 439a(b)(2).

The Commission sought comment as to whether or not principal campaign committees should be able to pay a candidate’s salary out of campaign funds. Three commenters opposed the NPRM’s proposal to prohibit the payment of candidate salaries and no commenter supported the proposal. One

commenter argued that the definition of personal use does not encompass a payment to, as distinguished from an obligation of, a candidate. The same commenter also argued that because many candidates must forego salary in order to conduct the business of the campaign, a candidate who is dependent on an income is put at a severe disadvantage compared to an incumbent who is free to campaign at all times without any reduction in compensation or to an affluent challenger, who can afford to campaign without receiving any compensation.

The commenter also noted that AO 1999–1, which cites AOs 1996–34, 1995–42, and 1995–20, stated that the Commission has permitted the use of campaign funds to enable candidates and immediate family members to attend campaign events. Finally, the commenter concluded that candidates without significant resources might not be able to forego salary payments in order to run for Federal office, and recommended that the Commission promulgate a regulation permitting candidates to be paid salaries from campaign funds, with restrictions sufficient to prevent abuse.

A second commenter, citing the above-mentioned statement by one of BCRA’s principal sponsors that the new law was not intended to codify the Commission’s advisory opinions, asserted that the Commission lacked the authority to characterize salary payments to candidates from campaign funds as a *per se* prohibited personal use. This commenter also argued that, were it not for their campaign responsibilities, candidates would not have to leave their jobs and give up their salaries. Thus, the commenter concluded, this situation fulfills BCRA’s “irrespective” test. The commenter also maintained that paying salaries to candidates so that they can buy personal items and services is akin to corporate employees making political contributions from their salaries. The commenter drew the analogy that, because corporate contributions are illegal but contributions from corporate employees are not, candidates should be able to draw salaries from campaign funds and should be allowed to purchase personal goods and services. Noting that would-be candidates of modest means might not be able to run for Federal office without salaries, the commenter urged the Commission not to change existing rules on this subject, but rather to either reconsider AO 1999–1 or let Congress decide the issue.

Finally, a third commenter, who joined in the comments of the previous two commenters, maintained that the

Commission's proposal exceeds both Congress's mandate in BCRA and congressional intent. The commenter also stated that the proposal would exacerbate what the commenter characterized as "enhanced advantages conferred upon the wealthy, including incumbent federal office holders," by BCRA. The commenter concluded that, unlike officeholders, persons of average means need a salary in order to pay expenses while running for office.

The Commission agrees with the commenters that the payment of a salary to a candidate is not a prohibited personal use as defined under Commission regulations since, but for the candidacy, the candidate would be paid a salary in exchange for services rendered to an employer. The Commission's personal use regulations issued on February 9, 1995 adopted the "irrespective test" in determining whether expenses would be deemed personal use. In the Explanation and Justification, the Commission explained that "if campaign funds are used for a financial obligation that is caused by campaign activity or the activities of an officeholder, that use is not personal use." Explanation and Justification, Final Rules on Expenditures; Reports by Political Committees; Personal Use of Campaign Funds, 60 FR 7862, at 7863-7864 (Feb. 9, 1995). A salary paid to a candidate would be in return for the candidate's services provided to the campaign and the necessity of that salary would not exist irrespective of the candidacy. As the Commission has previously stated, under the Act and Commission regulations, a candidate and the candidate's campaign committee have wide discretion in making expenditures to influence the candidate's election, but may not convert excess campaign funds to personal use. 2 U.S.C. 431(9) and 439a, AOs 1992-4, 1991-2, 1988-13, 1987-2, 1987-1, 1984-42, 1984-8, 1980-138 and 1980-49. Therefore, the Commission will permit a candidate's principal campaign committee to pay a salary to the candidate, thus superseding AO 1999-1.

Advisory Opinions 2001-10, 2001-03, 2000-40, 2000-37, and 2000-12 state the Commission will permit the use of campaign funds for salary payments to a member of the candidate's family provided that the family member is providing bona fide services to the campaign and the salary does not exceed fair market value for the services provided. Unlike the payment of salaries to members of a candidate's family, however, there need not be any showing that a candidate is providing bona fide services to the campaign; the

fact that the candidate's work is valuable to his or her campaign shall be presumed.

Note that a candidate's salary does not, however, constitute a qualified campaign expense as that term is defined in 11 CFR 9002.11 and 9032.9.

The payment of salaries to candidates from campaign funds is subject to certain conditions in the final rules. First, the candidate's salary must be paid from his or her principal campaign committee only, as defined in 11 CFR 100.5(e)(1). This condition precludes the possibility of multiple salaries, and generally adds clarifying specificity.

Second, the salary payment to the candidate must not exceed the minimum annual salary for the Federal office sought. Thus, if a candidate seeks a seat held by a member of the House of Representatives or the Senate who holds a leadership position, and is thus paid more than the minimum salary payable to a member of the House of Representatives or the Senate, respectively, the candidate's salary payment shall nonetheless not exceed the lowest salary for the Federal office that he or she seeks. Any salary payment to a candidate from campaign funds in excess of the salary paid to a Federal officeholder—U.S. House, U.S. Senate, or the Presidency—shall be considered personal use. See definition of "Individual holding Federal office," 11 CFR 300.2(o). See also 11 CFR 113.1(c) and 11 CFR 100.4. Further, any earned income that the candidate receives from salaries or wages from any other source will count towards the limit of the minimum annual salary for the Federal office sought. This condition will prevent candidates from paying themselves a salary from campaign funds on top of other earned income that they receive from other sources, such as from private-sector employment, to the extent that such combined payments exceed the minimum annual salary for the Federal office that the candidate is seeking. This ceiling on permissible candidate salaries from campaign funds is intended to prevent possible abuse in terms of candidates paying themselves exorbitant salaries, and will likewise ensure that a challenger may be paid out of campaign funds no more than the officeholder whom he or she is running against is paid by the government for his or her government service. Additionally, no candidate may receive a salary from campaign funds in excess of what he or she received as earned income in the year prior to becoming a candidate. This additional safeguard will help ensure that campaign salaries are not used to enrich candidates, but instead used to

compensate candidates for lost income that is forgone due to becoming a candidate.

Third, the final rule requires candidates who avail themselves of this salary provision to provide income tax records from the relevant years and other evidence of earned income upon the request of the Commission.

Fourth, payments made under this paragraph must be computed on a pro-rata basis. This is intended to prevent a candidate's principal campaign committee from paying the candidate the entire minimum annual salary for the Federal office sought by the candidate, unless he or she is a candidate, as defined by 11 CFR 100.3(a), for at least one year. Any tax payments required by the Internal Revenue Service, or state and/or local governments, are the responsibility of the candidate.

Fifth, an incumbent Federal officeholder, as defined in 11 CFR 100.5(f)(1), must not receive salary payments as a candidate from campaign funds. Otherwise, of course, such an incumbent officeholder would be receiving two salaries, one from his or her campaign and one for his or her official duties.

Sixth, under the final rules at 11 CFR 113.1(g)(1)(i)(I), the first payment of a salary from campaign funds to a candidate must be made no earlier than the filing deadline for access to the primary election ballot for Federal candidates, as determined by State law, or in those states that do not conduct primaries, on January 1 of each even-numbered year. See 11 CFR 100.24(a)(1)(i). If the candidate wins the primary election, the principal campaign committee may continue to pay him or her a salary from campaign funds through the date of the general election, up to and including the date of any general runoff. Id. If the candidate loses the primary, withdraws from the race, or otherwise ceases to be a candidate, no salary payments may be paid beyond that date. In odd-numbered years in which a special election for a Federal office occurs, the principal campaign committee of a candidate may pay him or her a salary from campaign funds starting on the date the special election is set and ending on the day of the special election. See 11 CFR 100.24(a)(1)(ii).

In making this decision, the Commission is satisfied that, because all candidate and family members' salaries will be fully disclosed to the public, those who contribute to the campaign and who support the candidate will be able to voice their approval, or

disapproval, of this use of campaign funds.

4. 11 CFR 113.1(g)(1)(i)(J) and 11 CFR 113.1(g)(1)(i)(C)—Noncampaign-Related Trips

One issue on which the Commission requested comment is raised by 2 U.S.C. 439a(b)(2)(E), which specifically included a “*vacation or other noncampaign-related trip*” (emphasis added) as a *per se* statutorily prohibited personal use. The NPRM accordingly proposed to add “[a] vacation or other noncampaign-related trip” to the regulatory list of *per se* personal uses in proposed 11 CFR 113.1(g)(1)(i)(K). The Commission also proposed to modify the pre-BCRA case-by-case rules at 11 CFR 113.1(g)(1)(ii)(C), which applies to “travel expenses” to reflect the changes made by BCRA. Seven sets of commenters, including the principal sponsors of BCRA, addressed the Commission’s proposal.

The principal sponsors of BCRA stated that Congress had intentionally left intact the statutory provision that states that campaign funds may be used “for ordinary and necessary expenses incurred in connection with duties of the individual as a holder of Federal office.”<sup>5</sup> Compare pre-BCRA 2 U.S.C. 439a with new 2 U.S.C. 439a(a)(2); see also 11 CFR 113.1(g)(5). The principal sponsors explained that Congress did not intend to modify current law or practice governing the use of campaign funds for travel expenses in connection with officeholders’ duties.

Consequently, they requested that the Commission modify the following regulations: proposed 11 CFR 113.1(g)(1)(i)(J); proposed 113.1(g)(1)(i)(K); proposed 11 CFR 113.1(g)(ii)(C); and 11 CFR 113.1(g)(5).

Another group of commenters also observed that new section 439a(a)(2) states that campaign funds may be used “for ordinary and necessary expenses incurred in connection with duties of the individual as a holder of Federal office.” This language, these commenters stated, expresses Congress’s intent to allow Senators to use campaign funds for their official expenses, including fact-finding trips. These commenters also pointed out that fact-finding trips, which members would not take but for their official duties, would not occur “irrespective” of their official duties. Therefore, these trips constitute part of members’ official duties and do

not constitute a prohibited personal use of campaign funds.

Finally, two commenters acknowledged that 2 U.S.C. 439a(b)(2) includes a vacation or noncampaign-related trip in the list of prohibited uses. Nonetheless, they asserted that, if the Commission were to issue regulations to ban the use of campaign funds for noncampaign-related travel, it would be ignoring Congress’s clear authorization in amended 2 U.S.C. 439a(a)(2) to allow the use of campaign funds for expenses incurred in connection with an individual’s duties as a Federal officeholder, and the “irrespective” test, which, as stated above, is now part of amended 2 U.S.C. 439a(b)(2). They urged the Commission to construe the statute as a whole.

Other commenters also argued that the Commission should not prohibit the use of campaign funds to pay for all noncampaign-related travel, including fact-finding trips. As did the previous commenters, these commenters noted that BCRA permits the use of campaign funds “for ordinary and necessary expenses incurred in connection with duties of the individual as a holder of Federal office.” Therefore, the commenters urged the Commission not to adopt regulations defining “noncampaign-related” travel as a *per se* prohibited personal use, but rather to evaluate travel on a case-by-case basis under 11 CFR 113.1(g)(1)(ii)(C), as has been the Commission’s rule.

Another commenter asserted that the Commission has historically treated the use of campaign funds for campaign-related travel and for officeholder travel as permissible. This commenter argued that the language of amended 2 U.S.C. 439a(a) has explicitly made this practice permissible by listing both campaign expenditures and officeholder-related expenses as acceptable uses of campaign funds. If, according to the commenter, Congress intended to change its longstanding practice, it would have done so explicitly, in its list of *per se* prohibited personal uses. This commenter concluded that Congress’s failure to specifically exclude officeholder-related travel from the *per se* list of prohibited personal uses in amended 2 U.S.C. 439a(b)(2) was inadvertent, and recommended that the Commission exclude both officeholder-related travel and campaign-related travel from proposed 11 CFR 113.1(g)(1)(i)(K).

A commenter stated that there is no need to change the Commission’s current personal use regulations because Congress did not intend either to limit or ban an officeholder’s ability to use campaign funds for officeholder travel,

even if the travel is not campaign-related, such as fact-finding trips. A different commenter maintained that campaign funds should not be used for fact-finding trips. Instead, the commenter recommended that campaign funds not be used for anything other than campaign costs, such as advertising and campaign literature, with the exception of charitable contributions.<sup>6</sup>

Based on Congressional guidance and the reasoning expressed in other comments concerning this matter, the Commission is not adding the “noncampaign-related trip” language to the list of *per se* personal uses in the final rules in 11 CFR 113.1(g)(1)(i)(J). Thus, this paragraph provides only that the use of campaign funds for a vacation is a *per se* personal use. (This proposed provision was designated as paragraph (g)(1)(i)(K) in the proposed rules.) The Commission is persuaded that amended section 439a(a), which provides that campaign funds may be used “for ordinary and necessary expenses incurred in connection with duties of the individual as a holder of Federal office,” encompasses certain noncampaign-related travel, notwithstanding the language of 2 U.S.C. 439a(b)(2)(E). Accordingly, aside from vacations, which are enumerated as a *per se* personal use in the final rules in 11 CFR 113.1(g)(1)(i)(J), the Commission will continue to evaluate travel expenses on a case-by-case basis under existing 11 CFR 113.1(g)(1)(ii)(C).

5. 11 CFR 113.1(g)(1)(ii)(D)—Noncampaign-Related Automobile Expenses

BCRA amended 2 U.S.C. 439a by including “a noncampaign-related automobile expense” in the list of *per se* prohibited uses of campaign funds. Given that statutory provision, the Commission proposed to delete vehicle expenses from the case-by-case rules set out in 11 CFR 113.1(g)(1)(ii).

Two sets of commenters addressed this proposal. BCRA’s principal sponsors stated that the Commission’s proposed regulation could be read, incorrectly, to completely prohibit the use of campaign funds for any vehicle expenses (other than for *de minimis* amounts), including campaign-related expenses. The other commenters argued

<sup>6</sup> According to the commenter, charitable contributions made with campaign funds should be allowed as long as the candidates themselves do not receive tax deductions for the charitable contributions. The Commission notes that contributions to certain charities are permitted by 2 U.S.C. 439a(a)(3) and 11 CFR 113.1(g)(2). Whether those contributions are tax-deductible falls within the jurisdiction of the Internal Revenue Service.

<sup>5</sup> For a detailed explanation of how the Commission’s personal use rules interact with the rules of the House of Representatives and the Senate, see the Commission’s 1995 Explanation and Justification of its rules concerning personal use of campaign funds at 60 FR 7870–7871 (Feb. 9, 1995).



that the Commission should not interpret BCRA to prohibit the use of campaign funds for all noncampaign-related vehicle expenses. Instead, these commenters urged the Commission to continue to permit, on a case-by-case basis, vehicle expenses paid for with campaign funds that are used for Federal officeholder purposes.

The Commission agrees with these reasons to continue to assess vehicle expenses on a case-by-case basis under 11 CFR 113.1(g)(1)(ii)(D). The text of proposed 11 CFR 113.1(g)(1)(i)(J) was identical to that of pre-BCRA 11 CFR 113.1(g)(1)(ii)(D). The Commission further notes that one of BCRA's principal sponsors explained that the " \* \* \* personal use \* \* \* provision is intended to codify the FEC's current regulations on the use of campaign funds for personal expenses \* \* \*" (emphasis added). 148 *Cong. Rec.* S2143 (daily ed. March 20, 2002) (statement of Sen. Feingold).

The Commission acknowledges the BCRA's sponsors' observation that the beginning of paragraph (g)(1)(ii)(D) could be read to prohibit campaign and officeholder-related uses of vehicles funded by campaign contributions. ("Vehicle expenses, unless they are a *de minimis* amount.") 11 CFR 113.1(g)(1)(ii)(D). The Commission notes, however, that this provision must be read together with the next sentence ("If a committee uses campaign funds to pay expenses associated with a vehicle that is used for both personal activities beyond a *de minimis* amount and campaign or officeholder related activities, the portion of the vehicle expenses associated with the personal activities is personal use, unless the person(s) using the vehicle for personal activities reimburse(s) the campaign account within thirty days for the expenses associated with the personal activities.").

#### 6. 11 CFR 113.1(g)(5) and 11 CFR 113.1(g)(6)—Technical Changes

The Commission is making non-substantive changes to two cross-references in 11 CFR 113.1(g)(5) to the definition of "expenditure," and to one cross-reference in 11 CFR 113.1(g)(6) to the definition of "contribution." These citation changes conform to the reorganized regulations on "contributions" and "expenditures." 67 FR 50582 (Aug. 5, 2002).

#### 7. 11 CFR 113.1(g)(7) Members of Candidate Family

The Commission is revising the provision in this regulation that includes as a member of the candidate's family a person who shares a residence

with the candidate. This change was not addressed in the NPRM, but is being included to clarify the intent of the regulation and to eliminate any potential conflict with the Defense of Marriage Act, 1 U.S.C. § 7. While the personal use prohibition applies to "any person," the regulations apply special scrutiny to members of a candidate's family as potential conduits for evasion of the personal use prohibition. At the same time, the regulations recognize that a joint account shared with one or more family members may be used to pay a candidate's personal living expenses without the role of the family members in such payments being treated as a contribution. 11 CFR 113.1(g)(6)(ii).

The revised regulation recognizes that any payments to a person sharing a residence with a candidate could serve as a means of supporting the candidate's personal living expenses and thus bans gifts from the campaign to family members or persons residing with the candidate, 11 CFR 113.1(g)(4), subjects salary payments by the campaign to such persons to certain conditions, 11 CFR 113.1(g)(1)(H), and limits payments for real or personal property owned by family members and used for campaign purposes. 11 CFR 113.1(g)(1)(E)(2). Use of campaign funds for mortgage, rent or utility payments for the residence of a candidate or of a member of the candidate's family is also prohibited, 11 CFR 113.1(g)(1)(E)(1), but would not operate any differently in the case of a family member who resides with the candidate. Similarly, anyone actually residing with a candidate could pay a share of living expenses without having those payments be deemed contributions to the candidate's campaign. Finally, personal funds of candidates would include the candidate's share of any joint accounts held by the candidate and a person residing with the candidate. 11 CFR 113.1(g)(6)(ii).

The revised regulation includes any person residing with the candidate within the definition of "Members of the candidate's family." The provision formerly included "a person who has a committed relationship with the candidate, such as sharing a residence and having mutual responsibility for each other's personal welfare or living expenses." The "committed relationship" condition could have been read as an approximation of marriage, especially as the 1995 Explanation and Justification for this provision, 60 FR 7872 (Feb. 29, 1995), stated that persons in this committed relationship category "will be treated as the equivalent of the candidate's spouse." This rendering of

the statute appears to be prohibited by the Defense of Marriage Act, 1 U.S.C. § 7, which provides that "[i]n determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife."

In addition, the Commission was concerned that a committed relationship does not represent a generally recognized legal test (for instance, most states do not recognize non-marital relationships contemplated by the "committed relationship" provision) and thus would be difficult for the Commission to ascertain and enforce if called upon to do so. The question of residence or domicile on the other hand is a factual matter that does not call upon the Commission to inquire into or make judgments about the nature of the relationship between a candidate and persons residing with the candidate.

#### 8. 11 CFR 113.1(g)(8)—Recordkeeping Requirement

In the NPRM, the Commission proposed new 11 CFR 113.1(g)(8), a recordkeeping requirement for campaign funds used for expenses that may be partly personal in nature. Such expenses may include vehicle, legal, meal, and travel expenses. See 11 CFR 113.1(g)(1)(ii)(A) through (D) and 11 CFR 113.2. As stated in the NPRM, the proposed regulation is based on the analysis in AO 2001-3, which advised that a member of Congress who proposed to pay for a vehicle with campaign funds and use it for a combination of campaign, official, and personal uses, should keep a log detailing each use of the car. Keeping such logs will help the Commission to determine to what extent "case-by-case" expenses are personal in nature. No commenters addressed this provision. The Commission adopts this provision as 11 CFR 113.1(g)(8), with one modification to clarify that the log will also serve to distinguish personal uses from uses related to a Federal officeholder's duties.

#### Amended Provisions of 11 CFR 113.2

Given the amendments BCRA made to 2 U.S.C. 439a described above regarding the deletion of the phrase "excess campaign funds" and the amendments being made to 11 CFR 113.1, the Commission is revising section 113.2 in several respects. First, the title and the introductory portion of this section are

being changed to more clearly convey that this section sets forth the permissible non-campaign uses of funds in a campaign account, rather than uses of what were previously called "excess campaign funds."

In the NPRM, the Commission noted that former 2 U.S.C. 439a included the phrase "for any other lawful purpose" in addition to enumerating permissible uses of excess campaign funds. BCRA amended section 439a by deleting "any other lawful purpose" from the list of permitted uses. Nonetheless, in the NPRM, the Commission proposed retaining that term in pre-BCRA 11 CFR 113.2(d). One commenter disagreed with the Commission's proposed rule and recommended that the "any other lawful purpose" language be deleted from the regulation. This commenter noted that pre-BCRA 11 CFR 113.2(d), which closely tracks the wording of section 439a, provides for four broad permissible uses of campaign funds: (1) Ordinary and necessary expenses incurred in connection with the duties of a holder of Federal office; (2) contributions to an organization described in 26 U.S.C. 170(c); (3) transfers to a national, state or local party committee; and (4) any other lawful purpose, except that such funds may not be converted to personal use, other than to defray officeholder expenses or repay loans made by the candidate for campaign purposes. Pointing out that BCRA deletes "any other lawful purpose" as an expressly permissible use of campaign funds, the commenter argued that BCRA reduces the categories of permissible uses of campaign funds from four to three. Thus, the commenter concluded that the "any other lawful purpose" language in 11 CFR 113.2(d) should be deleted and that the regulation should be revised accordingly.

The Commission concludes that the commenter's reasoning is correct, and therefore is removing and reserving paragraph (d) of former section 113.2, which referred to "any other lawful purpose." With this revision, it is now clear that in addition to defraying expenses in connection with a campaign for federal office, campaign funds may be used only for the enumerated non-campaign purposes identified in paragraphs (a), (b), and (c) of section 113.2, and that this listing of permissible non-campaign purposes is exhaustive.

The Commission notes that, pursuant to 2 U.S.C. 432(e)(3)(B), authorized committees also may make contributions of \$1,000 or less to authorized committees of other candidates. This provision was not

amended by BCRA which otherwise generally increased contribution limits to \$2,000 per person. Authorized committees may make contributions to organizations other than those described in section 170(c) of the Internal Revenue Code of 1986 and other authorized committees (subject to the \$1,000 limit) unless those contributions are in connection with the campaign for Federal office of the authorizing candidate. In furtherance of a Federal candidate's election, that Federal candidate may contribute to state and local candidates pursuant to this section.

A provision addressing the repayment of candidate loans has been deleted from section 113.2 as part of the removal of paragraph (d). The Commission will, if necessary, address this issue in the upcoming "Millionaires' Amendment" rulemaking. See 2 U.S.C. 441a(j).

Although the Commission is not amending section 113.2(e)(1), which refers to "excess funds," it is changing section 113.2(e)(1)(i), which refers to "any excess campaign or donated funds." These rules permit qualified Members of Congress who served in the 102d Congress or an earlier Congress to convert to personal use the unobligated balance of their excess funds as of Nov. 30, 1989. Paragraph (e)(1) addresses "excess funds," rather than "excess campaign funds," and sets forth detailed instructions to determine this amount. Revised paragraph (e)(1)(i) now refers simply to "campaign funds."

In light of Congress deleting the phrase "in excess of any amount to defray" campaign expenses from section 439a, and the Commission's revision herein to 11 CFR 113.1 and 113.2, officeholders may spend campaign funds to defray campaign expenses and expenses incurred in connection with the recipient's duties as a holder of federal office, and that such expenses may be paid in any order, at their discretion.

#### **Certification of No Effect Pursuant to 5 U.S.C. 605(b) (Regulatory Flexibility Act)**

The Commission certifies that the attached final rules will not have a significant economic impact on a substantial number of small entities. The basis of this certification is that national, State, and local party committees of the two major political parties to which the fraudulent solicitation, disclaimers, and civil penalties rules apply are not small entities under 5 U.S.C. 601. In addition, the rules for personal use only affect individuals, not entities, and the rules

for the prohibition on fraudulent solicitation do not carry an economic impact. Furthermore, the requirements of the disclaimer rules as applied to small entities are no more than what is necessary to comply with the new statute enacted by Congress, and in any event, such entities will not incur significant additional costs in complying with these requirements. The increase in civil penalties do not unduly burden small entities since a small entity would pay a civil penalty only if the entity engaged in a specific knowing and willful violation of the Act.

#### **List of Subjects**

##### *11 CFR Part 100*

Elections.

##### *11 CFR Part 110*

Campaign funds, and political committees and parties.

##### *11 CFR Part 111*

Campaign funds, and political committee and parties.

##### *11 CFR Part 113*

Campaign funds, and political candidates.

For the reasons set out in the preamble, subchapter A of chapter I of title 11 of the *Code of Federal Regulations* is amended as follows:

#### **PART 100—SCOPE AND DEFINITIONS (2 U.S.C. 431)**

1. The authority citation for part 100 continues to read as follows:

**Authority:** 2 U.S.C. 431, 434, 438(a)(8).

2. Section 100.18 is revised to read as follows:

##### **§ 100.18 Act (2 U.S.C. 431(19)).**

*Act* means the Federal Election Campaign Act of 1971 (Pub. L. 92-225), as amended in 1974 (Pub. L. 93-443), 1976 (Pub. L. 94-283), 1980 (Pub. L. 96-187), and 2002 (Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155).

#### **PART 110—CONTRIBUTION AND EXPENDITURE LIMITATIONS AND PROHIBITIONS**

3. The authority citation for part 110 continues to read as follows:

**Authority:** 2 U.S.C. 431(8), 431(9), 432(c)(2), 437d(a)(8), 438(a)(8), 441a, 441b, 441d, 441e, 441f, 441g, 441h, and 441k.

4. Section 110.11 is revised to read as follows:

##### **§ 110.11 Communications; advertising; disclaimers (2 U.S.C. 441d).**

(a) *Scope.* This section applies only to public communications, defined for this

acceptable and unacceptable purpose descriptions to be reported by authorized committees. Paragraph (B) requires authorized committees, when itemizing certain disbursements for which reimbursements are required, to provide a brief explanation of the activity for which reimbursement is required. These provisions have been in Title 11 of the **Code of Federal Regulations** since 1980 and 1995, respectively, and were not affected by the recent statutory changes to the election cycle reporting requirements.

#### Need for Correction

As published, the final rules inadvertently omit two paragraphs describing information to be reported by authorized committees of Federal candidates.

All committees must report the purpose of itemized disbursements (i.e., those disbursements aggregating in excess of \$200). Omitted paragraph (A) contains examples of suitably specific purpose descriptions as well as examples of those descriptions that are unacceptably vague. This paragraph is inconsistent with the reporting of rules for unauthorized committees (committees other than candidate committees) in 11 CFR 104.3(b)(3).

Omitted paragraph (B) is used in administering the "personal use" rules in 11 CFR 113.1. Federal candidates are barred from using campaign funds for personal benefit. Paragraph (B) requires authorized committees of Federal candidates itemizing disbursements for which partial or total reimbursement is required under 11 CFR 113.1(g)(1)(iii)(C) or (D) to provide a brief explanation of the activity for which the reimbursement is made.

Section 801 of Title 5 of the United States Code requires Federal agencies to submit regulations to Congress. These regulations were submitted to the Speaker of the House of Representatives and the President of the Senate on November 26, 2001.

#### Certification of No Effect Pursuant to 5 U.S.C. § 605(b) [Regulatory Flexibility Act]

This correction will not have significant economic impact on a substantial number of small entities. The basis of this certification is that this correction only requires political committees to once again add information to the reports they are required to file. These regulations were in 11 CFR since 1980 and 1995, respectively, before being inadvertently omitted in 2000.

#### List of Subjects in 11 CFR Part 104

Campaign funds, Political committees and parties, Reporting and recordkeeping requirements.

Accordingly, 11 CFR part 104 is corrected by making the following correcting amendment:

#### PART 104—REPORTS BY POLITICAL COMMITTEES

1. The authority citation for part 104 continues to read as follows:

**Authority:** 2 U.S.C. 431(1), 431(8), 431(9), 432(i), 434, 438(a)(8), 438(b), 439a.

#### § 104.3 Contents of reports (2 U.S.C. 434(b), 439a).

\* \* \* \* \*

2. In § 104.3 add the following paragraphs (b)(4)(i)(A) and (B):

(b) \* \* \*  
(4) \* \* \*  
(i) \* \* \*

(A) As used in this paragraph, *purpose* means a brief statement or description of why the disbursement was made. Examples of statements or descriptions which meet the requirements of this paragraph include the following: dinner expenses, media, salary, polling, travel, party fees, phone banks, travel expenses, travel expense reimbursement, and catering costs. However, statements or descriptions such as *advance*, *election day expenses*, *other expenses*, *expenses*, *expense reimbursement*, *miscellaneous*, *outside services*, *get-out-the-vote* and *voter registration* would not meet the requirements of this paragraph for reporting the purpose of an expenditure.

(B) In addition to reporting the purpose described in paragraph (b)(4)(i)(A) of this section, whenever an authorized committee itemizes a disbursement that is partially or entirely a personal use for which reimbursement is required under 11 CFR 113.1(g)(1)(ii)(C) or (D), it shall provide a brief explanation of the activity for which reimbursement is required.

\* \* \* \* \*

Dated: November 26, 2001.

**Danny L. McDonald,**  
*Chairman, Federal Election Commission.*  
[FR Doc. 01-29679 Filed 11-29-01; 8:45 am]  
**BILLING CODE 6715-01-P**

#### FEDERAL ELECTION COMMISSION

#### 11 CFR Part 111

#### [Notice 2001-18]

#### Extension to Administrative Fines

**AGENCY:** Federal Election Commission.

**ACTION:** Final rule; revision of the sunset date.

**SUMMARY:** The Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the expiration date in which the Federal Election Commission (hereinafter "the Commission") may assess civil money penalties for violations of the reporting requirements of section 434(a) of the Federal Election Campaign Act (hereinafter "the Act" or "FECA").

**DATES:** Effective on December 31, 2001.

**FOR FURTHER INFORMATION CONTACT:** Ms. Rosemary C. Smith, Assistant General Counsel, or Ms. Mai T. Dinh, Attorney, 999 E Street, NW., Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

#### SUPPLEMENTARY INFORMATION:

#### Explanation and Justification

Section 640 of the Treasury and General Government Appropriations Act, 2000, Pub. L. No. 106-58, 106th Cong., 113 Stat. 430, 476-77 (1999), amended § 309(a)(4) of the FECA, 2 U.S.C. 437g(a)(4), to provide for a modified enforcement process for violations of reporting requirements. Under § 437g(a)(4)(C) of the FECA, the Commission may assess a civil money penalty for violations of the reporting requirements of 2 U.S.C. 434(a). This authority, however, was to sunset on December 31, 2001. Pub. L. No. 106-58, 106th Cong., § 640(c). Recently, § 642 of the Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the sunset date to include all reports that cover activity between January 1, 2000, to December 31, 2003.

The Commission published final rules on May 19, 2000, to implement the amendment contained in the Treasury and General Government Appropriations Act, 2000. Section 111.30 of the regulations reflects the sunset provision of Pub. L. No. 106-58, 106th Cong., § 640(c). Therefore, the Commission is issuing this final rule to amend section 111.30 to extend the application of the administrative fine regulations, 11 CFR part 111, subpart B, to include all violations relating to reports that cover the period between January 1, 2000, to December 31, 2003.

The Commission is promulgating this final rule without notice or opportunity for comment because it falls under the "good cause" exemption of the Administrative Procedures Act, 5 U.S.C. 553(b)(B). The exemption allows

**FEDERAL ELECTION COMMISSION**

**11 CFR Parts 100, 101, 102, 104, 106, 110, 113, 114, 116, 300, 9002, 9003, 9004, 9034, and 9035**

[Notice 2002–29]

**BCRA Technical Amendments**

**AGENCY:** Federal Election Commission.

**ACTION:** Final rule; technical amendments.

**SUMMARY:** The Commission recently reorganized the sections defining “contributions” and “expenditures,” and also redesignated other sections. These technical amendments correct cites in title 11 of the *Code of Federal Regulations* to bring the regulations into conformity with the designation. Additionally, the final rules correct typographical mistakes made in the recently promulgated Bipartisan Campaign Reform Act rulemakings.

Further information is provided in the supplementary information that follows.

**EFFECTIVE DATE:** December 26, 2002.

**FOR FURTHER INFORMATION CONTACT:** Mai T. Dinh, Acting Assistant General Counsel, 999 E Street, NW., Washington, DC, 20463, (202) 694–1650 or (800) 424–9530.

**SUPPLEMENTARY INFORMATION:** The Bipartisan Campaign Reform Act of 2002 (“BCRA”), Pub. L. 107–155, 116 Stat. 81 (March 27, 2002), contains extensive amendments to the Federal Election Campaign Act of 1971 (“FECA” or “the Act”), as amended, 2 U.S.C. 431 *et seq.* This final rule is part of a continuing series of rulemakings the Commission has published over the last several months in order to meet the rulemaking deadlines set out in BCRA. In the Final Rule on Reorganization of the Definitions of “Contribution” and “Expenditure,” 67 FR 50582 (August 5, 2002), the Commission moved these definitions from former 11 CFR 100.7 and 100.8 to new 11 CFR part 100, subparts B, C, D and E. Additionally, the Commission notes that in the various final rules that the Commission promulgated this year, it moved the following sections and paragraphs: 109.2, 109.3, 110.1(i)(2), 110.4(a), 110.7, 110.9(b), 110.9(c), and 110.9(d). Consequently, current regulations that

include cross references to these former sections and paragraphs need to be updated to reflect the new citations.<sup>1</sup> Therefore, the Commission is publishing this final rule to make necessary technical and conforming amendments to its regulations to reflect the current citations, as well as to correct typographical errors that are in the various final rules.

Because the final rules published herein are merely technical and non-substantive, they are not a substantive rule requiring notice and comment under the Administrative Procedure Act, 5 U.S.C. 553. Under the “good cause” exception to the notice and comment requirements, 5 U.S.C. 553(b)(B) and 553(d)(3), the final rules are effective upon publication. Thus, the final rules are effective on December 26, 2002.

**Certification of No Effect Pursuant to 5 U.S.C. 605(b) [Regulatory Flexibility Act]**

This final rule does not have a significant economic impact on a substantial number of small entities. The amendments in this final rule are all technical and nonsubstantive in nature and do not have any economic impact on any entity subject to the underlying regulations.

**List of Subjects**

11 CFR Part 100

Elections.

11 CFR Part 101

Political candidates, Reporting and recordkeeping requirements.

11 CFR Part 102

Political committees and parties, Reporting and recordkeeping requirements.

11 CFR Part 104

Campaign funds, Political committees and parties, Reporting and recordkeeping requirements.

11 CFR Part 106

Campaign funds, Reporting and recordkeeping requirements.

11 CFR Part 110

Campaign funds, Political committees and parties.

11 CFR Part 113

Campaign funds.

11 CFR Part 114

Business and industry, Elections, Labor.

11 CFR Part 116

Administrative practice and procedure, Business and industry, Credit, Elections, Political candidates, Political committees and parties.

11 CFR Part 300

Campaign funds, Nonprofit organizations, Political committees and parties, Political candidates, Reporting and recordkeeping requirements.

11 CFR Part 9002

Campaign funds.

11 CFR Part 9003

Campaign funds, Reporting and recordkeeping requirements.

11 CFR Part 9004

Political candidates, Reporting and recordkeeping requirements.

11 CFR Part 9034

Campaign funds, Reporting and recordkeeping requirements.

11 CFR Part 9035

Campaign funds, Reporting and recordkeeping requirements.

For the reasons set out in the preamble, subchapters A, E and F of chapter 1 of title 11 of the *Code of Federal Regulations* are amended as follows:

**PART 100—SCOPE AND DEFINITIONS (2 U.S.C. 431)**

1. The authority citation for part 100 continues to read as follows:

**Authority:** 2 U.S.C. 431, 434, and 438(a)(8).

**§§ 100.5, 100.52, 100.82, 100.87, 100.89, 100.91, 100.142, 100.147, 100.149 and 100.159 [Amended]**

2. In the table below, for each section indicated in the left column, remove the citation indicated in the middle column, and replace it with the citation indicated in the right column:

| Section        | Remove                            | Add                           |
|----------------|-----------------------------------|-------------------------------|
| 100.5(c) ..... | 100.7(b)(9), (15) and (17) .....  | 100.80, 100.87, and 100.89.   |
| 100.5(c) ..... | 100.8(b)(10), (16) and (18) ..... | 100.140, 100.147 and 100.149. |

<sup>1</sup> See the following rulemakings: Final Rules on Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 FR 49064 (July 29, 2002); Final Rules on Reorganization of Regulations

on Contributions and Expenditures, 67 FR 50582 (August 5, 2002); Final Rules on Coordinated and Independent Expenditures, 67 FR (forthcoming December, 2002); Final Rules on Electioneering

Communications, 67 FR 65212 (October 23, 2002); Final Rules on Contribution Limitations and Prohibitions, 67 FR 69928 (November 19, 2002).

| Section                 | Remove         | Add            |
|-------------------------|----------------|----------------|
| 100.52(b)(5) .....      | 110.4(a) ..... | 110.20.        |
| 100.82(e)(1)(ii) .....  | 110.4 .....    | 110.4, 110.20. |
| 100.87(g) .....         | 110.7 .....    | 109.32.        |
| 100.89(g) .....         | 110.7 .....    | 109.32.        |
| 100.91 .....            | 110.4(a) ..... | 110.20.        |
| 100.142(e)(1)(ii) ..... | 110.4 .....    | 110.4, 110.20. |
| 100.147(g) .....        | 110.7 .....    | 109.32.        |
| 100.149(g) .....        | 110.7 .....    | 109.32.        |
| 100.151 .....           | 110.4(a) ..... | 110.20.        |

**PART 101—CANDIDATE STATUS AND DESIGNATIONS (2 U.S.C. 432(e))**

3. The authority citation for part 101 is revised to read as follows:

**Authority:** 2 U.S.C. 432(e), 434(a)(11), and 438(a)(8).

**§§ 101.2 and 101.3 [Amended]**

4. In the table below, for each section indicated in the left column, remove the citation indicated in the middle column, and replace it with the citation indicated in the right column:

| Section        | Remove            | Add                         |
|----------------|-------------------|-----------------------------|
| 101.2(a) ..... | 100.7 .....       | part 100, subparts B and C. |
| 101.3 .....    | 100.7(b)(1) ..... | 100.72(a).                  |
| 101.3 .....    | 100.8(b)(1) ..... | 100.131(a).                 |

**PART 102—REGISTRATION, ORGANIZATION, AND RECORDKEEPING BY POLITICAL COMMITTEES (2 U.S.C. 433)**

5. The authority citation for part 102 continues to read as follows:

**Authority:** 2 U.S.C. 432, 433, 434(a)(11), 438(a)(8), 441d.

**§§ 102.5, 102.7, 102.13 and 102.14 [Amended]**

6. In the table below, for each section indicated in the left column, remove the citation indicated in the middle column, and replace it with the citation indicated in the right column:

| Section            | Remove                            | Add   |
|--------------------|-----------------------------------|---|
| 102.5(b)(1) .....  | 100.7(b)(9), (15) and (17) .....  | 100.80, 100.87 and 100.89.                      |
| 102.5(b)(1) .....  | 100.8(b)(10), (16) and (18) ..... | 100.140, 100.147 and 100.149.                   |
| 102.7(d) .....     | 100.7 .....                       | part 100, subparts B and D.                     |
| 102.13(b) .....    | 110.7 .....                       | part 109, subpart D.                            |
| 102.13(c)(2) ..... | 11 CFR part 110 .....             | 11 CFR part 109, subpart D and 11 CFR part 110. |
| 102.14(c) .....    | 109.3 .....                       | 109.11.   |

**PART 104—REPORTS BY POLITICAL COMMITTEES (2 U.S.C. 434)**

7. The authority citation for part 104 continues to read as follows:

**Authority:** 2 U.S.C. 431(1), 431(8), 431(9), 432(i), 434, 438(a)(8) and (b), and 439a.

**§§ 104.3 and 104.6 [Amended]**

8. In the table below, for each section indicated in the left column, remove the citation indicated in the middle column, and replace it with the citation indicated in the right column:

| Section                 | Remove                           | Add                     |
|-------------------------|----------------------------------|-------------------------|
| 104.3(a)(3)(iii) .....  | 110.7 .....                      | part 109, subpart D.    |
| 104.3(b)(1)(viii) ..... | 110.7 .....                      | part 109, subpart D.    |
| 104.3(b)(3)(viii) ..... | 110.7 .....                      | part 109, subpart D.    |
| 104.3(d)(1) .....       | 100.7(b)(11) .....               | 100.82(a) through (d).  |
| 104.3(d)(1) .....       | 100.8(b)(12) .....               | 100.142(a) through (d). |
| 104.3(d)(1)(iv) .....   | 100.7(b)(11)(i)(A) and (B) ..... | 100.82(e)(1) and (2).   |
| 104.3(d)(1)(iv) .....   | 100.8(b)(12)(i)(A) and (B) ..... | 100.142(e)(1) and (2).  |
| 104.3(d)(1)(v) .....    | 100.7(b)(11) .....               | 100.82(a) through (d).  |
| 104.3(d)(1)(v) .....    | 100.8(b)(12) .....               | 100.142(a) through (d). |
| 104.3(g) .....          | 100.7(b)(12) .....               | 100.84.                 |
| 104.3(h) .....          | 100.7(b)(13) and (14) .....      | 100.85 and 100.86.      |
| 104.6(a) .....          | 100.8(b)(4) .....                | 100.134(a).             |

**PART 106—ALLOCATIONS OF CANDIDATE AND COMMITTEE ACTIVITIES**

Authority: 2 U.S.C. 438(a)(8), 441a(b), 441a(g).

citation indicated in the middle column, and replace it with the citation indicated in the right column:

**§§ 106.1, 106.2, 106.4, and 106.7 [Amended]**

9. The authority citation for part 106 continues to read as follows:

10. In the table below, for each section indicated in the left column, remove the

| Section           | Remove                           | Add                          |
|-------------------|----------------------------------|------------------------------|
| 106.1(b) .....    | 110.7 .....                      | 109.32 or 109.33.            |
| 106.1(c)(3) ..... | 100.7(b)(17) .....               | 100.89.                      |
| 106.1(c)(3) ..... | 100.8(b)(18) .....               | 100.149.                     |
| 106.2(a)(2) ..... | 100.7(b)(1) .....                | 100.72(a).                   |
| 106.2(a)(2) ..... | 100.8(b)(1) .....                | 100.131(a).                  |
| 106.4(a) .....    | 100.8(b)(1) .....                | 100.131(a).                  |
| 106.4(b) .....    | 100.7(b)(1) .....                | 100.72(a).                   |
| 106.7(c)(3) ..... | 100.7(b)(9), (15) or (17) .....  | 100.80, 100.87 or 100.89.    |
| 106.7(c)(3) ..... | 100.7(b)(10), (16) or (18) ..... | 100.140, 100.147 or 100.149. |

**PART 110—CONTRIBUTION AND EXPENDITURE LIMITATIONS AND PROHIBITIONS**

11. The authority citation for part 110 continues to read as follows:

Authority: 2 U.S.C. 431(8), 431(9), 432(c)(2), 437d, 438(a)(8), 441a, 441b, 441d, 441e, 441f, 441g, 441h and 441k.

**§§ 110.13 and 110.19 [Amended]**

12. In the table below, for each section indicated in the left column, remove the citation or phrase indicated in the middle column, and replace it with the citation or phrase indicated in the right column:

| Section                           | Remove                  | Add                         |
|-----------------------------------|-------------------------|-----------------------------|
| 110.13(a)(2) .....                | 100.7 .....             | part 100, subparts B and C. |
| 110.13(a)(2) .....                | 100.8 .....             | part 100, subparts D and E. |
| 110.19(e) paragraph heading ..... | maintain, finance ..... | finance, maintain.          |
| 110.19(e) .....                   | maintain, finance ..... | finance, maintain.          |

**PART 113—EXCESS CAMPAIGN FUNDS AND FUNDS DONATED TO SUPPORT FEDERAL OFFICE-HOLDER ACTIVITIES (2 U.S.C. 439a)**

Authority: 2 U.S.C. 432(h), 438(a)(8), 439a, 441a.

and replace it with the citation indicated in the right column:

**§ 113.1 [Amended]**

13. The authority citation for part 113 continues to read as follows:

14. In the table below, for each section indicated in the left column, remove the citation indicated in the middle column,

| Section           | Remove      | Add                         |
|-------------------|-------------|-----------------------------|
| 113.1(g)(5) ..... | 100.8 ..... | part 100, subparts D and E. |
| 113.1(g)(6) ..... | 100.7 ..... | part 100, subparts B and C. |

**PART 114—CORPORATE AND LABOR ORGANIZATION ACTIVITY**

15. The authority citation for part 114 continues to read as follows:

Authority: 2 U.S.C. 431(8)(B), 431(9)(B), 432, 434, 437d(a)(8), 438(a)(8), 441b.

**§§ 114.1, 114.2, 114.3, 114.4, 114.5, 114.9, and 114.10 [Amended]**

16. In the table below, for each section indicated in the left column, remove the citation indicated in the middle column, and replace it with the citation indicated in the right column:

| Section              | Remove                    | Add                         |
|----------------------|---------------------------|-----------------------------|
| 114.1(a)(1) .....    | 100.7(b)(11) .....        | 100.82(a) through (d).      |
| 114.2(b)(1) .....    | 100.7(a) .....            | part 100, subpart B.        |
| 114.2(b)(2)(i) ..... | 100.8(a) .....            | part 100, subpart D.        |
| 114.2(c) .....       | 109.1 .....               | 100.16.                     |
| 114.2(f)(1) .....    | 100.7 .....               | part 100, subparts B and C. |
| 114.2(f)(1) .....    | 100.8 .....               | part 100, subparts D and E. |
| 114.3(a)(1) .....    | 109.1 .....               | 100.16.                     |
| 114.3(b) .....       | 100.8(b)(4) .....         | 100.134(a).                 |
| 114.4(a) .....       | 109.1 .....               | 100.16.                     |
| 114.5(e)(2)(i) ..... | 100.8(b)(4) .....         | 100.134(a).                 |
| 114.9(a)(2) .....    | 100.7(a)(1)(iii)(B) ..... | 100.52(d)(2).               |

| Section            | Remove                    | Add           |
|--------------------|---------------------------|---------------|
| 114.9(b)(2) .....  | 100.7(a)(1)(iii)(B) ..... | 100.52(d)(2). |
| 114.9(d) .....     | 100.7(a)(1)(iii)(B) ..... | 100.52(d)(2). |
| 114.10(e)(2) ..... | 109.2 .....               | 109.10.       |

**PART 116—DEBTS OWED BY CANDIDATES AND POLITICAL COMMITTEES**

17. The authority citation for part 116 continues to read as follows:

**Authority:** 2 U.S.C. 433(d), 434(b)(8), 438(a)(8), 441a, 441b, and 451.

**§§ 116.4, 116.5 and 116.6 [Amended]**

18. In the table below, for each section indicated in the left column, remove the citation indicated in the middle column, and replace it with the citation indicated in the right column:

| Section           | Remove            | Add                         |
|-------------------|-------------------|-----------------------------|
| 116.4(a)(1) ..... | 100.7(b) .....    | part 100, subpart C.        |
| 116.4(b)(1) ..... | 100.7(b) .....    | part 100, subpart C.        |
| 116.4(c)(1) ..... | 100.7(b) .....    | part 100, subpart C.        |
| 116.5(b) .....    | 100.7(b)(8) ..... | 100.79.                     |
| 116.6(a) .....    | 100.7 .....       | part 100, subparts B and C. |
| 116.6(a) .....    | 100.7(b)(3) ..... | 100.74.                     |

**PART 300—NON-FEDERAL FUNDS**

19. The authority citation for part 300 is revised to read as follows:

**Authority:** 2 U.S.C. 434(e), 438(a)(8), 441a(a), 441i, 453.

**§§ 300.2 and 300.36 [Amended]**

20. In the table below, for each section indicated in the left column, remove the citation or phrase indicated in the middle column, and replace it with the citation or phrase indicated in the right column:

| Section                          | Remove                            | Add                           |
|----------------------------------|-----------------------------------|-------------------------------|
| 300.2(c) paragraph heading ..... | maintain, finance .....           | finance, maintain.            |
| 300.36(a)(2) .....               | 100.8(b)(10), (16), or (18) ..... | 100.140, 100.147, or 100.149. |
| 300.36(c)(2) .....               | 100.7 .....                       | part 100, subpart B.          |
| 300.36(c)(2) .....               | 100.8 .....                       | part 100, subpart D.          |

**PART 9002—DEFINITIONS**

21. The authority citation for part 9002 continues to read as follows:

**Authority:** 26 U.S.C. 9002 and 9009(b).

**§§ 9002.11 and 9002.13 [Amended]**

22. In the table below, for each section indicated in the left column, remove the citation indicated in the middle column, and replace it with the citation indicated in the right column:

| Section             | Remove             | Add                         |
|---------------------|--------------------|-----------------------------|
| 9002.11(b)(5) ..... | 100.7(b)(14) ..... | 100.86.                     |
| 9002.11(b)(5) ..... | 100.8(b)(15) ..... | 100.146.                    |
| 9002.13 .....       | 100.7 .....        | part 100, subparts B and C. |

**PART 9003—ELIGIBILITY FOR PAYMENTS**

23. The authority citation for part 9003 continues to read as follows:

**Authority:** 26 U.S.C. 9003 and 9009(b).

**§§ 9003.3 and 9003.4 [Amended]**

24. In the table below, for each section indicated in the left column, remove the citation indicated in the middle column, and replace it with the citation indicated in the right column:

| Section                 | Remove             | Add      |
|-------------------------|--------------------|----------|
| 9003.3(a)(2)(iii) ..... | 100.8(b)(15) ..... | 100.146. |
| 9003.4(b)(1) .....      | 100.7(b)(11) ..... | 100.82.  |

**PART 9004—ENTITLEMENT OF ELIGIBLE CANDIDATES TO PAYMENTS; USE OF PAYMENTS**

25. The authority citation for part 9004 continues to read as follows:



**Authority:** 26 U.S.C. 9004 and 9009(b).

**§§ 9004.1 and 9004.4 [Amended]**

26. In the table below, for each section indicated in the left column, remove the citation indicated in the middle column, and replace it with the citation indicated in the right column:

| Section            | Remove                       | Add                  |
|--------------------|------------------------------|----------------------|
| 9004.1 .....       | 110.9(c) .....               | 110.17(a).           |
| 9004.4(a)(2) ..... | 100.7(a)(1) or (b)(11) ..... | 100.52(b) or 100.82. |

**PART 9008—FEDERAL FINANCING OF PRESIDENTIAL NOMINATING CONVENTIONS**

27. The authority citation for part 9008 continues to read as follows:

**Authority:** 2 U.S.C. 437, 438(a)(8); 26 U.S.C. 9008, 9009(b).

**§ 9008.7 [Amended]**

28. In the table below, for each section indicated in the left column, remove the citation indicated in the middle column, and replace it with the citation indicated in the right column:

| Section            | Remove      | Add                              |
|--------------------|-------------|----------------------------------|
| 9008.7(b)(3) ..... | 110.4 ..... | 110.4, 110.19(b)(2), and 110.20. |

**PART 9032—DEFINITIONS**

29. The authority citation for part 9032 continues to read as follows:

**Authority:** 26 U.S.C. 9032 and 9039(b).

**§ 9032.4 [Amended]**

30. In the table below, for each section indicated in the left column, remove the citation indicated in the middle column, and replace it with the citation indicated in the right column:

| Section      | Remove      | Add                         |
|--------------|-------------|-----------------------------|
| 9032.4 ..... | 100.7 ..... | part 100, subparts B and C. |

**PART 9034—ENTITLEMENTS**

31. The authority citation for part 9034 continues to read as follows:

**Authority:** 26 U.S.C. 9034 and 9039(b).

**§§ 9034.2 and 9034.4 [Amended]**

32. In the table below, for each section indicated in the left column, remove the citation indicated in the middle column, and replace it with the citation indicated in the right column:

| Section            | Remove            | Add         |
|--------------------|-------------------|-------------|
| 9034.2(a)(4) ..... | 100.7(b)(1) ..... | 100.72(a).  |
| 9034.2(a)(4) ..... | 100.8(b)(1) ..... | 100.131(a). |
| 9034.4(a)(2) ..... | 100.8(b)(1) ..... | 100.131(a). |
| 9034.4(e)(1) ..... | 110.9(c) .....    | 110.17(a).  |

**PART 9035—EXPENDITURE LIMITATIONS**

33. The authority for part 9035 continues to read as follows:

**Authority:** 26 U.S.C. 9035 and 9039(b).

**§ 9035.1 [Amended]**

34. In the table below, for each section indicated in the left column, remove the citation indicated in the middle column, and replace it with the citation indicated in the right column:

| Section            | Remove                  | Add         |
|--------------------|-------------------------|-------------|
| 9035.1(c)(1) ..... | 100.8(b)(15) .....      | 100.146.    |
| 9035.1(c)(2) ..... | 100.8(b)(21)(iii) ..... | 100.152(c). |

acceptable and unacceptable purpose descriptions to be reported by authorized committees. Paragraph (B) requires authorized committees, when itemizing certain disbursements for which reimbursements are required, to provide a brief explanation of the activity for which reimbursement is required. These provisions have been in Title 11 of the **Code of Federal Regulations** since 1980 and 1995, respectively, and were not affected by the recent statutory changes to the election cycle reporting requirements.

#### Need for Correction

As published, the final rules inadvertently omit two paragraphs describing information to be reported by authorized committees of Federal candidates.

All committees must report the purpose of itemized disbursements (i.e., those disbursements aggregating in excess of \$200). Omitted paragraph (A) contains examples of suitably specific purpose descriptions as well as examples of those descriptions that are unacceptably vague. This paragraph is inconsistent with the reporting of rules for unauthorized committees (committees other than candidate committees) in 11 CFR 104.3(b)(3).

Omitted paragraph (B) is used in administering the "personal use" rules in 11 CFR 113.1. Federal candidates are barred from using campaign funds for personal benefit. Paragraph (B) requires authorized committees of Federal candidates itemizing disbursements for which partial or total reimbursement is required under 11 CFR 113.1(g)(1)(iii)(C) or (D) to provide a brief explanation of the activity for which the reimbursement is made.

Section 801 of Title 5 of the United States Code requires Federal agencies to submit regulations to Congress. These regulations were submitted to the Speaker of the House of Representatives and the President of the Senate on November 26, 2001.

#### Certification of No Effect Pursuant to 5 U.S.C. § 605(b) [Regulatory Flexibility Act]

This correction will not have significant economic impact on a substantial number of small entities. The basis of this certification is that this correction only requires political committees to once again add information to the reports they are required to file. These regulations were in 11 CFR since 1980 and 1995, respectively, before being inadvertently omitted in 2000.

#### List of Subjects in 11 CFR Part 104

Campaign funds, Political committees and parties, Reporting and recordkeeping requirements.

Accordingly, 11 CFR part 104 is corrected by making the following correcting amendment:

#### PART 104—REPORTS BY POLITICAL COMMITTEES

1. The authority citation for part 104 continues to read as follows:

**Authority:** 2 U.S.C. 431(1), 431(8), 431(9), 432(i), 434, 438(a)(8), 438(b), 439a.

#### § 104.3 Contents of reports (2 U.S.C. 434(b), 439a).

\* \* \* \* \*

2. In § 104.3 add the following paragraphs (b)(4)(i)(A) and (B):

(b) \* \* \*

(4) \* \* \*

(i) \* \* \*

(A) As used in this paragraph, *purpose* means a brief statement or description of why the disbursement was made. Examples of statements or descriptions which meet the requirements of this paragraph include the following: dinner expenses, media, salary, polling, travel, party fees, phone banks, travel expenses, travel expense reimbursement, and catering costs. However, statements or descriptions such as *advance*, *election day expenses*, *other expenses*, *expenses*, *expense reimbursement*, *miscellaneous*, *outside services*, *get-out-the-vote* and *voter registration* would not meet the requirements of this paragraph for reporting the purpose of an expenditure.

(B) In addition to reporting the purpose described in paragraph (b)(4)(i)(A) of this section, whenever an authorized committee itemizes a disbursement that is partially or entirely a personal use for which reimbursement is required under 11 CFR 113.1(g)(1)(ii)(C) or (D), it shall provide a brief explanation of the activity for which reimbursement is required.

\* \* \* \* \*

Dated: November 26, 2001.

**Danny L. McDonald,**  
Chairman, Federal Election Commission.  
[FR Doc. 01-29679 Filed 11-29-01; 8:45 am]  
**BILLING CODE 6715-01-P**

#### FEDERAL ELECTION COMMISSION

#### 11 CFR Part 111

#### [Notice 2001-18]

#### Extension to Administrative Fines

**AGENCY:** Federal Election Commission.

**ACTION:** Final rule; revision of the sunset date.

**SUMMARY:** The Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the expiration date in which the Federal Election Commission (hereinafter "the Commission") may assess civil money penalties for violations of the reporting requirements of section 434(a) of the Federal Election Campaign Act (hereinafter "the Act" or "FECA").

**DATES:** Effective on December 31, 2001.

**FOR FURTHER INFORMATION CONTACT:** Ms. Rosemary C. Smith, Assistant General Counsel, or Ms. Mai T. Dinh, Attorney, 999 E Street, NW., Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

#### SUPPLEMENTARY INFORMATION:

#### Explanation and Justification

Section 640 of the Treasury and General Government Appropriations Act, 2000, Pub. L. No. 106-58, 106th Cong., 113 Stat. 430, 476-77 (1999), amended § 309(a)(4) of the FECA, 2 U.S.C. 437g(a)(4), to provide for a modified enforcement process for violations of reporting requirements. Under § 437g(a)(4)(C) of the FECA, the Commission may assess a civil money penalty for violations of the reporting requirements of 2 U.S.C. 434(a). This authority, however, was to sunset on December 31, 2001. Pub. L. No. 106-58, 106th Cong., § 640(c). Recently, § 642 of the Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the sunset date to include all reports that cover activity between January 1, 2000, to December 31, 2003.

The Commission published final rules on May 19, 2000, to implement the amendment contained in the Treasury and General Government Appropriations Act, 2000. Section 111.30 of the regulations reflects the sunset provision of Pub. L. No. 106-58, 106th Cong., § 640(c). Therefore, the Commission is issuing this final rule to amend section 111.30 to extend the application of the administrative fine regulations, 11 CFR part 111, subpart B, to include all violations relating to reports that cover the period between January 1, 2000, to December 31, 2003.

The Commission is promulgating this final rule without notice or opportunity for comment because it falls under the "good cause" exemption of the Administrative Procedures Act, 5 U.S.C. 553(b)(B). The exemption allows

# Rules and Regulations

Federal Register

Vol. 67, No. 249

Friday, December 27, 2002

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

## OFFICE OF PERSONNEL MANAGEMENT

### 5 CFR Part 532

#### Prevailing Rate Systems

##### *CFR Correction*

In Title 5 of the Code of Federal Regulations, parts 1 to 699, revised as of January 1, 2002, on page 397, Appendix A to Subpart B of Part 532 is corrected by adding footnote reference "1" for South Dakota in the second column after Eastern South Dakota, and on page 399, Appendix B to Subpart B of Part 532 is corrected by removing footnote 1 at the end of the table.

[FR Doc. 02-55527 Filed 12-26-02; 8:45 am]

BILLING CODE 1505-01-D

## FEDERAL ELECTION COMMISSION

### 11 CFR Part 110

[Notice 2002-30]

#### Contribution Limitations and Prohibitions: Delay of Effective Date and Correction

**AGENCY:** Federal Election Commission.

**ACTION:** Final rule; delay of effective date and correction.

**SUMMARY:** The Federal Election Commission is publishing a correction to the final rules governing contributions limitations and prohibitions that were published in the **Federal Register** on November 19, 2002 (67 FR 69928). The correction: (1) Changes the effective date for revised 11 CFR 110.9 from January 1 to January 13, 2003; and (2) deletes the word "authorized" in referencing political committees in regulations pertaining to reattribution of contributions.

**DATES:** As of December 27, 2002, the effective date of 11 CFR 110.9 that was

revised on November 19, 2002 (67 FR 69928) is delayed until January 13, 2002. The effective date of the correction to 11 CFR 110.1(k)(3)(ii) is January 1, 2003.

**FOR FURTHER INFORMATION CONTACT:** Ms. Mai T. Dinh, Acting Assistant General Counsel, 999 E Street, NW., Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

**SUPPLEMENTARY INFORMATION:** The Federal Election Commission published in the **Federal Register** on November 19, 2002, final rules implementing amendments made by the Bipartisan Campaign Reform Act of 2002 ("BCRA") to the contribution limitations and prohibitions of the Federal Election Campaign Act of 1971, as amended ("FECA") (67 FR 69928). These final rules were published with a January 1, 2003 effective date. Among other things, the final rules revised 11 CFR 110.9 so that it now addresses only violations of the contributions and expenditure limitations rather than four miscellaneous topics, including fraudulent misrepresentation. The general fraudulent misrepresentation provision formerly found at 11 CFR 110.9(b) was moved to new 11 CFR 110.16(a) in another BCRA rulemaking entitled "Disclaimers, Fraudulent Solicitation, Civil Penalties, and Personal Use of Campaign Funds." The Commission had anticipated that the effective dates for the "Contribution Limitations and Prohibitions" and "Disclaimers, Fraudulent Solicitation, Civil Penalties, and Personal Use of Campaign Funds" rulemaking projects would be January 1, 2003. However, due to scheduling changes, the effective date for "Disclaimers, Fraudulent Solicitation, Civil Penalties, and Personal Use of Campaign Funds" is now January 13, 2002. Consequently, this correction delays the effective date for the final rules at 11 CFR 110.9 to January 13, 2003. The effective date remains January 1, 2003 for all other final rules governing contribution limitations and prohibitions that were published in the **Federal Register** on November 19, 2002.

The final rules published on November 19, 2002 also addressed the procedure governing the reattribution of excessive contributions from one contributor to another in 11 CFR 110.1(k). The final rules at 11 CFR 110.1(k)(3)(ii)(A)(1) and

110.1(k)(3)(ii)(B)(2), which describe steps a recipient political committee must take when reattributing excessive contributions from one contributor to another, inadvertently included the word "authorized" before the phrase "political committee." As made clear in the Explanation and Justification accompanying the final rules, the reattribution procedure is available to all political committees, not just authorized committees. See 67 FR 69932. Thus, this correction deletes the word "authorized" in 11 CFR 110.1(k)(3)(ii)(A)(1) and 110.1(k)(3)(ii)(B)(2).

#### Correction of Publication

Accordingly, the publication of final regulations on November 19, 2002 (67 FR 69928), which were the subject of FR Doc. 2002-00022, is corrected as follows:

On page 69948, in the first and second columns, respectively, remove "authorized" from 11 CFR 110.1(k)(3)(ii)(A)(1) and 110.1(k)(3)(ii)(B)(2).

Dated: December 23, 2002.

**Ellen L. Weintraub,**

*Vice Chair, Federal Election Commission.*

[FR Doc. 02-32711 Filed 12-26-02; 8:45 am]

BILLING CODE 6715-01-P

## FEDERAL HOUSING FINANCE BOARD

### 12 CFR Part 906

[No. 2002-62]

RIN 3069-AB23

#### Procedure for Conducting Monthly Survey of Rates and Terms on Conventional One-Family Non-farm Mortgage Loans

**AGENCY:** Federal Housing Finance Board.

**ACTION:** Final rule.

**SUMMARY:** The Federal Housing Finance Board (Finance Board) is making certain technical amendments to its regulation setting forth the practices and procedures for conducting the Monthly Survey of Rates and Terms on Conventional One-Family, Non-farm Mortgage Loans (Monthly Interest Rate Survey or MIRS). The amendments are being adopted solely to conform the text of the rule to the revised practices and

acceptable and unacceptable purpose descriptions to be reported by authorized committees. Paragraph (B) requires authorized committees, when itemizing certain disbursements for which reimbursements are required, to provide a brief explanation of the activity for which reimbursement is required. These provisions have been in Title 11 of the **Code of Federal Regulations** since 1980 and 1995, respectively, and were not affected by the recent statutory changes to the election cycle reporting requirements.

#### Need for Correction

As published, the final rules inadvertently omit two paragraphs describing information to be reported by authorized committees of Federal candidates.

All committees must report the purpose of itemized disbursements (i.e., those disbursements aggregating in excess of \$200). Omitted paragraph (A) contains examples of suitably specific purpose descriptions as well as examples of those descriptions that are unacceptably vague. This paragraph is inconsistent with the reporting of rules for unauthorized committees (committees other than candidate committees) in 11 CFR 104.3(b)(3).

Omitted paragraph (B) is used in administering the "personal use" rules in 11 CFR 113.1. Federal candidates are barred from using campaign funds for personal benefit. Paragraph (B) requires authorized committees of Federal candidates itemizing disbursements for which partial or total reimbursement is required under 11 CFR 113.1(g)(1)(iii)(C) or (D) to provide a brief explanation of the activity for which the reimbursement is made.

Section 801 of Title 5 of the United States Code requires Federal agencies to submit regulations to Congress. These regulations were submitted to the Speaker of the House of Representatives and the President of the Senate on November 26, 2001.

#### Certification of No Effect Pursuant to 5 U.S.C. § 605(b) [Regulatory Flexibility Act]

This correction will not have significant economic impact on a substantial number of small entities. The basis of this certification is that this correction only requires political committees to once again add information to the reports they are required to file. These regulations were in 11 CFR since 1980 and 1995, respectively, before being inadvertently omitted in 2000.

#### List of Subjects in 11 CFR Part 104

Campaign funds, Political committees and parties, Reporting and recordkeeping requirements.

Accordingly, 11 CFR part 104 is corrected by making the following correcting amendment:

#### PART 104—REPORTS BY POLITICAL COMMITTEES

1. The authority citation for part 104 continues to read as follows:

**Authority:** 2 U.S.C. 431(1), 431(8), 431(9), 432(i), 434, 438(a)(8), 438(b), 439a.

#### § 104.3 Contents of reports (2 U.S.C. 434(b), 439a).

\* \* \* \* \*

2. In § 104.3 add the following paragraphs (b)(4)(i)(A) and (B):

(b) \* \* \*

(4) \* \* \*

(i) \* \* \*

(A) As used in this paragraph, *purpose* means a brief statement or description of why the disbursement was made. Examples of statements or descriptions which meet the requirements of this paragraph include the following: dinner expenses, media, salary, polling, travel, party fees, phone banks, travel expenses, travel expense reimbursement, and catering costs. However, statements or descriptions such as *advance*, *election day expenses*, *other expenses*, *expenses*, *expense reimbursement*, *miscellaneous*, *outside services*, *get-out-the-vote* and *voter registration* would not meet the requirements of this paragraph for reporting the purpose of an expenditure.

(B) In addition to reporting the purpose described in paragraph (b)(4)(i)(A) of this section, whenever an authorized committee itemizes a disbursement that is partially or entirely a personal use for which reimbursement is required under 11 CFR 113.1(g)(1)(ii)(C) or (D), it shall provide a brief explanation of the activity for which reimbursement is required.

\* \* \* \* \*

Dated: November 26, 2001.

**Danny L. McDonald,**  
Chairman, Federal Election Commission.  
[FR Doc. 01-29679 Filed 11-29-01; 8:45 am]  
**BILLING CODE 6715-01-P**

#### FEDERAL ELECTION COMMISSION

#### 11 CFR Part 111

#### [Notice 2001-18]

#### Extension to Administrative Fines

**AGENCY:** Federal Election Commission.

**ACTION:** Final rule; revision of the sunset date.

**SUMMARY:** The Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the expiration date in which the Federal Election Commission (hereinafter "the Commission") may assess civil money penalties for violations of the reporting requirements of section 434(a) of the Federal Election Campaign Act (hereinafter "the Act" or "FECA").

**DATES:** Effective on December 31, 2001.

**FOR FURTHER INFORMATION CONTACT:** Ms. Rosemary C. Smith, Assistant General Counsel, or Ms. Mai T. Dinh, Attorney, 999 E Street, NW., Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

#### SUPPLEMENTARY INFORMATION:

#### Explanation and Justification

Section 640 of the Treasury and General Government Appropriations Act, 2000, Pub. L. No. 106-58, 106th Cong., 113 Stat. 430, 476-77 (1999), amended § 309(a)(4) of the FECA, 2 U.S.C. 437g(a)(4), to provide for a modified enforcement process for violations of reporting requirements. Under § 437g(a)(4)(C) of the FECA, the Commission may assess a civil money penalty for violations of the reporting requirements of 2 U.S.C. 434(a). This authority, however, was to sunset on December 31, 2001. Pub. L. No. 106-58, 106th Cong., § 640(c). Recently, § 642 of the Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the sunset date to include all reports that cover activity between January 1, 2000, to December 31, 2003.

The Commission published final rules on May 19, 2000, to implement the amendment contained in the Treasury and General Government Appropriations Act, 2000. Section 111.30 of the regulations reflects the sunset provision of Pub. L. No. 106-58, 106th Cong., § 640(c). Therefore, the Commission is issuing this final rule to amend section 111.30 to extend the application of the administrative fine regulations, 11 CFR part 111, subpart B, to include all violations relating to reports that cover the period between January 1, 2000, to December 31, 2003.

The Commission is promulgating this final rule without notice or opportunity for comment because it falls under the "good cause" exemption of the Administrative Procedures Act, 5 U.S.C. 553(b)(B). The exemption allows

**FEDERAL ELECTION COMMISSION****11 CFR Parts 100, 104, 105, 108 and 109**

[Notice 2002—26]

**Bipartisan Campaign Reform Act of 2002 Reporting****AGENCY:** Federal Election Commission.**ACTION:** Final rules and transmittal of regulations to Congress.

**SUMMARY:** The Federal Election Commission is promulgating new and revised rules regarding the reporting of electioneering communications and independent expenditures, monthly reporting by national political party committees and quarterly reporting by the principal campaign committees of candidates for the House of Representatives and Senate, as well as reporting related to party committee building funds. These rules implement several provisions of the Bipartisan Campaign Reform Act of 2002 (“BCRA”) that amend the Federal Election Campaign Act of 1971, as amended (“FECA” or “the Act”). Further information is provided in the **SUPPLEMENTARY INFORMATION** that follows.

**EFFECTIVE DATE:** February 3, 2003.

**FOR FURTHER INFORMATION CONTACT:** Mr. J. Duane Pugh Jr., Acting Special Assistant General Counsel, Ms. Mai T. Dinh, Acting Assistant General Counsel, or Ms. Cheryl A. F. Hemsley, Attorney, 999 E Street, NW., Washington, DC 20463, (202) 694–1650 or (800) 424–9530.

**SUPPLEMENTARY INFORMATION:** The Bipartisan Campaign Reform Act of 2002 (“BCRA”), Pub. L. 107–155, 116 Stat. 81 (2002), contains extensive and detailed amendments to the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. 431 *et seq.* This is one in a series of rulemakings the Commission is undertaking to implement the provisions of BCRA. The deadline for the promulgation of these rules is 270 days after the date of enactment, which is December 22, 2002.

Under the Administrative Procedures Act, 5 U.S.C. 553(d), and the Congressional Review of Agency Rulemaking Act, 5 U.S.C. 801(a)(1), agencies must submit final rules to the Speaker of the House of Representatives and the President of the Senate and publish them in the **Federal Register** at least 30 calendar days before they take effect. The final rules on BCRA Reporting were transmitted to Congress on December 18, 2002.

**Introduction**

These final rules address: (1) Reporting of electioneering communications; (2) reporting of independent expenditures; (3) quarterly reporting by the principal campaign committees of candidates for the House of Representatives and the Senate; (4) monthly reporting by political party committees; and (5) the reporting of funds for political party committee office buildings. See 2 U.S.C. 434(a), (e), (f) and (g); BCRA sec. 103, 201, 212, 501 and 503, 116 Stat. at 87–90, 93–94, and 114–115.

The Commission issued a Notice of Proposed Rulemaking (“NPRM”) addressing many of BCRA’s reporting requirements. See 67 FR 64,555 (Oct. 21, 2002) (“Reporting NPRM”). The Commission also previously sought comments on two of these topics in Notices of Proposed Rulemakings on Electioneering Communications, 67 FR 51,131 (Aug. 7, 2002), and Coordinated and Independent Expenditures, 67 FR 60,042 (Sept. 24, 2002). The Commission based the rules for another topic, the reporting of funds for the purchase or construction of party office buildings, on recently published final rules. See Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money; Final Rules, 67 FR 49,123 (July 29, 2002).

The Commission received four comments on this rulemaking. In addition, comments responding to the reporting issues in the previous NPRMs regarding electioneering communications and independent expenditures were considered by the Commission in developing these final reporting rules and are discussed in more detail below. The Commission received fifteen comments on electioneering communications reporting and two comments on coordinated and independent expenditures reporting. In addition, the Commission received testimony during the public hearings on electioneering communications on August 28 and 29, 2002, and on coordinated and independent expenditures on October 23 and 24, 2002.

The Commission also recently issued a Statement of Policy, explaining that during the transition period following BCRA’s effective date, the Commission intends to refrain from pursuing reporting entities for violations of the reporting requirements if they comply with Interim Reporting Procedures, which are specified in the Statement of Policy. FEC Policy Statement: Interim Reporting Procedures, 67 FR 71,075 (Nov. 29, 2002). All comments received,

hearing transcripts, NPRMs, Final Rules, and the Statement of Policy are on the Commission’s Web site at <http://www.fec.gov>. The development of new reporting forms and instructions is underway, and the new materials will be posted on the Commission’s Web site as they are completed. The Commission intends to have the new forms and instructions completed for reports due March 20, 2003, covering February 2003.

BCRA requires the Commission to promulgate standards for reporting computer software and also imposes certain other requirements on the Commission and on various persons who file reports with the Commission, which will take effect when that computer software becomes available. 2 U.S.C. 434(a)(12). Although these Congressional mandates are related to reporting, which is the subject of these final rules, the Commission does not propose to address computer software standards in these final rules. The computer software standards need to be developed in conjunction with revisions to the Commission’s reporting forms. Therefore, the Commission proposes to address computer software standards as soon as possible and will solicit public comments on the software standards at that time.

**Explanation and Justification**

*11 CFR 100.19 File, Filed, or Filing (2 U.S.C. 434(a))*

The Commission’s regulations at 11 CFR 100.19 define *file*, *filed*, and *filing*. The Commission proposed revisions in the NPRM to section 100.19 to redefine when 24-hour reports of independent expenditures would be considered filed and when the new 48-hour reports of independent expenditures and 24-hour reports of electioneering communications would be considered filed. The Commission received no comments on these proposed rules. The final rules are substantially similar to the proposed rules in the NPRM, with the changes noted below. The Commission notes that the paragraphs in 11 CFR 100.19 should be read together, and the entire section should be reviewed for applicable requirements.

Paragraph (a) of section 100.19 is unaffected by this rulemaking, except for a new heading. It retains the pre-BCRA general rule that a document is considered timely filed if it is delivered to the appropriate filing office (either the Commission or the Secretary of the Senate) by the close of business on the prescribed filing date. Paragraph (b) of section 100.19 retains the pre-BCRA

rule that a document is also considered timely filed if it is sent by registered or certified mail and postmarked by 11:59 p.m. Eastern Standard/Daylight Time on the prescribed filing date—except for pre-election reports. Pre-election reports must be filed no later than the 12th day before the relevant election or posted by registered or certified mail no later than the 15th day before the relevant election. See, e.g., 2 U.S.C. 434(a)(2)(A)(i). The references to midnight in paragraph (b) are being changed to 11:59 PM Eastern Standard/Daylight Time, whichever is applicable, consistent with paragraphs (c), (d), and (f) of this section. The revisions to paragraph (b) of section 100.19 clarify that paragraph (b) does not apply to reports addressed by paragraph (c) through new paragraph (f). The proposed new subtitle for paragraph (b) of “general rule” is not included in the final rules because paragraphs (a) and (b) of section 100.19 could both be considered part of the general rule.

Those exceptions are as follows: Paragraph (c) for electronic filing—“filed” means received and validated by the Commission by 11:59 p.m. Eastern Standard/Daylight Time on the filing date; paragraph (d) for 24-hour and 48-hour reports of independent expenditures—“filed” means received by the Commission by 11:59 p.m. Eastern Standard/Daylight Time on the day following (24-hour reports) or the second day following (48-hour reports) the date on which the spending threshold is reached in accordance with 11 CFR 104.4(f); paragraph (e) for 48-hour notices of last-minute contributions—“filed” means received by the Commission or the Secretary of the Senate within 48 hours of the receipt of a “last-minute” contribution of \$1,000 or more, which can be accomplished by using a facsimile transmission or the Commission’s website; paragraph (f) for 24-hour statements of electioneering communications—“filed” means received by the Commission by 11:59 p.m. Eastern Standard/Daylight Time of the day following the disclosure date. See 11 CFR 104.20.

Paragraphs (c) and (e) of section 100.19 remain substantially unchanged, except for new headings.

Revised paragraph (d) of section 100.19 requires that both the new 48-hour reports of independent expenditures and the 24-hour reports of independent expenditures must be received by the Commission by the filing deadline. 2 U.S.C. 434(g)(4). Because the reasons behind the filing requirements for 24-hour reports apply equally to the essentially similar 48-

hour reports, the final rules treat 48-hour reports the same as 24-hour reports with regard to permissible means of filing. The 24-hour and 48-hour reporting provisions allow reporting entities to submit their reports using facsimile machines or electronic mail, as long as they are not required under 11 CFR 104.18 to file electronically. Paragraph (d)(3) has also been revised since the NPRM to state that the Commission’s website may be used to file 24-hour and 48-hour reports of independent expenditures. Use of the Commission’s website, facsimile machines or electronic mail for such purposes or for electioneering communication statements under section 100.19(f), discussed below, does not constitute electronic filing under 11 CFR 104.18, so such use will not constitute mandatory or voluntary electronic filing under 11 CFR 104.18(a) or (b). Sending 24-hour reports by mail is not a viable option because it is unlikely these reports will be received by the Commission within 24 hours of the independent expenditures. See Independent Expenditure Reporting; Final Rules, 67 FR 12,834, at 12,835 (Mar. 20, 2002).

New paragraph (f) of section 100.19 addresses electioneering communications, which must be reported within 24 hours of the “disclosure date.” See 2 U.S.C. 434(f)(1) and 11 CFR 104.20 below. The Commission is adding new paragraph (f) to 11 CFR 100.19 to require these 24-hour statements be received by the Commission no later than 11:59 p.m. Eastern Standard/Daylight Time on the day following the disclosure date, rather than filed by that time. To assist reporting entities with meeting this deadline, the final rule specifically allows filing by facsimile machine or electronic mail in addition to any other delivery method that accomplishes Commission receipt before the conclusion of the day following the disclosure date. For the same reasons that are discussed with regard to paragraph (d) of 11 CFR 100.19, new paragraph (f) follows the timing and filing methods of 24-hour and 48-hour reports for independent expenditures.

#### *11 CFR 104.3(g) Funds for Party Office Buildings*

Before BCRA, the Act and Commission regulations provided an exception to the definition of contribution for donations to a national or State party committee that were specifically designated to defray any cost incurred for the construction or purchase of its office facility. Pre-BCRA 2 U.S.C. 431(8)(B)(viii); pre-BCRA 11

CFR 100.7(b)(12); 11 CFR 100.84. This exception is reflected in previous 11 CFR 104.3(g), which provided that funds or anything of value that were given to defray the costs of a party office facility and received by a political party committee must be reported as memo entries on Schedule A.

BCRA repealed the building fund exception to the definition of contribution for national party committees. BCRA, sec. 103(b)(1)(A), 116 Stat. at 87. Subsequent technical amendments at 2 U.S.C. 453(b) permit State and local political party committees to purchase or construct State and local party office buildings with non-Federal funds, subject to State law. BCRA, sec. 103(b)(2), 116 Stat. at 87–88. To implement these provisions of BCRA, the Commission promulgated new regulations at 11 CFR 300.12(b)(3) and (d), which eliminate this former exception for national party committees, and at 11 CFR 300.35, which provides that the source and reporting of donations used for the costs incurred by a State or local party committee for the purchase or construction of its office building are subject to State law if donated to a non-Federal account of the party committee. Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money; Final Rule, 67 FR 49,064, at 49,123 and 49,127 (July 29, 2002). However, if funds or things of value are contributed to or used by the Federal account of a State or local party committee for the purchase or construction of its office building, then these amounts or items are contributions under the Act. Consequently, new paragraph (g)(1) of 11 CFR 104.3 makes it clear that any funds or things of value received by a Federal account and used for the purchase or construction of an office building, regardless of contributor-specified purposes, are contributions and are not treated differently from other funds or things of value received by a Federal account. New paragraph (g)(2) states that gifts, subscriptions, loans, advances, deposits of money, or anything of value donated to a non-Federal account of a State or local party committee that are used for the purchase or construction of its office building are not contributions subject to the reporting requirements of FECA, but are subject to applicable State law reporting requirements. New paragraph (g)(3) specifies that national party committees’ receipts used to defray the costs of the construction or purchase of its office building are contributions subject to paragraph (g)(1). Thus, the memo entries required under previous

11 CFR 104.3(g) are no longer appropriate. New section 104.3(g) should be read in conjunction with 11 CFR 300.12(b)(3) and (d), 300.13, and 300.35. The Commission received no comments on this section.

*11 CFR 104.4 Independent Expenditures by Political Committees (2 U.S.C. 434(b), (d) and (g))*

1. Introduction

Prior to BCRA, the Commission had established reporting requirements for political committees making independent expenditures in accordance with 2 U.S.C. 434(b) and (g). See pre-BCRA 11 CFR 104.4. In the NPRM, the Commission proposed to revise the rules for political committees reporting independent expenditures made less than 20 days but more than 24 hours before an election and proposed to add new rules regarding the 48-hour reports of independent expenditures during the rest of the calendar year to implement BCRA's new reporting requirements for such independent expenditures. See 2 U.S.C. 434g.

The Commission received one comment on this section in the Reporting NPRM and one, from the same commenter, when these rules were published for comment in the Coordinated and Independent Expenditures NPRM, 67 FR 60,042 (Sept. 25, 2002). The commenter agreed with the proposal that 24-hour and 48-hour reports of independent expenditures need not be filed until the communications are publicly distributed or otherwise publicly disseminated. With the exception of certain clarifying changes suggested by the commenter, the final rules mirror those proposed in the NPRM.

2. 11 CFR 104.4(a) Regularly Scheduled Reporting

Paragraph (a) of section 104.4 is unaffected, other than the addition of a new heading, minor clarifications, a grammatical correction, and an updated cross-reference.

3. 11 CFR 104.4(b) Reports of Independent Expenditures Made at Any Time Up To and Including the 20th Day Before an Election

New paragraph (b) addresses reports of independent expenditures made by a political committee at any point in the campaign up to and including the 20th day before an election.

*A. 11 CFR 104.4(b)(1) Independent Expenditures Aggregating Less Than \$10,000*

New paragraph (b)(1) addresses independent expenditures aggregating less than \$10,000 with respect to a given election during the calendar year, up to and including the 20th day before an election. This calendar-year aggregation is based on 2 U.S.C. 434(b)(4), which requires calendar-year aggregation for reports of independent expenditures by political committees. Under the new rule, political committees must report the independent expenditures on Schedule E of FEC Form 3X, filed no later than the regular reporting date under 11 CFR 104.5. The Commission interprets 2 U.S.C. 434(g), added to the Act by BCRA, to require aggregation toward the various thresholds for independent expenditure reporting to be calculated on a per-election basis within the calendar year. For example, if a political committee makes \$5,000 in independent expenditures with respect to a Senate candidate, and \$5,000 in independent expenditures with respect to a House of Representatives candidate, and both of these ads are publicly distributed before the 20th day before the primary election, that political committee is not required to file 48-hour reports, but must disclose the independent expenditures on its regularly scheduled reports. If the political committee makes \$5,000 in independent expenditures with respect to a clearly identified candidate in the primary, and an additional \$5,000 in independent expenditures with respect to the same candidate in the general election but outside the 20-day window, no 48-hour reports are required; but again the political committee must disclose the independent expenditures on its regularly scheduled reports. If, however, the political committee made \$6,000 in independent expenditures supporting a Senate candidate in the primary election, and \$4,000 in independent expenditures opposing that Senate candidate's opponent in the primary, and these communications are published in a newspaper more than twenty days before the primary, the political committee must file a 48-hour report. The Commission received no comments on the interpretation implemented by this paragraph.

*B. 11 CFR 104.4(b)(2) Independent Expenditures Aggregating \$10,000 or More*

New paragraph (b)(2) addresses independent expenditures aggregating \$10,000 or more during the calendar year up to and including the 20th day

before an election. Political committees must file these reports on Schedule E of FEC Form 3X. These reports must be received by the Commission no later than 11:59 p.m. Eastern Standard/Daylight Time on the second day following the date on which a communication that constitutes an independent expenditure is publicly distributed or otherwise publicly disseminated. Further, political committees must file an additional 48-hour report each time subsequent independent expenditures reach or exceed the \$10,000 threshold with respect to the same election to which the first report related.

4. 11 CFR 104.4(c) Reports of Independent Expenditures Made Less Than 20 Days, But More Than 24 Hours Before the Day of an Election

Revisions to renumbered paragraph (c) (which was pre-BCRA 11 CFR 104.4(b)) state that 24-hour reports must be received by the Commission no later than 11:59 p.m. Eastern Standard/Daylight Time on the day following the date on which the \$1,000 threshold is reached during the final 20 days before the election. Further, revisions to this paragraph also indicate that additional 24-hour reports must be filed each time during the 24-hour reporting period in which subsequent independent expenditures reach or exceed the \$1,000 threshold with respect to the same election to which the previous report related.

5. 11 CFR 104.4(d) Verification

New paragraph (d) contains the report verification information previously found in pre-BCRA paragraph (b) of section 104.4. There are non-substantive grammatical changes to conform this paragraph to the rest of section 104.4.

6. 11 CFR 104.4(e) Where to File

New paragraph (e) largely restates pre-BCRA paragraph (c) of section 104.4. However, this paragraph has been reorganized since it was published in the Reporting NPRM. In the Reporting NPRM, paragraph (e)(2) would have addressed independent expenditures related to both Senate and House of Representatives candidates, and it would have omitted reference to the Secretary of Senate. In the final rule, paragraph (e)(2) addresses independent expenditures related to Senate candidates, and it retains the former requirement in 11 CFR 104.4(c) that regularly scheduled reports of independent expenditures related to Senate candidates must be filed with the Secretary of Senate. 11 CFR 104.4(e)(2)(i). However, with respect to



24-hour and 48-hour reports of independent expenditures relating to Senate candidates under BCRA, the Commission and not the Secretary of the Senate is the place of filing. 11 CFR 104.4(e)(2)(ii); see 2 U.S.C. 434(g)(3); see also the discussion of 11 CFR 105.2, below.

Proposed paragraph (e)(3) in the Reporting NPRM is being renumbered paragraph (e)(4), and it provides that if a State has obtained a waiver under 11 CFR 108.1(b), then reports of independent expenditures are not required to be filed with that State's Secretary of State.

#### 7. 11 CFR 104.4(f) Aggregating Independent Expenditures for Reporting Purposes

Paragraph (f) of 11 CFR 104.4 addresses aggregation of independent expenditures for reporting purposes. The provisions of pre-BCRA 11 CFR 109.1(f) are being moved to this section and revised to explain when and how political committees and other persons making independent expenditures must aggregate independent expenditures for purposes of determining whether 48-hour and 24-hour reports must be filed. Note that this aggregation rule applies to independent expenditures by political committees, as well as other persons; new 11 CFR 109.10(c) and (d) cross-reference this paragraph. Paragraph (f) establishes that every date on which a communication that constitutes an independent expenditure is "publicly distributed" or otherwise publicly disseminated serves as the date used to determine whether the total amount of independent expenditures has, in the aggregate, reached or exceeded the threshold reporting amounts (\$1,000 for 24-hour reports or \$10,000 for 48-hour reports). The term "publicly distributed" has the same meaning as provided in new 11 CFR 100.29(b)(3), which the Commission promulgated as part of the electioneering communications rulemaking. Electioneering Communications Final Rules, 67 FR 65,190, 65,192, 65,211 (Oct. 23, 2002). The term "publicly disseminated" refers to communications that are made public via other media, e.g., newspaper, magazines, handbills. Thus, paragraph (f) sets the same date as the starting date from which a person would have one or two days, where applicable, to file a 24-hour or 48-hour report of independent expenditures.

Congress changed the reporting requirements for independent expenditures by adding the phrase "or contracts to make" in 2 U.S.C. 434(g)(1) and (2). By doing so, BCRA ties 24-hour and 48-hour reporting of independent

expenditures to the time when a person "makes or contracts to make independent expenditures" aggregating at or above the \$1,000 and \$10,000 thresholds, respectively. Therefore, under new 11 CFR 104.4(f), each person must include in the calculation of the aggregate amount of independent expenditures, both disbursements for independent expenditures and all contracts obligating funds for disbursements for independent expenditures. Under this new rule and the timing requirements described above, when a communication that constitutes an independent expenditure is publicly distributed or publicly disseminated, the person who paid for, or who contracted to pay for, the communication is able to determine whether the communication satisfies the "express advocacy" requirement of the definition of an independent expenditure (see 11 CFR 100.16) and therefore must determine whether the disbursement for that communication constitutes an independent expenditure. A person reaching or exceeding the applicable reporting threshold is required to submit a report by 11:59 p.m. Eastern Standard/Daylight Time on the day after, for 24-hour reporting, or two days after, for 48-hour reporting, the date of the public distribution or public dissemination of that communication. Please note that under these rules, independent expenditures must be reported by political committees after a disbursement is made, or a debt reportable under 11 CFR 104.11(b) is incurred, for an independent expenditure, but no later than 11:59 p.m. on the day following the date on which the independent expenditure is first publicly distributed or otherwise publicly disseminated.

In some situations, a political committee does not make a payment or incur a reportable debt before the communication that constitutes the independent expenditure is publicly distributed or otherwise publicly disseminated. If the communication is both publicly distributed or otherwise publicly disseminated and paid for in the same reporting period, then the political committee must report the independent expenditure on Schedule E for that reporting period. If the communication is aired in one reporting period (e.g., during August for a monthly filer) and payment is made in a later reporting period (e.g., during September), then the political committee must report the independent expenditure as a memo entry on Schedule E on its August report if the \$10,000 threshold has been exceeded

and on Schedule D if it is a reportable debt under 11 CFR 104.11. The September report should show a payment on Schedule E and the same payment on Schedule D, if applicable.

In other situations, however, a political committee may pay the production and distribution costs associated with an independent expenditure in one reporting period, but not publicly distribute or otherwise publicly disseminate it until a later reporting period. In this case, the political committee must report the payment as a disbursement on Schedule B for operating expenditures. When, in a subsequent reporting period, the communication is publicly distributed or otherwise publicly disseminated, the political committee must file a Schedule E for the independent expenditure referencing the earlier Schedule B transaction. The political committee must also report the disbursement for the independent expenditure as a negative entry on Schedule B so the total disbursements are not inflated. Alternatively, if the political committee wishes to disclose the independent expenditure before the communication is publicly disseminated, it could report the independent expenditure on Schedule E for the reporting period in which the disbursement is made, with no further reporting obligation except for the 48-hour report if the total amount of disbursements for independent expenditures equals or exceeds \$10,000 on the day the communication is publicly distributed or otherwise publicly disseminated.

Obligations incurred, but not yet paid that are reportable debts, must be reported on Schedule D. For independent expenditures once the \$10,000 threshold is exceeded, political committees must also report memo entries on Schedule E. When, in a subsequent reporting period, the communication is publicly distributed or otherwise publicly disseminated, the political committee must file a Schedule E referencing the debt on Schedule D. The political committee must continue to report the debt on Schedule D and any payment on the debt on Schedules D and E, until the debt is extinguished.

The Commission received one comment supporting this proposal to base reporting of independent expenditures on the date of public distribution or public dissemination, rather than on the date a contract is executed. The policy reasons for adopting this reading of BCRA are the same as those set forth in the Explanation and Justification below for the reporting of electioneering communications.

## 8. Additional Requirements in the Internal Revenue Code

The Commission received one comment from the Internal Revenue Service ("IRS") on the coordinated and independent expenditure NPRM, which noted generally that even though some entities that are political organizations within the meaning of section 527 of the Internal Revenue Code may not be obliged to report contributions or expenditures to the Commission, these entities may still be required to report to the IRS. The IRS offered the following explanation, which the Commission is including here to provide additional guidance regarding the potential overlap between the Internal Revenue Code and the Commission's regulations. Section 527(j) of the Internal Revenue Code requires the reporting on IRS Form 8872 of certain contributions received and expenditures made by a tax-exempt political organization unless (i) the organization reports under the FECA as a political committee; (ii) the organization is a State or local committee of a political party or political committee of a State or local candidate; (iii) the organization is a qualified State or local political organization within the meaning of section 527(e)(5) of the Internal Revenue Code; (iv) the organization reasonably anticipates that it will not have gross receipts of \$25,000 or more for any taxable year; (v) the organization is otherwise exempt from Federal income taxation under section 501(a) of the Internal Revenue Code because it is described in section 501(c) of the Internal Revenue Code; or (vi) the expenditure made is treated as an independent expenditure under the FECA. In certain situations this could require a tax-exempt political organization making coordinated expenditures to report such expenditures on IRS Form 8872 even though that organization would not be required to report such items to the Commission. Moreover, a tax-exempt political organization that is required to report one or more independent expenditures to the Commission might also have to report certain contributions received and other expenditures to the IRS.

### 11 CFR 104.5 Filing Dates (2 U.S.C. 434(a)(2))

Section 104.5 sets forth filing dates for all reporting entities, including political committees. The NPRM proposed revisions to the rules for 24-hour reports of independent expenditures and proposed adding provisions for 24-hour reports of electioneering

communications and 48-hour reports of independent expenditures. The final rules in section 104.5 track the proposed rules, with the changes described below.

Section 104.5(a) is being revised to set forth the new reporting schedule for the principal campaign committees of House of Representatives and Senate candidates. Prior to BCRA, the principal campaign committees of these candidates were allowed to file semi-annually in non-election years. After November 5, 2002, excluding reports for 2002 runoff elections, principal campaign committees of House of Representatives and Senate candidates must file quarterly reports in non-election years, as well as in the election year. 2 U.S.C. 434(a)(2)(B). Revised paragraphs (a) and (a)(1) of section 104.5 now state that these committees must file quarterly reports. Like other quarterly reports, these must be complete as of March 31, June 30, September 30, and December 31, and must be filed by April 15, July 15, October 15, and January 31 of the following year, respectively. Paragraph (a)(2) of 11 CFR 104.5 sets forth the requirements for pre-election and post-general election reports in the election year and is identical to paragraphs (a)(1)(i) and (ii) of pre-BCRA 11 CFR 104.5. The rules regarding semi-annual reporting from pre-BCRA section 104.5(a) are being deleted. Please note that these new reporting dates do not affect the principal campaign committees or other authorized committees of Presidential candidates.

Revisions to paragraph (c) state that while unauthorized political committees may choose to file quarterly or monthly, a national committee of a political party must report monthly under new 11 CFR 104.5(c)(4), which is discussed below. Consequently, national party committees are no longer permitted to change their filing frequency. Paragraphs (c) and (c)(4) have been revised since the NPRM to consolidate the references to the national party committees, including the national congressional campaign committees.

Paragraph (c)(4) of 11 CFR 104.5 is a new provision implementing the BCRA requirement that all national political party committees must report on a monthly basis. 2 U.S.C. 434(a)(4)(B). Previously, national party committees were allowed to file quarterly in the election year and semi-annually in the non-election years. Under the changes to the Act made by BCRA, national political party committees must file monthly, and must file pre-general election and post-general election reports. BCRA's changes to FECA in this

regard may be intended to remove any doubt as to whether national political party committees that file quarterly must file these pre-election reports if they do not make any contributions or expenditures on behalf of candidates in these elections during pre-election reporting periods. These rules implement BCRA's amendment. No commenters addressed this topic.

The Commission sought, but received no comments on whether the national Congressional campaign committees of the political parties should be included in this new monthly filing requirement for national political party committees. The final rules require the Congressional campaign committees of national parties to file monthly for several reasons. First, Congressional campaign committees are treated as committees of a national political party elsewhere in the Act and the regulations. For example, 11 CFR 110.1 specifically includes the Congressional campaign committees as committees that are "established and maintained by a national political party." Further, the Supreme Court in *FEC v. Democratic Senate Campaign Committee*, 454 U.S. 27, 39 (1981), stated that the National Republican Senatorial Committee is part of the Republican Party organization. By analogy, the other Congressional campaign committees are also a part of their national party organizations. Moreover, the Commission notes that BCRA included a committee of a national political party in this monthly filing requirement, rather than the committee of a national political party. The wording seems to foreclose the argument that Congress intended to include only the national committees of the political parties in the monthly filing requirement.

Paragraph (g) of 11 CFR 104.5 moves the pre-BCRA contents of paragraph (g) to new paragraph (g)(2) with revisions, and adds a new paragraph (g)(1), which requires that 48-hour reports of independent expenditures must be received by the Commission no later than 11:59 p.m. Eastern Standard/Daylight Time on the second day following the date on which a communication is publicly distributed or otherwise publicly disseminated. The Commission received one comment on paragraph (g) of section 104.5, which urged the Commission to clarify that the filing requirements for subsequent reports of independent expenditures (24-hour and 48-hour reports) would be triggered by the public dissemination or distribution of the communication (as with the initial reports). Note that the term "publicly distributed" refers to communications distributed by radio or

television (see 11 CFR 100.29(b)(3)) and the term “publicly disseminated” refers to communications that are made public via other media, e.g., newspaper, magazines, handbills. New paragraph (g)(4) explains when communications that are mailed are considered to be “publicly distributed.”

New paragraph (j) of section 104.5 addresses the filing dates for electioneering communications. Specifically, it provides that the 24-hour statements must be received by the Commission by 11:59 p.m. Eastern Standard/Daylight Time on the day following the disclosure date.

#### 11 CFR 104.19 [Reserved]

Section 104.19 of 11 CFR is added and reserved for future use.

#### 11 CFR 104.20 Reporting Electioneering Communications

##### 1. Introduction

In the Explanation and Justification for the Electioneering Communications Final Rules, the Commission stated it would revise the proposed rules on reporting electioneering communications and re-propose the rules as part of this rulemaking.<sup>1</sup> 67 FR at 65,209. Consequently, the NPRM for this reporting rulemaking included the revised proposed rules for the reporting requirements for electioneering communications at proposed 11 CFR 104.20. The following explanation and justification for 11 CFR 104.20 discusses comments resulting from the Reporting NPRM and the Electioneering Communications NPRM. Although the Electioneering Communications NPRM would have designated the reporting of electioneering communications as section 104.19, the proposed rules in the Reporting NPRM designated reporting of electioneering communications as proposed section 104.20. In the following explanation and justification, citations to 104.19 refer to the original proposed rules in the Electioneering Communications NPRM, and citations to 104.20 refer to the proposed rules in the Reporting NPRM and the final rules.

##### 2. 11 CFR 104.20(a) Definitions

New section 104.20(a) includes the definitions for the relevant terms that are used throughout new section 104.20. These terms are: (1) Disclosure date; (2) direct costs of producing or airing electioneering communications; (3) persons sharing or exercising direction or control; (4) identification; and (5) publicly distributed.

##### A. 11 CFR 104.20(a)(1) Definition of “Disclosure Date”

BCRA requires persons who make electioneering communications that cost more than \$10,000 to file disclosure statements with the Commission within 24 hours of the disclosure date. 2 U.S.C. 434(f)(1). In the Electioneering Communications NPRM, proposed section 104.19(b) would have defined “disclosure date” as “the first date by which a person has made one or more disbursements, or has executed one or more contracts to make disbursements, for the direct costs of producing or airing electioneering communications aggregating in excess of \$10,000.” 67 FR at 51,145. The Electioneering Communications NPRM, however, also sought comment on whether the disclosure date should be the date on which the electioneering communication aired. Thus, under this proposal, an organization could make disbursements or enter into a contract to make disbursements that exceed \$10,000, but would not be required to disclose the disbursements or contract until the electioneering communication is aired. Although BCRA uses the term “airing,” the Commission has determined that “publicly distributed” more accurately encompasses how electioneering communications are disseminated to the public, including the airing of these communications. See below for discussion of the definition of “publicly distributed.”

All of the commenters who addressed this issue disagreed with the proposed rule in the Electioneering Communications NPRM and advocated adopting a final rule that would define “disclosure date” as the date of the public distribution of the electioneering communication. They argued that there is no electioneering communication, and therefore no reporting requirement, until the communication is actually publicly distributed.

Taking into consideration the comments described above, proposed section 104.20(a)(1) in the Reporting NPRM would have defined “disclosure date” as the date on which an electioneering communication is publicly distributed where there have been disbursements, or executed contracts for disbursements, for the direct costs of producing or airing an electioneering communication aggregating in excess of \$10,000. The Commission received one comment on the revised proposed definition of “disclosure date” at section 104.20(a)(1), which supported this approach. The final rule in section 104.20(a)(1) is similar to the proposed

rule. This date reflects the Commission’s concerns that there are legal and practical issues associated with compelling disclosure of potential electioneering communications before they are finalized and publicly distributed, and premature disclosure may require reporting entities to divulge confidential strategic and political information about their possible future activities.

Consequently, under new section 104.20(a)(1)(i), “disclosure date” means the first time in a calendar year that an electioneering communication is publicly distributed where the maker of the electioneering communications has also surpassed the \$10,000 disbursement threshold. Counting toward the threshold are disbursements made at any time for the direct costs of producing or airing either that communication or any other previously unreported electioneering communication. Thus, even disbursements for the direct costs of producing or airing the electioneering communication made in calendar years prior to the public distribution of the electioneering communication are aggregated toward the \$10,000 threshold. Conversely, any costs already reported for earlier electioneering communications are not aggregated toward the \$10,000 threshold. After the first disclosure date, subsequent disclosure dates occur in the same calendar year in which an electioneering communication is publicly distributed, if that person has made additional disbursements for the direct costs of producing or airing an electioneering communication that, in the aggregate, exceed \$10,000. 11 CFR 104.20(a)(1)(ii). The following example illustrates how the definition of “disclosure date” operates. From November of one year to March of the next year, Person X spends \$25,000 in direct costs to produce and air an electioneering communication, and the communication is publicly distributed on March 15. Thus, March 15 is the initial disclosure date under 11 CFR 104.20(a)(1)(i). Person X then pays another \$5000 to publicly distribute the same communication on April 1. April 1 is not a disclosure date because the subsequent disbursement does not exceed \$10,000. On April 15, Person X publicly distributes a different electioneering communication for which she spent \$7000 in direct costs to produce and air. April 15 is a disclosure date under 11 CFR 104.20(a)(1)(ii) because that is the date on which the communication was publicly distributed and the aggregation of the

<sup>1</sup>The original proposed rules were part of the Electioneering Communications NPRM. See 67 FR at 51,145.

disbursements for the direct costs after the initial disclosure date (\$5000 plus \$7000) exceeds \$10,000.

*B. 11 CFR 104.20(a)(2) Definition of "Direct Costs of Producing or Airing Electioneering Communications"*

In the Electioneering Communications NPRM, proposed section 104.19(a) would have required every person who makes a disbursement, or executes a contract, for the direct costs of producing or airing electioneering communications that aggregate in excess of \$10,000 during a calendar year, to file a statement with the Commission. Electioneering Communications NPRM, 67 FR at 51,145–46. Furthermore, proposed section 104.19(a)(2) would have included a non-exhaustive list of what constitutes direct costs of electioneering communications. *Id.* The Commission sought comment on two issues relating to this proposed requirement. The first was whether the list in proposed section 104.19(a)(2) was adequate and whether the list should be exhaustive. The second issue was whether the direct costs of producing an electioneering communication and the direct costs of airing it should be aggregated separately or together to determine whether such costs exceed \$10,000. The second issue is discussed in further detail in the explanation and justification for new section 104.20(b).

The commenters on the Electioneering Communications NPRM were split on the issue of whether the list of direct costs in proposed section 104.19(a)(2) should be exhaustive or non-exhaustive. One commenter who supported an exhaustive list argued that it is clear what is involved in producing a communication, and the proposed rule adequately addresses those costs. Another commenter recommended a non-exhaustive list so that the Commission could retain flexibility to identify other costs associated with producing and airing communications not listed in the proposed rules.

In order to provide clear guidance on this issue, proposed 11 CFR 104.20(a)(2) in the Reporting NPRM included an exhaustive list of direct costs associated with producing or airing an electioneering communication. The Commission sought comments on whether the proposed definition should include any other direct costs associated with producing or airing electioneering communications. In particular, the Commission sought comment on what, if any, additional in-house production costs should be considered direct costs.

The final rule in new section 104.20(a)(2) is similar to the proposed rule in the Reporting NPRM, and

defines "direct costs of producing or airing" with an exhaustive list. Paragraph (a)(2)(i) has been clarified to include "costs charged by a vendor" to show that the nature of service, not the nature of the vendor providing the service, controls whether its cost should be included. (The NPRM version listed "costs charged by a production company," which unduly focused on the type of company providing the service.) Paragraph (a)(2)(ii) has been revised to include the cost of studio time and material costs, which are in-house out-of-pocket production costs. The Commission understands "direct cost of producing or airing electioneering communications" as used in 2 U.S.C. 434(f)(4)(A) and (B) to include all such out-of-pocket costs and to not distinguish between those provided by vendors or those provided by in-house resources.

One commenter addressed the issue of what should be included in an exhaustive list. The commenter supported an exhaustive list and agreed with the items on the list in proposed section 104.20(a)(2). The commenter also suggested that the Commission make clear in the final rule that the definition does not "include planning or preparatory costs such as polling and focus groups, or in-house costs such as staff compensation and other overhead."

Paragraph (a)(2)'s list of vendor production costs, in-house production costs, and airtime costs is exhaustive. Only costs that fit within these categories are included. Illustrative examples of costs charged by a vendor are also included in the regulation, and these examples are not exhaustive. Paragraph (a)(2)(ii) makes clear that part of the costs addressed by the commenter, which are described as "in-house costs such as staff compensation and other overhead," are not among the enumerated out-of-pocket costs, so they will not be included in paragraph (a)(2)(ii). The other of the commenter's examples of polling and focus groups are not production costs as they are too attenuated from the resulting communication to be considered "direct costs of producing or airing an electioneering communication" under 2 U.S.C. 434(f)(4).

The final rule requires statements of electioneering communications to be filed when the direct costs of producing or airing electioneering communications exceed \$10,000. In both the Reporting NPRM and the Electioneering Communications NPRM, the Commission sought comment on how to aggregate the direct costs of producing or airing an electioneering communication to determine whether

the \$10,000 threshold has been exceeded. The commenters on the Electioneering Communications NPRM disagreed on this issue. Some commenters argued that BCRA should be read to require that production costs should be aggregated separately for the airtime costs. Under this interpretation, if it costs a person \$7,000 to produce the electioneering communication and \$7,000 to air it, the threshold is not met because neither the direct costs of producing or airing the electioneering communication exceeded \$10,000. In contrast, other commenters argued that BCRA mandates that the direct costs of producing and airing the electioneering communication be aggregated. Under this approach, the example above would result in the \$10,000 threshold being met because the direct costs of producing and airing are \$14,000.

The Commission has decided that it is appropriate to require that the costs of producing and the costs of airing be added together, rather than counted separately, to determine whether the threshold has been met. Thus, when the direct costs of producing or airing an electioneering communication exceed \$10,000 when combined, the person who makes the electioneering communication would be required to file a statement with the Commission when the electioneering communication is publicly distributed. Additionally, the Commission agrees with a commenter who noted that, as a practical matter, for most electioneering communications, the \$10,000 threshold will be exceeded, regardless of whether the production costs and the airing costs are aggregated separately or together.

*C. 11 CFR 104.20(a)(3) Definition of "Persons Sharing or Exercising Direction or Control"*

The Electioneering Communications NPRM included two proposed alternatives, identified as Alternative 4–A and Alternative 4–B, to implement the BCRA requirement to disclose "any person sharing or exercising direction or control over the activities" of the person making the disbursement for electioneering communications. See 2 U.S.C. 434(f)(2)(A). Many of the commenters asserted that both alternatives were vague and could encompass a large number of people, especially for electioneering communications made by membership organizations. Some of the commenters were also concerned that disclosing this information may reveal sensitive or confidential information and the decision-making processes of organizations, especially non-profit organizations, thereby placing them at a

competitive disadvantage. For these reasons, these commenters argued that the Commission should require limited, if any, disclosure of persons who share or exercise direction or control over the person who makes disbursements for electioneering communications or the activities involved in making electioneering communications.

In contrast, several commenters, including the Congressional sponsors of BCRA, disagreed with both alternatives because in their view neither would disclose sufficiently the information required by BCRA. See 2 U.S.C. 434(f)(2)(A). They asserted that BCRA requires disclosure of not only those who have direction or control over the electioneering communications, but also those who have direction or control over the organization that makes the electioneering communications.

While the Commission recognizes the concerns of those who objected to disclosure of the decision-making process of their organizations, BCRA requires persons who make electioneering communications to disclose those who share or exercise direction or control over the person making the disbursement for electioneering communications. 2 U.S.C. 434(f)(2)(A). Because neither Alternative 4-A nor Alternative 4-B in the Electioneering Communications NPRM appeared to encompass the disclosure required by BCRA, proposed section 104.20(c)(2) in the Reporting NPRM did not incorporate either of the two alternatives. Instead, proposed paragraph (c)(2) followed the wording of 2 U.S.C. 434(f)(2)(A).

To provide further guidance on proposed section 104.20(c)(2), the proposed rules included a definition of "sharing or exercising direction or control." Because it appears that the term "direction or control" in 2 U.S.C. 434(f)(2)(A) refers to the management or decision-making process of an organization, including a qualified nonprofit corporation ("QNC"), proposed section 104.20(a)(3) would have defined "sharing or exercising direction or control" to mean exercising authority or responsibility for policy formulation, day-to-day management, obligation of funds, or hiring or firing employees.

The Commission also sought comment on an alternative definition of "sharing or exercising direction or control" that was not in the proposed rule. Reporting NPRM, 67 FR at 64,560. Under the alternative definition described in the NPRM, the term would mean the officers, directors, partners, or any other individuals who have the authority to bind the organization,

entity, or person making the disbursement for electioneering communication. With this alternative the Commission sought a more objective, bright-line definition of "direction or control" that focused the definition on those persons who have the authority to act on behalf of the organization. One commenter addressed this issue. The commenter supported the alternative definition arguing that proposed section 104.20(a)(3) was overly broad and that the alternative definition better captured the requirements of BCRA. The commenter also suggested that the alternative definition be further narrowed to include only officers, directors, and partners.

The Commission is adopting this bright-line alternative approach described in the NPRM, with the clarifications described below, as new section 104.20(a)(3) because it properly encompasses BCRA's clear requirement to identify persons who exercise direction or control over the person making the electioneering communication. The Commission prefers the clarity of the bright-line approach to what may be the broader coverage of the NPRM's proposed rule text in order to avoid the vagueness involved in describing the functions that the rule intended to capture. New section 104.20(a)(3) defines "persons sharing or exercising direction or control" with a list of organizational positions that are readily known and verifiable: officer, director, executive director, partner, and in the case of unincorporated organizations, owner. In addition to this list, new section 104.20(a)(3) includes the "equivalent" of executive director. This term is intended to include the senior staff position in an organization, whatever its title, that functions as an executive director does. Thus, the Commission believes that the positions named or described in new section 104.20(a)(3) provide sufficient scope to capture responsible persons without sweeping too broadly.

#### *D. 11 CFR 104.20(a)(4) Definition of "Identification"*

New section 104.20(a)(4) incorporates the definition of the term "identification" in 11 CFR 100.12. This definition is identical to the proposed definition. No commenter discussed this definition.

#### *E. 101 CFR 104.20(a)(5) Definition of "Publicly Distributed"*

In the Electioneering Communications Final Rules, the Commission defines "publicly distributed" to mean "aired,

broadcast, cablecast, or otherwise disseminated through the facilities of a television station, radio station, cable television system, or satellite system." 11 CFR 100.29(b)(6). Therefore, new section 104.20(a)(5) adopts the definition of "publicly distributed" in 11 CFR 100.29(b)(6). The term "publicly distributed" is used throughout the final rules instead of "airing," except in the definition of "direct costs of producing or airing."

#### *3. 11 CFR 104.20(b) Who Must Report and When*

New section 104.20(b) details who must report electioneering communications to the Commission and when those statements are due. The final rule states that every person who makes a disbursement or executes a contract to make a disbursement for electioneering communications that exceeds \$10,000 in direct costs must file a statement with the Commission by the end of the day following the disclosure date. The various elements of this final rule are discussed in further detail below.

The definitions of "electioneering communication" in 11 CFR 100.29 and "disclosure date" in 11 CFR 104.20(a)(1) must be satisfied in order for an electioneering communication reporting obligation to arise. Thus, for example, because expenditures are exempted from the definition of "electioneering communication" by 2 U.S.C. 434(f)(3)(B)(ii) and 11 CFR 100.29(c)(3), political committees that pay for communications with funds reportable as expenditures do not report these payments under 11 CFR 104.20. Similarly, a "disclosure date" must have occurred, so the provisions of 11 CFR 104.20(a)(1)(i) or (ii) must have been satisfied.

BCRA requires that statements of electioneering communications be filed within 24 hours of the disclosure date, that is the date on which an electioneering communication is publicly distributed, assuming the \$10,000 threshold has been exceeded. 11 CFR 104.20(a)(1). One witness at the August 28, 2002 public hearing on electioneering communications acknowledged that in some cases it may be difficult to ascertain when an electioneering communication is publicly distributed for purposes of triggering the 24-hour reporting period. This is because the contract may not specify a precise time that the communication will be publicly distributed or because in some instances the broadcaster does not air the communication during the block of time specified in the contract, although the

day of initial broadcast will generally be known. To address the concern that a person may not know the exact time an electioneering communication is publicly distributed during the day that it is scheduled to air, the Commission is interpreting the 24-hour period in which to report the electioneering communication as starting at the end of the day in which the communication is publicly distributed. Therefore, new section 104.20(b) requires reporting of an electioneering communication by the end of the following day. The Commission did not receive any comments on this rule.

The last sentence of proposed section 104.20(b) stated that “[p]ersons *other than political committees* must file these 24-hour statements on FEC Form 9” (emphasis added). One commenter correctly noted that the highlighted language may be misleading because the Commission had stated in the Electioneering Communications Final Rules that, by operation of the expenditure and independent expenditure exemption from the definition of “electioneering communications,” political committees do not make disbursements for electioneering communications. See 67 FR at 65,197–98. Therefore, the final rule includes a sentence that makes clear that political committees report communications that are described in 11 CFR 100.29(a) as expenditures or independent expenditures and not as an electioneering communication. For those persons who are required to report electioneering communications, new section 104.20(b) requires all the information specified in new section 104.20(c) be reported on FEC Form 9.

#### 4. 11 CFR 104.20(c) Contents of Statements

New section 104.20(c) lists eight items that must be included in the statements of electioneering communications that must be filed with the Commission. No commenters addressed the introductory part of paragraph (c). The final rule slightly rewords the proposed rule to clarify that the information to be reported on FEC Form 9 pertains to electioneering communications.

##### A. 11 CFR 104.20(c)(1) Identification of the Person Making the Disbursements

New section 104.20(c)(1) requires identification of the persons who make a disbursement, or execute a contract to make a disbursement, for an electioneering communication. Under 11 CFR 100.12, as incorporated by new section 104.20(a)(4), “identification” means an individual’s first name, middle name or initial, if available, and

last name; mailing address; occupation; and the name of his or her employer; and, if the person is not an individual, the person’s full name and address. New section 104.20(c)(1) additionally requires a person that is not an individual to list its principal place of business. This rule implements the requirements in BCRA at 2 U.S.C. 434(f)(2)(A) and (B). The Commission did not receive any comments concerning this paragraph.

##### B. 11 CFR 104.20(c)(2) Identification of Persons Sharing or Exercising Direction or Control

As mandated by BCRA at 2 U.S.C. 434(f)(2)(A), new section 104.20(c)(2) requires identification of persons sharing or exercising direction or control over persons described in paragraph (c)(1), disclosing the same type of information. While one commenter addressed the definition of “sharing or exercising direction or control,” see above, no commenter specifically discussed this rule.

##### C. 11 CFR 104.20(c)(3) Identification of the Custodian of the Books and Accounts

BCRA at 2 U.S.C. 434(f)(2)(A) requires disclosure of the person who is the custodian of the books and accounts from which electioneering communication disbursements are made. New section 104.20(c)(3) implements this new provision. The information that must be disclosed about that person under BCRA and the new rules is the same as the information that must be disclosed about the persons described in paragraphs (c)(1) and (c)(2), except for paragraph (c)(1)’s requirement that a person that is not an individual state its principal place of business. The Commission did not receive any comments on this rule.

##### D. 11 CFR 104.20(c)(4) Disclosure of the Amount of Each Disbursement

BCRA also requires disclosure of disbursements of more than \$200 during the period covered by the statement, the date the disbursement was made, and the identification of the person who receives the disbursement. 2 U.S.C. 434(f)(2)(C). The final rule in new section 104.20(c)(4) follows the wording of the proposed rule without change in implementing this BCRA provision. No commenter discussed this provision in the proposed rules.

##### E. 11 CFR 104.20(c)(5) Disclosure of Candidates and Elections

Under 2 U.S.C. 434(f)(2)(D), the elections to which electioneering communications pertain, as well as the

names of all clearly identified candidates referred to in the electioneering communications, must be disclosed. The Electioneering Communications NPRM provided two alternatives to proposed 11 CFR 104.19(b)(5), identified as Alternative 5–A and Alternative 5–B, which would have implemented this statutory provision. 67 FR 51,146. Both alternatives would have required disclosure of the elections and all clearly identified candidates who are referred to in the electioneering communication, but would have contained different wording. Commenters preferred the wording of Alternative 5–B because it was easier to read and was more consistent with 2 U.S.C. 434(f)(2)(D). Because Alternative 5–B arguably was more consistent with the definition of “disclosure date,” see above, leaving no doubt as to which clearly identified candidates appear in an electioneering communication, proposed section 104.20(c)(5) in the Reporting NPRM incorporated the wording of Alternative 5–B. As such, the final rule remains unchanged from the proposed rule. No comments were received in response to the Reporting NPRM concerning proposed section 104.20(c)(5).

##### F. 11 CFR 104.20(c)(6) Disclosure Date

New section 104.20(c)(6) requires that electioneering communications statements list the disclosure date, as defined in section 104.20(a)(1), of each electioneering communication. While BCRA does not specifically require the disclosure date to be reported, this information is necessary as it is the triggering mechanism for filing the statement. This is similar to requiring the disclosure of the date an independent expenditure aggregating \$1,000 or more is made during the 24-hour reporting period. The Commission did not receive any comments on this requirement.

##### G. 11 CFR 104.20(c)(7) Disclosure of Donors to a Segregated Bank Account

BCRA requires persons who make disbursements for electioneering communications exclusively from segregated bank accounts to disclose the names and addresses of contributors who contribute an aggregate of \$1,000 or more to that segregated account. 2 U.S.C. 434(f)(2)(E). In the Electioneering Communications NPRM, the Commission sought comment on whether amounts given to persons who make disbursements for electioneering communications are contributions subject to the limitations, prohibitions, and reporting requirements of the Act.

In the new reporting provisions for electioneering communications in BCRA, the statute uses the terms “contributor” and “contributed,” but it does not use the term “contribution.” 2 U.S.C. 434(f)(2)(E) and (F). BCRA uses the more general “disbursement” more frequently. 2 U.S.C. 434(f)(2)(A), (B), (C), (E), and (F). Nor does BCRA amend the definition of “contribution.” See 2 U.S.C. 431(8). Additionally, the Commission concluded that political committees do not make disbursements for electioneering communications by operation of the expenditure and independent expenditure exemptions. Based on this analysis, the Commission proposed to treat funds given to persons who make electioneering communications as “donations.” See also Reporting NPRM, 67 FR at 64,560–61. One commenter agreed with the Commission’s approach and none opposed it. At this point, the Commission concludes that its analysis of the statutory wording is correct. Accordingly, the final rules treat these funds as “donations” and not as “contributions.”

In reading 2 U.S.C. 434(f)(2)(E) and (F) together with 2 U.S.C. 441b(c)(3)(B), the Commission stated in the Electioneering Communications NPRM that the disclosure requirements for segregated bank accounts appear to apply only to qualified nonprofit corporations (QNCs) organized under 26 U.S.C. 501(c)(4). See 67 FR at 51,143 and 11 CFR 114.10. Therefore, proposed 11 CFR 104.19(b)(6) would have permitted only QNCs to use segregated bank accounts to limit disclosure of their donors to only those who donate \$1000 or more to that account. Commenters on the Electioneering Communications NPRM urged that this option be made available to all persons who make electioneering communications, and not just QNCs. Because the Commission agreed with this suggestion, proposed 104.20(c)(7) in the Reporting NPRM made this option available to all persons.

The Commission continues to agree with this approach. Accordingly, new section 104.20(c)(7) in the final rules allows all persons who establish a separate bank account consisting of funds provided solely by individuals who are United States citizens, nationals, or permanent residents to limit their reporting of the identities of their donors of \$1,000 or more to those donors who have given directly to that bank account, as long as only funds from the separate bank account are used to pay for electioneering communications. Please note that the final rules at 11 CFR 114.14(d)(2), as published previously in the

Electioneering Communications Final Rules, provide such persons that are not QNCs with the option of establishing a segregated bank account similar to that allowed to QNCs. 67 FR 65,212.

Although no commenter addressed this provision specifically, one joint comment questioned the requirement that QNCs disclose their donors. The joint commenter made constitutional arguments and cited *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) (“*MCFL*”) and other cases in support of the assertions that disclosure of its donors imposes a burden on its free speech rights. They also stated that the segregated bank account option creates an administrative burden and would still require disclosure of some of their donors. The joint comment suggested that, with regard to QNCs, the Commission impose the same requirements for disclosure of electioneering communication as it does for independent expenditures arguing that legislative history indicates that Congress intended them to be treated similarly.

In some respects, the reporting rules applicable to QNCs’ electioneering communications require less disclosure than those applicable to QNCs’ independent expenditures. Electioneering communication rules require disclosure of donors of \$1,000 or more, while independent expenditure rules require disclosure of contributors of more than \$200. Compare new 11 CFR 104.20(c)(7) or (8) with new 11 CFR 109.10(e)(1)(vi). Additionally, electioneering communications are not subject to disclosure until disbursements related to them exceed \$10,000, and the similar threshold for independent expenditures is \$250. See 11 CFR 104.20(a)(1). While reporting of independent expenditure contributors is limited to those who contributed specifically for independent expenditures, 11 CFR 109.10(e)(1)(vi), QNCs can also reduce their reporting obligations by using separate bank accounts pursuant to 11 CFR 104.20(c)(7).

More generally, a commenter on the Electioneering Communications NPRM and the joint comment on the Reporting NPRM argued that the members of the organizations they represent could be subject to negative consequences if their names are disclosed in connection with an electioneering communication. The FECA provides for an advisory opinion process concerning the application of any of the statutes within the Commission’s jurisdiction or any regulations promulgated by the Commission, and such groups could also seek an advisory opinion from the

Commission to determine if the groups would be entitled to an exemption from disclosure that would be analogous to the exemption provided to the Socialist Workers Party. See Advisory Opinions 1990–13 and 1996–46 (both of which allowed the Socialist Workers Party to withhold the identities of its contributors and persons to whom it had disbursed funds because of a reasonable probability that the compelled disclosure of the party’s contributors’ names would subject them to threats, harassment, or reprisals from either Government officials or private parties). BCRA’s legislative history shows that some in Congress recognized the need for limited exceptions in these circumstances. See 148 Cong. Rec. S2136 (daily ed. Mar. 20, 2002) (remarks of Sen. Snowe). The Commission disagrees with the joint commenters’ assertion that the standard for obtaining a waiver is too high, given the significant disclosure interests Congress sought to protect in the political arena.

Nevertheless, *MCFL* status does not exempt a corporation from the independent expenditure reporting requirements. It only exempts the *MCFL* corporation’s use of its own funds from the prohibitions of 2 U.S.C. 441b. The Supreme Court in *MCFL* specifically noted the reporting requirements of 2 U.S.C. 434(c) and stated that “these reporting obligations provide precisely the information necessary to monitor *MCFL*’s independent spending activity and its receipt of contributions.” *MCFL*, 479 U.S. at 262. Thus, the Commission’s extension of the exemption of *MCFL* does not apply to reporting requirements for electioneering communications. Therefore, the Commission declines to create separate electioneering communication reporting requirements for QNCs.

#### *H. 11 CFR 104.20(c)(8) Disclosure of Donors When Not Using a Segregated Bank Account*

The Electioneering Communications NPRM explaining proposed section 104.19(b)(7) clearly stated that all persons who make electioneering communications, including QNCs that do not use segregated bank accounts, would be required to disclose their contributors who contribute an aggregate of \$1,000 or more during the prescribed time period. 67 FR 51,143. Nevertheless, some commenters interpreted proposed section 104.19(b)(7) to apply only to QNCs and objected to limiting the disclosure requirements to only QNCs. They argued that BCRA does not limit the requirements of 2 U.S.C. 434(f)(2)(E) and (F) to just QNCs. Consequently, they



recommended that all persons who make electioneering communications should be required to disclose their contributors under proposed section 104.19(b)(7). Additionally, some commenters expressed concern as to the requirement that organizations would be required to disclose their donors because donors may become inhibited from making donations aggregating \$1,000 or more.

In order to eliminate the confusion, proposed 11 CFR 104.20(c)(8) in the Reporting NPRM differed from proposed section 104.19(b)(7) in the Electioneering Communications NPRM in that it removed the reference to QNCs. Thus, proposed section 104.20(c)(8) sought to clarify that all persons who make electioneering communications would be required to disclose their donors who donate \$1,000 or more in the aggregate during the prescribed period, if they do not use segregated bank accounts. Other than the commenters that objected to disclosure of their donors, discussed above, the Commission did not receive any comments on this requirement. Because BCRA at 2 U.S.C. 434(f)(2)(F) specifically mandates disclosure of this information, the final rule at 11 CFR 104.20(c)(8) is identical to the proposed rule in the Reporting NPRM.

#### *I. Disclosure Requirements for Individuals Who Make Electioneering Communications*

The Commission also sought comments on how the proposed rules would apply to individuals making electioneering communications. The Commission did not receive any comments on this topic. The Commission concludes that, in instances where an individual makes a disbursement for an electioneering communication, 11 CFR 104.20(c)(1) requires disclosure of the identification of the individual, which means his or her name, address, occupation, and employer.

New 11 CFR 104.20(c)(2) requires the identification of any person sharing or exercising direction or control over the activities of the person who made the disbursement, or who executed a contract to make a disbursement, which implements 2 U.S.C. 434(f)(2)(A). The term "direction or control" in 2 U.S.C. 434(f)(2)(A) refers to the management or decision-making process of an organization, as the Commission has noted. See Explanation and Justification for 11 CFR 104.20(c)(2), above, and Reporting NPRM, 67 FR at 64,560. Therefore, the Commission defines "sharing or exercising direction or control" in new 11 CFR 104.20(a)(3)

with a four-part test applicable only to organizations and entities. Individuals are required to disclose any person sharing or exercising direction or control over their electioneering communication activities.

For purposes of new 11 CFR 104.20(c)(7) and (8), individuals are required to disclose donations received, which does not include salary, wages, or other compensation for employment. Donations required to be disclosed do include, however, gifts of \$1,000 or more from any source. The remainder of 11 CFR 104.20(c) applies to individuals in the same manner it applies to any other persons making electioneering communications. See 11 CFR 104.20(c)(3) through (6).

#### **8. 11 CFR 104.20(d) Recordkeeping Requirement**

The final rules at 11 CFR 104.20(d) require all persons who make electioneering communications or accept donations for the purpose of making electioneering communications to maintain records in accordance with 11 CFR 104.14. In the Electioneering Communications NPRM, proposed section 104.19(c) would have exempted QNCs from the recordkeeping requirements. The commenters who addressed this issue were split on whether QNCs should be exempted from the recordkeeping requirements. A commenter who did not support the exemption argued that because these entities are required to report their electioneering communications, they should also be required to maintain records that relate to the electioneering communications to support their reports.

In determining that all of the reporting and recordkeeping requirements for political committees were too burdensome for QNCs making independent expenditures, the Supreme Court in *MCFL* noted that *MCFL, Inc.* was subject to more "extensive requirements and more stringent restrictions" than unincorporated nonprofit organizations. 479 U.S. at 254–255. For this reason, proposed section 104.20(d) in the Reporting NPRM required QNCs to maintain only those records that pertain to their electioneering communications, which is a much reduced obligation. Additionally, this recordkeeping requirement is identical to what is required of any other person, including unincorporated nonprofit organizations, that make disbursements for electioneering communications. Furthermore, the availability of these records is necessary to assess the accuracy of the electioneering

communications reports filed by QNCs. Thus, proposed paragraph (d) in the Reporting NPRM did not include an exemption for QNCs. No subsequent comments were received concerning this paragraph. After consideration of the reasons stated above and in the NPRM, the Commission has concluded that a QNC exemption from recordkeeping is unwarranted. Therefore, new section 104.20(d) requires all persons, including QNCs, who make or accept donations for electioneering communications to maintain records in accordance with 11 CFR 104.14.

#### **9. 11 CFR 104.20(e) State Waivers**

Paragraph (e), which was not included in the NPRM, repeats the information in 11 CFR 104.20(b) that the place of filing for statements of electioneering communications is the Commission. This paragraph also states that like all other reports or statements, copies of the statement filed with the Commission must also be filed with the appropriate State official unless the state has obtained a waiver under 11 CFR 108.1(b). The NPRM sought comment on whether this waiver should apply to statements of electioneering communications. The Commission received no comments on this issue. Because section 108.1 of 11 CFR applies to all reports and statements filed with the Commission (and when appropriate the Secretary of the Senate), statements of electioneering communications clearly fall within its rubric. See discussion of 11 CFR 108.1, below.

#### *11 CFR 105.2 Place of Filing; Senate Candidates, Their Principal Campaign Committees, and Committees Supporting Only Senate Candidates (2 U.S.C. 434(g)(3))*

The Commission's pre-BCRA regulations required that 24-hour reports of independent expenditures supporting or opposing Senate candidates be filed with the Secretary of the Senate. See pre-BCRA 11 CFR 104.4(c)(2), 105.2, and 109.2(b). Revisions to 11 CFR 105.2 place the text of pre-BCRA 11 CFR 105.2 in paragraph (a), and add the heading, "General Rule."

New paragraph (b) of 11 CFR 105.2, headed, "Exceptions," implements exceptions to this general rule created by BCRA. BCRA establishes the Commission as the place of filing for both 24-hour and 48-hour reports of independent expenditures, regardless of the office sought by the clearly identified candidate. 2 U.S.C. 434(g)(3)(A). In the Reporting NPRM, the proposed revisions to section 105.2

would have made the Commission the point of filing for all 24-hour and 48-hour reports of independent expenditures. The Commission received no comments on this section, and the final rules follow the proposed rules regarding independent expenditures.

Similarly, BCRA establishes the Commission as the place of filing for electioneering communication statements, regardless of the office sought by the clearly identified candidate. 2 U.S.C. 434(f)(1). In the Electioneering Communications NPRM, proposed revisions to section 105.2 would have made the Commission the point of filing for all electioneering communication statements. 67 FR at 51,146. However, the Reporting NPRM proposed that 11 CFR 105.2(b) would not mention electioneering communication statements because section 105.2 only discusses reporting by political committees. 67 FR at 64,562. By operation of 2 U.S.C. 434(f)(3)(B)(ii) and 11 CFR 100.29(c)(3), communications paid for with expenditures and independent expenditures are excluded from the definition of "electioneering communications." Therefore, revised section 105.2(b), as proposed in the Reporting NPRM and as promulgated in these final rules, does not mention statements of electioneering communications. Nonetheless, electioneering communications by others may refer to Senatorial candidates. Under 11 CFR 104.20(b), electioneering communication statements related to electioneering communications that refer to a clearly identified candidate for Senate must be filed with the Commission, not the Secretary of the Senate.

#### 11 CFR 108.1 Filing Requirements

Paragraph (a) of 11 CFR 108.1 contains the general rule that a copy of each report and statement that is required to be filed with the Commission or the Secretary of the Senate must be filed with the Secretary of State for the appropriate State. The Commission is not making any changes to this general rule.

The rules at 11 CFR 108.1(b) provide an exception to the requirement that reporting entities must file copies of their reports with the Secretary of State for the appropriate State. This exception is allowed in States that have received a waiver from the Commission because the State can electronically receive and duplicate reports and statements filed with the Commission. The reporting requirements for both independent expenditures and electioneering communications specifically explain

that if a State has obtained a waiver under 11 CFR 108.1(b), then reporting entities are not required to file reports or statements with the Secretary of State for that State. See 11 CFR 104.4(e)(4) and 104.20(e). In the NPRM, the Commission proposed adding to paragraph (b) a statement that the list of States that have obtained waivers under this section is available on the Commission's website. The Commission received no comments on this proposal, and the final rule follows the proposed rule.

#### 11 CFR 109.2 [Reserved]

Section 109.2 of 11 CFR is removed and reserved for future use.

#### 11 CFR 109.10 Independent Expenditure by Persons Other Than Political Committees

The NPRM proposed to move the reporting requirements for persons other than political committees who make independent expenditures from pre-BCRA 11 CFR 109.2 to new 11 CFR 109.10. Other proposed revisions to this section generally followed the proposals regarding independent expenditure reporting by political committees, which are discussed above in the Explanation and Justification for 11 CFR 104.4. The Commission received no comments on this section. The final rules generally follow the proposed rules except as explained below.

Under new section 109.10, persons other than political committees must report their independent expenditures on either FEC Form 5 or in a signed statement containing certain information regarding the person who made the independent expenditure and the nature of the independent expenditure itself.

Paragraph (a) of new 11 CFR 109.10 states that political committees must report independent expenditures under 11 CFR 104.4.

Section 109.10(b) contains the general reporting requirement for persons other than political committees previously found in 11 CFR 109.2(a). New paragraph (b) states that persons other than political committees must report independent expenditures in excess of \$250 in a calendar year. New paragraph (b) specifically states that these reports must be filed in accordance with the quarterly reporting schedule specified in 11 CFR 104.5(a)(1)(i) and (ii). Paragraph (b) has been revised since the NPRM to establish that reporting entities must follow the quarterly reporting schedule.

Paragraph (c) addresses reports of independent expenditures aggregating \$10,000 or more with respect to a given

election from the beginning of the calendar year up to and including the 20th day before an election. This paragraph requires that 48-hour reports of independent expenditures be received rather than filed by 11:59 pm on the second day after the date on which the \$10,000 threshold is reached.

Revisions to paragraph (d) of new 11 CFR 109.10 (which was pre-BCRA 11 CFR 109.2(b)) also follow the changes in 11 CFR 104.4(c) regarding 24-hour reports of independent expenditures aggregating \$1,000 or more after the 20th day before the election.

Paragraph (e) of new 11 CFR 109.10 (which was pre-BCRA 11 CFR 109.2(a)(1) and (c)) addresses the contents and verification of statements and reports filed under this section. Paragraph (e) has been clarified so that the information required to be disclosed applies to those using FEC Form 5 or a verified statement. Paragraph (e) includes one significant change from pre-BCRA section 109.2(a)(1) and (c): a person making an independent expenditure is now required to certify that the expenditure was made independently from a political party committee and its agents, in addition to pre-BCRA requirement of certification that the expenditure was not coordinated with a candidate, a candidate's authorized committee, or an agent of either of the foregoing. This change reflects the addition of political party committees to the definition of "independent expenditure" in 2 U.S.C. 431(17) and the description of coordination in 2 U.S.C. 441a(a)(7)(B)(ii) under BCRA.

In BCRA, Congress deleted the term "consultation" from the list of activities that compromise the independence of expenditures. See 2 U.S.C. 431(17)(B). Notwithstanding that change, in the Reporting NPRM the Commission proposed the retention of the term "consultation" because it remains, post-BCRA, in other related provisions of the Act. Reporting NPRM, 67 FR at 64,558 and 64,568. For the same reasons explained with reference to the definition of "independent expenditure" in 11 CFR 100.16, see *Coordinated and Independent Expenditures*, NPRM, 67 FR 60,042, 60,061 (Sept. 24, 2002); *Coordinated and Independent Expenditures, Final Rules*, 67 FR (forthcoming Dec. 2002), the Commission is continuing to include "consultation" in the description of activity that would cause an expenditure to lose its independence (*i.e.*, "in cooperation, *consultation*, or concert with" a candidate or political party committee), even though the

statutory definition in 2 U.S.C. 431(17) does not retain the term.

The comment from the Internal Revenue Service, which is described in the Explanation and Justification of 11 CFR 104.4, above, will be of interest to political organizations within the meaning of section 527 of the Internal Revenue Code.

*Certification of No Effect Pursuant to 5 U.S.C. 605(b) (Regulatory Flexibility Act)*

The Commission certifies that the attached final rules do not have a significant economic impact on a substantial number of small entities. The bases of this certification are several. There are four areas in which new rules are being promulgated. The economic impact on small entities of each new rule is addressed below.

1. Independent Expenditure Reporting

First, with regard to the final rules addressing independent expenditures, the national, State, and local party committees of the two major political parties, and other political committees, are not small entities under 5 U.S.C. 601 because they are not small businesses, small organizations, or small governmental jurisdictions. Further, individuals operating under these rules are not small entities.

The small entities to which the rules do apply will not be unduly burdened by the final rules because there is no significant extra cost involved, as independent expenditures must already be reported. Collectively, the differential costs will not exceed \$100 million per year. In addition, new reporting requirements will not significantly increase costs, as they only apply to those spending \$10,000 or more on independent expenditures, and the actual reporting requirements are the minimum necessary to comply with the new statute enacted by Congress.

2. Electioneering Communications

Second, with regard to the final rules addressing electioneering communications, the only burden the final rules impose is on persons who make electioneering communications, and that burden is a minimal one, requiring persons who make such communications to provide the names and addresses of those who made donations of \$1000 or more to that person when the costs of the electioneering communication exceed \$10,000 per year. If that person is a corporation that qualifies as a QNC, then it must also certify that it meets that status. The number of small entities

affected by the final rules is not substantial.

In addition, the Commission is promulgating several rules that reduce any burden that might be placed on persons who must file electioneering communication reports. First, the Commission interprets the reporting requirement such that no reporting is required until after an electioneering communication is publicly distributed. More than likely, this will only require that person to file one report with the Commission. Also, the Commission is allowing all persons paying for electioneering communications to establish segregated bank accounts, and to report the names and addresses of only those persons who contributed to those accounts. Further, the Commission interprets the statute to not require that a certification of QNC status be filed until the person is also required to file a disclosure report. These are significant steps the Commission is taking to reduce the burden on those who make electioneering communications. The overall burden on the small entities affected by these final rules for reporting electioneering communications will not be \$100 million on an annual basis. Moreover, these final rules are no more than what is strictly necessary to comply with the new statute enacted by Congress.

3. Reporting Schedules for House of Representatives and Senate Candidates

Third, regarding the new rules requiring a new reporting schedule for non-election years for the authorized committees of House of Representatives and Senate candidates, the frequency of reports has increased. However, the additional cost will not reach \$100 million on an annual basis. Moreover, these final rules are no more than what is strictly necessary to comply with the new statute enacted by Congress.

4. Reporting Schedules for National Committees of Political Parties

Fourth, regarding the new rules requiring a different reporting schedule for national committees of political parties, as noted above, the two major national party committees are not small entities under 5 U.S.C. 601. In addition, the new reporting schedule applicable to other national party committees will not result in a cost of \$100 million per year, and is no more than what is strictly necessary to comply with the new statute enacted by Congress.

**List of Subjects**

*11 CFR Part 100*

Elections.

*11 CFR Part 104*

Campaign funds, Political committees and parties, Reporting and recordkeeping requirements.

*11 CFR Part 105*

Campaign funds, Political candidates, Political committees and parties, Reporting and recordkeeping requirements.

*11 CFR Part 108*

Elections, Reporting and recordkeeping requirements.

*11 CFR Part 109*

Elections, Reporting and recordkeeping requirements.

For the reasons set out in the preamble, subchapter A of chapter I of title 11 of the Code of Federal Regulations is amended as follows:

**PART 100—SCOPE AND DEFINITIONS**

1. The authority citation for part 100 continues to read as follows:

**Authority:** 2 U.S.C. 431, 434, and 438(a)(8).

2. Section 100.19 is revised as follows:

(a) Revising the introductory text and paragraphs (b) through (e).

(b) Adding a heading to paragraph (a) and adding paragraph (f).

The revisions and additions read as follows.

**§ 100.19 File, filed, or filing (2 U.S.C. 434(a)).**

With respect to documents required to be filed under 11 CFR parts 101, 102, 104, 105, 107, 108, and 109, and any modifications or amendments thereto, the terms *file*, *filed*, and *filing* mean one of the actions set forth in paragraphs (a) through (f) of this section. For purposes of this section, document means any report, statement, notice, or designation required by the Act to be filed with the Commission or the Secretary of the Senate.

(a) *Where to deliver reports.* \* \* \*

(b) *Timely filed.* A document, other than those addressed in paragraphs (c) through (f) of this section, is timely filed upon deposit as registered or certified mail in an established U.S. Post Office and postmarked no later than 11:59 p.m. Eastern Standard/Daylight Time on the filing date, except that pre-election reports so mailed must be postmarked no later than 11:59 p.m. Eastern Standard/Daylight Time on the fifteenth day before the date of the election.

Documents sent by first class mail must be received by the close of business on the prescribed filing date to be timely filed.

acceptable and unacceptable purpose descriptions to be reported by authorized committees. Paragraph (B) requires authorized committees, when itemizing certain disbursements for which reimbursements are required, to provide a brief explanation of the activity for which reimbursement is required. These provisions have been in Title 11 of the **Code of Federal Regulations** since 1980 and 1995, respectively, and were not affected by the recent statutory changes to the election cycle reporting requirements.

#### Need for Correction

As published, the final rules inadvertently omit two paragraphs describing information to be reported by authorized committees of Federal candidates.

All committees must report the purpose of itemized disbursements (i.e., those disbursements aggregating in excess of \$200). Omitted paragraph (A) contains examples of suitably specific purpose descriptions as well as examples of those descriptions that are unacceptably vague. This paragraph is inconsistent with the reporting of rules for unauthorized committees (committees other than candidate committees) in 11 CFR 104.3(b)(3).

Omitted paragraph (B) is used in administering the "personal use" rules in 11 CFR 113.1. Federal candidates are barred from using campaign funds for personal benefit. Paragraph (B) requires authorized committees of Federal candidates itemizing disbursements for which partial or total reimbursement is required under 11 CFR 113.1(g)(1)(iii)(C) or (D) to provide a brief explanation of the activity for which the reimbursement is made.

Section 801 of Title 5 of the United States Code requires Federal agencies to submit regulations to Congress. These regulations were submitted to the Speaker of the House of Representatives and the President of the Senate on November 26, 2001.

#### Certification of No Effect Pursuant to 5 U.S.C. § 605(b) [Regulatory Flexibility Act]

This correction will not have significant economic impact on a substantial number of small entities. The basis of this certification is that this correction only requires political committees to once again add information to the reports they are required to file. These regulations were in 11 CFR since 1980 and 1995, respectively, before being inadvertently omitted in 2000.

#### List of Subjects in 11 CFR Part 104

Campaign funds, Political committees and parties, Reporting and recordkeeping requirements.

Accordingly, 11 CFR part 104 is corrected by making the following correcting amendment:

#### PART 104—REPORTS BY POLITICAL COMMITTEES

1. The authority citation for part 104 continues to read as follows:

**Authority:** 2 U.S.C. 431(1), 431(8), 431(9), 432(i), 434, 438(a)(8), 438(b), 439a.

#### § 104.3 Contents of reports (2 U.S.C. 434(b), 439a).

\* \* \* \* \*

2. In § 104.3 add the following paragraphs (b)(4)(i)(A) and (B):

(b) \* \* \*

(4) \* \* \*

(i) \* \* \*

(A) As used in this paragraph, *purpose* means a brief statement or description of why the disbursement was made. Examples of statements or descriptions which meet the requirements of this paragraph include the following: dinner expenses, media, salary, polling, travel, party fees, phone banks, travel expenses, travel expense reimbursement, and catering costs. However, statements or descriptions such as *advance*, *election day expenses*, *other expenses*, *expenses*, *expense reimbursement*, *miscellaneous*, *outside services*, *get-out-the-vote* and *voter registration* would not meet the requirements of this paragraph for reporting the purpose of an expenditure.

(B) In addition to reporting the purpose described in paragraph (b)(4)(i)(A) of this section, whenever an authorized committee itemizes a disbursement that is partially or entirely a personal use for which reimbursement is required under 11 CFR 113.1(g)(1)(ii)(C) or (D), it shall provide a brief explanation of the activity for which reimbursement is required.

\* \* \* \* \*

Dated: November 26, 2001.

**Danny L. McDonald,**  
Chairman, Federal Election Commission.  
[FR Doc. 01-29679 Filed 11-29-01; 8:45 am]  
**BILLING CODE 6715-01-P**

#### FEDERAL ELECTION COMMISSION

#### 11 CFR Part 111

#### [Notice 2001-18]

#### Extension to Administrative Fines

**AGENCY:** Federal Election Commission.

**ACTION:** Final rule; revision of the sunset date.

**SUMMARY:** The Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the expiration date in which the Federal Election Commission (hereinafter "the Commission") may assess civil money penalties for violations of the reporting requirements of section 434(a) of the Federal Election Campaign Act (hereinafter "the Act" or "FECA").

**DATES:** Effective on December 31, 2001.

**FOR FURTHER INFORMATION CONTACT:** Ms. Rosemary C. Smith, Assistant General Counsel, or Ms. Mai T. Dinh, Attorney, 999 E Street, NW., Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

#### SUPPLEMENTARY INFORMATION:

#### Explanation and Justification

Section 640 of the Treasury and General Government Appropriations Act, 2000, Pub. L. No. 106-58, 106th Cong., 113 Stat. 430, 476-77 (1999), amended § 309(a)(4) of the FECA, 2 U.S.C. 437g(a)(4), to provide for a modified enforcement process for violations of reporting requirements. Under § 437g(a)(4)(C) of the FECA, the Commission may assess a civil money penalty for violations of the reporting requirements of 2 U.S.C. 434(a). This authority, however, was to sunset on December 31, 2001. Pub. L. No. 106-58, 106th Cong., § 640(c). Recently, § 642 of the Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the sunset date to include all reports that cover activity between January 1, 2000, to December 31, 2003.

The Commission published final rules on May 19, 2000, to implement the amendment contained in the Treasury and General Government Appropriations Act, 2000. Section 111.30 of the regulations reflects the sunset provision of Pub. L. No. 106-58, 106th Cong., § 640(c). Therefore, the Commission is issuing this final rule to amend section 111.30 to extend the application of the administrative fine regulations, 11 CFR part 111, subpart B, to include all violations relating to reports that cover the period between January 1, 2000, to December 31, 2003.

The Commission is promulgating this final rule without notice or opportunity for comment because it falls under the "good cause" exemption of the Administrative Procedures Act, 5 U.S.C. 553(b)(B). The exemption allows

(e) *Content of verified reports and statements and verification of reports and statements.*

(1) *Contents of verified reports and statement.* If a signed report or statement is submitted, the report or statement shall include:

(i) The reporting person's name, mailing address, occupation, and the name of his or her employer, if any;

(ii) The identification (name and mailing address) of the person to whom the expenditure was made;

(iii) The amount, date, and purpose of each expenditure;

(iv) A statement that indicates whether such expenditure was in support of, or in opposition to a candidate, together with the candidate's name and office sought;

(v) A verified certification under penalty of perjury as to whether such expenditure was made in cooperation, consultation, or concert with, or at the request or suggestion of a candidate, a candidate's authorized committee, or their agents, or a political party committee or its agents; and

(vi) The identification of each person who made a contribution in excess of \$200 to the person filing such report, which contribution was made for the purpose of furthering the reported independent expenditure.

(2) *Verification of independent expenditure statements and reports.* Every person shall verify reports and statements of independent expenditures filed pursuant to the requirements of this section by one of the methods stated in paragraph (2)(i) or (ii) of this section. Any report or statement verified under either of these methods shall be treated for all purposes (including penalties for perjury) in the same manner as a document verified by signature.

(i) For reports or statements filed on paper (e.g., by hand-delivery, U.S. Mail, or facsimile machine), the person who made the independent expenditure shall certify, under penalty of perjury, the independence of the expenditure by handwritten signature immediately following the certification required by paragraph (e)(1)(v) of this section.

(ii) For reports or statements filed by electronic mail, the person who made the independent expenditure shall certify, under penalty of perjury, the independence of the expenditure by typing the treasurer's name immediately following the certification required by paragraph (e)(1)(v) of this section.

Dated: December 17, 2002.

**David M. Mason,**

*Chairman, Federal Election Commission.*

[FR Doc. 03-91 Filed 1-2-03; 8:45 am]

**BILLING CODE 6715-01-P**

## FEDERAL ELECTION COMMISSION

### 11 CFR Parts 100, 102, 109, 110, and 114

[Notice 2002-27]

#### Coordinated and Independent Expenditures

**AGENCY:** Federal Election Commission.

**ACTION:** Final rules and transmittal of regulations to Congress.

**SUMMARY:** The Federal Election Commission is issuing final rules regarding payments for communications that are coordinated with a candidate, a candidate's authorized committee, or a political party committee. The final rules also address expenditures by political party committees that are made either in coordination with, or independently from, candidates. These final rules implement several requirements in the Bipartisan Campaign Reform Act of 2002 ("BCRA") that significantly amend the Federal Election Campaign Act of 1971, as amended ("FECA" or the "Act"). Further information is contained in the Supplementary Information that follows.

**EFFECTIVE DATE:** February 3, 2003.

**FOR FURTHER INFORMATION CONTACT:** Mr. John Vergelli, Acting Assistant General Counsel, or Attorneys Mr. Mark Allen (coordinated party expenditures), and Mr. Richard Ewell (coordinated communications paid for by other political committees and other persons), 999 E Street NW., Washington, DC, 20463, (202) 694-1650 or (800) 424-9530.

**SUPPLEMENTARY INFORMATION:** The Bipartisan Campaign Reform Act of 2002 ("BCRA"), Public Law 107-155, 116 Stat. 81 (March 27, 2002), contains extensive and detailed amendments to the Federal Election Campaign Act of 1971 ("FECA" or "the Act"), as amended, 2 U.S.C. 431 *et seq.* This is one in a series of rulemakings the Commission is undertaking in order to implement the provisions of BCRA and to meet the rulemaking deadlines set out in BCRA.

Section 402(c)(1) of BCRA establishes a general deadline of 270 days for the Commission to promulgate regulations to carry out BCRA, which is December 22, 2002. The final rules do not apply

with respect to runoff elections, recounts, or election contests resulting from the November 2002 general election. 2 U.S.C. 431 note.

Because of the brief period before the statutory deadline for promulgating these rules, the Commission received and considered public comments expeditiously. The Notice of Proposed Rulemaking ("NPRM"), on which these final rules are based, was published in the **Federal Register** on September 24, 2002. 67 FR 60,042 (September 24, 2002). The written comments were due by October 11, 2002. The Commission received 27 comments from 21 commenters. The names of the commenters and their comments are available at <http://www.fec.gov/register.htm> under "Coordinated and Independent Expenditures." A public hearing was held on Wednesday, October 23, 2002, and Thursday, October 24, 2002, at which 14 witnesses testified. A transcript of those hearings is also available at <http://www.fec.gov/register.htm>.

Under the Administrative Procedures Act, 5 U.S.C. 553(d), and the Congressional Review of Agency Rulemaking Act, 5 U.S.C. 801(a)(1), agencies must submit final rules to the Speaker of the House of Representatives and the President of the Senate, and publish them in the **Federal Register** at least 30 calendar days before they take effect. The final rules on coordinated and independent expenditures were transmitted to Congress on December 18, 2002.

#### Introduction

These final rules primarily address communications that are made in coordination with a candidate, an authorized committee of a candidate, or a political party committee. The regulations set forth the meaning of "coordination." They also set forth statutory requirements for political party committees with respect to the permitted timing of independent and coordinated expenditures, and transfers and assignments.

#### Explanation and Justification

##### 1. Statutory Overview

FECA limits the amount of contributions to Federal candidates, their authorized committees, and other political committees. 2 U.S.C. 441a(a). Under FECA and the Commission's regulations, these contributions may take the form of money or "anything of value" (the latter is an "in-kind contribution" provided to a candidate or political committee.) See 11 CFR 100.52(d)(1). Candidates must disclose

all contributions they receive. 2 U.S.C. 434(b)(2). Since the recipient does not actually receive a cash payment from an in-kind contribution, the recipient must report the value of an in-kind contribution as both a contribution received and an expenditure made so that the receipt of the contribution will be reported without overstating the cash-on-hand in the committee's treasury. See 11 CFR 104.13.

## 2. Overview of BCRA's Changes to the FECA and Commission Regulations

In BCRA, Congress revised the FECA's definition of "independent expenditure" in 2 U.S.C. 431(17). The revision added a reference to political party committees and their agents and reworked other aspects of the former definition. Corresponding revisions are being made to the regulations in 11 CFR 100.16.

Congress repealed the Commission's pre-BCRA regulations regarding "coordinated general public political communications" at former 11 CFR 100.23, and directed the Commission to adopt new regulations on "coordinated communications" in their place. Public Law 107-155, sec. 214(b), (c) (March 27, 2002). A new section 11 CFR 109.21 implements this Congressional mandate.

In addition, the new and revised rules implement several new restrictions found in BCRA on the timing of independent and coordinated expenditures made by committees of political parties. 2 U.S.C. 441a(d)(4). Those regulations are located in new 11 CFR part 109, subpart D. Similarly, Congress established new restrictions on transfers between committees of a political party. 2 U.S.C. 441a(d)(4). Those changes, as well as amendments to the rules on the assignment of coordinated party expenditure authority in pre-BCRA 11 CFR 110.7, are reflected in new 11 CFR part 109, subpart D.

Finally, Congress established new reporting obligations for independent expenditures. 2 U.S.C. 434(a)(5) and (g). These reporting obligations have been addressed in a separate rulemaking. See Final Rules and Explanation and Justification for Bipartisan Campaign Reform Act of 2002 Reporting, published elsewhere in this issue of the *Federal Register*. The comments received regarding the reporting of independent expenditures have been addressed separately in the Explanation and Justification for the amended reporting rules.

### 11 CFR 100.16 Definition of Independent Expenditure

In light of several Congressional changes to the statutory definition of

"independent expenditure" at 2 U.S.C. 431(17), the Commission is making several corresponding changes to the definition of the same term in 11 CFR 100.16. Most significantly, the statutory definition of "independent expenditure" is modified to exclude expenditures coordinated with a political party committee or its agents (in addition to the pre-BCRA exclusion of coordination with candidates). 2 U.S.C. 431(17).

Paragraph (a) of section 100.16 contains the revised pre-BCRA section 100.16. The first sentence of paragraph (a) is being changed by adding a reference to political party committees and their agents, thereby tracking BCRA's changes in 2 U.S.C. 431(17).

In BCRA, Congress deleted the term "consultation" from the list of activities that compromise the independence of expenditures. See 2 U.S.C. 431(17)(B). Notwithstanding that change, in the NPRM the Commission proposed the retention of the term "consultation" because it remains, post-BCRA, in other related provisions of the Act. Most importantly, the term "consultation" was used in a closely related provision added by BCRA itself. See 2 U.S.C. 441a(a)(7)(B)(ii) as amended by Public Law 107-155, sec. 214(a) (expenditures made in "cooperation, *consultation*, or concert, with, or at the request or suggestion of, a national, State, or local committee of a political party"); see also 2 U.S.C. 441a(a)(7)(B)(i) (expenditures that are made in "cooperation, consultation, or concert with, or at the request or suggestion of" candidates, political committees, and agents thereof are contributions) (emphasis added).

Similarly, while Congress referred to expenditures "not made in concert or cooperation with \* \* \* a political party committee or its agents" in 2 U.S.C. 431(17) (emphasis added), it did not refer to agents of a party committee in 2 U.S.C. 441a(a)(7)(B)(ii) when describing coordination with a party committee. The Commission proposed in the NPRM including agents of political party committees as persons who might take actions that would cause a communication to be coordinated with that party committee.

The Commission received one joint comment from two commenters<sup>1</sup> on each of the two proposals above, urging the Commission to include in the final rules both terms as proposed. The final rules retain the term "consultation" in

<sup>1</sup> For the purposes of this Explanation and Justification, all persons who expressed their views on the rules proposed in the NPRM are referred to as "commenters" without regard to whether those views were expressed to the Commission in writing or through testimony at the hearing.

paragraph (a) as an element in the regulatory definition of "independent expenditure," for the reasons outlined in the NPRM. The Commission is similarly including agents of a political party within the scope of its independent expenditure definition. 11 CFR 100.16(a).

In BCRA, Congress repealed the pre-BCRA regulatory definition of "coordinated general public political communication." See former 11 CFR 100.23 (January 1, 2001), repealed by Public Law 107-155, section 214(b) (March 27, 2002). Therefore, in one additional change to paragraph (a) of section 100.16, the Commission is deleting the term "coordinated general public political communication," and replacing it with references to a "coordinated communication" from section 109.21 and a "party coordinated communication" from 11 CFR 109.37.

The Commission is also moving pre-BCRA 11 CFR 109.1(e), which clarifies the basic definition of "independent expenditure," to paragraph (b) of section 100.16, without other changes. This rule provides that expenditures made by a candidate's authorized committee on behalf of that candidate never qualify as independent expenditures.

The Commission is adding a new paragraph (c) to provide examples of activities that would disqualify a communication from being treated as an independent expenditure. This provision does not in any way change the scope of the definition of coordinated communication in 11 CFR 109.21; it is merely intended to provide additional guidance.

### 11 CFR 100.23 [Removed and Reserved]

Prior to the enactment of BCRA, the Commission initiated a series of rulemakings in response to the Supreme Court's ruling on the appropriate application of the so-called "coordinated party expenditure" provisions of FECA. See *Colorado Republican Federal Campaign Committee v. Federal Election Commission*, 518 U.S. 604 (1996) ("*Colorado I*"). For example, the Commission addressed the issue of coordination when it promulgated former 11 CFR 100.23 (January 1, 2001) in December 2000. See Explanation and Justification of General Public Political Communications Coordinated with Candidates and Party Committees; Independent Expenditures, 65 FR 76,138 (Dec. 6, 2000). Former section 100.23 defined a new term, "coordinated general public political communication," drawing from judicial guidance in *Federal Election*

*Commission v. The Christian Coalition*, 52 F.Supp.2d 45, 85 (D.D.C. 1999) (“*Christian Coalition*”), to determine whether expenditures for communications by unauthorized committees, advocacy groups, and individuals were coordinated with candidates or qualified as independent expenditures. Consistent with *Christian Coalition*, *id.* at 92, the Commission’s regulations stated that such coordination could be found when candidates or their representatives influenced the creation or distribution of the communications by making requests or suggestions regarding, or exercising control or decision making authority over, or engaging in “substantial discussion or negotiation” regarding, various aspects of the communications. Former 11 CFR 100.23(c)(2) (January 1, 2001). The regulations explained that “substantial discussion or negotiation may be evidenced by one or more meetings, conversations or conferences regarding the value or importance of the communication for a particular election.” Former 11 CFR 100.23(c)(2)(iii) (January 1, 2001). The Commission provided an exception, however, for a candidate’s or political party’s response to an inquiry regarding the candidate’s or party’s position on legislative or public policy issues. See former 11 CFR 100.23(d) (January 1, 2001).

As explained above, Congress repealed 11 CFR 100.23 in BCRA and directed the Commission to promulgate new regulations to address coordinated communications. Those new regulations are discussed below in the Explanation and Justification for 11 CFR part 109. Accordingly, the Commission is now removing former section 100.23 from Title 11, Chapter 1, of the Code of Federal Regulations.

#### **11 CFR 102.6(a)(1)(ii) Transfers**

As a result of the enactment of 2 U.S.C. 441a(d)(4) and other provisions from BCRA affecting transfers between political party committees, the Commission revises 11 CFR 102.6(a)(1)(ii) to clarify the interaction of this section with those provisions of BCRA. Before BCRA, the Commission permitted unlimited transfers between or among national party committees, State party committees and/or any subordinate committees. See pre-BCRA 11 CFR 102.6(a)(1)(ii).

First, in BCRA, Congress provided that a national committee of a political party, including a national Congressional campaign committee of a political party, may not solicit, receive, or direct to another person a

contribution, donation, or transfer of funds or other thing of value, or spend any funds, that are not subject to the limitations, prohibitions, and reporting requirements of FECA. 2 U.S.C. 441i(a); see Explanation and Justification for 11 CFR 300.10(a), 67 FR 49,122 (July 29, 2002).

Second, in BCRA’s “Levin Amendment,” Congress placed restrictions on how State, district, and local party committees raise “Levin funds” and prohibited certain transfers between political party committees. See 2 U.S.C. 441i(b)(2)(C)(i); Explanation and Justification for 11 CFR 300.31, 67 FR 49,124 (July 29, 2002).

Third, also in the Levin Amendment, Congress provided that a State, district, or local committee of a political party that spends Federal funds and Levin funds for the newly defined term, Federal election activity, must raise those funds solely by itself. These committees may not receive or use transferred funds for this purpose. 2 U.S.C. 441i(b)(2)(B)(iv); see Explanation and Justification for 11 CFR 300.34(a) and (b), 67 FR 49,127 (July 29, 2002).

Fourth, Congress provided in BCRA that a committee of a political party that makes coordinated party expenditures under 2 U.S.C. 441a(d) in connection with the general election campaign of a candidate shall not, during that election cycle, transfer any funds to, assign authority to make coordinated party expenditures under this subsection to, or receive a transfer from, a committee of the political party that has made or intends to make an independent expenditure with respect to the candidate. 2 U.S.C. 441a(d)(4)(C); see Explanation and Justification for 11 CFR 109.35(c), below.

The Commission adds a new opening clause in paragraph (a)(1)(ii) of section 102.6 incorporating these restrictions by reference into the rules regarding the transfer of funds and the use of transferred funds.

The Commission received no comments on this section, and the final rule is unchanged from the proposed rule.

#### **Part 109—Coordinated and Independent Expenditures (2 U.S.C. 431(17), 441a(a) and (d), and Pub. L. 107–155 Sec. 214(c))**

The Commission is reorganizing 11 CFR part 109 into four subparts in an effort to simplify and clarify its regulations while implementing the Congressional mandates in BCRA regarding payments for coordinated communications and coordinated expenditures by political party committees. Subpart A explains the

scope of part 109 and defines the key term “agent.” Subpart B, which addresses the reporting and recordkeeping requirements for independent expenditures, has been addressed in a separate rulemaking. See Final Rules and Explanation and Justification for Bipartisan Campaign Reform Act of 2002 Reporting, published elsewhere in this issue of the **Federal Register**. Subpart C addresses coordination between a candidate or a political party and a person making a communication. Subpart D sets forth provisions applicable only to political party committees, including those pertaining to independent expenditures and support of candidates through coordinated party expenditures. See 2 U.S.C. 441a(d). The special authority for coordinated expenditures by political party committees, previously set forth in pre-BCRA 11 CFR 110.7, is being relocated to 11 CFR 109.32 and other sections in subpart D.

#### **11 CFR Part 109, Subpart A—Scope and Definitions**

##### *11 CFR 109.1 When Will This Part Apply?*

New section 109.1 introduces the scope of part 109. Section 109.1 explains that the regulations in part 109 set forth the general reporting requirements for both “independent expenditures” and “coordinated communications.” Note that the definition of “agent” found in pre-BCRA section 109.1 is being revised and moved to section 109.3. No comments were received regarding this section.

##### *11 CFR 109.3 Definitions*

The Commission proposed new 11 CFR 109.3 to define the term “agent,” which is used throughout 11 CFR part 109. This definition of agent is based on the same concept that the Commission used in framing the definition of “agent” in the revised “soft money” rules. See Final Rules and Explanation and Justification on Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 FR 49,081 (July 29, 2002). The definition of “agent” proposed in the NPRM focused on whether a purported agent has “actual authority, either express or implied,” to engage in one or more specified activities on behalf of specified principals.

In the NPRM, the Commission listed those specific sets of activities, which vary slightly depending on whether the agent engages in those activities on behalf of a national, State, district, or local committee of a party committee, or on behalf of a Federal candidate or



officeholder. See proposed 11 CFR 109.3(a) and (b), respectively. The activities specified in the NPRM closely paralleled the conduct activities associated with coordinated communications, as described in 11 CFR 109.21(b). These activities included requesting or suggesting that a communication be created, produced, or distributed; making or authorizing certain campaign-related communications; and being materially involved in decisions regarding specific aspects of communications. See proposed 11 CFR 109.3(a)(1) through (5) and (b)(1) through (5).

Several commenters requested additional clarification of the meaning of "material involvement," while other commenters suggested broadening this provision to include authority to be "materially involved" in discussions, in addition to decisions, regarding a communication. The Commission notes that the term "materially involved" is merely incorporated into the specified activities of an agent to preserve the parallel structure between the definition of "agent" and the coordination conduct standards in 11 CFR 109.21. See Explanation and Justification of 11 CFR 109.21(d)(2), below.

One commenter noted that because the proposed regulations contemplate the possibility that one candidate for Federal office might pay for a communication that is coordinated with a different candidate for Federal office, proposed 11 CFR 109.3(a)(5) should also be included as a specified activity in 11 CFR 109.3(b). The Commission agrees and is adding a new paragraph (b)(6) to 11 CFR 109.3 to make it clear that a person who works for one candidate and is authorized by that candidate to make a communication on behalf of other candidates based on material information derived from those other candidates, is to be considered an agent.

A number of commenters addressed the general scope of the definition. Seven commenters argued that the proposed definition would be overly broad because it would not expressly limit the definition of "agent" to situations where the person is acting within the scope of his or her "actual authority" as an agent. These commenters also urged the addition of a requirement that an agent's "coordination" conduct (see 11 CFR 109.21(d), below) toward a third party be based on information that was gained only due to his or her role as an agent. One of these commenters asserted that a person should not be considered an "agent" solely based on his or her authority to act, but should only become an agent when he or she takes some

action. Two commenters expressed their opposition to any attempt to categorize specific campaign positions or groups of people as agents *per se*, and one additional commenter suggested that if the Commission does include a class of *per se* agents, it should identify the specific persons within the campaign who would be placed in this category.

Several commenters expressed concern as to a candidate's or political party committee's "liability" for a person who qualifies as an agent but takes actions beyond the scope of his or her actual authority. Two other commenters expressed concerns that a principal would assume "liability" for a person who represents more than one candidate or group engaged in specified conduct while "wearing a different hat" (acting on behalf of a different person or group.) One of these commenters recommended an amendment to the rule text to provide that actions must be undertaken "on behalf of the principal" in order for liability to attach to the principal. Another commenter raised a particular concern with respect to common vendors that an "agent" who wears different hats for different groups might be deemed to engage in coordination *per se* by essentially sharing information within his or her own head.

On the other hand, eight commenters, including BCRA's principal sponsors, expressed concern that the scope of the proposed definition was underinclusive and would allow candidates or political parties to effectively coordinate communications with an outside spender through the use of conduits, including lower-level employees, consultants, or others with "apparent authority," who could sit in on a discussion and receive important information and convey that information to the third-party spender. BCRA's principal sponsors and two other commenters asserted that the definition of "agent" should not be drawn too narrowly because the analysis of whether a communication is coordinated should focus on whether the information was conveyed, not who conveyed it, or whether the conveyance was authorized. A different commenter suggested that the Commission's approach would create an incentive for a candidate, authorized committee, or a political party committee to share material information with staff members but make no effort to control the staff members' disclosures to outside entities. Three commenters urged that a person be deemed an agent if he or she discloses information to an outside entity in the absence of a strictly enforced policy against such disclosure.

One of these commenters indicated that a non-disclosure agreement might be employed to rebut the presumption of agency.

In the final rules, the Commission recognizes the Congressional determination that a spender can effectively coordinate a communication by acting in cooperation, consultation, or concert, with, or at the request or suggestion of, an agent as well as directly with a candidate, authorized committee, or political party committee. See, e.g., 2 U.S.C. 431(17) and 2 U.S.C. 441a(a)(7)(B)(i). In recognition of the concerns about overbreadth, the Commission is limiting the scope of the definition of "agent" in three ways. For the purposes of a coordination analysis under 11 CFR part 109, a person would only qualify as an "agent" when he or she: (1) Receives actual authorization, either express or implied, from a specific principal to engage in the specific activities listed in 109.3; (2) engages in those activities on behalf of that specific principal; and (3) those activities would result in a coordinated communication if carried out directly by the candidate, authorized committee staff, or a political party official. Contrary to the assertions of several commenters, a principal would not assume "liability" for agents who act outside the scope of their actual authority, nor would a person be considered an "agent" of a candidate if that person approaches an outside spender on behalf of a different organization or person. See Restatement (Second) of Agency § 219(1). The Commission rejects, however, the argument that a person who has authority to engage in certain activities should be considered to be acting outside the scope of his or her authority any time the person undertakes unlawful conduct. It is a settled matter of agency law that liability may exist "for unlawful acts of [] agents, provided that the conduct is within the scope of the agent's authority, whether actual or apparent." *U.S. v. Investment Enterprises, Inc.*, 10 F.3d 263, 266 (5th Cir. 1993).

One commenter specifically requested an exemption for "all persons in the legislative offices of federal officeholders" unless the "person dealing with them knows that they are acting on behalf of the officeholder in her capacity as a candidate." The Commission has intentionally avoided promulgating a regulation based on apparent authority, which is the authority of an actor as perceived by a third party, because such authority is often difficult to discern and would place the definition of "agent" in the

hands of a third party. Therefore, in the Commission's judgment, apparent authority is not a sufficient basis for agency for the purposes of revised 11 CFR part 109. The commenter's suggested approach would necessitate a determination of agency solely on the basis of apparent authority and is therefore inconsistent with the structure and purpose of the regulations.

These limitations, however, are not intended to establish any presumption against the creation of an agency relationship. The grant and scope of the actual authority, whether the person is acting within the scope of his or her actual authority, and whether he or she is acting on behalf of the principal or a different person, are factual determinations that are necessarily evaluated on a case-by-case basis in accordance with traditional agency principles. For example, the issue of whether or not an authorized person is acting on behalf of the principal is an objective, fact-based examination that is not dependent on that person's own characterization of whether he or she is acting in an individual capacity or on behalf of a different principal.

As explained in the NPRM, the Commission's pre-BCRA regulations include a special definition of "person" for 11 CFR part 109. See pre-BCRA 11 CFR 109.1(b)(1). The Commission did not include this separate definition of the term "person" in the NPRM because the term is already defined in pre-BCRA 11 CFR 100.10 and the Commission was concerned that a separate definition of "person" in 11 CFR part 109 might be confusing or misinterpreted as permitting labor organizations, corporations not qualified under 11 CFR 114.10(c), or other entities or individuals otherwise prohibited from making contributions or expenditures under the Act and Commission regulations, to pay for coordinated communications or to make independent expenditures. See, e.g., 11 CFR 110.20 and 114.2. The Commission has specifically addressed these prohibitions in 11 CFR 109.22, below, and the Commission did not receive any comments on the inclusion of a separate definition of "person" in 11 CFR part 109. Therefore, no new definition of "person" is included in the final rules.

#### **11 CFR Part 109, Subpart B—Independent Expenditures**

##### *11 CFR 109.10 How Do Political Committees and Other Persons Report Independent Expenditures?*

In the NPRM, the Commission included proposed 11 CFR 109.10 on reporting requirements for independent

expenditures. The Commission announced in the NPRM its expectation that these rules would not be included in the final rule of this rulemaking but would instead be finalized in a separate rulemaking. The Commission has subsequently promulgated 11 CFR 109.10 as part of a separate rulemaking. See Final Rules and Explanation and Justification for Bipartisan Campaign Reform Act of 2002 Reporting, published elsewhere in this issue of the **Federal Register**. There are no changes to 11 CFR 109.10 in this rulemaking.

##### *11 CFR 109.11 When is a Non-Authorization Notice (Disclaimer) Required? (2 U.S.C. 441d)*

The Commission is moving the disclaimer requirements for independent expenditures from pre-BCRA 11 CFR 109.3 to new 11 CFR 109.11. There are no substantive changes to this section. Additional changes to disclaimer requirements are provided at 11 CFR 110.11, which the Commission addressed in a separate rulemaking in light of BCRA's changes to the statutory disclaimer requirement. See 2 U.S.C. 441d and Final Rules and Explanation and Justification for Disclaimers, Fraudulent Solicitation, Civil Penalties, and Personal Use of Campaign Funds, 67 FR 76,962 (Dec. 13, 2002).

#### **11 CFR Part 109, Subpart C—Coordination**

##### *11 CFR 109.20 What Does "Coordinated" Mean?*

Congress did not define the term "coordinated" in FECA or in BCRA, but it did provide that an expenditure is considered to be a contribution to a candidate when it is "made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of," that candidate, the authorized committee of that candidate, or their agents. 2 U.S.C. 441a(a)(7)(B)(i). Similarly, in BCRA, Congress added a new paragraph to section 441a(a)(7)(B) to require that expenditures "made by any person (other than a candidate or candidate's authorized committee) in cooperation, consultation, or concert, with, or at the request or suggestion of, a national, State, or local committee of a political party shall be considered to be contributions made to such party committee." 2 U.S.C. 441a(a)(7)(B)(ii). Also, as explained above, an expenditure is not "independent" if it is "made in cooperation, consultation, or concert, with, or at the request or suggestion of," a candidate, authorized committee, or a political party committee. See 11 CFR 100.16.

New section 109.20(a) implements 2 U.S.C. 441a(a)(7)(B)(i) and (ii) by defining "coordinated" to mean "made in cooperation, consultation or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, or their agents, or a political party committee or its agents." While the definition of "coordinated" in 11 CFR 109.20(a) potentially encompasses a variety of payments made by a person on behalf of a candidate or political party committee, paragraph (a) is not intended to change current Commission interpretations other than to recognize the addition of the concept of coordination with political party committees under 2 U.S.C. 441a(a)(7)(B)(ii). The Commission notes that it may provide additional guidance in this area through a subsequent rulemaking.

The Commission recognizes, however, that many issues regarding coordination involve communications, and in BCRA Congress required the Commission to address coordinated communications. Public Law 107-155, sec. 214(c) (March 27, 2002). Therefore, the regulations in 11 CFR 109.21, explained below, specifically address the meaning of the phrase "made in cooperation, consultation, or concert, with, or at the request or suggestion of" in the context of communications paid for by a person other than the candidate with whom the communication was coordinated, that candidate's authorized committee, or a political party committee. Similarly, the regulations in 11 CFR 109.37, explained further below, specifically address the meaning of the phrase "made in cooperation, consultation, or concert with, or at the request or suggestion of" in the context of communications paid for by a political party committee.

In addition, paragraph (b) of section 109.20 addresses expenditures that are not made for communications but that are coordinated with a candidate, authorized committee, or political party committee. It is the successor to pre-BCRA 11 CFR 109.1(c). Paragraph (b) is being revised from its predecessor to reflect the addition of the concept of coordination with political party committees under 2 U.S.C. 441a(a)(7)(B)(ii), as well as the replacement of the reference to former 11 CFR 100.23, see Public Law 107-155, section 214(b) (March 27, 2002), and grammatical changes to reflect the new location of the rule. The Commission emphasizes that the relocation of paragraph (b) is not intended to change or alter current Commission interpretations of its predecessor in pre-BCRA section 109.1(c). One commenter asserted that only express advocacy

communications can constitute coordination, and urged the Commission to provide explicitly that non-communication expenditures will *not* be considered to be coordination. The Commission disagrees with the commenter's assertion because Congress has not so limited the statutory provisions relating to coordination. See 2 U.S.C. 431(17) and 441a(a)(7)(B)(i) and (ii). Therefore, the Commission is moving pre-BCRA 11 CFR 109.1(c), to section 109.20(b) with revisions to make it clear that these other expenditures, when coordinated, are also in-kind contributions (or coordinated party expenditures, if a political party committee so elects) to the candidate or political party committee with whom or with which they are coordinated. The exceptions contained in 11 CFR part 100, subpart C (exceptions to the definition of "contribution") and subpart E (exceptions to the definition of "expenditure") continue to apply.

#### *11 CFR 109.21 What Is a "Coordinated Communication"?*

In BCRA, Congress expressly repealed 11 CFR 100.23, Public Law 107-155, sec. 214(b) (March 27, 2002), and instructed the Commission to promulgate new regulations on "coordinated communications paid for by persons other than candidates, authorized committees of candidates, and party committees." Public Law 107-155, sec. 214(c) (March 27, 2002). Congress also mandated that the new regulations address four specific aspects of coordinated communications: (1) Republication of campaign materials; (2) the use of a common vendor; (3) communications directed or made by a former employee of a candidate or political party; and (4) communications made after substantial discussion about the communication with a candidate or political party. See Public Law 107-155, sec. 214(c)(1) through (4) (March 27, 2002).

The Commission is promulgating new 11 CFR 109.21 to comply with this Congressional mandate. This rule applies to communications coordinated with candidates, their authorized committees, political party committees, or the agents of any of the foregoing. Paragraph (a) of this section begins by defining "coordinated communication." Paragraph (b) spells out the treatment of "coordinated communications" as in-kind contributions, which must be reported. Next, paragraph (c) sets out the content standard for coordinated communications. Paragraph (d) establishes conduct standards for the coordination analysis. Paragraph (e) addresses the Congressional guidance

that an agreement or formal collaboration is not required for a communication to be considered "coordinated." Paragraph (f) provides a safe harbor for certain inquiries as to legislative and policy issues.

The Commission notes that Congress has provided that candidates and any entity "acting on behalf of 1 or more candidates" must not "solicit, receive, direct, transfer, or spend funds in connection with an election for Federal office, including funds for any Federal election activity, unless the funds are subject to the limitations, prohibitions, and reporting requirements of this Act." 2 U.S.C. 441i(e)(1)(A). The Commission has addressed this restriction in a separate rulemaking (see Final Rules and Explanation and Justification on Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 FR 49,081 (July 29, 2002)), and does not necessarily equate activity resulting in a coordinated communication under 11 CFR 109.21 with "acting on behalf of 1 or more candidates" in 2 U.S.C. 441i(e)(1). Therefore, a determination of whether a coordinated communication exists must be made separately from, and without reference to, a determination of whether an entity is "acting on behalf of 1 or more candidates" under 2 U.S.C. 441i(e)(1)(A).

#### 1. 11 CFR 109.21(a) Definition

Paragraph (a) of new section 109.21 sets forth the required elements of a "coordinated communication," which comprise a three-pronged test. For a communication to be "coordinated," all three prongs of the test must be satisfied. While no one of these elements standing alone fully answers the question of whether a communication is for the purpose of influencing a Federal election, see 11 CFR 100.52(a), 100.111(a), the satisfaction of all three prongs of the test set out in new 11 CFR 109.21 justifies the conclusion that payments for the coordinated communication are made for the purpose of influencing a Federal election, and therefore constitute in-kind contributions. Nevertheless, the Commission notes that the inclusion of one prong of its test, the content standard, could function efficiently as an initial threshold for the coordination analysis.

Under the first prong, in paragraph (a)(1), the communication must be paid for by someone other than a candidate, an authorized committee, a political party committee, or an agent of any of the foregoing. However, a person's status as a candidate does not exempt

him or her from this section with respect to payments he or she makes for communications on behalf of a different candidate. Under paragraph (a)(2), the second prong of the three-pronged test is a "content standard" regarding the subject matter of the communication. Under paragraph (a)(3), the third prong of the test is a "conduct standard" regarding the interactions between the person paying for the communication and the candidate or political party committee. A sentence proposed in the NPRM regarding republication of campaign materials is being moved from proposed paragraph (a)(3) in the NPRM to paragraph (c)(2) in the final rules.

Of the seven commenters who specifically commented on this three-part structure for the regulations, two expressed general support for the approach. The other five, including BCRA's principal sponsors, urged the Commission to emphasize the actual conduct and minimize the importance of any content standard. The final rules, however, maintain the same structure as the proposed rules for the reasons described below. The Commission recognizes that a content requirement may serve to exclude some communications that are made with the subjective intent of influencing a Federal election, thereby potentially narrowing the reach of 2 U.S.C. 441a(a)(7)(B)(i) and (ii), but the Commission believes that a content standard provides a clear and useful component of a coordination definition in that it helps ensure that the coordination regulations do not inadvertently encompass communications that are not made for the purpose of influencing a federal election.

#### 2. 11 CFR 109.21(b) Treatment as an In-Kind Contribution; Reporting

Under the Act and the Commission's regulations, a "contribution" is defined as "a 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," subject to a number of specific exceptions. See 11 CFR 100.52(a), *et seq.*; see also 2 U.S.C. 431(8)(A), *et seq.* An "expenditure" is similarly defined as "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value made by any person for the purpose of influencing any election for Federal office," and is also subject to a list of specific exceptions. See 11 CFR 100.111(a), *et seq.*; see also 2 U.S.C. 431(9)(A), *et seq.* Thus, a "payment" that is "made for the purpose of influencing any election for Federal

office” qualifies as either an “expenditure,” a “contribution,” or both, unless it is specifically excepted.

As explained above, the coordination provisions in the statute, 2 U.S.C. 441a(a)(7)(B)(i) and (ii), state that “expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of,” a candidate or a political party committee “shall be considered to be a contribution” to that candidate or political party committee. Several commenters argued that the Commission must first determine whether or not the payment for a communication constitutes an “expenditure” before proceeding to a coordination analysis. The Commission concludes that, when read as whole sentences, 2 U.S.C. 441a(a)(7)(B)(i) and (ii) require that for a contribution to exist, three requirements must be met: (1) There must be some conduct to differentiate the activity from an “independent expenditure,” see 2 U.S.C. 431(17); (2) there must be some form of payment; and (3) that payment must be made for the purpose of influencing any election for Federal office. The Commission has determined that a payment that satisfies the content and conduct standards of 11 CFR 109.21 satisfies the statutory requirements for an expenditure in the specific context of coordinated communications, and thereby constitutes a contribution under 2 U.S.C. 441a(a)(7)(B)(i) and (ii).

#### A. 11 CFR 109.21(b)(1) General Rule

Paragraph (b)(1) of section 109.21 provides that a payment for a coordinated communication is made “for the purpose of influencing” an election for Federal office, the same phrase used by Congress in the definition of both “expenditure” and “contribution.” 2 U.S.C. 431(8)(A) and (9)(A). Paragraph (b)(1) also states the general rule that a payment for a coordinated communication constitutes an in-kind contribution to the candidate, authorized committee, or political party committee with whom or with which it is coordinated, unless excepted under subpart C of 11 CFR part 100. Please note that this section encompasses electioneering communications under 11 CFR 100.29(a)(1), in addition to other communications. Congress expressly provided that when these communications are coordinated with a candidate, authorized committee, or political party committee, they must be treated like other coordinated communications in that disbursements for these communications are in-kind contributions to the candidate or party

committee with whom or which they were coordinated. See 2 U.S.C. 441a(a)(7)(C). Under BCRA, these coordinated electioneering communications, like other coordinated communications, must be treated as expenditures by the candidate, authorized committee, or political party committee with whom or with which they are coordinated. *Id.*

#### B. 11 CFR 109.21(b)(2) In-Kind Contributions Resulting From Conduct Described in Paragraphs (d)(4) or (d)(5) of This Section

Paragraph (b)(2) clarifies the application of the general rule of paragraph (b)(1) in a particular circumstance. Under the general rule in paragraph (b)(1), a candidate’s authorized committee or a political party committee receives an in-kind contribution, subject to the contribution limits, prohibitions, and reporting requirements of the Act. As explained below, two of the conduct standards, found in paragraphs (d)(4) and (d)(5) of section 109.21, do not focus on the conduct of the candidate, the candidate’s authorized committee or agents, but focus instead on the conduct of a common vendor or a former employee with respect to the person paying for the communication. To avoid the result where a candidate, authorized committee, or political party committee might be held responsible for receiving or accepting an in-kind contribution that did not result from its conduct or the conduct of its agents, the Commission explicitly provides that the candidate, the candidate’s authorized committee, or political party committee does not receive or accept in-kind contributions that result from conduct described in the conduct standards of paragraphs (d)(4) and (d)(5) of this section. This treatment is generally analogous to the handling of republished campaign materials under new 11 CFR 109.23 and the Commission’s pre-BCRA regulations. See former 11 CFR 109.1(d)(1). However, please note that the person paying for a communication that is coordinated because of conduct described in paragraphs (d)(4) or (d)(5) still makes an in-kind contribution for purposes of the contribution limitations, prohibitions, and reporting requirements of the Act.

One commenter suggested that the text of paragraph (b)(2) should be clarified to indicate that a candidate or political party committee receives and accepts an in-kind contribution resulting from a coordinated communication in which an agent of either engages in the conduct described

in paragraphs (d)(1) through (d)(3). The Commission agrees and is incorporating that suggested change into the final rules.

#### C. 11 CFR 109.21(b)(3) Reporting of Coordinated Communications

Paragraph (b)(3) of 11 CFR 109.21 provides that a political committee, other than a political party committee, must report payments for coordinated communications as in-kind contributions made to the candidate or political party committee with whom or which they are coordinated. Paragraph (b)(3) also clarifies that the recipient candidate, authorized committee, or political party committee with which a communication is coordinated must report the payor’s payment for that communication as an in-kind contribution received under 11 CFR 104.13 and must also report making a corresponding expenditure in the same amount. 11 CFR 104.13.

#### 3. 11 CFR 109.21(c) Content Standards

The NPRM sought comments as to whether content standards should be included in the coordinated communications rules, and if so, what the appropriate standard should be. A number of alternative content standards were included in the NPRM. Two commenters opposed the inclusion of any content standard, arguing that to do so would inappropriately narrow the scope of the rules when the conduct of the person paying for the communication and the candidate or political party committee is sufficient, by itself, to eliminate the independence of the communication, thereby creating an in-kind contribution under 2 U.S.C. 441a(a)(7)(B)(i) and (ii). Several other commenters, however, generally supported the inclusion of a content standard, although they disagreed as to what that standard should be.

The Commission is including content standards in the final rules on coordinated communications to limit the new rules to communications whose subject matter is reasonably related to an election. In the NPRM, the Commission proposed three distinct content standards, in paragraph (c), along with three alternatives for a fourth standard. The three proposed standards were an “electioneering communication” standard, a standard encompassing the republication of candidate campaign materials, and a standard for communications that “expressly advocate” the election or defeat of a clearly identified candidate for Federal office. In addition, the three alternative content standards ranged

from a minimal threshold that would have encompassed any “public communication” that refers to a “clearly identified candidate” (Alternative A), a public communication that “promoted, supported, attacked, or opposed” a candidate for Federal office (Alternative B), and a public communication that was made during a specific time period shortly before an election, was directed to a specific group of voters, and discussed the views or record of a candidate (Alternative C). The Commission proposed that a communication that satisfies any one of the standards would satisfy the “content” requirement of 11 CFR 109.21.

Commenters expressed a wide range of views as to the appropriate content standard. One commenter attempted to craft a stand-alone unitary content standard through a combination of the electioneering communication and republication standards. Four commenters argued that an “express advocacy” content standard is necessary to provide clear guidance and to ensure that the regulation is not vague or overly broad. Most other commenters acknowledged that the three standards of electioneering, republication, and express advocacy clearly comport with guidance from Congress and the courts, but three commenters argued that no additional content standards are warranted in the absence of any further directive from Congress. A joint comment by three commenters urged the Commission to focus the content standard on the content of the communication, rather than “external criteria” such as the timing or distribution of the communication. The same commenters also requested that the Commission adjust its content standard to ensure that communications between a political party committee and its “affiliates” are not covered.

Based generally on the approach taken by Congress with respect to electioneering communications, five commenters recommended a dual time-period approach to the content standard in which communications made 30 to 60 days before an election would be subject to lesser, if any, content restrictions than communications made outside of that time period. BCRA’s principal sponsors agreed with this approach in their comments and observed that communications made within 30 days of a primary or 60 days of a general election are usually campaign related. A different commenter also recommended temporal limits, but suggested that any communications made outside the 30 or 60 days should be completely excluded

from being treated as coordinated communications. BCRA’s principal sponsors specifically rejected this approach in their comments.

After considering the concerns raised by the commenters about overbreadth, vagueness, underinclusiveness, and potential circumvention of the restrictions in the Act and the Commission’s regulations, the Commission is setting forth four content standards to implement the statutory requirements. These standards all provide bright-line tests and subject to regulation only those communications whose contents, in combination with the manner of its creation and distribution, indicate that the communication is made for the purpose of influencing the election of a candidate for Federal office.

#### *A. 11 CFR 109.21(c)(1) Electioneering Communications*

Congress provided in BCRA that when “any person makes \* \* \* any disbursement for any electioneering communication \* \* \* and such disbursement is coordinated with a candidate or an authorized committee of such candidate, a Federal, state, or local political party committee thereof, or an agent or official of any such candidate, party or committee \* \* \* such disbursement shall be treated as a contribution to the candidate supported by the electioneering communication \* \* \* and as an expenditure by that candidate.” 2 U.S.C. 441a(a)(7)(C). To implement that statutory directive, the Commission proposed in the NPRM that the first content standard paragraph (c)(1) simply focus on whether the communication is an “electioneering communication” under 11 CFR 100.29. See Final Rule on Electioneering Communications, 67 FR 51,131 (Oct. 23, 2002). Although the proposed rule in the NPRM described a communication “that would otherwise be an electioneering communication,” this indirect reference has been removed and replaced with a direct reference to an electioneering communication.

Four commenters opined that the electioneering communication provisions in BCRA are unconstitutional, and opposed their inclusion as a content standard. One of these commenters argued that the electioneering communication content standard should be limited to include only communications containing “express advocacy.” The Commission concludes, however, that such an interpretation would undermine the scope of Congress’s definition of an electioneering communication, 2 U.S.C. 434(f)(3)(A), especially in light of the

Congressional mandate in 2 U.S.C. 441a(a)(7)(C). Another commenter argued that the Commission should nonetheless exclude the electioneering communications from the content standards because Congress did not specifically require its inclusion in that exact manner. In the Commission’s judgment, however, including the electioneering communication standard specifically authorized by Congress as one of the content standards in the definition of “coordinated communication” is a simple and straightforward way to implement 2 U.S.C. 441a(a)(7)(C). As one commenter noted, the inclusion of electioneering communications as a content standard promotes consistency because the term is already defined by Congress at 2 U.S.C. 434(f)(3)(A) and in the Commission’s new rules at 11 CFR 100.29.

The Commission considered and rejected constructing a separate definition of “coordination” that would have applied specifically to electioneering communications. A separate construction would be redundant because the relevant conduct under it would be identical to the conduct standards for other coordinated communication containing other types of content. Similarly, the Commission notes that Congress provided that an electioneering communication could be coordinated with an “official” of a candidate, party, or committee, in addition to the candidate, committees, and their agents. 2 U.S.C. 41a(a)(7)(C)(ii). The Commission is not, however, separately addressing coordination with an official in the final rule because such an official is subsumed within the definition of “agent” in 11 CFR 109.3.

#### *B. 11 CFR 109.21(c)(2) Dissemination, Distribution, or Republication of Campaign Material*

The second content standard implements the Congressional mandate that the Commission’s new rules on coordinated communications address the “republication of campaign materials.” See Public Law 107–155, sec. 214(c)(1) (March 27, 2002). The Commission’s former rule on republication of campaign materials, which has been moved from former 11 CFR 109.1(d) to new section 109.23 with minor changes explained below, sets out the required treatment of both the coordinated and uncoordinated dissemination, distribution, or republication of campaign material prepared by a candidate, an authorized committee, or an agent of either. Under section 109.23, discussed below, the

reporting responsibilities of candidates, authorized committees, and political party committees vary depending on whether they “coordinate” with a person financing the dissemination, distribution, or republication of a candidate’s campaign material.

In the final rules the “republication” content standard in paragraph (c)(2) of section 109.21 expressly links to paragraph (d)(6) of section 109.21. This link is important because paragraph (d)(6) of this section clarifies the application of the conduct standards of paragraph (d) of this section to the unique circumstances of republication. This change from the NPRM is intended to emphasize the relationship between paragraphs (c)(2) and (d)(6) of section 109.21. In addition, section 11 CFR 109.21(c)(2) includes a cross-reference to 11 CFR 109.23 to ensure that certain uses of campaign material exempted by 11 CFR 109.23(b) from the definition of “contribution” will not satisfy the content standard in 11 CFR 109.21(c)(2).

The Commission is making one change to the republication content standard from the rule proposed in the NPRM. In the NPRM, a communication would have satisfied the content standard proposed in 11 CFR 109.21(c)(2) when “the communication” disseminated, distributed, or republished campaign materials prepared by a candidate. The Commission is changing the standard so that the content standard will only be satisfied when “the public communication” disseminates, distributes, or republishes campaign materials. Although the Commission did not receive specific comments on this point, the Commission is employing the term “public communication,” as defined at 11 CFR 100.26, to conform the scope of this standard with the approach the Commission has consistently taken for the other content standards discussed below, with the exception of the “electioneering communication” standard.

#### *C. 11 CFR 109.21(c)(3) Express Advocacy*

The third content standard in paragraph (c)(3) of section 109.21 states that a communication also satisfies the content standard if it “expressly advocates” the election or defeat of a clearly identified candidate for Federal office. Although the commenters expressed widely differing opinions about whether this “express advocacy” standard should be the sole content standard, none of the commenters opposed including “express advocacy” as a content standard in the regulations.

#### *D. 11 CFR 109.21(c)(4) Additional Content Standard*

In addition to electioneering communications described in 11 CFR 100.29, communications that republish campaign materials, and communications that “expressly advocate” the election or defeat of a clearly identified candidate, the Commission proposed three other possible content standards in the NPRM and requested comment on additional alternatives. Each of these alternatives was premised on the communication qualifying as a “public communication,” with additional requirements. Alternative A required only that the communication qualify as a public communication and contain a reference to a clearly identified candidate for Federal office. Alternative B provided that the communication must also promote, support, attack, or oppose the clearly identified candidate. Alternative C required that the public communication refer to a clearly identified candidate, be made within 120 days of an election, be directed to voters within the jurisdiction of that candidate, and include an “express statement about the record or position or views on an issue, or the character, or the qualifications or fitness for office, or party affiliation,” of the clearly identified candidate.

Several commenters criticized Alternative A as overly broad, asserting that a clearly identified candidate is the minimal standard necessary to distinguish “issue ads” from communications made for the purpose of influencing an election. In contrast, several different commenters argued that the requirement of a clearly identified candidate was too restrictive because it would fail to encompass communications urging recipients to “vote Democrat” or “vote Republican.” These commenters suggested that at a minimum the Commission expand the reference to include a reference to a “clearly identified political party.” Furthermore, two commenters argued that the requirement of a clearly identified candidate also fails to encompass communications that “reflect and reinforce the themes and messages of the campaign.”

Five commenters criticized Alternative B, arguing that the terms “promote, support, attack, or oppose” are overly broad. Two different commenters suggested that the proposed standard relied on subjective criteria and would discourage public speech and weaken the value of having a content standard.

Several commenters also criticized Alternative C as overly broad and containing subjective criteria. One commenter specifically objected to including communications containing statements about a candidate’s positions on an issue. A different commenter cited a lack of a statutory basis or empirical support for the 120-day time limit and pointed out that the rule might be applied to cover communications made in a jurisdiction other than the jurisdiction of the clearly identified candidate.

In contrast, four commenters expressed general support for this standard, but with the removal of the 120 day limit, which they believed would exclude many coordinated communications made early in the election cycle. Two of these commenters also suggested that the Commission remove the word “express” from the requirement of an “express statement.” In addition, a different commenter proposed an alternative standard to cover a communication that (1) “expressly refers to” a candidate in his capacity as a candidate; (2) refers to the next election; and (3) is publicly disseminated and actually reaches 100 eligible voters.

The Commission is including a modified version of Alternative C in the final rules at 11 CFR 109.21(c)(4). Taking into consideration the suggestions of the commenters, this content standard is largely based on, but is somewhat broader than, Congress’s definition of an electioneering communication. A communication meets this content requirement if (1) it is a public communication; (2) it refers to a clearly identified candidate or political party; (3) it is directed to voters in the jurisdiction of the clearly identified Federal candidate; and (4) it is publicly distributed or publicly disseminated 120 days or fewer before a primary or general election.

The term “publicly distributed” refers to communications distributed by radio or television (*see* 11 CFR 100.29(b)(3)) and the term “publicly disseminated” refers to communications that are made public via other media, *e.g.*, newspaper, magazines, handbills. In this respect, paragraph (c)(4) reflects the fact that coordinated communications can occur through media other than television and radio. Moreover, for purposes of establishing a content standard in a coordination rule, there is no reason to exclude communications that meet the content requirements of an electioneering communication, but fail to constitute an electioneering communication only because of the media chosen for the communication.

Perhaps most importantly, paragraph (c)(4) creates parallel requirements for those whose communications do not technically qualify as electioneering communications. Because electioneering communications are by definition limited to broadcast, cable, or satellite communications (see 11 CFR 100.29), communications made through other media, such as print communications, are not included under the electioneering communication-based content standard of paragraph (c)(1). Similarly, political committees such as separate segregated funds or non-connected committees do not make electioneering communications because their payments are treated as expenditures. Therefore, under new paragraph (c)(4), for example, where a candidate and the separate segregated fund paying for the communication satisfy the conduct requirements of new 11 CFR 109.21(d), the separate segregated fund makes a coordinated communication if it pays for a newspaper advertisement. Thus, to avoid an arbitrary distinction in the content standards, paragraph (c)(4) applies to all "public communications," a term defined and set forth in BCRA by Congress. 2 U.S.C. 431(22); 11 CFR 100.26. The use of the term "public communication" provides consistency within the regulations and distinguishes covered communications from, for example, private correspondence and internal communications between a corporation or labor organization and its restricted class. The three commenters who specifically addressed the proposed use of this term expressed support for its inclusion. One of these commenters pointed out that the use of "public communication" provides "helpful consistency within the regulations." In addition, a different commenter suggested that the Commission "completely exempt" e-mail and Internet communications from its coordination regulations. By framing the content standard in terms of a "public communication," the Commission addresses that comment. Although the term "public communication" covers a broad range of communications, it does not cover some forms of communications, such as those transmitted using the Internet and electronic mail. 11 CFR 100.26.

This new standard focuses as much as possible on the face of the public communication or on facts on the public record. This latter point is important. The intent is to require as little characterization of the meaning or the content of communication, or inquiry into the subjective effect of the

communication on the reader, viewer, or listener as possible. See *Buckley v. Valeo*, 424 U.S. 1, 42-44 (1976). The new paragraph (c)(4) is applied by asking if certain things are true or false about the face of the public communication or with limited reference to external facts on the public record. This fourth content standard does not require a description of a candidate's views or positions, a requirement in the proposed rules that raised objections from commenters.

Paragraph (c)(4)(ii) of section 109.21 requires that the public communication must be publicly distributed or publicly disseminated 120 days or fewer before a primary election or a general election. The 120-day time frame is based on 2 U.S.C. 431(20)(A)(i) (see 11 CFR 100.24(b)(1)) and has several advantages. First, it provides a "bright-line" rule. Second, it focuses the regulation on activity reasonably close to an election, but not so distant from the election as to implicate political discussion at other times. As noted, Congress has, in part, defined "Federal election activity" in terms of a 120-day time frame, deeming that period of time before an election to be reasonably related to that election. See 2 U.S.C. 431(20)(A)(i). In contrast, the "express advocacy" content standard in paragraph (c)(3) of section 109.21 applies without time limitation. Similarly, this 120-day time frame is more conservative than the treatment of public communications in the definition of Federal election activity, which regulates public communications without regard to timeframe. 2 U.S.C. 431(20)(A)(iii); 11 CFR 100.24(b)(3).

The Commission has considered, but rejected, the use of a shorter time-frame, specifically, thirty days before a primary election and sixty days before a general election. This shorter time-frame would have been derived by analogy from the definition of "electioneering communication." See 2 U.S.C. 434(f)(3)(A). The shorter time-frames would have had the advantage of symmetry with the electioneering communication definition. There is, however, an important difference between the electioneering communication concept and the paradigm adopted here for regulating coordination. Although this content standard (*i.e.*, paragraph (c)(4)(ii)) is obviously similar to the definition of "electioneering communication," this content standard is only one part of a three-part test (see discussion of paragraph (a) of section 109.21, above), whereas the definition of "electioneering communication" is complete in itself. Under this final rule,

even if a political communication satisfies the content standard, the conduct standards must still be satisfied before the political communication is considered "coordinated." In this light, the content standard may be viewed as a "filter" or a "threshold" that screens out certain communications from even being subjected to analysis under the conduct standards.<sup>2</sup> Thus it is appropriate to consider a broader time-frame when applying this content standard because it serves only to identify political communications that may be coordinated if other conditions (*i.e.*, the conduct standards) are satisfied, and thus may be inappropriately underinclusive if too narrow.

The new standard also encompasses communications that refer to political parties as well as those that identify candidates, as suggested by several commenters. This extension of the content standards implements 2 U.S.C. 441a(a)(7)(B)(ii), added by section 214(c) of BCRA, which provides that expenditures made by any person in coordination with a political party committee is considered to be a contribution to that party committee.

Several commenters said that there should be an exception to the content standards for communications that refer to the "popular name" of a bill or law that includes the name of a Federal candidate who was a sponsor of the bill or law. In addition to questions whether such an exception is necessary in light of the other restrictions explained above, the Commission believes that the "popular name" proposal would also open new avenues for the circumvention of the Act and the Commission's regulations. Because the "popular name" of a bill is not a defined term, and is not subject to specific restrictions by Congress, an exemption for the use of a candidate's name in the popular name of a bill might shield a communication that clearly attacks or supports a candidate by naming the bill in a way that associates the candidate with a popular or disfavored stance. The Commission concludes that if one or more of the conduct standards is met and the communication is directed to voters in that candidate's jurisdiction and made within 60 days of general election, Congress does not intend for such a communication to be exempted from the statutory requirements merely

<sup>2</sup> In effect, the content standard of paragraph (c)(4)(ii) operates as a "safe harbor" in that communications that are publicly disseminated or distributed more than 120 days before the primary or general election will not be deemed to be "coordinated" under this particular content standard under any circumstances.



because the communication contains a reference to a crafted name for a piece of legislation in addition to the name of the clearly identified candidate.

The new standard also incorporates the concept of the "targeting" of the communication as an indication of whether it is election-related. BCRA's principal sponsors commented that a "key factor" in determining whether a communication should be covered under these rules is whether the communication is "targeted" to a specific voter audience. By requiring that the communication be "directed to voters in the jurisdiction of the clearly identified Federal candidate," the Commission is addressing this concern. In order to encompass communications that are coordinated with a political party committee and refer to a political party, but do not refer to a candidate, the Commission also provides that the content standard in paragraph (c)(4) would be satisfied when the communication is directed "to voters in a jurisdiction in which one or more candidates of the political party appear on the ballot." The "directed to voters" requirement focuses on the intended audience of the communication, rather than a quantitative analysis of the number of possible recipients or the expected geographic limits of a particular media, that will be determined on a case-by-case basis from the content of the communication, its actual placement, and other objective indicators of the intended audience. For example, a public communication that otherwise makes express statements about promoting or attacking Representative X or Senator Y for their stance on the "X-Y Bill" does not satisfy this requirement if it is only broadcast in Washington, DC, and not in either Member's district or State. For purposes of new paragraph (c)(4), "jurisdiction" means a member of Congress' district, the State of a U.S. Senator, and the entire United States for the President and Vice President in the general election or before the national nominating convention.

#### 4. 11 CFR 109.21(d) Conduct Standards

Paragraph (d) of section 109.21 lists five types of conduct that satisfy the "conduct standard" of the three-part coordination test. Under these rules, if one of these types of conduct is present, and the other requirements described in paragraphs (a) and (c) are satisfied, the communication is not made "totally independently" from the candidate, the candidate's authorized committee, or the political party committee, *see Buckley*, 424 U.S. at 47, and thus is

coordinated. The introductory sentence of paragraph (d) implements the Congressional mandate in BCRA that the coordination regulation not require "agreement or formal collaboration." Pub. L. 107-155, sec. 214(c) (March 27, 2002); *see* more complete discussion below.

In the NPRM, the Commission proposed five categories of conduct that would each satisfy the conduct standard when material information is conveyed or used: (1) A request or suggestion; (2) material involvement in decisions; (3) a substantial discussion; (4) use of a common vendor; and (5) use of a former employee or independent contractor of a campaign committee or political party. Several commenters offered general observations regarding the Commission's approach to a conduct standard in the NPRM. One commenter applauded the Commission's decision to focus on specific transactions leading to a coordinated communication, rather than general contacts between an organization and a campaign. That same commenter, however, complained along with three other commenters that the standards still operated to establish a presumption of coordination and should be further narrowed to require a direct causal link between the sharing of information and its use in a particular communication. One other commenter expressed a concern that the proposed rules would operate to unduly restrict corporations or labor organizations from preparing voter guides or "scorecards" to reflect the positions of candidates on specific legislation or issues.

BCRA's principal sponsors urged the Commission to ensure that lobbying activities would not result in a finding of coordination under the final rules. Similarly, a different commenter suggested that the conduct standards be limited to contacts with a candidate in his or her role as a candidate, rather than simply in the capacity of a legislator. That commenter indicated that without such a restriction the conduct rules would improperly restrict the ability of organizations to coordinate issue advocacy with elected officials. "An action alert from a nonprofit asking the public to call their Senators and urge them to pass McCain-Feingold," the commenter argued, "is more effective if the timing and content can be coordinated with Senator McCain."

##### A. 11 CFR 109.21(d)(1) Request or Suggestion

Under the Act, as amended by BCRA, an expenditure made by any person at the "request or suggestion" of a candidate, an authorized committee, a political party committee, or an agent of

any of the foregoing is a contribution to the candidate or political party committee. 2 U.S.C. 441a(a)(7)(B)(i), (ii). The first conduct standard, in 11 CFR 109.21(d)(1), implements this "request or suggestion" statutory provision. This standard has two prongs and satisfying either prong satisfies the conduct standard.

Three commenters requested in a joint comment that the term "suggest" be given additional definition or explanation, proposing that the definition should reflect a suggestion as a "a palpable communication intended to, and reasonably understood to, convey a request for some action." The Commission notes that the "request or suggest" standard is derived from the Supreme Court's *Buckley* decision and has existed in the Commission's regulations without further definition for over two decades. *See Buckley v. Valeo*, 424 U.S. at 47 (finding that "the 'authorized or requested' standard of the Act operates to treat all expenditures placed in cooperation with or with the consent of a candidate, his agents, or an authorized committee of the candidate as contributions"); *see* also H.R. Doc. No. 95-44, at 55 (Jan. 12, 1977) (Explanation and Justification for 11 CFR 109.1, defining independent expenditure as an "expenditure . . . which is not made \* \* \* at the request or suggestion of" a candidate, authorized committee, or their agents). A determination of whether a request or suggestion has occurred requires a fact-based inquiry that, even under the commenters' proffered explanation, can not be easily avoided through further definition.

A different commenter expressed concern that the proposed rule would have broadly affected communications made with respect to all candidates after the person paying for such communications has received a request or suggestion from any candidate. In this final rule, the Commission does not intend such an application. Neither of the two prongs of this conduct standard can be satisfied without some link between the request or suggestion and the candidate or political party who is, or that is, clearly identified in the communication. Where Candidate A requests or suggests that a third party pay for an ad expressly advocating the election of Candidate B, and that third party publishes such a communication with no reference to Candidate A, no coordination will result between Candidate B and the third party payor. However, a candidate is not removed from the provisions of the conduct standards merely by virtue of being a candidate. If Candidate A is an "agent"

for Candidate B in the example above, then the communication would be coordinated. Similarly, if Candidate A requests that Candidate B pay for a communication that expressly advocates the election of Candidate A, and Candidate B pays for such a communication, that communication is a coordinated communication and Candidate B makes an in-kind contribution to Candidate A.

The first type of conduct, in paragraph (d)(1)(i), is satisfied if the person creating, producing, or distributing the communication does so at the request or suggestion of a candidate, authorized committee, political party committee, or agent of any of the foregoing. The *Buckley* court originally drew on the 1974 House and Senate Reports accompanying the 1974 amendments to the Act when it upheld the section in FECA that distinguished a communication made “at the request or suggestion” of the candidate or political party committee from those that are made “totally independently from the candidate and his campaign.” *Buckley*, 424 U.S. at 47 (citing H.R. Rep. No. 93-1239, at 6 (1974) and S. Rep. No. 93-689, at 18 (1974)). A “request or suggestion” is therefore a form of coordination under the Act, as approved by *Buckley*. A request or suggestion encompasses the most direct form of coordination, given that the candidate or political party committee communicates desires to another person who effectuates them.

In the NPRM, the Commission noted that this provision, for example, would not apply to a speech at a campaign rally, but, in appropriate cases, would apply to requests or suggestions directed to specific individuals or small groups for the creation, production, or distribution of communications. One commenter agreed with this approach, requesting that the rule itself more clearly reflect this explanation. However, the Commission is not amending its rules because it could be potentially confusing to delineate in a rule every conceivable situation that could arise. Instead, the Commission offers the following explanation of the new rule. The “request or suggestion” conduct standard in paragraph (d)(1) is intended to cover requests or suggestions made to a select audience, but not those offered to the public generally. For example, a request that is posted on a web page that is available to the general public is a request to the general public and does not trigger the conduct standard in paragraph (d)(1), but a request posted through an intranet service or sent via electronic mail directly to a discrete group of recipients

constitutes a request to a select audience and thereby satisfies the conduct standard in paragraph (d)(1). Similarly, a request in a public campaign speech or a newspaper advertisement is a request to the general public and is not covered, but a request during a speech to an audience at an invitation-only dinner or during a membership organization function is a request to a select audience and thereby satisfies the conduct standard in paragraph (d)(1).

The second way to satisfy the “request or suggestion” conduct standard (paragraph (d)(1)(ii)) is for a person paying for a communication to suggest the creation, production, or distribution of the communication to the candidate, authorized committee, political party committee, or agent of any of the foregoing, and for the candidate, authorized committee, political party committee, or agent to assent to the suggestion. The NPRM explained that this second way of satisfying the conduct standard is intended to prevent circumvention of the statutory “request or suggestion” test (2 U.S.C. 441a(a)(7)(B)(i), (ii)) by, for example, the expedient of implicit understandings without a formal request or suggestion. Two commenters supported the addition of this new prong in order to prevent such circumvention of the Act. Two different commenters suggested that only affirmative assent should satisfy the conduct standard, although one of these commenters proposed that the rule should also cover situations where the parties have a prior agreement that a certain response be taken as an affirmative answer. Three other commenters opposed an assent standard entirely as overly complex and dependent on subjective criteria. One of these commenters argued that such an approach would undermine the Commission’s efforts to create bright lines with respect to conduct resulting in coordination, and joined with another of these commenters in expressing concern that such a standard would be too easily triggered in the context of lobbying or other discussions with elected representatives. Another of these commenters also questioned whether certain responses, such as silence or “when a Congressman’s eyes light up at the mention of a certain communication,” constitute assent. One commenter also questioned whether evidence of circumvention exists to justify this approach. This commenter warned that the assent standard could run afoul of the district court’s decision in *Christian Coalition*, which, in the commenter’s words, determined that

“coordination does not exist where a union or corporation merely informs a candidate about its own political plans.”

The Commission recognizes that the assent of a candidate may take many different forms, but it disagrees that a standard encompassing assent to a suggestion is overly complex. Assent to a suggestion is merely one form of a request; it is “an expression of a desire to some person for something to be granted or done.” See *Black’s Law Dict.* (6th ed. 1990) p. 1304 (definition of “request”). A determination of whether assent to a suggestion occurs is necessarily a fact-based determination, but no more so than a determination of whether other forms of a request or suggestion occur. The Commission therefore also disagrees with the commenter who suggested that the approach in the NPRM might not be permissible in light of the *Christian Coalition* decision. The Commission did not, as that commenter suggested, propose that coordination could result where a payor “merely informs” a candidate or political party committee of its plans. Rather, under the proposed rule, a candidate or a political party committee will have accepted an in-kind contribution only if there is assent to the suggestion; by rejecting the suggestion, the candidate or political party committee may unilaterally avoid any coordination.

It is the Commission’s judgment that the assent to a suggestion must be encompassed by this conduct standard to prevent the circumvention of the requirements of the Act in this area. Therefore, and in light of the reasons set forth in the NPRM and above, the Commission is promulgating the request or suggestion standard without change from its form in the NPRM.

One commenter suggested that the Commission should permit a person to rebut the “presumption” of coordination after a request or suggestion “by demonstrating that the organization had decided to make that communication prior to the contact with the candidate, campaign, or party.” The Commission does not agree with the creation of such a “presumption.” Instead, a request or suggestion must be based on specific facts, rather than presumed, to satisfy this conduct standard. Thus, the absence of a presumption obviates the need to establish a mechanism for rebuttal.

As discussed above, the *Buckley* Court expressly recognized a request or suggestion by a candidate as a direct form of coordination resulting in a contribution. *Buckley*, 424 U.S. at 47. In the NPRM, the Commission sought

comment on whether the unique nature of requests or suggestions by candidates or political party committees indicates that such conduct should be handled differently under the coordination regulations. Specifically, the Commission asked whether a request or suggestion for a communication by a candidate or political party committee should be viewed as a special case, and as sufficient, in and of itself, regardless of the contents of the communication, to establish coordination. Three commenters opposed any rule in which a request or suggestion, without any content standard, could constitute a coordinated communication. One of these commenters argued that such an approach would permit a “false positive,” such as when a group that has long planned a lobby effort meets with a legislator, and the legislator “expresses her hope” that the group will publicize a particular piece of legislation bearing her name. Similarly, another of these commenters asserted that there are “numerous communications that may be made at the request or suggestion of a candidate that have no relationship to any election.” The Commission agrees with these commenters’ concerns. Even supporters of this approach appeared to acknowledge in their testimony that a request to run an advertisement well before the next election might not be in an “electoral context” and therefore should not necessarily be treated as a coordinated communication under the Commission’s regulations. Therefore, the final rules do not create any exception from the content standard for the “request or suggestion” conduct standard.

#### *B. 11 CFR 109.21(d)(2) Material Involvement*

The second conduct standard, 11 CFR 109.21(d)(2), addresses situations in which a candidate, authorized committee, or a political party committee is “materially involved in decisions” regarding specific aspects of a public communication paid for by someone else. Those specific aspects are listed in paragraphs (i) through (vi) of paragraph (d)(2): (i) The content of the communication; (ii) the intended audience; (iii) the means or mode of the communication; (iv) the specific media outlet used; (v) the timing or frequency of the communication; or (vi) the size or prominence of a printed communication or duration of a communication by means of broadcast, cable, or satellite. Please note that “the specific media outlet used” includes those listed in the definition of “public communication” in 11 CFR 100.26, including the

broadcast and print media, mass mailings, and telephone banks. The “content of the communication” would include the script of telephone calls.

One commenter argued that this conduct standard should be limited to situations in which a candidate or political party has “significant control or influence over decisions” regarding the communication. The Commission disagrees, as such a standard would do little to clarify the rule or its application. The same commenter expressed concern about the scope of the “material involvement” standard, arguing that one candidate’s actions with respect to a third-party spender might “taint” all of that third-party’s communications with respect to different candidates. For the same reasons discussed above in the context of the “request or suggestion” standard, the Commission is not tailoring its rules to address that perceived potential outcome.

Two other commenters characterized the material involvement standard as redundant in light of the “substantial discussion” conduct standard, and one also opposed its inclusion because of vagueness and because Congress did not mandate this specific approach in BCRA, nor was it mandated by *Christian Coalition*. In contrast, four commenters indicated general support for the inclusion of this standard in the final rules and urged the Commission to expand it to cover material involvement in “discussions,” in addition to decisions, regarding a communication. The Commission recognizes that there is a potential overlap between the “material involvement” standard and the “substantial discussion” standard explained below. Many activities that satisfy the “substantial discussion” conduct standard will also satisfy the “material involvement” standard, but the “material involvement” standard encompasses some activities that would not be encompassed by the “substantial discussion” standard or any of the other conduct standards. For example, a candidate is materially involved in a decision regarding the content of a communication paid for by another person if he or she has a staffer deliver to that person the results of a polling project recently commissioned by that candidate, and the polling results are material to the payor’s decision regarding the intended audience for the communication. However, as explained below, the “substantial discussion” standard would not be satisfied by such delivery without some “discussion” or some form of interactive exchange between the candidate and the person paying for the communication. The

Commission thus believes that the “material involvement” standard is necessary to address forms of “real world” coordination that would not be addressed in any of the other conduct standards.

One commenter advised against any interpretation of the rule that would define “material” to require a showing of direct causation. For the purposes of 11 CFR part 109, “material” has its ordinary legal meaning, which is “important; more or less necessary; having influence or effect; going to the merits.” *Black’s Law Dict.* (6th ed. 1990) p. 976. Thus, the term “materially involved in decisions” does not encompass all interactions, only those that are important to the communication. The term “material” is included to safeguard against the inclusion of incidental participation that is not important to, or does not influence, decisions regarding a communication. The factual determination of whether a candidate’s or authorized committee’s involvement is “material” must be made on a case-by-case basis.

The “material involvement” standard does not provide a “bright-line” because its operation is necessarily fact-based. Nevertheless the inclusion of a “materiality” requirement serves to protect against overbreadth, consistent with Supreme Court jurisprudence. In construing the meaning of “material” in the context of Securities Exchange Commission regulations, the Supreme Court specifically rejected a “bright-line rule” for materiality:

A bright-line rule indeed is easier to follow than a standard that requires the exercise of judgment in the light of all the circumstances. But ease of application alone is not an excuse for ignoring the purposes of the Securities Acts and Congress’ policy decisions. Any approach that designates a single fact or occurrence as always determinative of an inherently fact-specific finding such as materiality, must necessarily be overinclusive or underinclusive.

*Basic v. Levinson*, 485 U.S. 224, 236 (1988). Therefore, the “material involvement” standard does not impose a requirement of direct causation, but focuses instead on the nature of the information conveyed and its importance, degree of necessity, influence or the effect of involvement by the candidate, authorized committee, political party committee, or their agents in any of the communication decisions enumerated in 11 CFR 109.21(d)(2)(i) through (vi).

The Commission has considered and rejected the suggestion of the commenter who recommended that “material involvement” be narrowed to

a “but-for” test, which would require proof that the communication would not have occurred *but for* the material involvement of a candidate, authorized committee, political party committee, or agent. The Commission is not adopting this approach or any similar requirement of direct causation in its final rules. Under such an analysis, information would only be “material” if all other potential influences on the content of the communication, its intended audience, its means or mode, the specific media outlet used, the timing or frequency of the communication, or the size, prominence, or duration of the communication could be eliminated. This would result in an extremely intrusive factual determination. For example, under the commenter’s suggested approach, a candidate might propose a specific date for publication of a communication, but that candidate would not be materially involved in the decision regarding the timing of the communication unless the Commission could prove that no alternate factor could have led to the same timing decision. Such an approach is also unworkable because foreclosing all potential alternatives imposes an unnecessarily high burden of proof. The Commission also believes that such an approach would be unwarranted because the plain meaning of “material,” as explained above, provides sufficient guidance for an inherently fact-based determination. For the same reasons, the Commission rejects any interpretation of “material involvement” that would require a showing that the communication is made “as a result of” the involvement of a candidate, an authorized committee, a political party committee, or an agent.

Instead, a candidate, authorized committee, or political party committee is considered “materially involved” in the decisions enumerated in paragraph (d)(2) after sharing information about plans, projects, activities, or needs with the person making the communication, but only if this information is found to be material to any of the above-enumerated decisions related to the communication. Similarly, a candidate or political party committee is “materially involved in decisions” if the candidate, political party committee, or agent conveys approval or disapproval of the other person’s plans. The candidate or representatives of an authorized committee or political party committee need not be present or included during formal decisionmaking process but need only participate to the

extent that he or she assists the ultimate decisionmaker, much like a lawyer who provides legal advice to a client is materially involved in a client’s decision even when the client ultimately makes the decision.

The Commission notes that as with the “request or suggest” standard, the “material involvement” standard would not be satisfied, for example, by a speech to the general public, but is satisfied by remarks addressed specifically to a select audience, some of whom subsequently create, produce, or distribute public communications. However, it is not necessary that the involvement of the candidate or political party committee be traced directly to one specific communication. Rather, a candidate’s or political party committee’s involvement is material to a decision regarding a particular communication if that communication is one of a number of communications and the candidate or political party committee was materially involved in decisions regarding the strategy for those communications. For example, if a candidate is materially involved in a decision about the content or timing of a 10-part advertising campaign, then each of the 10 communications is coordinated without the need for further inquiry into the decisions regarding each individual ad on its own.

In order to respond to requests by several commenters for additional clarification about how the standard would operate, the Commission is providing the following hypothetical: Candidate A reads in the newspaper that the Payor Group is planning an advertising campaign urging voters to support Candidate A. Candidate A faxes over her own ad buying schedule to Payor Group, hoping that Payor Group will plan its own ad buying schedule around Candidate A’s schedule to maximize the effect of both ad campaigns. The Payor Group subsequently runs ads that are all on NBC and ABC during the 6:00 news hour and during the most expensive weekday timeslot on NBC, whereas Candidate A’s ads are run on CBS during the 6:00 news hour and during the most expensive time slot on CBS. When asked, Payor Group acknowledges that it received the fax from Candidate A, but says only that its plans for the timing of the campaign were in flux at the time they received the fax. The analysis under the “materially involved” conduct standard focuses on whether the fax constituted material involvement by the candidate in a decision regarding the timing of the Payor Group communications. Significant facts might include that the

Payor Group changed its previously planned schedule, or that Payor Group had not yet made plans and had factored in the fax in its decision to choose CBS and the same time slot, or show in some other way that the fax was “important; more or less necessary, having influence or effect, [or] going to the merits” with respect to the Payor Group’s decisions about the timing of its ads. The transmission and receipt of the fax in combination with the correlation of the two ad campaigns gives rise to a reasonable inference that Candidate A’s involvement was material to the Payor Group’s decision regarding the timing of its ad campaign. If, on the other hand, the example is changed so that the Payor Group’s ads run on the same channel right after the candidate’s ads in a way that lessens the effect of both ad campaigns, it may be appropriate to conclude that Candidate A’s involvement was *not* material to the Payor Group’s decision regarding the timing of its ad campaign. In other words, the degree to which the communications overlapped or did not overlap is one indication of whether Candidate A’s involvement was material to the timing of the Payor Group communications.

#### *C. 11 CFR 109.21(d)(3) Substantial Discussion*

In BCRA, Congress also directed the Commission to address “payments for communications made by a person after substantial discussion about the communication with a candidate or political party.” Public Law 107–155, sec. 214(c)(4) (March 27, 2002). In the NPRM, the Commission proposed a third conduct standard that would apply when a communication satisfying one or more of the content standards “is created, produced, or distributed after one or more substantial discussions about the communication between the person paying for the communication” and a candidate, authorized committee, political party committee, or an agent of any of the foregoing. 67 FR at 60,065 (September 24, 2002). The proposed rule also specified that a discussion is substantial “if information about the plans, projects, or needs of the candidate or political party committee is conveyed to a person paying for the communication, and that information is material to the creation, production, or distribution of the communication.” 67 FR at 60,066 (September 24, 2002).

Three commenters supported the inclusion of this standard exactly as proposed in the NPRM. Two different commenters, however, characterized this standard as redundant in light of the “material involvement” standard

and suggested that they be combined into a single standard. One other commenter asserted that there was "insufficient quantification" as to the meaning of a "substantial" discussion and recommended that "substantial discussion" join "material involvement" as subjects for future rulemaking consideration. A different commenter advised that "material" should be further defined in the context of this standard. Two commenters advocated a return to the *Christian Coalition* test of whether or not the candidate and the spender emerge as "partners or joint venturers," while one of these commenters urged the Commission to specifically exclude discussions about policy and legislation in this context.

The Commission is including the "substantial discussion" standard in the final rules on coordinated communications because, as stated above, Congress required it to address this issue. Public Law 107-155, sec. 214(c)(4) (March 27, 2002). Under paragraph (d)(3) of 11 CFR 109.21, a communication meets the conduct standard if it is created, produced, or distributed after one or more substantial discussions between the person paying for the communication, or the person's agents, and the candidate clearly identified in the communication, his or her authorized committee, his or her opponent, or the opponent's authorized committee, a political party committee, or their agents. While the Commission recognizes the commenter's concerns that "substantial" and "material" are not set forth as bright-line tests, the Commission views an analysis of a "substantial discussion" as necessarily fact-specific and not naturally conducive to a meaningful bright-line analysis. Nevertheless, the Commission is providing an analytical framework in which a finder of fact determines whether a discussion occurred, whether certain information was conveyed, and whether that information is material to the creation, production, or distribution of the communication. The *Christian Coalition* suggestion that a candidate and spender emerge as "joint venturers" would only serve to confuse readers. The "substantial discussion" conduct standard in this final rule addresses a direct form of coordination between a candidate, authorized committee, political party committee, or their agents and a third-party spender, and the Commission is narrowing the scope of this standard through the additional requirements that the discussion be "substantial" and the information conveyed be "material." Paragraph

(d)(3) explains that a "discussion" is "substantial" if information about the plans, projects, activities, or needs of the candidate, authorized committee, or political party committee that is material to the creation, production or distribution of the communication is conveyed to a person paying for the communication. "Discuss" has its plain and ordinary meaning, which the Commission understands to mean an interactive exchange of views or information. "Material" has the meaning explained above in the context of the "materially involved" standard. In other words, the substantiality of the discussion is measured by the materiality of the information conveyed in the discussion.

#### *D. 11 CFR 109.21(d)(4) Common Vendor*

In BCRA, Congress required the Commission to address "the use of a common vendor" in the context of coordination. Public Law 107-155, sec. 214(c)(2) (March 27, 2002). In the NPRM, the Commission proposed the conduct standard in paragraph (d)(4) of section 109.21 to implement this Congressional mandate. Proposed paragraphs (d)(4)(i) and (ii) provide that a common vendor is a commercial vendor who is contracted to create, produce, or distribute a communication by the person paying for that communication after that vendor has, during the same election cycle, provided any one of a number of listed services to a candidate who is clearly identified in that communication, or his or her authorized committee, or his or her opponent or the opponent's authorized committee, or a political party committee, or an agent of any of the foregoing. Under proposed paragraph (d)(4)(iii), the conduct standard would be satisfied if the common vendor conveys material information about the plans, projects, or needs of a candidate, authorized committee, or political party committee to the person paying for the communication, or if the vendor uses that material information in the creation, production, or distribution of a covered communication.

Many commenters addressed the "common vendor" standard proposed in the NPRM. One commenter asserted that this rule would not be enforceable because the term "common vendor" was "inadequately defined" to cover most vendors. This commenter warned that proposed standard would not reach many vendors who continuously reorganize personnel, merge, or dissolve and reorganize as different entities during or between election cycles. The

same commenter believed it was important to include in the list of covered services media production vendors, pollsters, and media buying firms (for purchasing time slots) because they work closely together.

The Commission recognizes the possibility that commercial vendors may attempt to circumvent the new rules by re-organizing as different entities or replacing personnel. However, the Commission notes that the final rules focus on the use or conveyance of information used by a vendor, including its owner, officers, and employees, in providing services to a candidate, authorized committee, or political party committee, rather than the particular structure of the vendor. The specific reference to a vendor's owners and officers was not included in the proposed rule, but is being added to the final rule to address the commenter's concern. Therefore, if an individual or entity qualifies as a commercial vendor at the time that individual or entity contracts with the person paying for a communication to provide any of the specified services, then the individual or entity qualifies as a common vendor to the extent that the same individual or entity, "or any owner, officer, or employee" of the commercial vendor, has provided any of the enumerated services to the candidate during the specified time period. Thus, a commercial vendor may qualify as a common vendor under 11 CFR 109.21(d)(4) even after reorganizing or shifting personnel.

Five commenters argued that the Commission should presume that the conduct standard is satisfied whenever a candidate and an outside spender use the same common vendor. According to these commenters, the rule proposed by the Commission in the NPRM would create an "impossibly high standard to meet" if it required a showing that the common vendor actually "uses" particular information.

In contrast, five different commenters asserted that any such presumption would be overly broad and "taint" the vendor, or submit the candidate, political party committee, vendor, or spender to unwarranted "liability" for communications presumed to be coordinated merely because of the use of the vendor. Several commenters in this latter group were concerned that an overly broad rule would chill speech and discourage vendors from providing services to candidates or political party committees, which the commenters warned would be particularly troublesome in areas where only a limited number of vendors provide specific services. One commenter

argued that the proposed standard could lead to extensive and burdensome investigations that would place spenders at a disadvantage because it would be difficult for them to show that the vendor had not used certain information from a candidate's campaign committee or political party committee to create a communication. One commenter, who described himself as being in the business of "buying media spot time on behalf of various political clients," stated that he had spent a substantial sum of money responding to investigations, and opposed any rule in which "merely associating" with a common vendor might expose the person paying for a communication to the risk of enforcement proceedings. Four of these commenters, however, were generally supportive of the Commission's proposal to require that the common vendor "use or convey" material information to the person making the communication at issue, as opposed to simply providing services to both a candidate or party and the spender.

Similarly, three other commenters expressed concern about the "*per se* inclusion of vendors by class" and suggested that the inclusion of specific types of vendors should merely raise a "rebuttable presumption." These three commenters further noted that the proposed reference to "material information" would include information "used previously" in providing services to the candidate or party. These commenters questioned how a vendor might account for the "use" of material information.

After considering the wide range of comments, the Commission has decided to promulgate a final rule that is similar in many respects to the proposed rule, with certain modifications discussed below. It disagrees with those commenters who contended the proposed standard created any "prohibition" on the use of common vendors, and likewise disagrees with the commenters who suggested it established a presumption of coordination. Instead, the Commission notes that a different group of commenters urged the Commission to adopt such a presumption precisely because they believed the proposed standard did not already contain a presumption and would therefore be difficult to meet. The final rules in 11 CFR 109.21(d)(4) restrict the potential scope of the "common vendor" standard by limiting its application to vendors who provide specific services that, in the Commission's judgment, are conducive to coordination between a candidate or political party committee

and a third party spender. But under this final rule, even those vendors who provide one or more of the specified services are not in any way prohibited from providing services to both candidates or political party committees and third-party spenders. This regulation focuses on the sharing of information about plans, projects, activities, or needs of a candidate or political party through a common vendor to the spender who pays for a communication that could not then be considered to be made "totally independently" from the candidate or political party committee.

The only commenter who identified himself as providing vendor services indicated that it is not the common practice for vendors to make use of one client's media plans in executing the instructions of a different client, and sharing "any client information given by another" would "compromise the professional relationship" that is at the "core of any service business." That commenter observed that "[c]ommon vendors, at whatever tier, who avoid such conduct should never be at risk of being deemed an instrument of coordination." No other commenters offered conflicting information on these points. Thus, because the Commission addresses only the use or conveyance of information material to the communication, the final rules narrowly target the coordination activity without unduly intruding into existing business practices.

The common vendor rule is carefully tailored to ensure that all four of the following conditions must be met. First, under 11 CFR 109.21(d)(4)(i), the person paying for the communication, or the agent of such a person, must contract with, or employ, a "commercial vendor" to create, produce, or distribute the communication. The term "commercial vendor" is defined in the Commission's pre-BCRA regulations at 11 CFR 116.1(c) as "any person[] providing goods or services to a candidate or political committee whose usual and normal business involves the sale, rental, lease, or provision of those goods or services." Thus, this standard only applies to a vendor whose usual and normal business includes the creation, production, or distribution of communications, and does not apply to the activities of persons who do not create, produce, or distribute communications as a commercial venture.

The second condition, in paragraph (d)(4)(ii), is that the commercial vendor must have provided certain services to the candidate or political party committee that puts the commercial

vendor in a position to acquire information about the campaign plans, projects, activities, or needs of the candidate or political party committee that is material to the creation, production or distribution of the communication. Nine specific services are enumerated in paragraphs (d)(4)(ii)(A) through (I). Providing these services places the "common vendor" in a position to convey information about the candidate's or party committee's campaign plans, projects, activities, or needs to the person paying for the communication where that information is material to the communication.

The third condition is that the new rule only applies to common vendors who provide the specified services during the current election cycle. "Election cycle" is defined in 11 CFR 100.3. The Commission sought comment on whether a different time period, such as a fixed two-year period, would more accurately align the rule with existing campaign practices. One commenter responded that a two-year period would be too long and suggested that the standard should pertain "only to vendors who were common during the election year," or possibly further limited to vendors who provide services during the 30-day period before a primary election or the 60-day period before an election. That commenter also suggested that a time limit be placed on the use or conveyance of information received from a candidate or political party in recognition that such information would eventually become stale and unworthy of restriction. A different commenter, however, suggested that a two-year time limit would be too short because it would not appropriately encompass election activity that takes place throughout the six-year Senate election cycle. Another commenter advised that the time limit for common vendor activities should be limited to the period "during the calendar year in which the candidate's name is on the ballot for election to Federal office." One commenter proposed an alternative in which a vendor's services would not be covered by the rule outside of the 30 days following the time the vendor ceased working for the candidate or political party committee.

The Commission is retaining "election cycle" as the temporal limit in the final rules. The election cycle provides a clearly defined period of time that is reasonably related to an election. The mixture of an election cycle with a calendar year cutoff would likely cause confusion.

The fourth condition, in paragraph (d)(4)(iii), requires that the commercial

vendor “uses or conveys information about the candidate’s campaign plans, projects, activities, or needs” or the political party committee’s campaign plans, projects, activities, or needs where that information is material to the creation, production, or distribution of the communication. This requirement encompasses situations in which the vendor assumes the role of a conduit of information between a candidate or political party committee and the person making or paying for the communication, as well as situations in which the vendor makes use of the information received from the candidate or political party committee without actually transferring that information to another person. By referring in the final rule to the candidate’s “campaign” plans, projects, activities, or needs, the Commission clarifies that this conduct standard is not intended to encompass lobbying activities or information that is not related to a campaign. The Commission notes, however, that to the extent information relates to campaign plans, projects, activities, or needs, that information would be covered by this provision even if that information also related to non-campaign plans, projects, activities, or needs of the candidate.

Several commenters opposed the inclusion of the “use or convey” requirement as being exceedingly difficult to prove, while other commenters viewed it as necessary protection against an unduly burdensome rule. Two of the commenters who supported a general presumption of coordination suggested that a confidentiality agreement might be used to rebut the presumption, while three others opposed a general presumption suggested that the Commission establish a safe harbor for spenders who enter into a confidentiality agreement filed under seal with the Commission. A different commenter suggested that the “use or convey” provision would be “unworkable” unless it provided for some form of exception for the use of an “ethical screen.” Otherwise, according to that commenter, a single employee might “disqualify” an entire firm from providing services to both a candidate and a third-party spender.

The final rule does not require the use of any confidentiality agreement or ethical screen because it does not presume coordination from the mere presence of a common vendor. The final rule also does not dictate any specific changes to the business relationship between a vendor and its clients. The Commission does not anticipate that a person who hires a vendor and who, irrespective of BCRA’s requirements,

follows prudent business practices, will be inconvenienced by the final rule. Nevertheless, the Commission does not agree that the mere existence of a confidentiality agreement or ethical screen should provide a *de facto* bar to the enforcement of the limits on coordinated communication imposed by Congress. Without some mechanism to ensure enforcement, these private arrangements are unlikely to prevent the circumvention of the rules.

The Commission also sought comment on the list of common vendor services covered in paragraph (d)(4)(ii), and specifically whether purchasing advertising time slots for television, radio, or other media should be added to that list. Several commenters recommend excluding the following groups of vendor classes from those listed in the proposed rules on the principle that they lack adequate control as decisionmakers or they have little knowledge of communications: (1) “Media time buyers and others where the technical nature of their services diminishes their role in controlling the content of strategically sensitive communications;” (2) fundraisers; (3) vendors involved in selecting personnel, contractors, or subcontractors; (4) vendors involved in consulting; and (5) vendors involved in identifying or developing voter lists, mailing lists, or donor lists. A media buyer urged the Commission not to include media buyers in the list of covered activities because they have little decisionmaking authority and act within “predetermined strategic parameters including timing, geographic and demographic target audiences, and budget,” but do not “create, produce, or distribute” a communication by themselves.

The Commission is incorporating the list of covered common vendor services into the final rules without change from its form in proposed section 109.21(d)(4)(ii) of the NPRM. The Commission recognizes that media buyers might potentially serve a number of different roles at the direction of various clients. Therefore, the Commission is not including “purchasing advertising time slots for television, radio, or other media” as a distinct category in the list of common vendor services covered in paragraph (d)(4)(ii). However, media buyers and other similar service providers are included to the extent that their services fit within one of the other categories already listed in paragraph (d)(4)(ii).

#### *E. 11 CFR 109.21(d)(5) Former Employee/Independent Contractor*

In BCRA, Congress required the Commission to address in its revised coordination rules “persons who previously served as an employee of” a candidate or political party committee.” Public Law 107–155, sec. 214(c)(3) (March 27, 2002). In the NPRM, the Commission proposed 11 CFR 109.21(d)(5) to implement this Congressional requirement. Proposed paragraph (d)(5) would have applied to communications paid for by a person who was previously an employee or an independent contractor of a candidate, authorized committee, or political party committee, or by the employer of such a person. Under the rule proposed in the NPRM, the “former employee” conduct standard would be satisfied if the former employee or independent contractor “makes use of or conveys” “material information” about the candidate’s or political party committee’s plans, projects, or needs to the person paying for the communication.

Commenters responding to the proposed rules made many of the same points about the “former employee” standard as they made with respect to the “common vendor” standard. One commenter opposed the proposal in the NPRM that covered the “use” of material information provided by a former employee. Such a standard, that commenter asserted, would be too broad and would amount to a “*per se*” rule that would lead to overly intrusive investigations. In contrast, four commenters argued that the proposed standard was not broad enough and suggested that the Commission establish a presumption of coordination when a former employee or an independent contractor of a campaign committee or political party committee pays for, or his or her current employer pays for, a communication that satisfies the content requirements of this section. These commenters argued that without such a presumption, it would be far too difficult to prove that an employee used material information or conveyed information to the new employer. In addition, however, three of these commenters suggested that the Commission limit the application of this presumption of coordination to a specified class of employees who are likely to “possess material political information.” A different commenter indicated that it would be difficult to enforce this conduct standard because the definition of “independent contractor” in the NPRM was underinclusive in that it failed to account for the fact that an independent



contractor might reorganize or change names, making it difficult to verify the identity of the independent contractor or former employee. As with the potential reorganization of common vendors discussed above, the Commission does not believe that new requirements are necessary at this time to address the commenter's concerns. Employees and independent contractors are natural persons, rather than corporations or other entities or legal constructs, so the Commission anticipates that reorganization for the purpose of circumventing the new rules is even less likely than in the context of common vendors.

Three other commenters asserted that Congress had not mandated the proposed rule and expressed concern about the "increased risk of legal liability" for both party committees and former employees" that they believed would "stigmatize" the former employee and make it difficult for that person to find subsequent employment.

This proposed rule would have required that the employment or independent contractor relationship exist during the current election cycle. As discussed above with regard to paragraph (d)(4) on common vendors, the Commission requested comments on whether this time period should be a fixed two-year period, or the same election cycle, but not more than two years. Most comments on this provision were identical to the comments on the temporal requirements in paragraph (d)(4). One commenter believed the two-year time frame was "inappropriate and overly injurious both to corporations trying to communicate about legislative topics and to those former employees of candidates seeking employment with such corporations." In contrast, a different commenter suggested a six-year time period and asserted that the two-year period was too short to fully address the real-world practices in this area. Another commenter offered the same proposal the commenter had offered with respect to common vendors: the former employee should be covered during the calendar year in which the candidate's name is on the ballot for election to Federal office. A fourth commenter suggested that the time frame be limited to the previous two years of the current election cycle.

The final rule in paragraph (d)(5) incorporates the temporal limit of the "election cycle," which is defined in 11 CFR 100.3. This time limit establishes a clear boundary based on an existing definition and ensures that there is a clear link between the conveyance or use of the material information and the time period in which that material

might be relevant. In addition, the Commission disagrees with the single commenter who claimed that the two-year limit would harm the job prospects of former employees or inhibit discussions between corporations and candidates or political party committees. The Commission notes that the final rule focuses only on the use or conveyance of information that is material to a subsequent communication and does not in any way prohibit or discourage the subsequent employment of those who have previously worked for a candidate's campaign or a political party committee.

One commenter proposed a "cooling off period" for a former employee instead of a temporal limit based on a calendar year or an election cycle. Under that proposed approach, the former employee or independent contractor of a candidate or political party would have to wait for a certain time period, which the commenter proposed as 30–60 days, before providing services to a person paying for a communication covered by section 109.21(c). After that period, the former employee or independent contractor would not trigger the proposed conduct standard. The Commission is unwilling to impose a complete ban on an individual's employment opportunities, as a "cooling off period" requirement would function. Instead, the Commission views the narrowly tailored approach proposed in the NPRM as preferable and is therefore not incorporating a "cooling off period" into the final rules.

This conduct standard expressly extends to an individual who had previously served as an "independent contractor" of a candidate's campaign committee or a political party committee. One commenter opposed the inclusion of independent contractors, arguing that an "independent contractor" is legally distinct from an "employee" and Congress, recognizing this distinction in other statutes, must have made an intentional decision to exclude independent contractors by using the term "employee" in section 214(c)(3). The Commission disagrees with this assumption and instead notes that the inclusion of independent contractors is entirely consistent with the use of "employee" because both groups receive some form of payment for services provided to the candidate, authorized committee or political party committee. Therefore, the Commission includes the term "independent contractor" in the final rule to preclude circumvention by the expedient of characterizing an "employee" as an "independent contractor" where the

characterization makes no difference in the individual's relationship with the candidate or political party committee. This coordination standard also applies to the employer of an individual who was an employee or independent contractor of a candidate, authorized committee, or political party committee. The Commission interprets the Congressional intent behind section 214(c)(3) of BCRA to encompass situations in which former employees, who by virtue of their former employment have been in a position to acquire information about the plans, projects, activities, or needs of the candidate's campaign or the political party committee, may subsequently use that information or convey it to a person paying for a communication. The Commission has added the requirement that the information must be material to the subsequent communication in order to ensure that the conduct standard is not overly broad.

One commenter argued that the proposed rule's incorporation of the phrase "material information used \* \* \* in providing services to the candidate" was vague and overly broad, and should be limited to material information about "campaign strategy and tactics," excluding policy views. This commenter also questioned whether the information must be material to the communication itself, or whether the information used to serve the candidate was material to those services. The Commission notes that in many cases the information may be material to both, but for the purposes of this final rule the Commission is only concerned with whether the information is material to the communication, not to the services previously provided to the candidate. As with the common vendor standard, this requirement encompasses both situations in which the former employee assumes the role of a conduit of information and situations in which the former employee makes use of the information but does not share it with the person who is paying for the communication.

The Commission is including this conduct standard to address what it understands to be Congress' primary concern, which is a situation in which a former employee of a candidate goes to work for a third party that pays for a communication that promotes or supports the former employer/candidate or attacks or opposes the former employer/candidate's opponent. One commenter proposed that the former employer (*i.e.*, the candidate's campaign or a political party committee) must be shown to exercise ongoing control over its former employee. A different

commenter, however, recognized that the Commission's proposed rules would address such a concern by removing the reporting duties that might otherwise be triggered by the actions of the former employee who acted without the knowledge of his or her former employer. This reporting rule is included in the final rules in 11 CFR 109.21(b)(2). This commenter, however, raised a similar concern by suggesting that the final rule should be limited to cover only former employees when they are acting under the direction or control of their new employer, the third-party spender, to ensure that the former employee does not use or convey material information without the spender's knowledge. The Commission notes, however, that such a limitation is unnecessary and confusing in cases where the former employee or independent contractor pays for the communication by himself or herself.

The conduct standard in the final rule in 11 CFR 109.21(d)(5) does not require that the former employee act under the continuing direction or control of, at the behest of, or on behalf of, his or her former employer. This is because a former employee who acts under such circumstances is a present agent, and the revised rules covering agents apply to this individual. See 11 CFR 109.3. To give effect to the statutory language requiring that the Commission's coordination regulations address "former employees" (see Pub. L. 107-155, sec. 214(c)(3)) the Commission concluded that a "former employee," as that term is used in the statute, must be different from "agent." Furthermore, the Commission does not find in BCRA, the FECA, or the general legal principles of employer-employee law, a need or justification for such an exception that would, in essence, categorically free employers from responsibility for the actions of their employees. Instead, the Commission reiterates its observation offered above with respect to the "common vendor" standard. Irrespective of the Congressional requirements in BCRA, employers may elect to clearly define the scope of employee responsibilities and to institute prudent policies or practices to ensure that the employee adheres to the scope of those expectations.

One commenter supported an exception to the "common vendor" and "former employee" conduct standards to permit persons in either of those classes to use or convey information if that vendor or former employee "makes use of information in a manner that is adverse to the candidate or political party committee without any coordination with the candidate

benefiting from the communication." In the Commission's judgment, such an exception would obfuscate otherwise bright lines and provide a clear path for the circumvention of the Act and the Commission's regulations without offering a discernible benefit. Under the proposed exception, "use of information in a manner that is adverse to the candidate or political party committee" requires a subjective determination of both the interests of the candidate or political party and the effect that the "information" has on those interests.

The Commission also sought comment as to whether this conduct standard should be extended to volunteers, such as "fundraising partners," who by virtue of their relationship with a candidate or a political party committee, have been in a position to acquire material information about the plans, projects, activities, or needs of the candidate or political party committee. Three commenters opposed the inclusion of volunteers. One of these commenters argued that volunteers traditionally participate in more than one campaign at a time and "as a matter of practice, campaigns attempt to make volunteers feel more involved in the campaign by the intentional communication of 'insider' information." While the FECA exempts campaign volunteers from certain requirements, this "practice" of sharing "insider" information is not adequate justification to exclude volunteers. Rather, the Commission recognizes that some, but not all, "volunteers" operate as highly placed consultants who might be given information about the plans, projects, activities, or needs of the candidate or political party committee with the expectation that the "volunteer" will use or convey that information to effectively coordinate a communication paid for by that "volunteer" or by a third-party spender. Nevertheless, the Commission is not extending the scope of the "former employee" standard in its final rules to encompass volunteers for a different reason. The Commission views the choice of the word "employee" in section 214(c)(3) as a significant indication of Congressional intent that the regulations be limited to individuals who were in some way employed by the candidate's campaign or political party committee, either directly or as an independent contractor. The Commission also notes that even though volunteers are not subject to the "former employee" conduct standard, their actions could nonetheless come within a different conduct standard in new 11 CFR

109.21(d). For example, if a candidate requests that a volunteer pay for a communication, and the volunteer does so, the communication is coordinated if the content of the communication satisfies one or more of the content standards in new 11 CFR 109.21(c). Also, in some cases a volunteer may qualify as an agent of a candidate or a political party under the definition in new 11 CFR 109.3.

*F. 11 CFR 109.21(d)(6) Dissemination, Distribution, or Republication of Campaign Materials*

Paragraph (d)(6) clarifies the application of the conduct standards to a candidate or authorized committee after the initial preparation of campaign materials when those materials are subsequently disseminated, distributed, or republished, in whole or in part, by another person. In light of the candidate's initial role in preparing the campaign material that is subsequently incorporated into a republished communication, it is possible that the candidate's involvement in the original preparation of part or all of that content might be construed as triggering *per se* one or more of the conduct standards in paragraph (d) of 11 CFR 109.21. To avoid this result, the Commission is including 11 CFR 109.21(d)(6) in the final rules to clarify that the candidate's actions in preparing the original campaign materials are not to be considered in the conduct analysis of paragraph (d)(1) through (d)(3) of section 109.21. (See above). Instead, 11 CFR 109.21(d)(6) explains that the focus is on the conduct of the candidate that occurs after the initial preparation of the campaign materials. For example, if a candidate requests or suggests that a supporter pay for the republication of a campaign ad, the resulting communication paid for by the supporter satisfies both a content standard (republication) and conduct standard (request or suggestion), and is therefore a coordinated communication. However, without that request or suggestion, and assuming no other contacts with the candidate, the candidate's authorized committee, or their agents, the communication does not satisfy the "request or suggestion" conduct standard and is not a coordinated communication even though it contains campaign material prepared by the candidate.

The final rules are being changed from the proposed rules to explain more clearly the application of the conduct standards in paragraphs (d)(4) and (d)(5) to republished campaign materials, as well as to clarify the relationship between paragraph (c)(2) and (d)(6) of

section 109.21 as well as between 11 CFR 109.37(a)(2)(i) and paragraph (d)(6) of section 109.21. The conduct standards in paragraph (d)(4) and (d)(5) would not be affected by (d)(6). Whereas a candidate's or authorized committee's original preparation of campaign materials might have possibly been misconstrued as satisfying the conduct standards in (d)(1) through (d)(3) without the addition of (d)(6), there is no such danger that the (d)(4) "common vendor" standard or the (d)(5) "former employee" standard would be satisfied by the candidate's or authorized committee's original preparation of campaign materials. However, to avoid any potential confusion, the second sentence in paragraph (d)(6) clarifies that a communication that satisfies the conduct standards in (d)(4) or (d)(5) is still a coordinated communication even if the communication only satisfies the content standard in paragraph (c)(2).

##### 5. 11 CFR 109.21(e) No Requirement of Agreement or Formal Collaboration

When Congress, in BCRA, required the Commission to promulgate new regulations on coordinated communications, it specifically barred any regulatory requirement of "agreement or formal collaboration" to establish coordination. Public Law 107-155, sec. 214(c) (March 27, 2002). In the NPRM, the Commission noted that although Congress did not define this phrase, earlier versions of BCRA stated that "collaboration or agreement" was not required to show coordination. See S. 27, 107th Cong., 1st Sess. (as passed by the Senate and transferred to the House, 478 Cong. Rec. H2547 (May 22, 2001)). The phrase "agreement or formal collaboration" reached its final form through a substitute amendment to H.R. 2356 offered by Representative Shays. See H. Amdt. 417, 478 Cong. Rec. H393 through H492 (February 13, 2002). New 11 CFR 109.21(d) provides that each of the five conduct standards can be satisfied "whether or not there is agreement or formal collaboration, which is defined in paragraph (e)," thereby implementing the Congressional prohibition against any requirement of agreement or formal collaboration in the coordination analysis. The final rule follows the proposed rule, with only a small grammatical change.

One commenter supported a distinction between "formal collaboration" and "collaboration." Two other commenters strongly supported this paragraph as proposed in the NPRM. Another commenter recognized the Congressional prohibition on a requirement of agreement or formal collaboration, but urged the

Commission to establish clear guidelines as to what is and is not permissible activity. The Commission attaches significance to the addition of the term "formal" as it modifies the term "collaboration." Thus, paragraph (e) states that the conduct standards in paragraph (d) of section 109.21 require some degree of collaboration, but not "formal" collaboration in the sense of being planned or systematically approved or executed.

New paragraph (e) also explains the term "agreement." Coordination under section 109.21 does not require a mutual understanding or meeting of the minds as to all, or even most, of the material aspects of a communication. Any agreement means the communication is not made "totally independently" from the candidate or party. See *Buckley*, 424 U.S. at 47. In the case of a request or suggestion under paragraph (d)(1) of section 109.21, agreement is not required at all.

A fourth commenter suggested that there should be no finding of coordination where "the organization was not seeking the candidate's agreement and would have run the ad anyway." This commenter recommended that the Commission further refine the requirement so that a communication is considered coordinated only if the request, agreement or collaboration of the candidate or political party is shown to lead the organization to change some aspect of the communication.

The Commission is not adopting either of these suggestions as they require a subjective determination of the intent of the spender and are therefore inconsistent with the Commission's approach of establishing clear guidance through objective determinations where possible. Paragraph (e) therefore does not require any particular form of investigation or finding, but simply implements the judgment of Congress by clarifying the two criteria that are not required.

##### 6. 11 CFR 109.21(f) Safe Harbor for Responses to Inquiries About Legislative or Policy Issues

In the NPRM, the Commission requested comment on whether any specific "safe harbor" provisions or exceptions to the conduct or content standards should be included in the final rules. Commenters recommended a number of possible exceptions and safe harbors. As explained below, the Commission is including one of the proposed exceptions in its final rules in 11 CFR 109.21(f).

Several commenters urged the Commission to adopt an exception to

the conduct standards for a candidate's response to an inquiry, whether in writing or other form, regarding his or her position on legislative or policy issues. These responses are helpful in preparing voter guides, voting records, in debates or other communications. One commenter cited constitutional considerations and argued that such an exception is required by *Clifton v. FEC*, 114 F.3d 1309 (1st Cir. 1997). Another advised that this exception would provide notice that the regulation is not intended to deter certain activities that groups or individuals "might otherwise avoid out of an abundance of caution." A different commenter advocated an exemption for any public communications, including republication of materials from candidates, their committees or political parties, that meet the criteria of 11 CFR 110.13 regarding candidate debates and forums, and 11 CFR 114.4(c) regarding voter registration drives and voter education.

In new section 109.21(f) the Commission is providing a "safe harbor" to address the commenters' concerns that the preparation of a voter guide or other inquiries about the views of a candidate or political party committee might satisfy one of the conduct standards in section 109.21(d). This safe harbor applies to inquiries regarding views on legislation or other policy issues, but does not include a response that conveys information about the candidate's or political party's campaign plans, projects, activities, or needs that is material to the creation, production, or distribution of a subsequent communication.

This exception satisfies the requirements of *Clifton v. FEC*, 114 F.3d 1309. See also new 11 CFR 114.4(c)(5), explained below. In *Clifton*, the Court examined the Commission's then-new regulations at 11 CFR 114.4(c)(4) and (5). The Commission's old regulations permitted corporations and labor organizations to prepare and produce "voter guides" to the general public, subject to the following prohibition:

[T]he corporation or labor organization shall not contact or in any other way act in cooperation, coordination, or consultation with or at the request or suggestion of the candidates, the candidates' committees or agents regarding the preparation, contents and distribution of the voter guide, except that questions may be directed in writing to the candidates included in the voter guide and the candidates may respond in writing; 11 CFR 114.4(c)(5)(ii)(A) (1996). While *Clifton* invalidated that regulation as unauthorized by the Act, 927 F. Supp. at 500, the Court nevertheless suggested that a safe harbor might have survived.

The safe harbor in new 11 CFR 109.21(f) is more permissive than the regulations at issue in *Clifton* in several respects. First, the regulations in section 109.21 do not institute a general prohibition on any contact with the candidate or political party committee, so paragraph (f) functions as a safe harbor from less-restrictive regulations. For example, organizations whose activities are confined to producing voter guides may contact a candidate and discuss aspects of that candidate's campaign plans, projects, activities, or needs without making a coordinated communication so long as the voter guide does not contain express advocacy and it is not directed to voters in a specific jurisdiction and made available within the designated time period directly before an election, as provided in paragraphs 109.21(c)(1) and (4). In addition, whereas the regulations at issue in *Clifton* specifically required that both the inquiry and the response be written, paragraph (f) does not.

Three commenters urged the Commission to adapt its rules to exclude lobbying contacts with a candidate. Similarly, a different commenter proposed an exception for any legislative communication made prior to a vote, hearing, or other legislative consideration of the issue, and that "coincidentally" occurs prior to an election. Another commenter also urged the Commission to exempt grassroots communications that urge the people to contact state, local or national officials urging them to take action in their official capacity so long as they do not refer to the election or an official's status or qualifications as a federal candidate.

The Commission has considered these possible exceptions as well as the statements of BCRA's principal sponsors that the Commission's regulations should not interfere with lobbying activities. Therefore, these final rules are not intended to restrict communications or discussions regarding pending legislation or other issues of public policy. The Commission has determined, however, that sufficient safeguards exist in the final rules to ensure that lobbying and other activities that are not reasonably related to elections will not be unduly restricted. Additional exceptions are unnecessary and inappropriate because they could be exploited to circumvent the requirements of 11 CFR part 109.

One commenter proposed an exemption for a "legislative communication" made during legislative consideration of an issue when the communication "coincidentally" occurs just before an

election. This exemption is neither necessary nor workable, as it hinges on a complex analysis of several separate factors, as well as a determination of what qualifies as a "legislative communication." The potential number of communications that might satisfy the content standard, satisfy the conduct standard, and "coincidentally" occur just before an election is likely to be quite small in comparison to the potential number of communications that would actually be made for the purpose of influencing an election but carefully tailored to fit within the proposed exemption.

In addition, one commenter cautioned that exceptions are not appropriate to the extent that they apply to communications that meet the "electioneering communication" content standard. This commenter asserted that the plain language of the BCRA provides the Commission with little to no room to craft exceptions with respect to electioneering communications. The Commission disagrees that any such Congressional directive can be derived from plain language of BCRA in the context of coordinated electioneering communications.

#### *11 CFR 109.22 Who Is Prohibited From Making Coordinated Communications?*

The Commission requested comment on whether to include a separate section to clarify that any person who is otherwise prohibited under the Act from making a contribution or expenditure is also prohibited from making a coordinated communication. No comments addressed this provision. Section 109.22 is included in the final rules to avoid any potential misconception that 11 CFR 100.16, 11 CFR 109.23, or any portion of 11 CFR part 109 in any way permit a corporation, labor organization, foreign national, or other person to make a contribution or expenditure when that person is otherwise prohibited by any provision of the Act or the Commission's regulations from doing so.

#### *11 CFR 109.23 How Are Payments for the Dissemination, Distribution, or Republication of Candidate Campaign Materials Treated and Reported?*

The Commission has decided to implement only those regulatory changes that are necessary to implement section 214 of BCRA at this time. In the NPRM, the Commission proposed moving former 11 CFR 109.1(d) to proposed new section 11 CFR 100.57, along with several substantive changes. To whatever extent that proposed 11

CFR 100.57 would have elaborated on former 11 CFR 109.1(d), the Commission has reconsidered and instead is addressing the payments for the republication of campaign materials in new 11 CFR 109.23, which more closely follows former section 109.1(d). New section 109.23 implements post-BCRA 2 U.S.C. 441a(a)(7)(B)(iii), with several changes made to reflect new requirements in BCRA. Paragraph (a) of section 109.23 corresponds to former 11 CFR 109.1(d)(1), and paragraph (b) of section 109.23 addresses the exceptions in former 11 CFR 109.1(d)(2), in addition to several new exceptions.

#### *1. 11 CFR 109.23(a) Financing of the Dissemination, Distribution, or Republication of Campaign Materials Prepared by a Candidate*

Paragraph (a) of 11 CFR 109.23 addresses the financing of the dissemination, distribution, or republication of campaign materials prepared by the candidate, the candidate's authorized committee, or their agents and is the successor to former 11 CFR 109.1(d)(1). The only changes from the former rule are the replacement of one cross-reference to former 11 CFR 100.23 (repealed by Congress in BCRA), a clarification that a candidate does not receive or accept an in-kind contribution unless there is coordination, and minor grammatical changes. Paragraph (a) provides that the financing of the distribution, or republication of campaign materials prepared by the candidate, the candidate's authorized committee, or an agent of either is considered a contribution for the purposes of the contribution limitations and reporting responsibilities by the person making the expenditure but is not considered an in-kind contribution received or an expenditure made by the candidate or the candidate's authorized committee unless the dissemination, distribution, or republication of campaign materials is coordinated.

Under former 11 CFR 109.1(d)(1), coordination was determined by whether the dissemination, distribution, or republication of the campaign material qualified as a "coordinated general public political communication" under former 11 CFR 100.23, which was repealed by Congress in BCRA. Therefore, under new 11 CFR 109.23, whether the dissemination, distribution, or republication is coordinated is determined by reference to the new coordinated communication rules in 11 CFR 109.21 and 109.37.

As discussed above in the Explanation and Justification for 11 CFR 109.21(c)(2) and 109.21(d)(6), a

communication that disseminates, distributes, or republishes campaign material prepared by a candidate, the candidate's authorized committee, or an agent of either, and that satisfies one of the conduct standards in section 109.21(d), is a coordinated communication. Under 11 CFR 109.21(b), and by implication from paragraph (a) of section 109.23, the financing of such a "coordinated communication" is an in-kind contribution received by the candidate, authorized committee, or political party committee with whom or with which it was coordinated. In other words, the person financing the dissemination, distribution, or republication of candidate campaign material has provided something of value to the candidate, authorized committee, or political party committee. See 2 U.S.C. 431(8)(A)(i). Note that this is the same result under former section 109.1(d)(1). Even though the candidate, authorized committee, or political party committee does not receive cash-in-hand, the practical effect of this constructive receipt is that the candidate, authorized committee, or political party committee must report the in-kind contribution in accordance with 11 CFR 104.13, meaning that it must report the amount of the payment as a receipt under 11 CFR 104.3(a) and also as an expenditure under 11 CFR 104.3(b).

To the extent that the financing of the dissemination, distribution, or republication of campaign materials finances does not qualify as a coordinated communication, the candidate or authorized committee that originally prepared the campaign materials has no reporting responsibilities and has not received or accepted an in-kind contribution. However, whether or not the dissemination, distribution, or republication qualifies as a coordinated communication under 11 CFR 109.21, paragraph (a) of section 109.23, like former section 109.1(d)(1), requires the person financing such dissemination, distribution, or republication always to treat that financing, for the purposes of that person's contribution limits and reporting requirements, as an in-kind contribution made to the candidate who initially prepared the campaign material. In other words, the person financing the communication must report the payment for that communication if that person is a political committee or is otherwise required to report contributions. Furthermore, that person must count the amount of the payment towards that person's contribution limits with

respect to that candidate under 11 CFR 110.1 (persons other than political committees) or 11 CFR 110.2 (multicandidate political committees), and with respect to the aggregate bi-annual contribution limitations for individuals set forth in 11 CFR 110.5.

Although paragraph (a) of 11 CFR 109.23 is nearly otherwise unchanged from former 11 CFR 109.1(d)(1), the new reference to 11 CFR 109.21 has an important impact because new section 109.21 reflects Congress's decision in post-BCRA 2 U.S.C. 441a(a)(7)(B)(ii) that expenditures may be coordinated with a political party committee. Therefore, the republication of campaign material may be coordinated with a political party committee. As explained above, the financing "by any person of the dissemination, distribution, or republication of campaign material prepared by a candidate *qualifies as an expenditure for the purposes of 2 U.S.C. 441a(a)(7)(B)(ii).*" See 2 U.S.C. 441a(a)(7)(B)(iii) (emphasis added.) Under 2 U.S.C. 441a(a)(7)(B)(ii), "expenditures" that are coordinated with a political party committee "shall be considered to be contributions made to such party committee." Thus, reading 2 U.S.C. 441a(a)(7)(B)(ii) and (iii) together, the Commission concludes that when a person coordinates with a political party committee to finance the dissemination, distribution, or republication of a candidate's campaign material, that financing constitutes a contribution to the political party committee. Therefore, under paragraph (a) of section 109.23, the financing of the dissemination, distribution, or republication of campaign material prepared by a candidate constitutes an in-kind contribution to a political party committee with which it was coordinated, and the amount of that financing must be reported by that political party committee as both an in-kind contribution received and an expenditure made. See 11 CFR 104.13. The Commission notes that section 109.23 does not encompass in this respect the dissemination, distribution, or republication of campaign material prepared by the political party committee, but only campaign material prepared by a candidate.

#### 2. 11 CFR 109.23(b) Exceptions

In the NPRM, the Commission proposed several exceptions to the general "republication" rule proposed 11 CFR 100.57. Proposed 11 CFR 100.57(b) would have clarified that five listed uses of campaign material prepared by a candidate would not qualify as a contribution under proposed 11 CFR 100.57(a). The

exceptions were largely drawn from uses already permitted by other rules.

Several commenters focused on the proposed exceptions or proposed additional exemptions. One commenter proposed that republication should not be considered a contribution unless there is coordination. The Commission does not discern any instruction from Congress, nor any other basis, that justifies such a departure from the Commission's longstanding interpretation of the underlying republication provision in the Act, now set forth at 2 U.S.C. 441a(a)(7)(B)(iii). The same commenter also inquired as to whether a corporation or labor organization may pay for the republication of campaign materials for use outside its restricted class, so long as that republication is not coordinated with a candidate under the applicable conduct standards set forth in 11 CFR 109.21(d) (see below). The Commission normally addresses specific inquiries about the application of particular provisions through its Advisory Opinion process, rather than in the rulemaking context, but the Commission takes this opportunity to emphasize that this rulemaking is not intended to change existing law with respect to the practices of corporations or labor organizations. See 11 CFR 109.22. Both the pre- and post-BCRA regulations provide that the financing of the dissemination, distribution, or republication of a candidate's campaign material constitutes a contribution to that candidate. Furthermore, such financing for activities outside the restricted class of a corporation or labor organization would also constitute an expenditure by the labor organization or corporation made in connection with an election for Federal office that would therefore be prohibited by 2 U.S.C. 441b(a). Therefore, a corporation or labor organization may not disseminate, distribute, or republish campaign materials except as provided in 11 CFR 114.3(c)(1).

The same commenter also proposed additional exceptions for paragraph (b) to cover republication and distribution of original campaign material that already exists in the public domain, such as presentations made by candidates, biographies, positions on issues or voting records. The Commission declines to promulgate a "public domain" exception because such an exception could "swallow the rule," given that virtually all campaign material that could be republished could be considered to be "in the public domain." In the event that a campaign retains the copyright to its campaign materials, and the campaign materials

are thus not in the public domain as a matter of law, this means that the republisher would presumably have to obtain permission from the campaign to republish the campaign materials, raising issues of authorization or coordination. See 11 CFR 110.11.

Similarly, a commenter suggested an exception to permit the "fair use" of campaign materials, which would presumably permit the republication of campaign slogans and other limited portions of campaign materials for analysis and other uses provided under the legal tests developed with respect to intellectual property law. This commenter also argued that the "fair use" exception should be available to supporters of the candidate who originally produced the materials, as well as that candidate's opponents.

The Commission, however, believes that a "fair use" exception could swallow the rule. Furthermore, the Commission notes that "fair use" is an exception in the intellectual property arena intended to protect literary, scholastic, and journalistic uses of material without infringing upon the intellectual property rights of those who created the material. The Commission declines to import this concept into the political arena where it would not serve to promote the same important purposes, and where the exceptions to the definitions of "contribution" and "expenditure" already address these concerns. See, e.g., 11 CFR 100.73 and 100.132 (exceptions to the definition of "contribution" and "expenditure," respectively, for news stories, commentary, and editorials.) In the context of intellectual property law, the republication of another person's work is generally viewed as undesirable by the original author, thus the "fair use" exception provides a limited exception to the general limitations on such republication. In contrast, Congress has addressed republication of campaign materials through 2 U.S.C.

441a(a)(7)(B)(iii) in a context where the candidate/author generally views the republication of his or her campaign materials, even in part, as a benefit. Given the different purpose served by intellectual property law and campaign finance law, a "fair use" exception would be inappropriate and unworkable in the campaign arena. Additionally, the Commission believes that such legitimate benefits as would flow from a fair use exception are met through application of 11 CFR 109.23(b)(4).

The Commission is including the exceptions proposed in 100.57(b) in its final rules at CFR 109.23(b). Under 11 CFR 109.23(b)(1), a candidate or political party committee is permitted to

disseminate, distribute, or republish its own materials without making a contribution. Paragraph (b)(2) exempts the use of material in a communication advocating the defeat of the candidate or party who prepared the material. For example, Person A does not make a contribution to Candidate B if Person A incorporates part of Candidate B's campaign material into its own public communication that advocates the defeat of Candidate B. However, if the same public communication also urged the election of Candidate B's opponent, Candidate C, and incorporated a picture or quote that had been prepared by Candidate C's campaign, then the result does constitute a contribution to Candidate C.

A third exception, in paragraph (b)(3), makes it clear that campaign material may be republished as part of a *bona fide* news story as provided in 11 CFR 100.73 or 11 CFR 100.132. In paragraph (b)(4), the Commission allows limited use of candidate materials in communications to illustrate a candidate's position on an issue.

Finally, in paragraph (b)(5), the Commission recognizes that a national, State, or subordinate committee of a political party makes a coordinated party expenditure rather than an in-kind contribution when it uses its coordinated party expenditure authority under 11 CFR 109.32 to pay for the dissemination, distribution, or republication of campaign material. This rule is based on former 11 CFR 109.1(d)(2), which provided that a State or subordinate party committee could engage in such dissemination, distribution, or republication as an agent designated by a national committee pursuant to former 11 CFR 110.7(a)(4), but is somewhat broader than former 11 CFR 109.1(d)(2).

#### **11 CFR Part 109, Subpart D—Special Provisions for Political Party Committees**

##### *11 CFR 109.30 How Are Political Party Committees Treated for Purposes of Coordinated and Independent Expenditures?*

A national, State, or subordinate committee of a political party may make expenditures up to prescribed limits in connection with the general election campaign of a Federal candidate that do not count against the committees' contribution limits. See 2 U.S.C. 441a(d). These expenditures are commonly referred to as "coordinated party expenditures." Political party committees, however, need not demonstrate actual coordination with their candidates to avail themselves of

this additional spending authority. Nor are political party committees restricted as to the nature of the expenditures they may make on behalf of a candidate that are treated as coordinated party expenditures. Political party committees may also make independent expenditures. See *Colorado Republican Federal Campaign Committee v. Federal Election Commission*, 518 U.S. 604 (1996) ("Colorado I").

In BCRA, Congress set certain new restrictions on these "coordinated party expenditures" and related restrictions on political party committee independent expenditures. There are also certain new restrictions on transfers and assignments of coordinated party expenditure authorizations between party committees. 2 U.S.C. 441a(d)(4)(A) through (C).

Section 109.30 provides an introduction to subpart D of part 109 that states how political party committees are treated for purposes of coordinated and independent expenditures. This new section first clarifies that political party committees may make independent expenditures subject to the provisions of sections 109.35 and 109.36. (See discussion below.) Second, section 109.30 explains that political party committees may support candidates with coordinated party expenditures and states that these coordinated party expenditures are subject to limits that are separate from and in addition to the contribution limits at 11 CFR 110.1 and 110.2.

No comments were received on this section, and the final rule is unchanged from the proposed rule in the NPRM except that the reference to other 11 CFR part 109, subpart D provisions has been revised to exclude section 109.31.

##### *11 CFR 109.31 [Reserved]*

The Commission in the NPRM proposed rules at 11 CFR 109.30 to 109.37 regarding political party committees. The Commission is issuing final rules at 11 CFR 109.30 and 109.32 to 109.37, but not at 11 CFR 109.31. The reasons regarding proposed section 109.31 are set forth below.

Under FECA, certain political party committees have long been authorized to make what have come to be known as "coordinated party expenditures." 2 U.S.C. 441a(d). Although this term is used extensively (see, e.g., the Commission's Campaign Guides), it is not formally defined in the Commission's regulations.

The Commission in the NPRM proposed a rule which would have defined "coordinated party expenditure" at 11 CFR 109.31. That proposed definition included payments

made by a national committee of a political party, including a national Congressional campaign committee, or a State committee of a political party, including any subordinate committee of a State committee, under 2 U.S.C. 441a(d) for anything of value in connection with the general election campaign of a candidate, including party coordinated communications defined at 11 CFR 109.37.

The Commission received two comments on section 109.31 in support of the proposed rule. One witness at the hearing criticized this provision, asserting that in conjunction with 11 CFR 109.20 this provision would subject everything political parties do to the coordinated party expenditure limits.

In light of the concern raised, the Commission's recognition that this rule is not required by BCRA, and in order to devote the Commission's resources to the rules that are most directly required by BCRA to be completed this calendar year, the Commission is not issuing a final rule at 11 CFR 109.31. Instead, the Commission is adding and reserving this section and may revisit the "coordinated party expenditures" definition in the future.

The Commission notes, however, that the term "coordinated party expenditures" does appear in the final rules at 11 CFR 109.23(b), 109.20(b), 109.30, 109.32, 109.33, 109.34, and 109.35. To prevent any confusion, the Commission clarifies in the absence of a definition at section 109.31 that the term "coordinated party expenditure" refers to an expenditure made by a political party committee pursuant to 2 U.S.C. 441a(d). The Commission stresses that it is not restricting the traditional flexibility political parties have had in making coordinated expenditures in support of their candidate.

#### *11 CFR 109.32 What Are the Coordinated Party Expenditure Limits?*

The Commission's restructuring of 11 CFR part 109 includes moving the coordinated party expenditure limits found at former 11 CFR 110.7(a) and (b) to 11 CFR 109.32. This new section retains the basic organizational structure of paragraphs (a) and (b) of former section 110.7, while making the revisions explained below. The final rule is unchanged from the proposed rule in the NPRM except where noted below.

##### **1. 11 CFR 109.32(a) Coordinated Party Expenditure Limits for Presidential Elections**

The Commission sets forth in paragraph (a) of section 109.32, in

amended fashion, the coordinated party expenditure limit for the national committee of a political party for Presidential elections that appeared at former section 110.7(a). Because political party committees may also make independent expenditures, *Colorado I*, 518 U.S. at 618, the heading of paragraph (a) clarifies that the "expenditures" referred to in section 109.32 are "coordinated party expenditures." See 2 U.S.C. 441a(d). This clarification also appears in paragraphs (a)(1), (2), (3), and (4) of section 109.32.

Paragraph (a)(1) authorizes the national committee of a political party to make coordinated party expenditures in connection with the general election campaign of any candidate for President of the United States affiliated with the party. The final rule deletes the words "the party's" as surplusage that was inadvertently added into the proposed rule. Paragraph (a)(1) is the successor to former 11 CFR 110.7(a)(1) and is unchanged from that rule except for the clarification noted above.

Paragraph (a)(2) sets out the coordinated party expenditure limit, which is two cents multiplied by the voting age population of the United States, following former 11 CFR 110.7(a)(2). Paragraph (a)(2) of section 109.32 also states that this spending limit shall be increased in accordance with 11 CFR 110.17, which the Commission is adding to clarify that this spending limit is subject to increase. Section 110.17 is the successor to former 11 CFR 110.9(c). See Final Rules and Explanation and Justification for Contribution Limitations and Prohibitions, 67 FR 69,928 (November 19, 2002). Paragraph (a)(2) of section 109.32 also refers to 11 CFR 110.18, the definition of the term "voting age population," which is discussed below.

Paragraph (a)(3) provides that any coordinated party expenditure under paragraph (a) of this section is in addition to any expenditure by a national committee of a political party serving as the principal campaign committee of a candidate for President of the United States, as well as any contribution by the national committee to the candidate permissible under 11 CFR 110.1 or 110.2. Paragraph (a)(3) is the successor to former 11 CFR 110.7(a)(3) and is substantively unchanged from that rule.

Paragraph (a)(4) provides that any coordinated party expenditures made by the national committee of a political party pursuant to paragraph (a) of this section, or made by any other party committee under authority assigned by a national committee of a political party

under 11 CFR 109.33, on behalf of that party's Presidential candidate shall not count against the candidate's expenditure limitations under 11 CFR 110.8. The only change to paragraph (a)(4) from the proposed rule is that the term "designated" has been changed to "assigned" in order to be consistent with the terminology applied in section 109.33.

Paragraph (a)(4) is the successor to former 11 CFR 110.7(a)(6), and is revised to clarify that only the national party committee has coordinated party expenditure authority for Presidential general elections and that any other political party committee making a coordinated party expenditure in such an election must be so assigned by the national committee.

##### **2. 11 CFR 109.32(b) Coordinated Party Expenditure Limits for Other Federal Elections**

Paragraph (b) of section 109.32 addresses coordinated party expenditures in other Federal elections, and is the successor to former 11 CFR 110.7(b). Paragraph (b) applies to the national committee of a political party and a State committee of a political party, including any subordinate committee of a State committee, for Federal elections other than Presidential elections. As in paragraph (a) above, paragraph (b) clarifies that the "expenditures" referred to in paragraphs (b)(1), (2), and (4) are coordinated party expenditures.

Paragraph (b)(1) authorizes the national committee of a political party and a State committee of a political party, including any subordinate committee of a State committee, to make coordinated party expenditures in connection with the general election campaign of a candidate for Federal office in that State who is affiliated with the party. The phrase "a candidate for Federal office in that State who is affiliated with the party" is changed from the phrase "the party's candidate for Federal office in that State" that was inadvertently included in the proposed rule. Paragraph (b)(1) is the successor to former 11 CFR 110.7(b)(1) and is unchanged from the previous rule except for the clarification noted above.

Paragraph (b)(2)(i) sets out the coordinated party expenditure limit for Senate candidates and for House candidates from a State that is entitled to only one Representative at the greater of two cents multiplied by the voting age population of the State or \$20,000. Paragraph (b)(2)(ii) sets out the coordinated party expenditure limit for House candidates from any other State at \$10,000. Paragraph (b)(2) follows



former 11 CFR 110.7(a)(2). Paragraph (b)(2) of section 109.32 also refers to 11 CFR 110.18, the definition of the term "voting age population," which is discussed below.

Paragraph (b)(3) provides that the spending limitations in paragraph (b)(2) shall be increased in accordance with 11 CFR 110.17, which is the successor to former 11 CFR 110.9(c). See Final Rules and Explanation and Justification for Contribution Limitations and Prohibitions, 67 FR 69,928 (November 19, 2002). The Commission is adding paragraph (b)(3) to the rule in order to clarify that this limit is subject to increase. The Commission is changing the citation to 11 CFR 110.17(c), as proposed in the NPRM, to a citation to 11 CFR 110.17, to make it consistent with the reference to section 110.17 in paragraph (a)(2) described above.

Paragraph (b)(4) provides that any coordinated party expenditure under paragraph (b) of this section shall be in addition to any contribution by a political party committee to the candidate permissible under 11 CFR 110.1 or 110.2. Paragraph (b)(4) of 11 CFR 109.32 is the successor to former 11 CFR 110.7(b)(3), and is unchanged apart from the clarification noted above and a clarification that the contributions referenced are those made by a political party committee.

The Commission received two comments on this section, one which supported the rule proposed in the NPRM and another which stated the commenter's agreement with the statement of the coordinated party expenditure limits set forth in 2 U.S.C. 441a(d).

#### *11 CFR 109.33 May a Political Party Committee Assign Its Coordinated Party Expenditure Authority to Another Political Party Committee?*

Section 109.33 restates and clarifies the pre-BCRA rule permitting assignment of coordinated party expenditure authority between political party committees. Section 109.33 replaces the authorizing provisions found in the pre-BCRA regulations at 11 CFR 110.7(a)(4) and (c); further changes to section 110.7 are addressed below.

In light of the new statutory restrictions on coordination and independent expenditures in BCRA, such assignments of coordinated party expenditure authority are prohibited under certain circumstances in which the assigning political party committee has made coordinated party expenditures (using part of the spending authority) and the intended assignee political party committee has made or intends to make independent

expenditures with respect to the same candidate during an election cycle. See 2 U.S.C. 441a(d)(4)(C) and 11 CFR 109.35(c). Therefore, paragraph (a) of section 109.33 begins with a cross-reference to 11 CFR 109.35(c), which implements the statutory restrictions on assignments and transfers.

Paragraph (a) of section 109.33 restates the Commission's longstanding policy that a political party committee with authority to make coordinated party expenditures may assign all or part of that authority to other political party committees, and that this interpretation extends to both national and State committees of political parties. See Campaign Guide for Political Party Committees at p.16 (1996). Paragraph (a) of section 109.33 provides that coordinated party expenditure authority may be assigned only to other political party committees. See 2 U.S.C. 441a(d). Pre-BCRA 11 CFR 110.7(a)(4) indicated that coordinated expenditures may be made "through any *designated agent*, including State and subordinate party committees." [Emphasis added.] This limitation of assignment to other political party committees precludes possible circumvention of the new restrictions on transfers and assignments between political party committees found in BCRA. 2 U.S.C. 441a(d)(4)(B), (C). It is the Commission's understanding that, historically, political party committees have not assigned coordinated spending authority to entities that are not party committees, and thus this prophylactic measure should not adversely affect party committees.

Paragraph (a) provides that whenever a political party committee authorized to make coordinated party expenditures assigns another political party committee to use part or all of its spending authority, the assignment must be in writing, must specify a dollar amount, and must be made before the party committee receiving the assignment actually makes the coordinated party expenditure. In this respect, the rule codifies longstanding Commission interpretation. See Campaign Guide for Political Party Committees at p.16 (1996). This provision applies to both national and State party committees wishing to assign their 2 U.S.C. 441a(d) authority.

Paragraph (b) of section 109.33 is the successor to pre-BCRA 11 CFR 110.7(c). It provides that, for purposes of the coordinated spending limits, a State committee includes subordinate committees of the State committee. Unlike its predecessor, pre-BCRA section 110.7(c), paragraph (b) of section 109.33 covers district and local political

party committees (see 11 CFR 100.14(b)) to the extent that a State committee assigns to them its coordinated spending authority, given that these district or local committees may not qualify as "subordinate State committees."

Paragraphs (b)(1) and (2) of section 109.33 restate with only minor non-substantive revision the pre-BCRA rule in 11 CFR 110.7(c)(1) and (2) setting out the State committees' methods of administering the coordinated party expenditure authority.

Paragraph (c) of section 109.33 sets forth recordkeeping requirements. This new paragraph (c) provides that a political party committee that assigns its authority to make coordinated party expenditures under this section, or that receives an assignment of coordinated expenditure authority, must maintain the written assignment for at least three years in accordance with 11 CFR 104.14. This three-year requirement is consistent with other recordkeeping requirements in the Act and in the Commission's regulations. See 2 U.S.C. 432(d); 11 CFR 102.9(c).

Although the Commission did not include this precise recordkeeping requirement in proposed section 109.33 in the NPRM, it sought comment more generally on whether to require political party committees to attach copies of written assignments to reports they file with the Commission, or to fax or e-mail them if they are electronic filers. The comments received regarding section 109.33, as described below, did not address the reporting issue.

The Commission has decided to require recordkeeping rather than reporting in section 109.33. Recordkeeping is less burdensome for political party committees and should provide sufficient documentation of assignments of coordinated party expenditure authority should questions subsequently arise. Indeed, the required maintenance of such documentation may serve a political party committee's own interest. See MUR 5246.

The Commission received two comments on this section as proposed in the NPRM. The commenters, while supporting the rule proposed in the NPRM, asserted that it should be made clear that nothing in the rule supersedes the prohibition on political party committees making both coordinated and independent expenditures with respect to a candidate after nomination. See 2 U.S.C. 441a(d)(4)(A); 11 CFR 109.35(b). The Commission does not intend for section 109.33 to supersede that prohibition, which is in the final rules at section 109.35(b). The Commission believes that section

109.35(b), in its final rule formulation, and section 109.35(c) referenced within section 109.33, serve to maintain the prohibition against circumvention through assignments of coordination party expenditure authority under section 109.33.

Finally, the Commission is making a non-substantive change from the NPRM in the title of section 109.33 in the final rule. The Commission is changing the word "limit" to "authority" in order to match the text of the rule. The only other changes to the NPRM aside from the addition of paragraph (c) are non-substantive changes to paragraphs (a) and (b).

*11 CFR 109.34 When May a Political Party Committee Make Coordinated Party Expenditures?*

Section 109.34 restates without substantive revision the pre-BCRA rule in 11 CFR 110.7(d) permitting a political party committee to make coordinated party expenditures in connection with the general election campaign before or after its candidate has been nominated. All pre-nomination coordinated expenditures continue to be subject to the coordinated party expenditure limitations, whether or not the candidate on whose behalf they are made receives the party's nomination. The Commission received one comment on this section, which supported the proposed rule.

*11 CFR 109.35 What Are the Restrictions on a Political Party Committee Making Both Independent Expenditures and Coordinated Party Expenditures in Connection With the General Election of a Candidate?*

In BCRA, Congress prohibits political party committees, under certain conditions, from making both coordinated party expenditures and independent expenditures with respect to the same candidate, and from making transfers and assignments to other political party committees. 2 U.S.C. 441a(d)(4). A critical threshold issue is identifying the political party committees to which these prohibitions apply. Congress provided that for the purposes of these new prohibitions, "all political committees established and maintained by a national political party (including all Congressional campaign committees) and all political committees established and maintained by a State political party (including any subordinate committee of a State committee) shall be considered to be a single political committee." 2 U.S.C. 441a(d)(4)(B). Congress plainly intended to combine certain political party committees into a collective entity or

entities for purposes of these prohibitions. 2 U.S.C. 441a(d)(4)(B).

1. 11 CFR 109.35(a) Applicability

In the NPRM, the Commission proposed a rule that divided a political party into a national group of political committees and various State and local groups of political committees for the purposes of implementing the BCRA provisions governing independent and coordinated expenditures by a political party. See 2 U.S.C. 441a(d)(4). The NPRM acknowledged the legislative history supporting a "single committee" interpretation that combined the national, State and local party committees, but proposed the "dual groups" interpretation in order to give the fullest possible effect to the transfer and assignment provision of the same statute. 67 FR at 60,054 (September 24, 2002). Under the transfer and assignment provision, a "committee of a political party" that makes coordinated party expenditures under 2 U.S.C. 441a(d) in connection with the general election campaign of a candidate must not, during that election cycle, transfer any funds to, assign authority to make coordinated party expenditures to, or receive a transfer from, "a committee of the political party" that has made or intends to make an independent expenditure with respect to that candidate. 2 U.S.C. 441a(d)(4)(C). The NPRM questioned whether, without more than one group or aggregation of political party committees, transfers or assignments between political party committees could occur as contemplated in section 441a(d)(4)(C).

Several commenters, including BCRA's principal sponsors, urged that the Commission adopt the "single committee" approach, asserting that it followed from the statutory language as well as the legislative history.

One commenter criticized the "single committee" approach as contrary to *Colorado I*, asserting that this Supreme Court decision permitted political party committees to make both coordinated and independent expenditures.

Several witnesses testifying at the hearing argued that treating all party committees as a single entity is impractical because party committees at the national or State level do not control party committees at lower levels in their organizations. These commenters complained that a local party committee under the "single committee" approach, by making an independent expenditure with respect to a candidate, could preclude the State or national party committee from making coordinated party expenditures with respect to that candidate.

No comments were received that supported the NPRM's "dual groups" approach, although two witnesses testified at the hearing that the dual approach would be preferable to the "single committee" approach (one of these commenters, however, also testified that the BCRA sponsors intended the "single committee" approach).

Commenters favoring the "single committee" approach suggested examples of how the transfer and assignment provision could be given meaningful effect. One commenter proposed that the transfer and assignment provision may apply prior to nomination, unlike the prohibition on making both coordinated and independent expenditures with respect to a candidate, which applies only after nomination. Two commenters suggested that the transfer and assignment provision could be read to prohibit a national party from making coordinated party expenditures with respect to a candidate prior to nomination and then transferring funds to a State party committee that would then try to make supposedly independent expenditures with respect to that candidate.

In the final rules, paragraph (a) of 11 CFR 109.35 generally tracks the statutory language in 2 U.S.C. 441a(d)(4)(B).

2. 11 CFR 109.35(b) Restrictions on Certain Coordinated and Independent Expenditures

Congress provided in BCRA that on or after the date on which a political party nominates a candidate, no "committee of the political party" may make: (1) Any coordinated expenditure under 2 U.S.C. 441a(d) with respect to the candidate during the election cycle at any time after it makes any independent expenditure with respect to the candidate during the election cycle; or (2) any independent expenditure with respect to the candidate during the election cycle at any time after it makes any coordinated expenditure under 2 U.S.C. 441a(d) with respect to the candidate during the election cycle. 2 U.S.C. 441a(d)(4)(A).

Section 109.35(b) generally tracks the statute.

As noted above, the result that any political party committee within the "single committee" could bind all the political party committees within the "single committee" was criticized by several commenters at the hearing. These commenters asserted that this result would preclude a national or State committee of a political party from making a coordinated party expenditure with respect to a nominee if a local

party committee first made an independent expenditure with respect to that same nominee, even of small size and without the State or national committee's prior knowledge or consent. The Commission notes the commenters' concerns, but points out that just that result is the apparent aim of the statute. 2 U.S.C. 441a(d)(4)(A).

### 3. 11 CFR 109.35(c) Restrictions on Certain Transfers and Assignments

Congress provided in BCRA that a "committee of a political party" that makes coordinated party expenditures with respect to a candidate shall not, during an election cycle, transfer any funds to, assign authority to make coordinated party expenditures under 2 U.S.C. 441a(d) to, or receive a transfer of funds from, a "committee of the political party" that has made or intends to make an independent expenditure with respect to the candidate. 2 U.S.C. 441a(d)(4)(C).

In the final rules, paragraph (c) of 11 CFR 109.35 generally tracks the statutory language in 2 U.S.C. 441a(d)(4)(C).

Finally, the Commission noted in the NPRM that it was not proposing specific rules to implement the statutory language in the transfer and assignment provision that a political party committee "intends to make" an independent expenditure with respect to a candidate. 2 U.S.C. 441a(d)(4)(C). The Commission received no comments on this issue and incorporates no specific language into section 109.35.

### 4. Impact of Political Party Committee Activity Carried Out Pursuant to Contribution Limits and Coordinated Party Expenditure Authority

2 U.S.C. 441a(d)(4) applies to coordinated party expenditures and to political party committee independent expenditures. Congress did not directly address political party committees' monetary and in-kind contributions to candidates that are subject to the contribution limits under 2 U.S.C. 441a(a) and 441a(h). See 2 U.S.C. 441a(d)(1) ("Notwithstanding any other provision of law with respect to \* \* \* limitations on contributions, [political party committees] may make expenditures in connection with the general election campaign of candidates for Federal office, subject to the limitations contained [in this subsection]" [emphasis added]); 2 U.S.C. 441a(d)(4)(A) (addresses coordinated party expenditures made under section 441a(d) and does not directly address contributions). See also 11 CFR 109.30, 109.32.

Political party committees may make in-kind contributions to a candidate in the form of coordinated activity. See 2 U.S.C. 441a(a)(7)(B)(i) and 11 CFR 109.20, discussed above. The Commission notes that such coordination between a political party committee and a candidate may compromise the actual independence of any simultaneous or subsequent independent expenditures the political party committee may attempt with respect to that candidate. Similarly, coordinated party expenditures made by a political party committee with respect to a candidate prior to nomination, see 11 CFR 109.34, may be considered evidence that could compromise the actual independence of any simultaneous or subsequent independent expenditures the political party committee may attempt with respect to that candidate. See 11 CFR 109.35; *Buckley v. Valeo*, 424 U.S. at 47 (in striking down limits on independent expenditures, the Court described such expenditures as made "totally independently of the candidate and his campaign" [emphasis added]).

Finally, the title of section 109.35 in this Explanation and Justification has been altered from the NPRM to match the title in the rule.

#### *11 CFR 109.36 Are There Additional Circumstances Under Which a Political Party Committee Is Prohibited From Making Independent Expenditures?*

Prior to the enactment of BCRA, the Commission's rules prohibited a national committee of a political party from making independent expenditures in connection with the general election campaign of a candidate for President. See former 11 CFR 110.7(a)(5). In the NPRM, the proposed rule at 11 CFR 109.36 would have largely deleted this prohibition. The NPRM limited the remaining application of the prohibition to certain circumstances in which the national committee of a political party serves as the principal campaign committee or authorized committee of its Presidential candidate, as permitted under 2 U.S.C. 432(e)(3)(A)(i) and 441a(d)(2). See 11 CFR 102.12(c)(1) and 9002.1(c). Such a prohibition is consistent with 11 CFR 100.16(b) (redesignated from former section 109.1(e)) providing that no expenditure by an authorized committee of a candidate on behalf of that candidate shall qualify as an independent expenditure.

The Commission received several comments on this section, each of which urged the Commission to retain the prohibition at former 11 CFR 110.7(a)(5) regarding national party

committee independent expenditures with respect to Presidential nominees. One commenter asserted that neither *Colorado I* nor BCRA require the deletion of the prohibition, and that in light of the significance of this issue, Congress would have expressly addressed it if Congress desired a change in the current regulation. The commenter noted that such a change in the rule is based upon a misinterpretation of BCRA, which should not be read as affirmatively authorizing political party committees to engage in any particular activity. Another commenter claimed that to allow in a broad fashion national party committees to make independent expenditures on behalf of their Presidential candidates is to invite abuse. The commenter stated that Presidential candidates and their parties are so inextricably intertwined as to preclude any meaningful possibility that one can operate "independently" of the other, and that the degree of coordination that exists between a national party committee and its Presidential candidate typically far exceeds even the level of coordination between a party committee and its congressional candidates.

The Commission acknowledges the concerns expressed in the comments but for the following reasons is including 11 CFR 109.36 in the final rules. First, the Commission does not believe it appropriate to retain in its rules a conclusive presumption of coordination after *Colorado I*. Even though *Colorado I* expressly involved only Congressional races, and arguably the likelihood of coordination may be greater between a national party committee and its Presidential nominee, the rule at section 109.36 is consistent with the Supreme Court's decision.

Second, the Commission concludes that Congress in BCRA effectively repealed the prohibition at 11 CFR 110.7(a)(5). See 2 U.S.C. 441a(d)(4). Under a new statutory provision, Congress prohibits political party committees from making both post-nomination independent expenditures and post-nomination coordinated expenditures in support of a candidate. See 2 U.S.C. 441a(d)(4)(A). A national party committee could thus make independent expenditures with respect to a candidate after nomination, if not prohibited under section 441a(d)(4)(A). See 11 CFR 109.35(a). Because this provision appears to apply equally to party committee expenditures on behalf of either Presidential or Congressional candidates, a national party committee may be able to make independent expenditures with respect to a

Presidential candidate under certain circumstances. Thus, while Congress did not specifically require the deletion of the prohibition at former 11 CFR 110.7(a)(5), the Commission has concluded that a provision within BCRA is consistent with that result. To the extent that BCRA, and *Colorado I* as discussed above, do not require the Commission to promulgate the rule at section 109.36, the Commission nonetheless exercises its discretion to do so as a permissible interpretation of BCRA and *Colorado I*.

Finally, the Commission notes that if coordination occurs between a national party committee and its Presidential nominee, it would negate the actual independence of independent expenditures the national party committee attempted with respect to that candidate. See *Buckley v. Valeo*, 424 U.S. at 47 (in striking down limits on independent expenditures, the Court described such expenditures as made "totally independently of the candidate and his campaign" [emphasis added]). The Commission recognizes that the ability of a national party committee to make such independent expenditures may be unlikely in practice, but the Commission's rules must allow for such a possibility, and as noted above, must reject a conclusive presumption that such expenditures are always coordinated.

Finally, section 109.36 contains one non-substantive change from the NPRM, and the title of section 109.36 in this Explanation and Justification has been slightly altered from the NPRM to match the title in the rule.

#### 11 CFR 109.37 What Is a "Party Coordinated Communication"?

In BCRA, Congress required the Commission to promulgate new regulations on "coordinated communications" that are paid for by persons other than candidates, authorized committees of candidates, and party committees. Public Law 107-155, sec. 214(b), (c); see 11 CFR 109.21 above. Although Congress did not specifically direct the Commission to address coordinated communications paid for by political party committees, the Commission is doing so to give clear guidance to those affected by BCRA.

The Commission in the NPRM proposed a rule which would have been at 11 CFR 109.37, political party coordinated communications, using the same content and conduct standards as proposed in section 109.21 for coordinated communications by other persons.

The Commission received a number of comments on this proposal. The

comments fall into two general categories. One group of commenters urged the Commission to defer this party coordinated communication rulemaking, arguing (1) that it is not strictly required by BCRA, (2) that the Commission should be focusing its resources at this time on the rulemaking most directly required by BCRA, and (3) that the comment period was a difficult time for the political parties to focus on the rulemaking because it was shortly before the 2002 general election. These commenters also asserted that party coordinated communications is a complicated subject area, citing the many questions posed in the NPRM in their claim that the Commission should defer this rulemaking.

On the substance of the proposed rule, this group of commenters testified at the hearing that the proposed content and conduct standards were both overbroad. (See the discussion above regarding 11 CFR 109.21). These commenters noted that any coordination standard for political party committees must allow for the regular contacts between a political party committee and its candidates. Another commenter raised an equal protection argument, asserting that a regulation that on its face appears to treat political party committees the same as other persons may as a practical matter have an unequal impact on the political parties.

The other group of commenters relied on the relationship between a political party committee and its candidates for the assertion that the Commission should promulgate a party coordinated communication rule using a rebuttable presumption that the communications are coordinated with candidates. These commenters stated that this presumption could be rebutted by a showing of actual independence. One commenter believed that the Commission's rule should describe ways in which a political party committee could establish its independence from a candidate. Another commenter noted that *Colorado I*, which struck down a conclusive presumption of coordination, does not prevent the use of a rebuttable presumption, and that such a rule is necessary to ensure that political party committee independent expenditures are in fact "totally independent" from candidates as required by the Supreme Court in *Buckley*.

While the Commission recognizes that Congress in BCRA did not specifically direct the Commission to address coordinated communications paid for by political party committees, the Commission is doing so to give clear guidance to those affected by BCRA.

Congress determined to regulate political party committees' independent expenditures and coordinated party expenditures, and thus it is appropriate and useful for the Commission to promulgate rules at this time detailing standards for party coordinated communications. See 2 U.S.C. 441a(d)(4) and 11 CFR 109.35, discussed above.

The Commission is promulgating final rules similar to those in proposed section 109.37, generally applying the same regulatory analysis to communications paid for by the political party committees that is applied to communications paid for by other persons. See 11 CFR 109.21(a) through (f). This analysis determines when communications paid for by a political party committee are considered to be coordinated with a candidate, a candidate's authorized committee, or their agents.

Following 11 CFR 109.21(a), section 109.37(a) defines the circumstances in which communications paid for by political party committees are considered to be coordinated with a candidate, a candidate's authorized committee, or agents of any of the foregoing. Under 11 CFR 109.37(a)(1) through (3), such communications are deemed to be "party coordinated communications" when they were paid for by a political party committee or its agent, satisfy at least one of the content standards in section 109.37(a)(2)(i) through (iii), and satisfy at least one of the conduct standards in 11 CFR 109.21(d)(1) through (d)(6), subject to the provisions of 11 CFR 109.21(e) and other conditions.

The party coordinated communication content standards in section 109.37(a)(2)(i) through (iii) are adopted from 11 CFR 109.21(c)(2) through (c)(4). The first content standard, at paragraph (a)(2)(i) of section 109.37, is a public communication that disseminates, distributes, or republishes, in whole or in part, campaign materials prepared by a candidate, the candidate's authorized committee, or an agent of any of the foregoing, unless the dissemination, distribution, or republication is excepted under 11 CFR 109.23(b). The Commission also provides in this content standard that for a communication that satisfies this standard, see the conduct standard in 11 CFR 109.21(d)(6), under which the communication is evaluated. See the discussion above of 11 CFR 109.21(c)(2). This content standard at 11 CFR 109.37(a)(2)(i) for party coordinated communications is the same as the standard set forth for coordinated

communications by other persons in 11 CFR 109.21(c)(2).

The second content standard, at paragraph (a)(2)(ii) of section 109.37, is a public communication that expressly advocates the election or defeat of a clearly identified candidate for Federal office. This content standard for party coordinated communications is identical to the standard set forth for coordinated communications by other persons in 11 CFR 109.21(c)(3).

The third content standard, at paragraph (a)(2)(iii) of section 109.37, is a public communication that (1) refers to a clearly identified candidate for Federal office; (2) is publicly distributed or otherwise publicly disseminated 120 days or fewer before a general, special, or runoff election, or 120 days or fewer before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate; and (3) is directed to voters in the jurisdiction of the clearly identified candidate. 11 CFR 109.37(a)(2)(iii)(A)–(C). See the discussion above of 11 CFR 109.21(c)(4). This content standard at section 109.37(a)(2)(iii) is based on the content standard at section 109.21(c)(4) but limits its coverage to communications that refer to a clearly identified candidate for Federal office.

Finally, the Commission notes that the content standard at 11 CFR 109.21(c)(1), coordinated electioneering communications, is not applied to party coordinated communications because electioneering communications, as defined, exclude communications which constitute expenditures under the Act, which includes political party committee expenditures. See 2 U.S.C. 434(f)(3)(B)(ii); 11 CFR 100.29(c)(3).

For the conduct standards for party coordinated communications, in paragraph (a)(3) of section 109.37, the Commission refers to the conduct standards set forth in 11 CFR 109.21(d)(1) through (d)(6), subject to the provisions of 11 CFR 109.21(e) and other conditions. As in 11 CFR 109.21(d), agreement or formal collaboration is not necessary for a finding that a communication is coordinated. See the discussion above of 11 CFR 109.21(d) and (e). Further, paragraph (a)(3) of section 109.37 provides that a candidate's response to an inquiry about that candidate's positions on legislative or policy issues, but not including a discussion of campaign plans, projects, activities, or needs, does not satisfy any of the conduct standards in 11 CFR 109.21(d)(1) through (d)(6). This safe harbor parallels the safe harbor at 11

CFR 109.21(f). See the discussion above of 11 CFR 109.21(f).

The Commission also addresses in paragraph (a)(3) of section 109.37 circumstances in which the in-kind contribution results solely from conduct in 11 CFR 109.21(d)(4) or (d)(5). Under these circumstances, the candidate does not receive or accept an in-kind contribution and is not required to report an expenditure. See the discussion above regarding 11 CFR 109.21(b)(2).

Paragraph (b) of section 109.37 explains the treatment of party coordinated communications. This paragraph provides that political party committees must treat payments for communications coordinated with candidates as either in-kind contributions or coordinated party expenditures.

The Commission excepts from 11 CFR 109.37(b) such payments that are otherwise excepted from the definitions of "contribution" and "expenditure" found at 11 CFR part 100 subparts C and E. For example, the payment by a State or local committee of a political party of the costs of preparation, display, or mailing or other distribution incurred by such committee with respect to a printed slate card, sample ballot, palm card, or other printed listing(s) of three or more candidates for any public office for which an election is held in the State in which the committee is organized is not a contribution or an expenditure. 11 CFR 100.80 and 100.140. Thus, if such communications were coordinated with candidates, the payments for such communications would not be treated as either in-kind contributions or as coordinated party expenditures.

For such a payment that a political party committee treats as an in-kind contribution, paragraph (b)(1) of section 109.37 states that it is made for the purpose of influencing a Federal election. See the discussion above regarding 11 CFR 109.21(b).

For such a payment that a political party committee treats as a coordinated party expenditure, paragraph (b)(2) of section 109.37 states that such expenditure is made pursuant to coordinated party expenditure authority under 11 CFR 109.32 in connection with the general election campaign of the candidate with whom it was coordinated.

Finally, paragraphs (b)(1) and (b)(2) of section 109.37 each refer to the reporting obligations flowing from party coordinated communications under 11 CFR part 104.

#### *11 CFR 110.1 Contributions by Persons Other Than Multicandidate Political Committees*

The Commission clarifies that the section 110.1 limitations on contributions to political committees making independent expenditures apply to contributions made by persons other than multicandidate committees to political party committees that make independent expenditures. See 11 CFR 110.1(n). Paragraph 110.1(n) replaces pre-BCRA paragraph (d)(2) of section 110.1 regarding the application of the contribution limits to contributions to committees that make independent expenditures.

This section is being updated because under pre-BCRA paragraph (d)(2) of section 110.1, the Commission recognized that political committees other than party committees may make independent expenditures, but did not contemplate party committees doing so. See *Colorado I*, 518 U.S. at 618. For example, national party committees may receive contributions aggregating \$20,000 per year from individuals, a contribution limit that Congress increased to \$25,000 for contributions made on or after January 1, 2003. See 2 U.S.C. 441a(a)(1)(B). Consequently, under BCRA, the \$20,000 (\$25,000) contribution limit continues to apply when the recipient national party committee uses the contribution to make independent expenditures. The Commission notes that 11 CFR 110.1(h) regarding contributions to political committees supporting the same candidate, remains unchanged except to state that the support to candidates by political party committees may include independent expenditures. The Commission received no comments on this section.

Additional changes to 11 CFR 110.1 are addressed in a separate rulemaking on BCRA's increased contribution limits. See Final Rules and Explanation and Justification for Contribution Limitations and Prohibitions, 67 FR 69,928 (November 19, 2002).

#### *11 CFR 110.2 Contributions by Multicandidate Political Committees*

The Commission clarifies that the section 110.2 limitations on contributions to political committees making independent expenditures apply to contributions made by multicandidate committees to political party committees that make independent expenditures. See 11 CFR 110.2(k). Paragraph 110.2(k) replaces pre-BCRA paragraph (d)(2) of section 110.2 regarding the application of the contribution limits to contributions to

committees that make independent expenditures.

This section is being updated for the reasons set forth above in the discussion regarding 11 CFR 110.1. The Commission received no comments on this section.

Additional changes to 11 CFR 110.2 were addressed in a separate rulemaking on BCRA's increased contribution limits. See Final Rules and Explanation and Justification for Contribution Limitations and Prohibitions, 67 FR 69,928 (November 19, 2002).

#### 11 CFR 110.7 *Removed and Reserved*

The pre-BCRA regulations at 11 CFR 110.7 contained the coordinated party expenditure limits and related provisions. As explained above, the Commission is moving section 110.7, in amended form, to 11 CFR part 109, subpart D. Specifically, the provisions in section 110.7 are revised and redesignated as follows: 11 CFR 110.7(a) and (b) to 11 CFR 109.32(a) and (b) and 109.36; 11 CFR 110.7(c) to 11 CFR 109.33; and 11 CFR 110.7(d) to 11 CFR 109.34.

#### 11 CFR 110.8 *Presidential Candidate Expenditure Limitations*

As in 11 CFR 109.32(a) and (b) discussed above, the Commission clarifies that the expenditure limits for publicly funded Presidential candidates are increased in accordance with 11 CFR 110.17. See 11 CFR 110.8(a)(2). To accommodate this new section 110.8(a)(2), the Commission is redesignating pre-BCRA paragraphs (a)(1) and (a)(2) as (a)(1)(i) and (a)(1)(ii), respectively.

In 11 CFR 110.8(a)(3), the Commission references the definition of "voting age population" at 11 CFR 110.18. The voting age population is a factor in the calculation of expenditure limitations in 11 CFR 110.8(a). No commenters addressed this section.

The Commission also made additional changes to 11 CFR 110.9(c) in a separate rulemaking, including moving it to 11 CFR 110.17. See Final Rules and Explanation and Justification for Contribution Limitations and Prohibitions, 67 FR 69,928 (November 19, 2002).

#### 11 CFR 110.14 *Contributions to and Expenditures by Delegates and Delegate Committees*

In light of the Congressional repeal of former 11 CFR 100.23, the removal of the separate definition of "independent expenditure" under 11 CFR 109.1, and the removal of 11 CFR 109.2, see Final Rules and Explanation and Justification for Bipartisan Campaign Reform Act of

2002 Reporting, published elsewhere in this issue of the **Federal Register**, the Commission is making several necessary technical revisions to 11 CFR 110.14. These technical revisions were not originally proposed in the NPRM. Within 11 CFR 110.14, the Commission is replacing all references to a "coordinated general public political communication under 11 CFR 100.23" with references to "coordinated communication under 11 CFR 109.21." In addition, the Commission is replacing all citations to former 11 CFR 109.2 with citations to 11 CFR 109.10. Finally, the Commission is replacing all references to independent expenditures under 11 CFR part 109 with references to independent expenditures under 11 CFR 100.16 to reflect the removal of the definition of "independent expenditure" in former 11 CFR 109.1.

#### 11 CFR 110.18 *Voting Age Population*

The Commission is moving pre-BCRA section 110.9(d) regarding voting age population ("VAP") to 11 CFR 110.18 as part of a reorganization of section 110.9. This provision is referenced in sections 109.32(a) and (b) (coordinated party expenditure limits) and 110.8(a)(3) (Presidential candidate expenditure limits) where the VAP is used as a factor in calculating the limits. Section 110.18 is revised from pre-BCRA section 110.9(d) to clarify that the Secretary of Commerce each year certifies to the Commission and publishes in the **Federal Register** an estimate of the VAP pursuant to 2 U.S.C. 441a(e). No comments addressed this provision.

Changes to the other provisions of section 110.9, including paragraph (c) of this section, are addressed in a separate rulemaking. See Final Rules and Explanation and Justification for Contribution Limitations and Prohibitions, 67 FR 69,928 (November 19, 2002).

#### 11 CFR 114.4 *Disbursements for Communications Beyond the Restricted Class in Connection With a Federal Election*

Paragraph (c)(5) of section 114.4 pertains to voter guides paid for by corporations and labor organizations. The Commission makes several changes to this paragraph to conform with other regulatory changes in response to BCRA.

The pre-BCRA version of paragraphs (c)(5)(i) and (ii) of section 114.4 provided that a corporation or labor organization must not, among other things, "contact" a candidate in the preparation of a voter guide, except in writing. In this rulemaking, the Commission is promulgating a safe harbor in the coordination rules that

allows a person, such as a corporation or labor union, to contact a candidate to inquire about the candidate's positions on legislative or policy issues without a subsequent communication paid for by that person being deemed coordinated with the candidate (assuming there are no other actions resulting in coordination). See 11 CFR 109.21(f) and the above discussion relating to this provision.

Accordingly, paragraph (c)(5)(i) of section 114.4 is being amended to delete the prohibition against any contact with a candidate in the preparation of a voter guide.

Paragraph (c)(5)(ii) of section 114.4 is being amended to delete the requirement that contact with the candidate be in writing.

The Commission is also making several non-substantive changes to paragraphs (c)(5)(i) and (ii) of section 114.4 to conform these provisions to the statutory provisions on which they are based. Compare 2 U.S.C. 441a(a)(7)(B) with 11 CFR 114.5(c)(5)(i) and (ii).

The Commission received three comments on this section, all of which urged the Commission to include an exception to the coordination standard at 11 CFR 109.21 for inquiries to candidates in connection with voter guides. The Commission is including the described safe harbor at 11 CFR 109.21(f) to address this concern.

The Commission notes that an appeals court in one circuit invalidated portions of pre-BCRA 11 CFR 114.4(c)(5). See *Clifton v. Federal Election Commission*, 927 F. Supp. 493 (D. Me. 1996), modified in part and remanded in part, 114 F.3d 1309 (1st Cir. 1997), cert. denied, 522 U.S. 1108 (1998). Subsequently a Petition for Rulemaking asked the Commission to repeal its voter guide regulation. See Notice of Availability, 64 FR 46,319 (Aug. 25, 1999). The Commission's present rulemaking consists of changes necessitated by BCRA, although any additional changes to the voter guide regulations could be addressed in a future rulemaking.

#### **Certification of No Effect Pursuant to 5 U.S.C. 605(b) [Regulatory Flexibility Act]**

The Commission certifies that the attached rules will not have a significant economic impact on a substantial number of small entities. The basis of this certification is that the national, State, and local party committees of the two major political parties, and other political committees are not small entities under 5 U.S.C. 601 because they are not small businesses, small organizations, or small governmental

jurisdictions. Further, individual citizens operating under these rules are not small entities.

To the extent that any political committee may fall within the definition of "small entities," their numbers are not substantial, particularly the number that would coordinate expenditures with candidates or political party committees in connection with a Federal election.

In addition, the small entities to which the rules apply will not be unduly burdened by the proposed rules because there is no significant extra cost involved, as any new potential recordkeeping responsibilities would be minimal and optional. Any commercial vendors whose clients include campaign committees or political party committees were previously subject to different rules regarding coordination, and will not experience a significant economic impact as a result of the new rules because the requirements of these new rules are no more than what is necessary to comply with the new statute enacted by Congress.

**Derivation Table**

The following derivation table identifies the new sections in parts 100, 109, and 110 and the corresponding pre-BCRA rules that addressed those subject areas.

| New section       | Old section                                      |
|-------------------|--|
| 100.16(b) .....   | 109.1(e).  |
| 109.1 .....       | New.   |
| 109.3 .....       | 109.1(b)(5).                                     |
| 109.11 .....      | 109.3.   |
| 109.20 .....      | 109.1(c).  |
| 109.21 .....      | New.   |
| 109.22 .....      | New.   |
| 109.23 .....      | 109.1(d).  |
| 109.30 .....      | New.   |
| 109.31 .....      | New—Reserved.                                    |
| 109.32(a) .....   | 110.7(a) (except para. (a)(4) and para. (a)(5)). |
| 109.32(b) .....   | 110.7(b).  |
| 109.33 .....      | 110.7(a)(4) and (c).                             |
| 109.34 .....      | 110.7(d).  |
| 109.35 .....      | New.   |
| 109.36 .....      | 110.7(a)(5).                                     |
| 109.37 .....      | New.   |
| 110.1(n) .....    | New.   |
| 110.2(k) .....    | New.   |
| 110.8(a)(2) ..... | New.   |
| 110.8(a)(3) ..... | New.   |
| 110.18 .....      | 110.9(d).  |

**List of Subjects**

*11 CFR Part 100*

Elections.

*11 CFR Part 102*

Political committees and parties, reporting and recordkeeping requirements.

*11 CFR Part 109*

Elections, reporting and recordkeeping requirements.

*11 CFR Part 110*

Campaign funds, political committees and parties.

*11 CFR Part 114*

Business and industry, elections, labor.

For the reasons set out in the preamble, subchapter A of chapter 1 of title 11 of the Code of Federal Regulations is amended as follows:

**PART 100—SCOPE AND DEFINITIONS**

1. The authority citation for part 100 is revised to read as follows:

**Authority:** 2 U.S.C. 431, 434, and 438(a)(8).

2. Section 100.16 is revised to read as follows:

**§ 100.16 Independent expenditure (2 U.S.C. 431(17)).**

(a) The term *independent expenditure* means an expenditure by a person for a communication expressly advocating the election or defeat of a clearly identified candidate that is not made in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, or their agents, or a political party committee or its agents. A communication is "made in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, or their agents, or a political party committee or its agents" if it is a coordinated communication under 11 CFR 109.21 or a party coordinated communication under 11 CFR 109.37.

(b) No expenditure by an authorized committee of a candidate on behalf of that candidate shall qualify as an independent expenditure.

(c) No expenditure shall be considered independent if the person making the expenditure allows a candidate, a candidate's authorized committee, or their agents, or a political party committee or its agents to become materially involved in decisions regarding the communication as described in 11 CFR 109.21(d)(2), or shares financial responsibility for the costs of production or dissemination with any such person.

**§ 100.23 [Reserved.]**

3. Remove and reserve § 100.23.

**PART 102—REGISTRATION, ORGANIZATION, AND RECORDKEEPING BY POLITICAL COMMITTEES (2 U.S.C. 433)**

4. The authority citation for Part 102 continues to read as follows:

**Authority:** 2 U.S.C. 432, 433, 434(a)(11), 438(a)(8), and 441d.

5. Section 102.6(a)(1)(ii) is revised to read as follows:

**§ 102.6 Transfers of funds; collecting agents.**

(a) \* \* \*

(1) \* \* \*

(ii) Subject to the restrictions set forth at 11 CFR 109.35(c), 300.10(a), 300.31 and 300.34(a) and (b), transfers of funds may be made without limit on amount between or among a national party committee, a State party committee and/or any subordinate party committee whether or not they are political committees under 11 CFR 100.5 and whether or not such committees are affiliated.

\* \* \* \* \*

6. Part 109 is revised to read as follows:

**PART 109—COORDINATED AND INDEPENDENT EXPENDITURES (2 U.S.C. 431(17), 441a(a) and (d), and Pub. L. 107–155 sec. 214(c))**

Sec.

**Subpart A—Scope and Definitions**

- 109.1 When will this part apply?
- 109.2 [Reserved]
- 109.3 Definitions.

**Subpart B—Independent Expenditures**

- 109.10 How do political committees and other persons report independent expenditures?
- 109.11 When is a "non-authorization notice" (disclaimer) required?

**Subpart C—Coordination**

- 109.20 What does "coordinated" mean?
- 109.21 What is a "coordinated communication"?
- 109.22 Who is prohibited from making coordinated communications?
- 109.23 Dissemination, distribution, or republication of candidate campaign materials.

**Subpart D—Special Provisions for Political Party Committees**

- 109.30 How are political party committees treated for purposes of coordinated and independent expenditures?
- 109.31 [Reserved]
- 109.32 What are the coordinated party expenditure limits?
- 109.33 May a political party committee assign its coordinated party expenditure authority to another political party committee?



acceptable and unacceptable purpose descriptions to be reported by authorized committees. Paragraph (B) requires authorized committees, when itemizing certain disbursements for which reimbursements are required, to provide a brief explanation of the activity for which reimbursement is required. These provisions have been in Title 11 of the **Code of Federal Regulations** since 1980 and 1995, respectively, and were not affected by the recent statutory changes to the election cycle reporting requirements.

#### Need for Correction

As published, the final rules inadvertently omit two paragraphs describing information to be reported by authorized committees of Federal candidates.

All committees must report the purpose of itemized disbursements (i.e., those disbursements aggregating in excess of \$200). Omitted paragraph (A) contains examples of suitably specific purpose descriptions as well as examples of those descriptions that are unacceptably vague. This paragraph is inconsistent with the reporting of rules for unauthorized committees (committees other than candidate committees) in 11 CFR 104.3(b)(3).

Omitted paragraph (B) is used in administering the "personal use" rules in 11 CFR 113.1. Federal candidates are barred from using campaign funds for personal benefit. Paragraph (B) requires authorized committees of Federal candidates itemizing disbursements for which partial or total reimbursement is required under 11 CFR 113.1(g)(1)(iii)(C) or (D) to provide a brief explanation of the activity for which the reimbursement is made.

Section 801 of Title 5 of the United States Code requires Federal agencies to submit regulations to Congress. These regulations were submitted to the Speaker of the House of Representatives and the President of the Senate on November 26, 2001.

#### Certification of No Effect Pursuant to 5 U.S.C. § 605(b) [Regulatory Flexibility Act]

This correction will not have significant economic impact on a substantial number of small entities. The basis of this certification is that this correction only requires political committees to once again add information to the reports they are required to file. These regulations were in 11 CFR since 1980 and 1995, respectively, before being inadvertently omitted in 2000.

#### List of Subjects in 11 CFR Part 104

Campaign funds, Political committees and parties, Reporting and recordkeeping requirements.

Accordingly, 11 CFR part 104 is corrected by making the following correcting amendment:

#### PART 104—REPORTS BY POLITICAL COMMITTEES

1. The authority citation for part 104 continues to read as follows:

**Authority:** 2 U.S.C. 431(1), 431(8), 431(9), 432(i), 434, 438(a)(8), 438(b), 439a.

#### § 104.3 Contents of reports (2 U.S.C. 434(b), 439a).

\* \* \* \* \*

2. In § 104.3 add the following paragraphs (b)(4)(i)(A) and (B):

(b) \* \* \*

(4) \* \* \*

(i) \* \* \*

(A) As used in this paragraph, *purpose* means a brief statement or description of why the disbursement was made. Examples of statements or descriptions which meet the requirements of this paragraph include the following: dinner expenses, media, salary, polling, travel, party fees, phone banks, travel expenses, travel expense reimbursement, and catering costs. However, statements or descriptions such as *advance*, *election day expenses*, *other expenses*, *expenses*, *expense reimbursement*, *miscellaneous*, *outside services*, *get-out-the-vote* and *voter registration* would not meet the requirements of this paragraph for reporting the purpose of an expenditure.

(B) In addition to reporting the purpose described in paragraph (b)(4)(i)(A) of this section, whenever an authorized committee itemizes a disbursement that is partially or entirely a personal use for which reimbursement is required under 11 CFR 113.1(g)(1)(ii)(C) or (D), it shall provide a brief explanation of the activity for which reimbursement is required.

\* \* \* \* \*

Dated: November 26, 2001.

**Danny L. McDonald,**  
Chairman, Federal Election Commission.  
[FR Doc. 01-29679 Filed 11-29-01; 8:45 am]  
**BILLING CODE 6715-01-P**

#### FEDERAL ELECTION COMMISSION

#### 11 CFR Part 111

#### [Notice 2001-18]

#### Extension to Administrative Fines

**AGENCY:** Federal Election Commission.

**ACTION:** Final rule; revision of the sunset date.

**SUMMARY:** The Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the expiration date in which the Federal Election Commission (hereinafter "the Commission") may assess civil money penalties for violations of the reporting requirements of section 434(a) of the Federal Election Campaign Act (hereinafter "the Act" or "FECA").

**DATES:** Effective on December 31, 2001.

**FOR FURTHER INFORMATION CONTACT:** Ms. Rosemary C. Smith, Assistant General Counsel, or Ms. Mai T. Dinh, Attorney, 999 E Street, NW., Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

#### SUPPLEMENTARY INFORMATION:

#### Explanation and Justification

Section 640 of the Treasury and General Government Appropriations Act, 2000, Pub. L. No. 106-58, 106th Cong., 113 Stat. 430, 476-77 (1999), amended § 309(a)(4) of the FECA, 2 U.S.C. 437g(a)(4), to provide for a modified enforcement process for violations of reporting requirements. Under § 437g(a)(4)(C) of the FECA, the Commission may assess a civil money penalty for violations of the reporting requirements of 2 U.S.C. 434(a). This authority, however, was to sunset on December 31, 2001. Pub. L. No. 106-58, 106th Cong., § 640(c). Recently, § 642 of the Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the sunset date to include all reports that cover activity between January 1, 2000, to December 31, 2003.

The Commission published final rules on May 19, 2000, to implement the amendment contained in the Treasury and General Government Appropriations Act, 2000. Section 111.30 of the regulations reflects the sunset provision of Pub. L. No. 106-58, 106th Cong., § 640(c). Therefore, the Commission is issuing this final rule to amend section 111.30 to extend the application of the administrative fine regulations, 11 CFR part 111, subpart B, to include all violations relating to reports that cover the period between January 1, 2000, to December 31, 2003.

The Commission is promulgating this final rule without notice or opportunity for comment because it falls under the "good cause" exemption of the Administrative Procedures Act, 5 U.S.C. 553(b)(B). The exemption allows

# Rules and Regulations

Federal Register

Vol. 68, No. 9

Tuesday, January 14, 2003

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

## FEDERAL ELECTION COMMISSION

### 11 CFR Part 110

[Notice 2003-1]

#### Contribution Limitations and Prohibitions; Correction

**AGENCY:** Federal Election Commission.

**ACTION:** Final rule; correction.

**SUMMARY:** The Federal Election Commission published a correction to the final rules governing contribution limitations and prohibitions in the *Federal Register* on December 27, 2002 (67 FR 78959). The correction, in part, delayed the January 1, 2003 effective date for revised 11 CFR 110.9. Due to a typographical error, the date of the delayed effective date for this section was published as January 13, 2002; the correct delayed effective date for this section should have read January 13, 2003.

**EFFECTIVE DATES:** The revision of 11 CFR 110.9 published on November 19, 2002 (67 FR 69928) is effective January 13, 2003.

**FOR FURTHER INFORMATION CONTACT:** Ms. Mai T. Dinh, Acting Assistant General Counsel, 999 E Street, NW., Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

**SUPPLEMENTARY INFORMATION:** The Federal Election Commission published in the *Federal Register* on December 27, 2002, Notice 2002-30 to delay the effective date of the revisions to 11 CFR 110.9 contained in the Contribution Limitations and Prohibitions; Final Rule. 67 FR 78959; *see also* 67 FR 69928 (November 19, 2002) (Contribution Limitations and Prohibitions; Final Rule). Due to a typographical error, Notice 2002-30 incorrectly stated that the delayed effective date for revised 11 CFR 110.9 would be January 13, 2002 rather than January 13, 2003. Consequently, this Notice corrects the

delayed effective date for revised 11 CFR 110.9 to January 13, 2003.

#### Correction of Publication

Accordingly, the publication on December 27, 2002 (67 FR 78959) of the correction to the final regulations, which was the subject of Notice 2002-30, is revised as follows:

On page 78959 in the **DATES** section in the second and third line of the second column, change "January 13, 2002" to read "January 13, 2003."

Dated: January 8, 2003.

**Ellen L. Weintraub,**

*Chair, Federal Election Commission.*

[FR Doc. 03-666 Filed 1-13-03; 8:45 am]

**BILLING CODE 6715-01-P**

## FEDERAL RESERVE SYSTEM

### 12 CFR Part 201

[Regulation A; Docket No. R-1141]

#### Extensions of Credit by Federal Reserve Banks

**AGENCY:** Board of Governors of the Federal Reserve System.

**ACTION:** Final rule.

**SUMMARY:** The Board of Governors is publishing final amendments to Regulation A to reflect its approval of the initial interest rates for extensions of primary and secondary credit. The amendments also correct a typographical error. These amendments supersede the text of one section of the final rule that the Board approved on October 31, 2002, and published in the *Federal Register* on November 7, 2002. The new primary and secondary credit rates do not indicate a change in the stance of monetary policy.

**EFFECTIVE DATE:** January 9, 2003.

**FOR FURTHER INFORMATION CONTACT:** Brian Madigan, Deputy Director (202/452-3828) or William Nelson, Senior Economist (202/452-3579), Division of Monetary Affairs; or Stephanie Martin, Assistant General Counsel (202/452-3198) or Adrienne Threatt, Counsel (202/452-3554), Legal Division; for users of Telecommunication Devices for the Deaf (TDD) only, contact 202/263-4869.

**SUPPLEMENTARY INFORMATION:** On October 31, 2002, the Board announced that it would eliminate the adjustment

and extended credit programs and replace them with new primary and secondary credit programs, effective January 9, 2003 (67 FR 67777, November 7, 2002). Reserve Banks will offer primary credit for very short terms (usually overnight) as a backup source of liquidity to depository institutions that the Reserve Banks deem to be in generally sound financial condition. The Board expects that most depository institutions will qualify for primary credit. Under appropriate circumstances, Reserve Banks may extend secondary credit as a backup source of liquidity to depository institutions that do not qualify for primary credit.

The preamble to the Board's final rule indicated the Board's expectation that the initial interest rate for primary credit would be 100 basis points above the prevailing target federal funds rate of the Federal Open Market Committee (FOMC) and that the initial secondary credit rate would be 50 basis points above the primary credit rate. At the time it published its final rule, the Board did not know what the target federal funds rate would be on January 9, 2003, and thus could not determine the initial primary and secondary credit rates. Section 201.51(a)-(b) of the October 2002 final rule therefore simply described the above-market rates for primary and secondary credit but did not list the actual rates to be in effect on January 9, 2003.

On January 6, 2003, the Federal Reserve Board approved requests by each of the 12 Federal Reserve Banks to establish an initial interest rate for primary credit of 2.25 percent, which is 100 basis points above the current target federal funds rate. The Board also approved requests by the 12 Federal Reserve Banks to establish an initial secondary credit rate of 2.75 percent. These new primary and secondary credit rates will be listed in tables contained at § 201.51(a)-(b). The Board also has amended § 201.51(c) to correct a typographical error in the cross-reference to § 201.4. These amendments supersede the text of § 201.51(a)-(c) that appeared in the Board's October 2002 final rule.

The Board reiterates that the new primary and secondary credit rates simply implement the new, above-market lending programs and do not affect the stance of monetary policy, as

acceptable and unacceptable purpose descriptions to be reported by authorized committees. Paragraph (B) requires authorized committees, when itemizing certain disbursements for which reimbursements are required, to provide a brief explanation of the activity for which reimbursement is required. These provisions have been in Title 11 of the **Code of Federal Regulations** since 1980 and 1995, respectively, and were not affected by the recent statutory changes to the election cycle reporting requirements.

#### Need for Correction

As published, the final rules inadvertently omit two paragraphs describing information to be reported by authorized committees of Federal candidates.

All committees must report the purpose of itemized disbursements (i.e., those disbursements aggregating in excess of \$200). Omitted paragraph (A) contains examples of suitably specific purpose descriptions as well as examples of those descriptions that are unacceptably vague. This paragraph is inconsistent with the reporting of rules for unauthorized committees (committees other than candidate committees) in 11 CFR 104.3(b)(3).

Omitted paragraph (B) is used in administering the "personal use" rules in 11 CFR 113.1. Federal candidates are barred from using campaign funds for personal benefit. Paragraph (B) requires authorized committees of Federal candidates itemizing disbursements for which partial or total reimbursement is required under 11 CFR 113.1(g)(1)(iii)(C) or (D) to provide a brief explanation of the activity for which the reimbursement is made.

Section 801 of Title 5 of the United States Code requires Federal agencies to submit regulations to Congress. These regulations were submitted to the Speaker of the House of Representatives and the President of the Senate on November 26, 2001.

#### Certification of No Effect Pursuant to 5 U.S.C. § 605(b) [Regulatory Flexibility Act]

This correction will not have significant economic impact on a substantial number of small entities. The basis of this certification is that this correction only requires political committees to once again add information to the reports they are required to file. These regulations were in 11 CFR since 1980 and 1995, respectively, before being inadvertently omitted in 2000.

#### List of Subjects in 11 CFR Part 104

Campaign funds, Political committees and parties, Reporting and recordkeeping requirements.

Accordingly, 11 CFR part 104 is corrected by making the following correcting amendment:

#### PART 104—REPORTS BY POLITICAL COMMITTEES

1. The authority citation for part 104 continues to read as follows:

**Authority:** 2 U.S.C. 431(1), 431(8), 431(9), 432(i), 434, 438(a)(8), 438(b), 439a.

#### § 104.3 Contents of reports (2 U.S.C. 434(b), 439a).

\* \* \* \* \*

2. In § 104.3 add the following paragraphs (b)(4)(i)(A) and (B):

(b) \* \* \*

(4) \* \* \*

(i) \* \* \*

(A) As used in this paragraph, *purpose* means a brief statement or description of why the disbursement was made. Examples of statements or descriptions which meet the requirements of this paragraph include the following: dinner expenses, media, salary, polling, travel, party fees, phone banks, travel expenses, travel expense reimbursement, and catering costs. However, statements or descriptions such as *advance*, *election day expenses*, *other expenses*, *expenses*, *expense reimbursement*, *miscellaneous*, *outside services*, *get-out-the-vote* and *voter registration* would not meet the requirements of this paragraph for reporting the purpose of an expenditure.

(B) In addition to reporting the purpose described in paragraph (b)(4)(i)(A) of this section, whenever an authorized committee itemizes a disbursement that is partially or entirely a personal use for which reimbursement is required under 11 CFR 113.1(g)(1)(ii)(C) or (D), it shall provide a brief explanation of the activity for which reimbursement is required.

\* \* \* \* \*

Dated: November 26, 2001.

**Danny L. McDonald,**  
Chairman, Federal Election Commission.  
[FR Doc. 01-29679 Filed 11-29-01; 8:45 am]  
**BILLING CODE 6715-01-P**

#### FEDERAL ELECTION COMMISSION

#### 11 CFR Part 111

#### [Notice 2001-18]

#### Extension to Administrative Fines

**AGENCY:** Federal Election Commission.

**ACTION:** Final rule; revision of the sunset date.

**SUMMARY:** The Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the expiration date in which the Federal Election Commission (hereinafter "the Commission") may assess civil money penalties for violations of the reporting requirements of section 434(a) of the Federal Election Campaign Act (hereinafter "the Act" or "FECA").

**DATES:** Effective on December 31, 2001.

**FOR FURTHER INFORMATION CONTACT:** Ms. Rosemary C. Smith, Assistant General Counsel, or Ms. Mai T. Dinh, Attorney, 999 E Street, NW., Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

#### SUPPLEMENTARY INFORMATION:

#### Explanation and Justification

Section 640 of the Treasury and General Government Appropriations Act, 2000, Pub. L. No. 106-58, 106th Cong., 113 Stat. 430, 476-77 (1999), amended § 309(a)(4) of the FECA, 2 U.S.C. 437g(a)(4), to provide for a modified enforcement process for violations of reporting requirements. Under § 437g(a)(4)(C) of the FECA, the Commission may assess a civil money penalty for violations of the reporting requirements of 2 U.S.C. 434(a). This authority, however, was to sunset on December 31, 2001. Pub. L. No. 106-58, 106th Cong., § 640(c). Recently, § 642 of the Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the sunset date to include all reports that cover activity between January 1, 2000, to December 31, 2003.

The Commission published final rules on May 19, 2000, to implement the amendment contained in the Treasury and General Government Appropriations Act, 2000. Section 111.30 of the regulations reflects the sunset provision of Pub. L. No. 106-58, 106th Cong., § 640(c). Therefore, the Commission is issuing this final rule to amend section 111.30 to extend the application of the administrative fine regulations, 11 CFR part 111, subpart B, to include all violations relating to reports that cover the period between January 1, 2000, to December 31, 2003.

The Commission is promulgating this final rule without notice or opportunity for comment because it falls under the "good cause" exemption of the Administrative Procedures Act, 5 U.S.C. 553(b)(B). The exemption allows

# Rules and Regulations

Federal Register

Vol. 68, No. 14

Wednesday, January 22, 2003

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

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## FEDERAL ELECTION COMMISSION

### 11 CFR Parts 104 and 110

[Notice 2003-2]

#### BCRA Technical Corrections

**AGENCY:** Federal Election Commission.

**ACTION:** Final rule; technical amendments.

**SUMMARY:** The Commission published technical amendments to its regulations on December 26, 2002, entitled “BCRA Technical Amendments.” These amendments became effective upon publication. However, some of the amendments changed regulations that were promulgated but had not become effective as of December 26, 2002, and therefore could not take effect. Thus, the Commission is re-promulgating the technical amendments that did not take effect with the original BCRA technical amendments. Further information is provided in the supplementary information that follows.

**EFFECTIVE DATES:** The effective date for the revisions to 11 CFR 104.3(d)(1), introductory text, is December 31, 2002. The effective date for revisions to 11 CFR 110.19(e) is January 1, 2003.

**FOR FURTHER INFORMATION CONTACT:** Mai T. Dinh, Acting Assistant General Counsel, 999 E Street, NW., Washington DC, 20463, (202) 694-1650 or (800) 424-9530.

**SUPPLEMENTARY INFORMATION:** The Commission promulgated a series of regulations to implement the Bipartisan Campaign Reform Act of 2002 (“BCRA”), Public Law 107-155, 116 Stat. 81 (March 27, 2002).<sup>1</sup> As part of that effort, the Commission recently published technical amendments to its regulations to correct obsolete citations and typographical errors. See BCRA Technical Amendments Final Rule, 67 FR 78679 (Dec. 26, 2002). While these technical amendments became effective on December 26, 2002, the final rule amended sections that had been promulgated but had not yet been made effective as of that date. The affected sections are 11 CFR 104.3(d)(1) and 110.19(e). Additionally, the changes to the amendments to 11 CFR 113.1(g)(5) and (6), and 114.10(e) that were part of the BCRA Technical Amendments Final Rule will not be made because they are no longer necessary.<sup>2</sup> Therefore, the Commission is publishing and establishing the correct effective dates for the revisions to 11 CFR 104.3(d)(1) and 110.19(e) in this final rule.

Because the amendments published herein are merely technical and nonsubstantive, they are not a substantive rule requiring notice and comment under Administrative Procedure Act, 5 U.S.C. 553. Under the “good cause” exception in 5 U.S.C. 553(b)(B) and 553(d)(3), these technical amendments do not need to wait the 30 days after publication in the **Federal Register** to become effective. Rather, the effective date for the revisions to 11 CFR

104.3(d)(1) is December 31, 2002; and the effective date for 11 CFR 110.19(e) is January 1, 2003.

#### Certification of No Effect Pursuant to 5 U.S.C. 605(b) (Regulatory Flexibility Act)

This final rule does not have a significant economic impact on a substantial number of small entities. The amendments in this final rule are all technical and nonsubstantive in nature and do not have any economic impact on any entity subject to the underlying regulations.

#### List of Subjects

##### 11 CFR Part 104

Campaign funds, Political committees and parties, Reporting and recordkeeping requirements.

##### 11 CFR Part 110

Campaign funds, Political committees and parties.

For the reasons set out in the preamble, subchapters A of chapter 1 of title 11 of the *Code of Federal Regulations* are amended as follows:

#### PART 104—REPORTS BY POLITICAL COMMITTEES (2 U.S.C. 434)

1. The authority citation for part 104 continues to read as follows:

**Authority:** 2 U.S.C. 431(1), 431(8), 431(9), 432(i), 434, 438(a)(8) and (b), and 439a.

#### § 104.3 [Amended]

2. In the table below, for each section indicated in the left column, remove the citation indicated in the middle column, and replace it with the citation indicated in the right column:

| Section                              | Remove             | Add                     |
|--------------------------------------|--------------------|-------------------------|
| 104.3(d)(1), introductory text ..... | 100.7(b)(11) ..... | 100.82(a) through (d).  |
| 104.3(d)(1), introductory text ..... | 100.8(b)(12) ..... | 100.142(a) through (d). |

<sup>1</sup> See the following rulemakings: Final Rules on Prohibited and Excessive Contributions: Non-Federal Funds or Soft, 67 FR 49064 (July 29, 2002); Final Rules on Reorganization of Regulations on Contributions and Expenditures, 67 FR 50582 (Aug. 5, 2002); Final Rules on Coordinated and Independent expenditures, 67 FR (Jan. 3, 2003);

Final Rules on Electioneering Communications, 67 FR 65212 (October 23, 2002); Final Rules on Contribution Limitations and Prohibitions, 67 FR 69928 (Nov. 19, 2002).

<sup>2</sup> The appropriate changes to 11 CFR 113.1(g)(5) and (6), and 114.10(e)(2) have already been made

as part of the Final Rules on Disclaimers, Fraudulent Solicitation, Civil Penalties, and Personal Use of Campaign Funds, 67 FR 76962, 76979 (Dec. 13, 2002), and Final Rules on Electioneering Communications, 67 FR at 65212, respectively.

**PART 110—CONTRIBUTION AND EXPENDITURE LIMITATIONS AND PROHIBITIONS**

Authority: 2 U.S.C. 431(8), 431(9), 432(c)(2), 437d, 438(a)(8), 441a, 441b, 441d, 441e, 441f, 441g, 441h and 441k.

citation or phrase indicated in the middle column, and replace it with the citation or phrase indicated in the right column:

3. The authority citation for part 110 continues to read as follows:

**§ 110.19 [Amended]**

4. In the table below, for each section indicated in the left column, remove the

| Section                           | Remove                  | Add                |
|-----------------------------------|-------------------------|--------------------|
| 110.19(e) paragraph heading ..... | maintain, finance ..... | finance, maintain. |
| 110.19(e) .....                   | maintain, finance ..... | finance, maintain. |

Dated: January 14, 2003.  
**Ellen L. Weintraub,**  
 Chair, Federal Election Commission.  
 [FR Doc. 03-1184 Filed 1-21-03; 8:45 am]  
 BILLING CODE 6715-01-P

**DEPARTMENT OF TRANSPORTATION**

**Federal Aviation Administration**

**14 CFR Part 39**

[Docket No. 2000-CE-80-AD; Amendment 39-13019; AD 2003-02-03]

RIN 2120-AA64

**Airworthiness Directives; Raytheon Aircraft Company 65, 90, 99, 100, 200, and 300 Series, and Model 2000 Airplanes**

**AGENCY:** Federal Aviation Administration, DOT.

**ACTION:** Final rule.

**SUMMARY:** This amendment adopts a new airworthiness directive (AD) that applies to certain Raytheon Aircraft Company (Raytheon) 65, 90, 99, 100, 200, and 300 series, and Model 2000 airplanes. This AD requires you to install new exterior operating instruction placards for the airstair door and emergency exits. This AD is the result of Raytheon improving the visibility and understandability of the door operating instruction placards. This was done as a result of difficulty opening the emergency exits of a similar type design airplane. The actions specified by this AD are intended to assure that clear and complete operating instructions are visible for opening the airstair door and emergency exits. If the operating instructions are not visible or understandable, this could result in the inability to open the airstair door or emergency exits during an emergency situation.

**DATES:** This AD becomes effective on March 7, 2003.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in the regulations as of March 7, 2003.

**ADDRESSES:** You may get the service information referenced in this AD from Raytheon Aircraft Company, 9709 E. Central, Wichita, Kansas 67201-0085; telephone: (800) 429-5372 or (316) 676-3140. You may view this information at the Federal Aviation Administration (FAA), Central Region, Office of the Regional Counsel, Attention: Rules Docket No. 2000-CE-80-AD, 901 Locust, Room 506, Kansas City, Missouri 64106; or at the Office of the Federal Register, 800 North Capitol Street, NW., Suite 700, Washington, DC.

**FOR FURTHER INFORMATION CONTACT:** Mr. Steven E. Potter, Aerospace Engineer, Wichita Aircraft Certification Office, FAA, 1801 Airport Road, Wichita, Kansas 67209; telephone: (316) 946-4124; facsimile: (316) 946-4407.

**SUPPLEMENTARY INFORMATION:**

**Discussion**

*What events have caused this AD?* FAA believes that the instructions for opening the airstair door and emergency exits are either not visible or not easy to understand on Raytheon 65, 90, 99, 100, 200, and 300 series, and Model 2000 airplanes. This is based on an accident that resulted in the issuance of AD 97-04-02. AD 97-04-02 was later superseded by AD 98-21-20 to incorporate more visible and understandable instructions.

*What is the potential impact if FAA took no action?* If the exterior door operating instruction placards are not visible or understandable, this could result in the inability to open the airstair door or emergency exits during an emergency situation.

*Has FAA taken any action to this point?* We issued a proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an AD that would apply to certain Raytheon 65, 90, 99, 100, 200, and 300 series, and Model 2000 airplanes. This proposal was published in the **Federal Register** as a notice of proposed rulemaking (NPRM) on August 9, 2002 (67 FR 51791). The NPRM proposed to require you to install new exterior

operating instruction placards for the airstair door and emergency exits.

*Was the public invited to comment?* The FAA encouraged interested persons to participate in the making of this amendment. The following presents the comments received on the proposal and FAA's response to each comment:

**Comment Issue No. 1: AD Is Unjustified**

*What is the commenter's concern?* The commenter believes that in the accident that resulted in the earlier ADs, the damage to the airplane prevented the doors from opening. Therefore, the commenter believes that if the new placards had been present in this situation, they still would not have prevented injuries or loss of life. We infer that the commenter wants the NPRM withdrawn based on no compelling evidence that the presence of the placards addresses the unsafe condition.

*What Is FAA's response to the concern?* We do not concur. In an emergency situation, exiting the airplane is of the utmost importance, especially if the postcrash scenario includes a cabin fire. The cabin crew and/or passengers may become incapacitated. Therefore, the exterior emergency exit door operating instructions must be extremely clear and complete so that any person will be able to open the exit door.

We are not changing the final rule AD action based on this comment.

**Comment Issue No. 2: Placards Are Not Durable**

*What is the commenter's concern?* The commenter states that the placards supplied by Raytheon do not adhere to the airplane surface properly. The placards often begin to peel-off either in flight or while washing the airplane. We infer that the commenter wants the NPRM withdrawn because the placards will eventually come off on their own.

*What is FAA's response to the concern?* We are aware that durability and adherence of the placards to the airplane surface may be a problem. However, it is not a valid reason for withdrawing the NPRM. The owners/

acceptable and unacceptable purpose descriptions to be reported by authorized committees. Paragraph (B) requires authorized committees, when itemizing certain disbursements for which reimbursements are required, to provide a brief explanation of the activity for which reimbursement is required. These provisions have been in Title 11 of the **Code of Federal Regulations** since 1980 and 1995, respectively, and were not affected by the recent statutory changes to the election cycle reporting requirements.

#### Need for Correction

As published, the final rules inadvertently omit two paragraphs describing information to be reported by authorized committees of Federal candidates.

All committees must report the purpose of itemized disbursements (i.e., those disbursements aggregating in excess of \$200). Omitted paragraph (A) contains examples of suitably specific purpose descriptions as well as examples of those descriptions that are unacceptably vague. This paragraph is inconsistent with the reporting of rules for unauthorized committees (committees other than candidate committees) in 11 CFR 104.3(b)(3).

Omitted paragraph (B) is used in administering the "personal use" rules in 11 CFR 113.1. Federal candidates are barred from using campaign funds for personal benefit. Paragraph (B) requires authorized committees of Federal candidates itemizing disbursements for which partial or total reimbursement is required under 11 CFR 113.1(g)(1)(iii)(C) or (D) to provide a brief explanation of the activity for which the reimbursement is made.

Section 801 of Title 5 of the United States Code requires Federal agencies to submit regulations to Congress. These regulations were submitted to the Speaker of the House of Representatives and the President of the Senate on November 26, 2001.

#### Certification of No Effect Pursuant to 5 U.S.C. § 605(b) [Regulatory Flexibility Act]

This correction will not have significant economic impact on a substantial number of small entities. The basis of this certification is that this correction only requires political committees to once again add information to the reports they are required to file. These regulations were in 11 CFR since 1980 and 1995, respectively, before being inadvertently omitted in 2000.

#### List of Subjects in 11 CFR Part 104

Campaign funds, Political committees and parties, Reporting and recordkeeping requirements.

Accordingly, 11 CFR part 104 is corrected by making the following correcting amendment:

#### PART 104—REPORTS BY POLITICAL COMMITTEES

1. The authority citation for part 104 continues to read as follows:

**Authority:** 2 U.S.C. 431(1), 431(8), 431(9), 432(i), 434, 438(a)(8), 438(b), 439a.

#### § 104.3 Contents of reports (2 U.S.C. 434(b), 439a).

\* \* \* \* \*

2. In § 104.3 add the following paragraphs (b)(4)(i)(A) and (B):

(b) \* \* \*

(4) \* \* \*

(i) \* \* \*

(A) As used in this paragraph, *purpose* means a brief statement or description of why the disbursement was made. Examples of statements or descriptions which meet the requirements of this paragraph include the following: dinner expenses, media, salary, polling, travel, party fees, phone banks, travel expenses, travel expense reimbursement, and catering costs. However, statements or descriptions such as *advance*, *election day expenses*, *other expenses*, *expenses*, *expense reimbursement*, *miscellaneous*, *outside services*, *get-out-the-vote* and *voter registration* would not meet the requirements of this paragraph for reporting the purpose of an expenditure.

(B) In addition to reporting the purpose described in paragraph (b)(4)(i)(A) of this section, whenever an authorized committee itemizes a disbursement that is partially or entirely a personal use for which reimbursement is required under 11 CFR 113.1(g)(1)(ii)(C) or (D), it shall provide a brief explanation of the activity for which reimbursement is required.

\* \* \* \* \*

Dated: November 26, 2001.

**Danny L. McDonald,**  
Chairman, Federal Election Commission.  
[FR Doc. 01-29679 Filed 11-29-01; 8:45 am]  
**BILLING CODE 6715-01-P**

#### FEDERAL ELECTION COMMISSION

#### 11 CFR Part 111

#### [Notice 2001-18]

#### Extension to Administrative Fines

**AGENCY:** Federal Election Commission.

**ACTION:** Final rule; revision of the sunset date.

**SUMMARY:** The Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the expiration date in which the Federal Election Commission (hereinafter "the Commission") may assess civil money penalties for violations of the reporting requirements of section 434(a) of the Federal Election Campaign Act (hereinafter "the Act" or "FECA").

**DATES:** Effective on December 31, 2001.

**FOR FURTHER INFORMATION CONTACT:** Ms. Rosemary C. Smith, Assistant General Counsel, or Ms. Mai T. Dinh, Attorney, 999 E Street, NW., Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

#### SUPPLEMENTARY INFORMATION:

#### Explanation and Justification

Section 640 of the Treasury and General Government Appropriations Act, 2000, Pub. L. No. 106-58, 106th Cong., 113 Stat. 430, 476-77 (1999), amended § 309(a)(4) of the FECA, 2 U.S.C. 437g(a)(4), to provide for a modified enforcement process for violations of reporting requirements. Under § 437g(a)(4)(C) of the FECA, the Commission may assess a civil money penalty for violations of the reporting requirements of 2 U.S.C. 434(a). This authority, however, was to sunset on December 31, 2001. Pub. L. No. 106-58, 106th Cong., § 640(c). Recently, § 642 of the Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the sunset date to include all reports that cover activity between January 1, 2000, to December 31, 2003.

The Commission published final rules on May 19, 2000, to implement the amendment contained in the Treasury and General Government Appropriations Act, 2000. Section 111.30 of the regulations reflects the sunset provision of Pub. L. No. 106-58, 106th Cong., § 640(c). Therefore, the Commission is issuing this final rule to amend section 111.30 to extend the application of the administrative fine regulations, 11 CFR part 111, subpart B, to include all violations relating to reports that cover the period between January 1, 2000, to December 31, 2003.

The Commission is promulgating this final rule without notice or opportunity for comment because it falls under the "good cause" exemption of the Administrative Procedures Act, 5 U.S.C. 553(b)(B). The exemption allows

**FEDERAL ELECTION COMMISSION****11 CFR Parts 100, 101, 104, 110, 116, 400, and 9035****[Notice 2003—3]****Increased Contribution and Coordinated Party Expenditure Limits for Candidates Opposing Self-Financed Candidates****AGENCY:** Federal Election Commission.**ACTION:** Interim final rules.

**SUMMARY:** The Federal Election Commission (“FEC” or “Commission”) is adopting, as interim final rules, new regulations relating to increased contribution limits for individuals when contributing to candidates who are facing self-financed candidates under the Federal Election Campaign Act of 1971 (“FECA” or the “Act”), as amended by the Bipartisan Campaign Reform Act of 2002 (“BCRA”). The so-called “Millionaires’ Amendment” in BCRA raises the individual contribution limits for candidates for the Senate and House of Representatives depending on the amount that opposing candidates expend from personal funds in connection with an election. BCRA also removes the limitations on national and State party committee expenditures on behalf of a candidate if the opposing candidate’s expenditures from personal funds exceed a threshold amount. These interim final rules implement the various provisions of the Millionaires’ Amendment including thresholds, computation formulas, increased contribution limits with overall caps, repayment of personal loans, and reporting requirements.

The Commission is promulgating these rules on an interim final basis. The Commission is soliciting comments on all aspects of the interim final rules and may amend the interim rules as appropriate in response to comments received. Further information is contained in the Supplementary Information that follows.

**DATES:** The interim final rules are effective on February 26, 2003. Comments must be received on or before March 28, 2003. If the Commission receives sufficient requests to testify, it may hold a hearing on these interim final rules. If the Commission decides to hold a hearing, it will announce the date after the end of the comment period. Persons wishing to testify at a hearing should so indicate in their written or electronic comments.

**ADDRESSES:** All comments should be addressed to Ms. Mai T. Dinh, Acting Assistant General Counsel, and must be

submitted in either electronic or written form. Electronic mail comments should be sent to *millionaire@fec.gov* and must include the full name, electronic mail address, and postal service address of the commenter. Electronic mail comments that do not contain the full name, electronic mail address, and postal service address of the commenter will not be considered. If the electronic mail comments include an attachment, the attachment must be in the Adobe Acrobat (.pdf) or Microsoft Word (.doc) format. Faxed comments should be sent to (202) 219–3923, with printed copy follow-up to ensure legibility. Written comments and printed copies of faxed comments should be sent to the Federal Election Commission, 999 E Street, NW., Washington, DC 20463.

Commenters are strongly encouraged to submit comments electronically to ensure timely receipt and consideration.

**FOR FURTHER INFORMATION CONTACT:** Ms. Mai T. Dinh, Acting Assistant General Counsel, Mr. J. Duane Pugh, Jr., Acting Special Assistant General Counsel, or Mr. Robert M. Knop, Attorney, 999 E Street, NW., Washington, DC 20463, (202) 694–1650 or (800) 424–9530.

**SUPPLEMENTARY INFORMATION:** In the Bipartisan Campaign Reform Act of 2002 (“BCRA”), Public Law 107–155, 116 Stat. 81 (March 27, 2002), Congress made extensive and detailed amendments to the Federal Election Campaign Act of 1971, as amended (“FECA” or the “Act”), 2 U.S.C. 431 *et seq.* This is one of a series of rulemaking notices the Commission has published over the past several months in order to meet the rulemaking deadlines set out in BCRA. The Commission adopted these interim final rules on December 19, 2002.

These interim final rules address the so-called “Millionaires’ Amendment” to BCRA. Section 304 of BCRA adds a new paragraph (i) to 2 U.S.C. 441a, which addresses Senate elections. Section 319 of BCRA adds a new section 441a–1 to the FECA, which addresses elections for the House of Representatives. The Senate provisions also add new notification or reporting requirements in 2 U.S.C. 434. Collectively, these provisions address elections in which a candidate for the Senate or the House of Representatives faces an opponent who is spending significant amounts of his or her personal funds on the race. It is important to note that the increased contribution and coordinated party expenditure limitations available to candidates opposing self-financed candidates under the Millionaires’ Amendment apply *only* to candidates running for the Senate or the House of

Representatives and do *not* apply to candidates running for President or Vice-President. These interim final rules also address a provision of BCRA limiting how a candidate may repay a loan he or she has made to his or her campaign. 2 U.S.C. 441a(j).

Under the Administrative Procedures Act, 5 U.S.C. 553(d), and the Congressional Review of Agency Rulemaking Act, 5 U.S.C. 801(a)(1), agencies must submit final rules to the Speaker of the House of Representatives and the President of the Senate and publish them in the **Federal Register** at least 30 calendar days before they take effect. The interim final rules on Increased Contribution Limits for Candidates Opposing Self-financed Candidates were transmitted to Congress on January 17, 2003.

**Explanation and Justification**

As of January 1, 2003, the Act, as amended by BCRA, limits the amount that a person, other than a multicandidate political committee, may contribute to a candidate to \$2,000 per election, which is indexed for inflation. 2 U.S.C. 441a(a)(1)(A). Under the Act, an individual may not contribute, in the aggregate, more than \$37,500 to candidates and their authorized committees during a 2-year period. 2 U.S.C. 441a(a)(3)(A). The Act also limits the amounts of coordinated expenditures by national and State political party committees (including subordinate committees) made in connection with the general election campaign of a candidate. 2 U.S.C. 441a(d)(3).

The Millionaires’ Amendment raises contribution limits on contributions received by a candidate for the Senate or the House of Representatives who is facing a “self-financed” opponent, that is, an opponent who spends significant amounts of his or her personal funds on the race. As the opponent’s spending from personal funds reaches certain prescribed levels, the candidate is granted limited relief from certain contribution limits and party spending limits.<sup>1</sup> First, when the spending of personal wealth by the opponent reaches certain thresholds (and other conditions are met), the candidate may accept contributions from individuals under increased contribution limits. Second, national and State political party committees may make unlimited coordinated party expenditures on behalf of the candidate under 2 U.S.C.

<sup>1</sup> “Candidate” is used in this document to mean that candidate who is facing an “opponent,” or “opposing candidate,” whose expenditures from personal funds are sizeable.



441a(d)(3). These increased contribution and coordinated expenditure limits are in effect only when certain specific conditions are met, and are rescinded if other contingencies occur.

The Millionaires' Amendment establishes a "threshold amount" for each election. For House of Representatives races, the threshold amount is a set amount, \$350,000. 2 U.S.C. 441a-1(a)(1). For Senate races, the threshold amount varies, according to a formula driven by the "voting age population" of the State. 2 U.S.C. 441a(i)(1)(B).

The Millionaires' Amendment measures the opponent's expenditure of personal funds relative to the candidate's expenditures from personal funds. BCRA defines two new terms, "personal funds" and "opposition personal funds amount." 2 U.S.C. 431(26); 2 U.S.C. 441a(i)(1)(D) (Senate); 2 U.S.C. 441a-1(a)(2) (House of Representatives). For both Senate elections and House of Representatives elections, the opposition personal funds amount is the difference between the opponent's expenditures from personal funds and the candidate's expenditures from personal funds. 2 U.S.C. 441a(i)(1)(D) (Senate); 2 U.S.C. 441a-1(a)(2) (House of Representatives). This provision precludes the acceptance of contributions under increased limits, as well as the lifting of the coordinated spending limits, in a situation where a candidate's own expenditures from personal funds offset the opponent's expenditures from personal funds.

The calculation of the opposition personal funds amount also takes into account any fundraising advantage the candidate may have which negates the advantage the opponent gains from his or her expenditures from personal funds. This "gross receipts advantage" is another check on the operation of the Millionaires' Amendment, accounting for the situation where a candidate's advantage in "ordinary" fundraising may offset the expenditures from personal funds by the opponent. 2 U.S.C. 441a(i)(1)(E) (Senate); 2 U.S.C. 441a-1(a)(2)(B) (House of Representatives).

In Senate elections, when the opposition personal funds amount reaches certain multiples of the threshold amount, the candidate may accept increased contributions according to a tiered schedule. The first such multiple is twice the threshold amount. When the opposition personal funds amount reaches twice the threshold amount, the contribution limit for individuals is tripled. 2 U.S.C. 441a(i)(1)(C)(i)(I). A contribution accepted under this increased

contribution limit does not count against the individual's aggregate contribution limit under 2 U.S.C. 441a(a)(3). 2 U.S.C. 441a(i)(1)(C)(i)(II). The contribution limits also increase at multiples of four times and ten times the threshold amount. When the opposition personal funds amount reaches four times the threshold amount, the contribution limit for individuals is raised six-fold. When the opposition personal funds amount reaches ten times the threshold amount, the contribution limit for individuals is raised six-fold and the Act's limits on coordinated political party expenditures on behalf of the candidate are lifted. 2 U.S.C. 441a(i)(1)(C)(iii)(III).

In House of Representatives elections, if the opposition personal funds amount reaches the threshold amount, the individual contribution limits are tripled, such increased contributions do not count against the section 441a(a)(3) individual aggregate contribution limits, and the coordinated political party expenditures limits in section 441a(d)(3) are lifted. 2 U.S.C. 441a-1(a)(1)(A) through (C). Note that for House of Representatives candidates, unlike Senate candidates, the limits are raised or lifted all at once, and not in increments.

For both Senate and House of Representatives candidates, the operation of the increased contribution limits and the suspension of the limit on coordinated political party expenditures are subject to an on-going check in the form of the so-called "proportionality provision." See 147 CR S2538 (daily ed. March 20, 2001) (Sen. DeWine). If the sum of the contributions accepted under the increased limits plus the coordinated party expenditures made by political party committees under the increased limits exceeds 110% of the opposition personal funds amount in a Senate election or 100% of the opposition personal funds amount in a House of Representatives election, then the contribution limits revert to the original amount, and the political party expenditure limits also revert to their original amount. 2 U.S.C. 441a(i)(2)(A)(ii) (Senate); 2 U.S.C. 441a-1(a)(3)(A)(ii) (House of Representatives). Thus, the Millionaires' Amendment does not permit those candidates facing wealthy self-financed opponents to raise individual contributions significantly in excess of the amount of personal funds wealthy opponents actually spend on their own elections.

The increased contribution limits are also terminated if the self-financed opponent withdraws from the race. 2 U.S.C. 441a(i)(2)(B) (Senate); 2 U.S.C. 441a-1(a)(3)(B) (House of

Representatives). Additionally, both the Senate and House of Representatives versions of the Millionaires' Amendment prescribe rules for disposing of "excess contributions" received under the increased contribution limits. 2 U.S.C. 441a(i)(3) (Senate); 2 U.S.C. 441a-1(b) (House of Representatives).

#### Part 100—Definitions

##### 1. 11 CFR 100.19 File, Filed, or Filing (2 U.S.C. 434(a))

The Commission's regulations at 11 CFR 100.19 define "file, filed, and filing." The rule in current paragraph (b) states that a document is considered timely filed if it is: (1) Delivered to the appropriate filing office (either the Commission or the Secretary of the Senate), or (2) sent by registered or certified mail and postmarked by 11:59 p.m. Eastern Standard/Daylight Time of the prescribed filing date—except for pre-election reports. The final rule adds paragraph (g), discussed below, to the list of reports not subject to the rule in paragraph (b). Thus, paragraph (b) notes that this rule does not apply to reports described in 11 CFR 100.19(c) through (g) which are electronic filings, 48-hour and 24-hour reports of independent expenditures, 48-hour notices of last-minute contributions, electioneering communication statements, and notifications of expenditures from personal funds, respectively.

New paragraph (g) states that notifications of self-financed candidates' expenditures from personal funds, required under 11 CFR part 400, are considered timely filed by Senate candidates' principal campaign committees only if they are faxed or e-mailed to the Commission and faxed or e-mailed to each opposing candidate within 24 hours of the time the thresholds set forth in 11 CFR 400.21 and 400.22 are exceeded, thereby triggering the reporting requirement. As discussed in greater detail below (see Explanation and Justification for new 11 CFR 400.21, 400.22, and 400.24), Senate candidates' principal campaign committees are required to file their original notifications with the Secretary of the Senate and copies of their notifications with the Commission and each opposing candidate. Notifications by House of Representatives candidates' principal campaign committees are considered timely filed only when they are both electronically filed (if required under 11 CFR 104.18, 400.20, and 400.23) with the Commission and when they are faxed or e-mailed to each opposing candidate within 24 hours of the time the thresholds defined in 11

CFR 400.21 and 400.22 are exceeded, thereby triggering the reporting requirement.

**2. 11 CFR 100.33 Definition of "Personal Funds" (2 U.S.C. 431(26))**

The definition of "personal funds" in new section 100.33 largely tracks the definition provided in BCRA (2 U.S.C. 431(26)), which, in turn, appears to be based primarily on the definition of "personal funds" in former 11 CFR 110.10(b). Because BCRA placed the new statutory definition of "personal funds" in 2 U.S.C. 431, giving it general applicability in FECA, the Commission has decided to place the corresponding regulatory definition in 11 CFR part 100 to give general applicability to the definition in all of the Commission's regulations relating to Title 2 of the United States Code. Therefore, the version of the definition in 11 CFR 110.10(b) is deleted. The Commission notes that the regulations relating to Title 26 of the United States Code also contain a definition of "personal funds" at 11 CFR 9003.2(c)(3). The definition of "personal funds" in 11 CFR 9003.2(c)(3) is not being changed. Only the definition of "personal funds" in former 11 CFR 110.10(b) is being altered in conformance with the definition of "personal funds" in BCRA.

Although the new statutory definition of "personal funds" seems to be based largely on the previous definition contained in former 11 CFR 110.10(b), it differs from that prior rule in a number of respects. First, although both definitions include salary and income from *bona fide* employment, BCRA considers only salary and earned income received during the current election cycle (as defined in new 11 CFR 400.2, discussed below) to be the candidate's personal funds. Second, while both definitions include income from trusts established before and after certain points in time, the relevant date in BCRA is the beginning of the election cycle (again, as defined in new 11 CFR 400.2) whereas in former 11 CFR 110.10(b) the relevant date is the point at which an individual becomes a candidate for Federal office.

A third difference between the definition of "personal funds" in BCRA and former § 110.10(b) involves the receipt of gifts by the candidate. While both definitions include gifts of a personal nature that had been customarily received by the candidate before a certain point in time, BCRA counts only those that had been customarily received prior to the beginning of the election cycle (*see* Explanation and Justification for new 11 CFR 400.2, below) whereas former 11

CFR 110.10(b) counted those that had been customarily received prior to candidacy.

**Part 101—Candidate Status and Designations**

**11 CFR 101.1 Candidate Designations (2 U.S.C. 432(e)(1))**

Currently, § 101.1(a) requires Statements of Candidacy (FEC Form 2) to be filed with the Commission or with the Secretary of the Senate, as appropriate under 11 CFR part 105, within 15 days of the time an individual becomes a candidate. Since this is the same time in which a candidate will be required to file a Declaration of Intent under new section 11 CFR 400.20 (*see* Explanation and Justification for new 11 CFR 400.20, below), the Commission has decided to add the information required in the Declaration of Intent to FEC Form 2.

We note that current sections of 11 CFR 101.1(a) and 105.2 require Senate candidates to file their Statements of Candidacy with the Secretary of the Senate. This requirement will not change under the Commission's interim final rules. However, in the interest of rapid notification to the Commission and to each opposing candidate, new 11 CFR 400.20(b)(1) will require Senate candidates to fax or electronically mail a *copy* of their Statement of Candidacy to the Commission. Further, both Senate and House of Representatives candidates will be required to send a fax or an electronic mail message to each opposing candidate that either attaches their FEC Form 2 or contains the information required by 11 CFR 400.23 (*see* Explanation and Justification for new 11 CFR 400.23, below).

**Part 102—Registration, Organization, and Recordkeeping by Political Committees (2 U.S.C. 433)**

**11 CFR 102.2 Statement of Organization: Forms and Committee Identification Number (2 U.S.C. 433(b), (c))**

New 11 CFR 102.2(a)(1)(viii) requires the principal campaign committee of each Senate and House of Representatives candidate to provide either an electronic mail address or a facsimile number, for the purpose of receiving Declarations of Intent and Notifications of Expenditures from Personal Funds from other candidates in the same election as required by subpart B of part 400. This requirement is intended to facilitate the notification of expenditures from personal funds under part 400. Use of facsimile machines or electronic mail will provide candidates' principal campaign committees nearly

instantaneous notification. The Commission recognizes that not all principal campaign committees may have a facsimile machine, an electronic mail address, or even a computer system. However, the Commission notes that most public libraries have computers available for free public use and several Web sites provide free access to electronic mail. Thus, the Commission concludes that this requirement will at most create only a minimal burden on some candidates, and to whatever extent it might do so is outweighed by the overall benefits.

**Part 104—Reports by Political Committees (2 U.S.C. 434)**

**11 CFR 104.19 Special Reporting Requirements for Principal Campaign Committees of Candidates for Election to the United States Senate or United States House of Representatives**

The definition of "opposition personal funds amount" in new 11 CFR 400.10 includes the computation for "gross receipts advantage," as defined in 2 U.S.C. 441a(i)(1)(E) (Senate) and 441a-1(a)(2)(B) (House of Representatives). *See* below for discussion and explanation and justification of these definitions. To compute the "gross receipt advantage," candidates must know of the gross receipts of each of their opposing candidates during any election cycle that may be expended in connection with the election where they are running against a self-financed candidate. The "gross receipts advantage" also takes into account amounts that candidates contribute to their own campaign by subtracting that amount from the gross receipts their authorized committees received.

Because the former regulations and the reporting forms did not require candidates' authorized committees to report the information necessary to compute "gross receipts advantage" in a concise and comprehensive manner, the Commission is adding a new section, 11 CFR 104.19, to require supplemental reporting by the principal campaign committees of candidates who are seeking election to the U.S. Senate or U.S. House of Representatives. This ensures that the candidates in the same election have sufficient and timely information to do the necessary computations under 11 CFR part 400.

Paragraph (a) limits the scope of this new section to only these candidates. It also provides that the reports required under this section must be filed with the Commission. Paragraph (b) describes when these reports must be filed and the content required. Paragraph (b)(1)

requires principal campaign committees to file by July 15 of the year before the general election of the office sought that discloses the gross receipts available to the candidates and their authorized committees to expend in connection with the primary election and the general election as determined on June 30 of that year. The gross receipts amounts must include the contributions that have been designated, deemed to be designated, or redesignated for both the primary election and the general election. Principal campaign committees must report the amount of contributions from personal funds of their candidates received by any of the candidates' authorized committees by June 30 that have been designated for the primary election and the general election. They must then subtract the contributions from personal funds that have been designated for the primary election from the gross receipts that may be expended in connection with the primary election and disclose that amount. Likewise, they must also compute and disclose the amount for the general election.

Paragraph (b)(2) requires that principal campaign committees file another report on January 31 of the year of the general election of the office sought. This paragraph is similar to paragraph (b)(1) except that the pertinent date is December 31 of the year preceding the relevant general election. Principal campaign committees must disclose the same information under paragraph (b)(2) as in paragraph (b)(1) but instead of reporting the amount determined as of June 30, this amount is determined as of December 31.

While BCRA mandates that the opposition personal funds amount use the amounts determined for June 30 and December 31, the interim final rules set the deadlines for the reports at July 15 and January 31, respectively, to coincide with the filing deadlines of the second quarterly reports and the year-end reports that all authorized committees are required to file. The Commission seeks comment whether these are appropriate deadlines.

#### **Part 110—Contribution and Expenditure Limitations and Prohibitions**

##### *1. 11 CFR 110.1 Conforming Amendment to 11 CFR 110.1(b)(3) Regarding Net Debts Outstanding (2 U.S.C. 441a(j))*

Current 11 CFR 110.1(b)(3) restricts the ability of candidates and their authorized committees to accept contributions after the election. It states

that they can accept contributions up to the amount of their "net debts outstanding." "Net debts outstanding" is defined in current 11 CFR 110.1(b)(3)(ii). In order to conform with the fundraising restrictions in new 11 CFR 116.11 (*see* Explanation and Justification for new 11 CFR 116.11, below), new paragraph (b)(3)(ii)(C) would be added to current 11 CFR 110.1 to exclude the amount of personal loans that exceed \$250,000 from the definition of "net debts outstanding."

##### *2. 11 CFR 110.10 Deletion of Former 11 CFR 110.10(b) Definition of "Personal Funds"*

As explained in greater detail above (*see* Explanation and Justification for new 11 CFR 100.33), the Commission is implementing BCRA's new definition of "personal funds." The Commission has decided to locate this new definition in new 11 CFR 100.33. Accordingly, the Commission is deleting the former definition of "personal funds" in former 11 CFR 110.10(b).

#### **Part 116—Debts Owed by Candidates and Political Committees**

BCRA added a new subsection (j) to 2 U.S.C. 441a, which restricts the ability of candidates and their authorized committees to raise funds after the election to repay loans that the candidates made to their authorized committees. These loans are referred to as "personal loans." Section 441a(j) of FECA states that:

Any candidate who incurs personal loans after the effective date of the Bipartisan Campaign Reform Act of 2002 in connection with the candidate's campaign for election shall not repay (directly or indirectly), to the extent such loans exceed \$250,000, such loans from any contributions made to such candidate or any authorized committee of such candidate after the date of such election.

Although 2 U.S.C. 441a(j) is part of the Millionaires' Amendment, the provision has wider application than the other provisions of the Millionaires' Amendment because it is placed as a separate subsection within 2 U.S.C. 441a. This statutory provision thus applies to all personal loans from candidates to their authorized committees regardless of whether the increased contribution and party spending limits in 2 U.S.C. 441a(i) or 441a-1 apply. BCRA's amendment to 2 U.S.C. 441a regarding candidate loans also applies to presidential candidates, who may be self-financed, or who may be permitted under the public funding regime to make limited expenditures from personal funds for their campaigns. Therefore, the interim final

rules add new section 11 CFR 116.11—*Debts Owed by Candidates or Political Committees* rather than include new rules implementing 2 U.S.C. 441a(j) in 11 CFR part 400 with the other Millionaires' Amendment regulations. The interim final rules also include a conforming amendment to 11 CFR 110.1(b)(3) regarding net debts outstanding, *see* above.

##### *1. 11 CFR 116.11 Restriction on an Authorized Committee's Repayment of Personal Loans Exceeding \$250,000 Made by the Candidate to the Authorized Committee*

###### A. Interim Final Rule

According to the sponsors of the Millionaires' Amendment, the purpose of 2 U.S.C. 441a(j) is to restrict the amount of money candidates and their authorized committees can raise after the election to repay the candidates for personal loans.<sup>2</sup> Essentially, authorized committees may only use up to \$250,000 of contributions made after the election to repay the candidates. New 11 CFR 116.11 sets forth these restrictions.

The interim final rules define "personal loans" in paragraph (a) of 11 CFR 116.11. The definition includes not only loans made by candidates to their authorized committees, but also loans made by other persons to the authorized committees that are endorsed or guaranteed by the candidate or that are secured by the personal funds of the candidate. This definition ensures that loans to authorized committees that are used in connection with the candidate's campaign for election, for which the candidate is personally liable, are subject to the provisions of 11 CFR 116.11. It is important to note that new 11 CFR 116.11 applies to all loans made, endorsed, or guaranteed by candidates regardless of whether the other provisions of the Millionaires' Amendment are triggered, *i.e.*, the increased contribution limits.

The definition of "personal loans" in paragraph (a) specifies that advances made by the candidate to their authorized committees are personal loans subject to the repayment restrictions in 11 CFR 116.11. The Commission seeks comment on whether the interim final rules should specify within this definition of "personal loans" other debts and obligations that

<sup>2</sup> "This (amendment) limits candidates who incur personal loans in connection with their campaign in excess of \$250,000. They can do \$250,000 and then reimburse themselves with fundraisers. But anything more than that, they cannot repay it by going out and having fundraisers once they are elected with their own money." 147 CR S2451 (daily ed. Mar. 19, 2001) (statement of Sen. Domenici).

the candidate's authorized committee owes to the candidate.

The introductory text in paragraph (b) makes clear that if a candidate makes several personal loans over the course of an election, those loans will not be treated separately for purposes of this section but will, instead, be considered in the aggregate. Paragraphs (b) and (d) treat a primary election as a separate election from a general election. If a candidate makes several personal loans to the authorized committee, all the loans will be added together to determine whether they exceed \$250,000 and are, therefore, subject to the provisions of this section.

Under paragraph (b)(1), authorized committees may repay the entire amount of any personal loans from contributions that are made *on the date of the election or before that date*. Repayment of the entire loan amount is permitted under BCRA and FECA even if the total loan amount exceeds \$250,000 and as long as these contributions were made on or before the date of the election.

In contrast, paragraphs (b)(2) and (3) both address repayments using contributions made after the election. Paragraph (b)(2) allows authorized committees to use only \$250,000 of contributions that are made after the election to repay the candidate's personal loans to his or her campaign committee. Consequently, paragraph (b)(3) prohibits authorized committees from using more than \$250,000 of contributions that are made after the election to repay the candidate for personal loans.

It is important to note that 11 CFR 116.11(b)(1), (b)(2), and (b)(3) are not mutually exclusive. Under the interim final rules, authorized committees may use contributions that are made *before* the election to repay candidate loans in any amount, and contributions made *after* the election to repay candidate loans up to \$250,000. For example, Candidate A loans \$600,000 to her authorized committee. The authorized committee receives \$350,000 in contributions by election day and receives an additional \$400,000 in contributions after the election. Candidate A's authorized committee may use \$250,000 of the \$400,000 received after the election and \$350,000 received before the election to repay the entire amount of the candidate's personal loan.

Paragraph (c) of new 11 CFR 116.11 outlines certain conditions regarding the repayment of candidates' personal loans after the election. Paragraph (c)(1) establishes a post-election time limit for the use of remaining cash on hand for

the repayment of personal loans. If a candidate's authorized committee wishes to use the cash on hand as of the day after the election to repay any portion of the candidate's personal loan(s), it must repay the personal loan(s) within 20 days of the election, which is the close of books for the post-general election report. After the 20-day post-election time period has elapsed, paragraph (c)(2) requires a candidate's authorized committee to treat the remaining balance of the candidate's personal loan that exceeds \$250,000 as a contribution from the candidate to the authorized committee, given that this amount could never be repaid, and given that the amount must be accounted for on the authorized committee's next report.

Further, paragraph (c)(3) requires the candidate's authorized committee to report both the amount of cash on hand used to repay the candidate's personal loan(s) (under paragraph (c)(1)) and the treatment of the remaining loan amount as a contribution from the candidate (under paragraph (c)(2)) in the authorized committee's next scheduled report.

Example: Candidate X loans \$500,000 to her campaign on October 1 for the general election. As of the day after the general election, Candidate X's authorized committee has cash on hand from the general election in the amount of \$100,000. Candidate X's authorized committee decides to use \$50,000 of the cash on hand to repay part of the candidate's personal loan, leaving an outstanding balance of \$450,000. Candidate X's authorized committee must repay \$50,000 of the personal loan and must treat \$200,000 as a contribution from the candidate within 20 days of the general election because that is the amount that exceeds \$250,000 of the remaining balance. Candidate X's authorized committee must report the repayment of \$50,000 of the personal loan and the treatment of \$200,000 of the personal loan's outstanding balance as a contribution on the next regularly scheduled report, the post-general election report.

BCRA specifically states that 2 U.S.C. 441a(j) applies only to personal loans that are made after November 6, 2002. Thus, the limitations on repayment of personal loans from contributions made after the respective election do not apply to personal loans made before this date. Consequently, any outstanding loan balances of candidate loans that were made before November 6, 2002, may be repaid with contributions made after this date subject to the provisions concerning net debts outstanding in 11 CFR 110.1(b)(3).

B. Alternative Interpretation of 2 U.S.C. 441a(j)

The definition of "personal loans" in new 11 CFR 116.11(a) is based on a broad interpretation of the opening phrase "[a]ny candidate who incurs personal loans" in 2 U.S.C. 441a(j) to mean loans made by candidates to their authorized committees. This interpretation is based on the legislative history of the Senate debates on this provision.<sup>3</sup>

The Commission, however, seeks comments on its interpretation of "incurs" in 2 U.S.C. 441a(j). "Incur" means "[t]o become liable or subject to \* \* \* and to become through one's own action liable or subject to."<sup>4</sup> In the opening phrase of 2 U.S.C. 441a(j), it is the candidate who is "incurring" the personal loans. Thus, arguably, the use of "incurs" could refer to the candidate's liability and not the authorized committee's liability to the candidate. The interim final rules reject this interpretation of 2 U.S.C. 441a(j) to mean loans that are made *to* candidates rather than loans made *by* candidates for two reasons. First, the legislative history supports a different interpretation. Second, the practical consequence of interpreting 2 U.S.C. 441a(j) to apply to loans made *to* candidates rather than loans made *by* candidates to their authorized committee would be that similarly situated candidates may be treated differently. Under this interpretation, a candidate who takes out a loan from a lending institution and then lends the loan proceeds to his or her authorized committee would be subject to the restrictions of 2 U.S.C. 441a(j) and 11 CFR 116.11. Conversely, a candidate who liquidates an asset and loans the proceeds from the sale to his or her authorized committee would not be subject to these sections and the candidate's authorized committee would be able to raise funds after the election to repay him or her. For these two reasons, the Commission rejects this possible interpretation of 2 U.S.C. 441a(j) at this time.

<sup>3</sup> "If you incur debt from a personal loan and then you get elected as Senator, and then you go around and say, now I am Senator, I want you to get my money so I can pay back what I used of my own money to run for election. It is clear in this amendment that you cannot do that in the future." 147 CR S2537 (daily ed. Mar. 20, 2001) (statement of Sen. Domenici); "[The] language [of 2 U.S.C. 441a(j)] makes it clear there will not be any effort after the election to raise money to repay those loans; \* \* \* " *Id.* at S2462 (daily ed. Mar. 19, 2001) (statement of Sen. Durbin); see also footnote 2, above.

<sup>4</sup> *Black's Law Dictionary* 108 (6th ed. 1990).

## 2. 11 CFR 116.12 *Repayment of Candidate Loans of \$250,000 or Less*

In a recent BCRA-related rulemaking, the Commission deleted 11 CFR 113.2(d) from the regulations. “Disclaimers, Fraudulent Solicitation, Civil Penalties, and Personal Use of Campaign Funds: Final Rules and Explanation and Justification,” 67 FR 76962 (December 13, 2002). That now-deleted paragraph addressed, among other things, the repayment of candidate loans using campaign funds. In the Explanation and Justification, the Commission noted that it would return to the issue of repayment of candidate loans in the Millionaires’ Amendment rulemaking, if necessary. 67 FR at 76975. The Commission has decided to address this issue in 11 CFR 116.11 and 116.12 as part of this rulemaking, rather than in part 113, because part 116 specifically implements statutory changes directly affecting the repayment of candidate loans (*i.e.*, 2 U.S.C. 441a(j)).

Whereas 11 CFR 116.11 outlines the requirements regarding the repayment of candidate’s personal loans that, in the aggregate, exceed \$250,000, new 11 CFR 116.12 contains requirements regarding the repayment of candidate’s personal loans that, in the aggregate, are equal to or less than \$250,000. Paragraph (a) of 11 CFR 116.12, states that a candidate’s authorized committee may repay up to \$250,000 of a candidate’s personal loans using contributions to the candidate or the candidate’s authorized committee made any time before, on, or after the date of the election as long as the personal loans were used in connection with the candidate’s campaign for election. BCRA places no temporal limit on the contributions that may be used to repay personal loans of \$250,000 or less, so paragraph (a) permits candidate’s authorized committees to use contributions received before, during, or after the election for this purpose.

Paragraph (b) of 11 CFR 116.12 states that this section applies separately to each election. This means that, if a candidate were to make a personal loan or loans in connection with more than one election, his or her authorized committee may repay up to \$250,000 of the aggregate loan amount for each election. For example, Candidate X makes a \$250,000 personal loan to her campaign for the primary election and a \$250,000 personal loan to her campaign committee for the general election. As of the date after the general election, Candidate X has \$500,000 in aggregate outstanding personal loans made to her authorized committee for the primary and general elections.

Candidate X’s authorized committee may use contributions received before, during, or after the primary election to repay Candidate X’s \$500,000 outstanding personal loan balance, \$250,000 for the primary election loan and \$250,000 for the general election loan.

Paragraph (c) states that nothing in 11 CFR 116.12 shall supercede 11 CFR 9035.2 regarding the limitations on expenditures from personal funds or family funds of a presidential candidate who accepts matching funds. Presidential primary candidates must still comply with the limit on expenditures from personal funds exceeding \$50,000 prescribed by 11 CFR 9035.2 and 2 U.S.C. 9035.

## **Part 400—Increased Limits for Candidates Opposing Self-financed Candidates**

### **Scope and Definitions**

#### *1. 11 CFR 400.1 Scope and Effective Date*

The Commission is promulgating new rules implementing the Millionaires’ Amendment. These rules are in new part 400 of Title 11 of the Code of Federal Regulations.

Paragraph (a) of new 11 CFR 400.1 introduces the scope of the part, which is elections to the office of United States Senator, or Representative in, or Delegate or Resident Commissioner to, the Congress, in which a candidate is permitted an increased contribution limit in response to certain expenditures from personal funds by an opposing candidate. Paragraph (a) also states expressly that part 400 does not apply to presidential and vice-presidential elections. Paragraph (b) of 11 CFR 400.1 specifies the effective date of part 400, February 26, 2003, and makes the important clarification that part 400 will not apply to any runoff elections, recounts, or election contests resulting from elections prior to that date. Pub. L. 107–155, Sec. 402(a)(4).

The Commission seeks comment on whether it should adopt a provision, in 11 CFR 400.1, whereby candidates and national and State committees of political parties would be permitted to affirmatively “opt-out” of the Millionaires’ Amendment’s benefits and obligations, in cases where all of the following conditions were met: (1) The candidate has no intention of making expenditures from personal funds in excess of the relevant threshold amount in 11 CFR 400.9; (2) the candidate and the candidate’s authorized committee have no intention of accepting contributions under the increased limits; and (3) the national and State

committees of the candidate’s political party have no intention of making coordinated expenditures on behalf of the candidate’s election. By “opting-out,” the candidate would be prohibited from accepting contributions under the increased limits and the national and State committees of the candidate’s political party would be prohibited from making coordinated expenditures on behalf of the candidate’s election in excess of the usual coordinated expenditure limits in 11 CFR 109.32(b). In return, the candidate and the national and State committees of the candidate’s political party would be exempt from all the notification and reporting obligations under 11 CFR part 400.

In addition, the Commission seeks comment on whether, and under what circumstances, candidates and national and State committees of political parties who had “opted out” should be permitted to opt back in to the Millionaires’ Amendment’s benefits and obligations.

#### *2. 11 CFR 400.2 Definition of “Election Cycle”*

BCRA provides a definition of “election cycle,” which is, by its own terms, specific to the Millionaires’ Amendment. 2 U.S.C. 431(25). New 11 CFR 400.2 implements this definition, tracking the specific language of the statute. Ordinarily, statutory definitions from 2 U.S.C. 431 are implemented by regulations in part 100, which includes definitions that have application throughout Title 11. However, the regulatory definition of “election cycle” in 2 U.S.C. 431(25) is codified in part 400 because the scope of the definition in 2 U.S.C. 431(25) is limited, by its own terms, to the Millionaires’ Amendment.

“Election cycle” is defined in the Millionaires’ Amendment in BCRA to be the period from election-to-election, with the primary election and the general election considered to be separate elections. 2 U.S.C. 431(25). Thus, the period from the day after the last general election for a particular office to the day of the next primary election for that same office is one election cycle, and the period from the day after the primary election to the day of the general election is another separate election cycle.

In the case of a run-off election, the Commission has decided to treat it as an extension of the election cycle containing the election that necessitated the run-off under 11 CFR 400.2(c). For example, in the case of a primary election where no candidate receives the necessary percentage of votes to be declared the winner and where, therefore, a run-off election must be

held to determine the winner, the Commission will consider the run-off election to be part of the primary election cycle, for purposes of the Millionaires' Amendment.

### 3. 11 CFR 400.3 Definition of "Opposing Candidate"

The operative provisions of the Millionaires' Amendment are triggered by expenditures of personal funds by "an opposing candidate." See 2 U.S.C. 441a(i)(1)(D) (Senate); 2 U.S.C. 441a-1(a)(2) (House of Representatives). New 11 CFR 400.3 defines "opposing candidate." Paragraph (a) applies to primary elections. It establishes that "opposing candidate" means another candidate seeking the nomination of the same party as the candidate who may benefit from increased contribution limits and the lifting of the coordinated party expenditure limits. The final sentence of this paragraph clarifies that a candidate may have more than one "opposing candidate" in a primary.

The Commission seeks comment as to whether "opposing candidate" should be expanded to include candidates seeking another political party's nomination for the same office. Under such an expanded definition, for example, a self-financed candidate seeking the nomination of political party ABC would be an "opposing candidate" where his or her personal funds are intended to influence the primary of political party XYZ by working to defeat whichever candidate of political party XYZ is judged to be the strongest opponent of the self-financed candidate in the general election.

Paragraph (b) of 11 CFR 400.3 applies to general elections, and establishes that "opposing candidate" means another candidate seeking election to the same office as the candidate who may benefit from increased contribution limits. Again, the final sentence states that a candidate may have more than one "opposing candidate" in the general election.

### 4. 11 CFR 400.4 Definition of "Expenditure From Personal Funds"

The amount of "expenditures from personal funds" by an opposing candidate is an important factor in determining whether the increased contribution limits and unlimited coordinated party expenditures are permitted under the Millionaires' Amendment. 2 U.S.C. 441a(i)(1)(D) (Senate); 2 U.S.C. 441a-1(a)(2) (House of Representatives). This term is defined in both the Senate and the House of Representatives versions of the Millionaires' Amendment as "an

expenditure made by a candidate using personal funds," as "a contribution or loan made by a candidate using personal funds," and as "a loan secured using such funds to candidate's authorized committee." 2 U.S.C. 434(a)(6)(B)(i) (Senate); 2 U.S.C. 441a-1(b)(1)(A) (House of Representatives).

New 11 CFR 400.4 implements this statutory definition and includes cross-references to 11 CFR 100.33, which defines "personal funds." The introductory wording of 11 CFR 400.4(a) states that all of the items described in paragraphs (a)(1) through (a)(4) are aggregated to determine expenditures from personal funds.

Paragraph (a)(1) follows the definition of "expenditure" in 11 CFR part 100, subparts D and E. It includes payments made directly by the candidate for purposes of influencing the election in which he or she is a candidate. Paragraph (a)(2) includes in the definition contributions and loans made by the candidate to his or her authorized committee using personal funds. 2 U.S.C. 434(a)(6)(B)(i)(II). Paragraph (a)(3) includes in the definition a loan made by any person to the candidate's authorized committee if that loan is secured or guaranteed by the candidate's personal funds. BCRA requires that obligations to make expenditures from personal funds be included when aggregating such expenditures. 2 U.S.C. 434(a)(6)(B)(ii) (Senate); 2 U.S.C. 441a-1(b)(1)(A)(ii) (House of Representatives). Thus, 11 CFR 400.4(a)(4) states that any obligation to make an expenditure from personal funds that is legally enforceable against the candidate falls within the definition of "expenditure from personal funds."

BCRA does not define when an expenditure from personal funds is considered to be made. The Commission, in 11 CFR 400.4(b), defines when an expenditure from personal funds will be considered made for purposes of 11 CFR part 400. Paragraph (b) states that an expenditure is considered made on the date the funds are deposited into the bank account designated by the candidate's authorized committee as the campaign depository, on the date the instrument transferring the funds is signed, or on the date the contract obligating the personal funds is executed, whichever date is earlier. Accordingly, contributions or loans made by the candidate to his or her authorized committee or loans made by any person but secured or guaranteed with the candidate's personal funds will be considered made on the date the loaned funds are deposited into the authorized

committee's bank account or, in the case of a loan from a third party secured by the candidate's personal funds, the date the contract obligating the candidate's personal funds was signed, whichever date is earlier. In the situation where a candidate makes direct expenditures on behalf of his or her authorized committee, the expenditure will be considered to have been made on the date he or she signed the check or other instrument conveying the funds or signed a contract obligating his or her personal funds in connection with the direct expenditure. Evidence of expenditures will be receipts, cancelled checks, and signed contracts and such documents must be maintained under the recordkeeping provisions of 11 CFR 102.9.

### 5. 11 CFR 400.5 Definition of "Applicable Limit"

The Senate provisions of the Millionaires' Amendment use the term "applicable limit." 2 U.S.C. 441a(i)(1)(A). This means the amount limitation on contributions to candidates by persons other than multicandidate committees in 2 U.S.C. 441a(a)(1)(A) that is modified by the operation of the Millionaires' Amendment. Although the House of Representatives version does not use the term "applicable limit," it also operates to increase the 2 U.S.C. 441a(a)(1)(A) limits for individuals. 2 U.S.C. 441a-1(a)(1)(A). Accordingly, new 11 CFR 400.5 defines "applicable limit" by linking the term to the contribution limitation in 11 CFR 110.1(b)(1), which implements 2 U.S.C. 441a(a)(1)(A). The Commission notes this applicable limit will most likely change every two years due to the indexing of the applicable limit for inflation under 2 U.S.C. 441a(c) and 11 CFR 110.1(b)(1). See 11 CFR 110.17(b).

### 6. 11 CFR 400.6 Definition of "Increased Limit"

The Millionaires' Amendment, under certain circumstances, allows a candidate certain advantages to respond to expenditures from personal funds by an opposing candidate. One of these advantages is an increase in the amount limitation on contributions to the candidate by individuals. The other advantage is a suspension of the usual limits on coordinated expenditures by national and State political party committees in connection with the general election campaign of the candidate (see 11 CFR 109.32(b)). 2 U.S.C. 441a(i)(1)(C) (Senate); 2 U.S.C. 441a-1(a)(1) (House of Representatives). This suspension of the coordinated expenditure limits applies to any

coordinated spending authority either of these party committees may assign to another party committee, such as a Congressional campaign committee or a district or local party committee, under 11 CFR 109.33.

New 11 CFR 400.6 defines “increased limit” to mean an amount limitation on contributions from individuals that exceed the applicable limit (*see* Explanation and Justification for new 11 CFR 400.5, above) in 11 CFR 110.1(b). It is important to note that under the Millionaires’ Amendment the amount limitations for contributions from persons other than individuals (political committees, multicandidate political committees (PACs), partnerships, limited liability corporations, Indian tribes, etc.) to candidates do not increase.

New 11 CFR 400.6 also includes within the definition of “increased limit” the suspension of party expenditure limits, where applicable. The Commission notes that nothing in the Millionaires’ Amendment changes the restrictions on coordinated party expenditures in 11 CFR 109.35.

#### 7. 11 CFR 400.7 Definition of “Contribution That Exceeds the Applicable Limit”

The Millionaires’ Amendment provides that, in certain circumstances, an individual may contribute more to a candidate than otherwise allowed under 2 U.S.C. 441a(a)(1)(A) and 11 CFR 110.1(b). The limits in 2 U.S.C. 441a(a)(1)(A) and 11 CFR 110.1(b) are defined as the “applicable limit” in new 11 CFR part 400. *See* Explanation and Justification for new 11 CFR 400.5, above. New 11 CFR 400.7 defines “contribution that exceeds the applicable limit” as the difference between the contribution amount and the applicable limit.

*Example:* A contributor delivered a check for \$6,000 to a Senate candidate who had been accepting contributions up to that amount under the increased limits. *See* 2 U.S.C. 441a(i)(1)(C)(i)(I). Because the current applicable limit under 11 CFR 110.1(b)(1) is \$2,000, the “amount of the contribution above the applicable limit” is \$4,000.

#### 8. 11 CFR 400.8 Definition of “Gross Receipts”

Both the Senate and House of Representatives provisions of the Millionaires’ Amendment take into account any overall fundraising advantage that a candidate may have over his or her opposing candidate before allowing the opposing candidate’s expenditures from personal funds to trigger increased limits on contributions to the candidate and

unlimited coordinated party expenditures on behalf of the candidate. The candidate’s fundraising advantage, if any, is called the “gross receipts advantage” in both versions of the Millionaires’ Amendment. 2 U.S.C. 441a(i)(1)(E) (Senate); 2 U.S.C. 441a–1(2)(B) (House of Representatives). If the candidate’s gross receipts advantage offsets the advantage the opposing candidate derives from the expenditure of his or her personal funds, then the increased contribution limits do not come into play. The Commission’s regulations do not define the term “gross receipts advantage.” Instead, the Commission has incorporated the calculation of “gross receipts advantage” into the formulas for determining the opposition personal funds amount in 11 CFR 400.10 (*see* Explanation and Justification for new 11 CFR 400.10, below).

“Gross receipts” is not defined in BCRA. New 11 CFR 400.8 defines “gross receipts” by reference to an existing reporting regulation already applicable to authorized committees in other contexts, 11 CFR 104.3(a)(3). Section 104.3(a)(3) enumerates the types of receipts that make up the “total amount of receipts” and that must be reported by a candidate’s principal campaign committee on behalf of all the candidate’s authorized committees.<sup>5</sup> This approach has the benefit of relying on rules and concepts already familiar to candidates and authorized committees to implement this part of BCRA.

#### 9. 11 CFR 400.9 Definition of “Threshold Amount”

Both the Senate and House of Representatives provisions of the Millionaires’ Amendment define a “threshold amount.” If the opposing candidate’s expenditures from personal funds, adjusted for the candidate’s expenditures from personal funds and the candidate’s gross receipts advantage (*see* Explanation and Justification for new 11 CFR 400.10, below), exceed this threshold amount, or specified multiples of this threshold amount, and other conditions are met, the candidate receives the advantage of increased contribution limits and the lifting of the coordinated party spending limits.

<sup>5</sup> Note that certain amounts that qualify as “expenditures from personal funds” are reported under 11 CFR 104.3(a)(3), e.g., contributions from candidates under 11 CFR 104.3(a)(3)(ii). However, expenditures from personal funds are expressly excluded from BCRA’s definition of “gross receipts advantage.” 2 U.S.C. 441a(i)(8)(E) (Senate); 2 U.S.C. 441a–1(a)(2)(B)(ii) (House of Representatives). The Commission has accounted for this in the computation of “opposition personal funds amount” in 11 CFR 400.10, below.

In the Senate provisions, the threshold amount varies from State to State according to a statutory formula called “State-by-State Competitive and Fair Campaign Formula.” 2 U.S.C. 441a(i)(1)(B)(i). The formula is the sum of \$150,000 plus the product of the “voting age population” of the State and \$0.04. *Id.*

The interim final rules define “threshold amount” in new 11 CFR 400.9. Paragraph (a) applies to Senate elections. It defines threshold amount by restating the “State-by-State Competitive and Fair Campaign Formula” from 2 U.S.C. 441a(i)(1)(B)(i). Paragraph (a) also defines “voting age population” by reference to new 11 CFR 110.18, which is entitled “voting age population.” *See also* former 11 CFR 110.9(d). New 11 CFR 110.18 provides that the term means “resident population, 18 years of age or older.” That section also provides that the Commission will assure that this data is published annually in the **Federal Register**. The Commission will also post this data on its website.

Paragraph (b) applies to House of Representatives elections. Because the threshold amount in House of Representatives elections is statutorily fixed at \$350,000, paragraph (b) simply restates that amount. 2 U.S.C. 441a–1(a)(1).

#### 10. 11 CFR 400.10 Definition of “Opposition Personal Funds Amount”

The purpose of the Millionaires’ Amendment is to allow a candidate to respond to very large expenditures of personal funds by an opposing candidate. However, the operative provisions of the Millionaires’ Amendment are not triggered directly by the opposing candidate’s expenditures from personal funds. Instead, the opposing candidate’s expenditure of personal funds is measured relative to the candidate’s own expenditures from personal funds. For both Senate and House of Representatives elections, the “opposition personal funds amount” is the difference between the opponents’ expenditures from personal funds and the candidate’s own expenditures from personal funds. 2 U.S.C. 441a(i)(1)(D) (Senate); 2 U.S.C. 441a–1(a)(2) (House of Representatives). This provision precludes the operation of the Amendment in a situation where a candidate’s own expenditures from personal funds offsets the opponent’s expenditures from personal funds.

The opposition personal funds amount is subject to one other factor, called the “gross receipts advantage.” 2 U.S.C. 441a(i)(1)(E) (Senate); 2 U.S.C.



441a-1(a)(2)(B) (House of Representatives). As explained in more detail above, if the candidate's overall fundraising advantage, called the "gross receipts advantage," offsets an opposing candidate's expenditures from personal funds, the increased contribution and coordinated party expenditure limits will not be triggered. Given that gross receipts advantage must be taken into account in determining the opposition personal funds amount, the Commission has decided to imbed the factors necessary for calculating gross receipts advantage into the formulas in the regulations for determining the opposition personal funds amount, as explained below.

Accordingly, 11 CFR 400.10 defines "opposition personal funds amount" by setting out three mutually exclusive formulas. Only one of the formulas will apply at a given time, depending on the date of the computation. The date of computation is important because Congress, in BCRA, specified two benchmark dates for making the determination of gross receipts advantage: June 30 and December 31 of the year preceding the year in which the general election is held. Before June 30 of the year preceding the year in which the general election is held, gross receipts advantage does not seem to be given effect by the statute. 2 U.S.C. 441a(i)(1)(D)(ii) (Senate); 2 U.S.C. 441a-1(a)(2)(B) (House of Representatives). On or after June 30 of the year preceding the year in which the general election is held, however, gross receipts advantage must be taken into account in determining the opposition personal funds amount.

The Commission notes that, although the statute uses the benchmark dates of June 30 and December 31 of the year preceding the year in which the general election is held for determining gross receipts advantage, the formulas in the Commission's rule for calculating opposition personal funds amount (new 11 CFR 400.10), are framed in terms of the later dates of July 16 of the year preceding the year in which the general election is held and February 1 of the year in which the general election is held, respectively. The reason for this discrepancy is that the disclosure reports containing the necessary information for determining gross receipts advantage as of June 30 and December 31 of the year preceding the year in which the general election is held, the Second Quarterly Report, the Year End Report, and the supplement reports required under new 11 CFR 104.19, are not due until July 15 of the year preceding the year in which the general election is held and January 31

of the year in which the general election is held, respectively. Furthermore, it will not actually be possible to make the necessary calculations until the day after each of those reports is due.

Accordingly, the formulas for calculating the opposition personal funds amount revolve around two important dates: July 16 of the year preceding the year in which the general election is held (the day after the Second Quarterly Report is due) and February 1 of the year in which the general election is held (the day after the Year End Report is due).

The formulas and their respective effective dates are set out in paragraph (a) of new 11 CFR 400.10 using variables that are defined in paragraph (b). The first term is the same in each of the formulas: The difference between the expenditures of personal funds by the candidate and the opposing candidates. This is expressed as a formula, " $a - b$ ," where " $a$ " is the amount of expenditures from personal funds by the opposing candidate and " $b$ " is the amount of expenditures from personal funds by the candidate seeking to accept contributions under the increased limits. The difference between the three sets of formulas is how gross receipts advantage is computed. In the formula that applies prior to July 16 of the year before the general election year (paragraph (a)(1)), gross receipts advantage is *not* factored into the formula, as explained above. Thus, during this timeframe, the opposition personal funds amount is simply the difference between the expenditures from personal funds by the candidate and each opposing candidate.

The first of the benchmark dates set by Congress for computing gross receipts advantage is June 30 of the year before the general election year. As explained above, the information necessary for calculating gross receipts advantage as of that date will not be available to the public until July 16 of the year before the general election year. Accordingly, July 16, rather than June 30 of the year before the general election year, marks the beginning date for applicability of the second formula (paragraph (a)(2)).

Paragraph (a)(2) sets out two different formulas (using the terminology of the formula, " $a - b - ((c - d) \div 2)$ " or " $a - b$ "). Variable " $c$ " is the aggregate amount of the gross receipts of the candidate's authorized committees, minus any contributions by the candidate from personal funds, during any election cycle that may be expended in connection with the election, as determined on June 30 of the year preceding the year in which the general

election is held. Variable " $d$ " is the aggregate amount of the gross receipts of the opposing candidate's authorized committee, minus any contributions by that opposing candidate from personal funds, during any election cycle that may be expended in connection with the election, as determined on June 30 of the year preceding the year in which the general election is held.

If the amount for variable " $c$ " is greater than the amount for variable " $d$ ," then the first of these formulas must be used to determine the opposition personal funds amount ( $a - b - ((c - d) \div 2)$ ). If the reverse is true, however, then the gross receipts advantage is considered to be equal to \$0 because BCRA states that the gross receipts advantage is taken into consideration only if the candidate's authorized committee's gross receipts exceed the opposing candidate's authorized committee's gross receipts. 2 U.S.C. 441a(i)(1)(E)(ii) (Senate); 2 U.S.C. 441a-1(a)(2)(B)(ii) (House of Representatives) (" $* * *$  the term 'gross receipts advantage' means the excess, *if any*  $* * *$ ") (emphasis added). Thus, the opposition personal funds amount simply equals the difference between the greatest aggregate amount of expenditures from personal funds made by the opposing candidate and the candidate opposing the opposing candidate in the same election (using the terminology of the formulas, " $a - b$ "). The computation of gross receipts advantage then remains constant until the next statutory benchmark date occurs. It is important to note, however, that the opposition personal funds amount is still subject to change during this time period, depending on changes in the amounts of expenditures from personal funds of the candidates in the same election.

The second of the benchmark dates set by Congress for computing gross receipts advantage is December 31 of the year before the general election year. As explained above, the information necessary for calculating gross receipts advantage as of that date will not be available to the public until February 1 of the general election year. Accordingly, February 1 of the general election year, rather than December 31 of the year before the general election year, marks the beginning date for applicability of the third set of formulas (paragraph (a)(3)).

Like paragraph (a)(2), paragraph (a)(3) sets out two formulas (using the terminology of the formula, " $a - b - ((e - f) \div 2)$ " or " $a - b$ "). Variable " $e$ " is the aggregate amount of the gross receipts of the candidate's authorized committees, minus any contributions by

the candidate from personal funds, during any election cycle that may be expended in connection with the election, as determined on December 31 of the year preceding the year in which the general election is held. Variable “f” is the aggregate amount of the gross receipts of the opposing candidate’s authorized committee, minus any contributions by that opposing candidate from personal funds, during any election cycle that may be expended in connection with the election, as determined on December 31 of the year preceding the year in which the general election is held.

If the amount for variable “e” is greater than the amount for variable “f,” then the first of these formulas must be used to determine the opposition personal funds amount  $(a - b - ((e - f) \div 2))$ . If the reverse is true, however, then the gross receipts advantage is not taken into consideration, for the same reason stated in the Explanation and Justification for paragraph (a)(2), above, and consequently is equal to \$0. The opposition personal funds amount simply equals the difference between the greatest aggregate amount of expenditures from personal funds made by the opposing candidate and the candidate opposing the opposing candidate in the same election (using the terminology of the formulas, “a – b”). The computation of gross receipts advantage then remains constant until the day of the general election. Once again, however, it is important to note that the opposition personal funds amount is still subject to change during this time period, depending on changes in the amounts of expenditures from personal funds of the candidates in the same election.

### Notification and Reporting Requirements

#### 1. 11 CFR 400.20 Declaration of Intent

Both the Senate and the House of Representatives versions of the Millionaires’ Amendment (2 U.S.C. 434(a)(6)(B)(ii) (Senate) and 441a–1(b)(1)(B) (House of Representatives)) require candidates to file a “declaration of intent” within 15 days of becoming a candidate. This declaration must state the amount by which the candidate intends to exceed the threshold amount (see Explanation and Justification for new 11 CFR 400.9, above). New 11 CFR 400.20 implements these statutory requirements.

Paragraph (a) sets forth the basic requirements for filing Declarations of Intent, including the 15 day filing deadline. See 11 CFR 100.3 for the

definition of “candidate.” The declaration must be filed with the Commission and with each “opposing candidate” as described in 11 CFR 400.3.

Paragraph (b) sets forth the methods of filing for the Senate in paragraph (b)(1) and for the House of Representatives in paragraph (b)(2). Because Senate candidates are exempt from the FECA’s electronic filing requirements at 2 U.S.C. 434(a)(11), under paragraph (b)(1), Senate candidates must send a copy of their Statement of Candidacy with the declaration to the Commission, *in addition* to their paper filing with the Secretary of the Senate. Candidates will be required to send the copy of their filing to the Commission using either a facsimile machine or as an attachment to an electronic mail message to ensure that it is received within the statutorily required time frame. Additionally, Senate candidates will be required to fax or electronically mail either their FEC Form 2 as an attachment, or the information required in FEC Form 2 by 11 CFR 101.1(a), including the amount by which they expect to exceed the threshold amount to each opposing candidate.

Under paragraph (b)(2), candidates for the House of Representatives will also be required to include the Declaration of Intent information on their Statement of Candidacy, FEC Form 2. Currently, political committees that exceed, or that have reason to expect to exceed, \$50,000 in contributions or expenditures must file electronically. Paragraph (b)(2) requires candidates for the House of Representatives who state on FEC Form 2 that they intend to exceed the threshold amount, as defined in 11 CFR 400.9, to file electronically. This is because the electronic filing threshold in 11 CFR 104.18 (\$50,000) is lower than the \$350,000 threshold for part 400. By declaring his or her intention to exceed \$350,000 in expenditures from personal funds, a House of Representatives candidate is stating that he or she anticipates spending more than seven times the \$50,000 electronic filing threshold. Additionally, House of Representatives candidates are required to fax or electronically mail their FEC Form 2 as an attachment, or the information required therein by 11 CFR 101.1(a), including the amount by which they intend to exceed the threshold amount, to each opposing candidate.

With these required methods of filing, the Commission seeks to facilitate the making and receiving of the Declaration of Intent by all candidates. As explained in the discussion of revised § 101.1

above, due to the availability of computers in public libraries and the availability of free electronic mail on several Web sites, the Commission does not believe that requiring the use of electronic mail will pose an undue burden on candidates, especially when weighed against the fact that electronic mail will provide the most rapid manner of notification possible.

#### 2. 11 CFR 400.21 Initial Notification of Expenditures From Personal Funds

BCRA (2 U.S.C. 434(a)(6)(B)(iii) (Senate) and 441a–1(b)(1)(C) (House of Representatives)) requires the filing of an “initial notification” of expenditures from personal funds within 24 hours of the time certain threshold amounts of expenditures from candidates’ personal funds are exceeded. For Senate candidates, that amount is two times the threshold amount defined in 11 CFR 400.9(a). For House of Representatives candidates, that amount is the threshold amount as defined in 11 CFR 400.9(b). New 11 CFR 400.21 largely tracks the wording of the statute at 2 U.S.C. 434(a)(6)(B)(iii) (Senate) and 441a–1(b)(1)(C) (House of Representatives), with two modifications. First, as discussed in greater detail below (see Explanation and Justification for new 11 CFR 400.25), while BCRA seems to require candidates themselves to file initial notifications of expenditures from personal funds, the Commission interprets this to mean that the candidates’ principal campaign committees are primarily responsible for these notifications, consistent with their other reporting obligations. Second, as explained in more detail below (see Explanation and Justification for new 11 CFR 400.24), FECA requires all original documents filed by Senate candidates’ principal campaign committees to be filed with the Secretary of the Senate. Accordingly, paragraph (a) of new 11 CFR 400.21 requires Senate candidates’ principal campaign committees to file their original notifications with the Secretary of the Senate and to file copies with other required recipients, including the Commission.

New 11 CFR 400.21 addresses the requirements for the principal campaign committees of Senate candidates in paragraph (a). Paragraph (a) states that Senate candidates’ principal campaign committees must notify the Secretary of the Senate, the Commission, and each opposing candidate when making expenditures from personal funds in connection with the election exceeding two times the threshold amount, as defined in 11 CFR 400.9. Paragraph (a) makes clear that such notifications must be received by each required recipient

within 24 hours of when the expenditures are made.

Paragraph (b) of 11 CFR 400.21 contains the requirements for the principal campaign committees of House of Representatives candidates. Paragraph (b) states that House of Representatives candidates' principal campaign committees must notify the Commission, each opposing candidate, and the national party of each opposing candidate when making expenditures from personal funds in connection with the election exceeding the \$350,000 threshold amount, as defined in 11 CFR 400.9. Paragraph (b) also makes clear that such notifications must be received by each required recipient within 24 hours of when the expenditures are made. The content and method of filing of initial notification of expenditures from personal funds are discussed below in the Explanation and Justification for new 11 CFR 400.23 and 400.24.

### 3. 11 CFR 400.22. *Additional Notification of Expenditures From Personal Funds*

After the initial notification discussed above, BCRA (2 U.S.C. 434(a)(6)(B)(iv) and 441a-1(b)(1)(D)) requires the filing of additional notices each time expenditures from the candidate's personal funds exceed \$10,000. Like 11 CFR 400.21, new 11 CFR 400.22 largely tracks the language of the statute, with two modifications. First, as discussed in greater detail below (*see* Explanation and Justification for new 11 CFR 400.25), while BCRA seems to require candidates themselves to file additional notifications of expenditures from personal funds, the Commission interprets this to mean that the candidates' principal campaign committees are primarily responsible for these notifications, consistent with their other reporting obligations. Second, as explained in more detail below (*see* Explanation and Justification for new 11 CFR 400.24), FECA requires all original documents filed by Senate candidates' principal campaign committees to be filed with the Secretary of the Senate. Accordingly, paragraph (a) of new 11 CFR 400.22 requires Senate candidates' principal campaign committees to file their original notifications with the Secretary of the Senate and to file copies with other required recipients.

New 11 CFR 400.22 addresses the requirements for the principal campaign committees of Senate candidates in paragraph (a). Paragraph (a) states that Senate candidates' principal campaign committees must notify the Secretary of the Senate, the Commission, and each opposing candidate when making

additional expenditures from personal funds in connection with the election exceeding \$10,000. Paragraph (a) makes clear that such notifications must be received by each required recipient within 24 hours of when the expenditures are made.

Paragraph (b) of 11 CFR 400.22 contains the requirements for the principal campaign committees of House of Representatives candidates. Paragraph (b) states that House of Representatives candidates' principal campaign committees must notify the Commission, each opposing candidate, and the national party of each opposing candidate when making additional expenditures from personal funds in connection with the election exceeding \$10,000. Paragraph (b) also makes clear that such notifications must be received by each required recipient within 24 hours of when the expenditures are made. The content and method of filing of additional notifications of expenditures from personal funds are discussed below in the Explanation and Justification for new 11 CFR 400.23 and 400.24.

### 4. 11 CFR 400.23. *Contents of Notifications of Expenditures From Personal Funds*

The Millionaires' Amendment at 2 U.S.C. 434(a)(6)(B)(v) (Senate) and 441a-1(b)(1)(E) (House of Representatives) specifically sets forth the contents of the initial and additional notifications discussed above. BCRA requires that the initial and each additional notification contain the following information: (1) The name and office sought by the candidate making the expenditures from personal funds, (2) the date and amount of each such expenditure, and (3) the total amount of expenditures from personal funds that the candidate has made in connection with the election from the beginning of the election cycle to the date of the expenditure that, when aggregated with all others, exceed the \$10,000 threshold, thereby triggering the additional notification requirement. The interim final rule in 11 CFR 400.23 largely tracks the notification requirements of the statute.

While new 11 CFR 400.23(c) requires candidates and their authorized committees to provide information regarding the date and amount of each expenditure from personal funds, the Commission has included language in paragraph (c) to make it clear that the candidate's principal campaign committee is not required to supply such detailed information regarding each expenditure from personal funds more than once.

*Example:* Candidate X, a candidate for the House of Representatives, spends \$200,000 from personal funds in connection with his election campaign on April 1 and another \$200,000 on April 10. On April 11, within 24 hours of triggering the \$350,000 threshold, Candidate X's principal campaign committee files an initial notification of expenditures from personal funds pursuant to 11 CFR 400.21, on which the committee provides the dates and amounts of all expenditures from personal funds to date, namely the expenditure of \$200,000 on April 1 and the subsequent expenditure of \$200,000 on April 10. On April 12, Candidate X spends an additional \$15,000 from personal funds. On April 13, within 24 hours, Candidate X's principal campaign committee files an additional notification of expenditures from personal funds as required by 11 CFR 400.22. On the April 13 additional notification, Candidate X's principal campaign committee would provide the date and amount of the \$15,000 expenditure and would report the total aggregate amount of expenditures from personal funds as \$415,000 (\$200,000 + \$200,000 + \$15,000). Candidate X's principal campaign committee would not be required to report the date and amount of the two \$200,000 expenditures on the April 13 additional notification because details regarding those expenditures were already provided in the initial notification of expenditures from personal funds that the committee filed on April 11.

### 5. 11 CFR 400.24. *Methods of Filing Notifications*

BCRA does not specify methods of filing the initial and additional Notifications of Expenditures from Personal Funds. New 11 CFR 400.24 addresses methods of filing. Paragraph (a) contains the requirements for Senate candidates and paragraph (b) contains the requirements for House of Representatives candidates. As discussed in greater detail below (*see* Explanation and Justification for 11 CFR 400.25), while BCRA could be interpreted to require candidates themselves to file initial and additional notifications of expenditures from personal funds, the Commission concludes that the primary reporting obligation should reside with the candidates' principal campaign committees, although candidates must ensure that their principal campaign committees comply with this obligation.

Although 2 U.S.C. 434(a)(6) does not specifically require Senate candidates to file their initial and additional notifications of expenditures from personal funds with the Secretary of the Senate, 2 U.S.C. 432(g)(1), which was not amended by BCRA, states that all reports required to be filed by Senate candidates under the FECA must be filed with the Secretary of the Senate. Accordingly, paragraph (a) of 11 CFR 400.24 requires Senate candidates'

principal campaign committees to file their initial and additional notifications of expenditures from personal funds with the Secretary of the Senate on FEC Form 10. Paragraph (a) also requires Senate candidates' principal campaign committees to send a copy of FEC Form 10 by either facsimile machine or electronic mail or to send an electronic mail containing the information required by 11 CFR 400.23 to the Commission and to each opposing candidate. Although Senate candidates are exempt from the FECA's electronic filing requirements, the Commission is requiring their principal campaign committees to send this time-sensitive information regarding their expenditures from personal funds by facsimile machine or electronic mail in order to provide the most rapid notification possible.

Paragraph (b) of 11 CFR 400.24 requires certain methods of filing for House of Representatives candidates. As noted above, House of Representatives candidates are subject to the electronic filing requirements of 2 U.S.C. 434(a)(11). Therefore, whereas Senate candidates' principal campaign committees must send their notifications to the Commission by facsimile machine or by electronic mail, House of Representatives candidates' principal campaign committees must electronically file FEC Form 10 as they would any other report using the Commission's electronic filing system. This is because House of Representatives candidates who exceed the threshold amount in 11 CFR 400.10(b) will be well over the \$50,000 electronic filing threshold. Additionally, House of Representatives candidates' principal campaign committees will be required to send their FEC Form 10 via facsimile or as an attachment to an electronic mail message, or to send an electronic mail message containing the information required in new 11 CFR 400.23 to each opposing candidate as well as to the national party committees of each opposing candidate.

Although 11 CFR 400.21 and 400.22 require candidates to file the initial notification of expenditures from personal funds and additional notification of expenditures from personal funds with their opposing candidates, they may not be able to do so because they are unable to obtain the phone number of the facsimile machine or the electronic mail address of one or more of their opposing candidates' principal campaign committees. This may be because the opposing candidate's principal campaign committee failed to supply that information in its Statement of

Organization. The Commission seeks comment on whether it should waive these notification to opposing candidates requirements where the opposing candidate's authorized committee does not report the phone number for its facsimile machine or its electronic mail address on FEC Form 1, the Statement of Organization.

#### *6. 11 CFR 400.25 Reporting Obligations of Candidates and Candidates' Principal Campaign Committees*

The Commission notes that BCRA states that *candidates* are required to file various notifications under the Millionaires' Amendments. For example, BCRA requires candidates to file initial notifications of expenditures from personal funds (2 U.S.C. 434(a)(6)(B)(iii) and 441a-1(b)(1)(C)) and additional notifications of expenditures from personal funds (2 U.S.C. 434(a)(6)(B)(iv) and 441a-1(b)(1)(D)). In the case of notifications of the disposal of excess contributions (2 U.S.C. 441a(i)(3) and 441a-1(a)(4)), either the candidates or their authorized committees must file the notifications. These reporting obligations are similar in nature and extent to other reporting requirements in FECA. Accordingly, the Commission has decided to implement these new reporting requirements in a manner consistent with the way in which other reporting requirements operate under 2 U.S.C. 434 and 11 CFR part 104.

Under FECA, political committees, including candidates' authorized political committees and principal campaign committees, are required to file regularly scheduled reports of receipts and disbursements. See 11 CFR 104.3. Although the obligation to file the reports rests with political committees, it is the committees' treasurers who are liable if their committees fail to file the required reports. See 11 CFR 104.1(a). Consequently, the Commission is taking a similar approach to the reporting requirements under the Millionaires' Amendment. While the Commission's regulations implementing the new reporting provisions state that candidates' principal campaign committees are required to file the required reports and notifications (see 11 CFR 400.21, 400.22, 400.24, and 400.54, below), candidates are responsible for ensuring that their principal campaign committees meet these new disclosure obligations under new 11 CFR 400.25. The Commission seeks comment on whether holding candidates personally liable for violations of the reporting requirements

under subpart B of part 400 is consistent with Congressional intent.

#### **Determining When the Increased Limits Apply**

The Millionaires' Amendment prescribes rules for calculating the amounts of the increased limits to allow response to expenditures from personal funds by an opposing candidate, and also for determining when these increased limits do and do not apply. New 11 CFR part 400, subpart C implements the Millionaires' Amendment provisions concerning when a candidate may and must not accept contributions from individuals under the increased limits and when a national or State political party political party committee may and must not make coordinated party expenditures exceeding the limits in 2 U.S.C. 441a(d). New subpart D of part 400 covers the procedures for calculating the increased limits.

#### *1. 11 CFR 400.30 Receipt of Notification of Opposing Candidate's Expenditures From Personal Funds*

Paragraph (a) of new 11 CFR 400.30 clarifies that the section applies to both Senate races and House of Representatives races.

Paragraph (b) sets the conditions under which a candidate may accept contributions above the applicable limit, while paragraph (c) sets the conditions under which certain political party committees may make unlimited coordinated party expenditures on behalf of the candidate. There are several conditions that must be satisfied before a candidate may accept contributions above the applicable limit (see 11 CFR 400.5) pursuant to the increased contribution limits (see 11 CFR 400.6), and before a national or State political party committee may make unlimited coordinated party expenditures on behalf of the candidate in the general election. The first of these conditions is that the candidate must receive certain notification from the opposing candidate. 2 U.S.C. 441a(i)(2)(A)(i) (Senate); 2 U.S.C. 441a-1(a)(3)(A)(i) (House of Representatives). This condition is implemented in new 11 CFR 400.30.

There seems to be an inconsistency in the statute between the notification that the opposing candidate must give, and the notification that the candidate must receive. In both the Senate and the House of Representatives versions, the opposing candidate must give notifications in terms of his or her "expenditures from personal funds." 2 U.S.C. 434(a)(6)(B)(ii) through (v) (Senate); 2 U.S.C. 441a-1(b)(1)(B)

through (E) (House of Representatives). The candidate must, however, receive notification of the "opposition personal funds amount." 2 U.S.C. 441a(i)(2)(A)(i) (Senate); 2 U.S.C. 441a-1(a)(3)(A)(i) (House of Representatives). The terms "expenditure from personal funds" and "opposition personal funds amount" mean different things in the Millionaires' Amendment. See 11 CFR 400.4 and 400.10, respectively.

New 11 CFR 400.30 reconciles these provisions by interpreting the reference to "opposition personal funds amount" in 2 U.S.C. 441a(i)(2)(A)(i) (Senate) and 2 U.S.C. 441a-1(a)(3)(A)(i) (House of Representatives) to mean "expenditure from personal funds." Thus, paragraph (b) of new 11 CFR 400.30 provides that a candidate must not accept, pursuant to this part, any contribution above the applicable limits (see 11 CFR 400.5) until the candidate has received the initial notification of an opposing candidate's expenditures from personal funds, as defined in new 11 CFR 400.4.

Although this regulatory interpretation diverges to some extent from the wording of 2 U.S.C. 441a(i)(2)(A)(i) (Senate) and 441a-1(a)(3)(A)(i) (House of Representatives), this interpretation harmonizes the statutory scheme by reconciling the nature of the notification that the opposing candidate must give with the nature of notification that the candidate must receive. This interpretation also makes sense when one considers that the self-financed candidate is not able to calculate the opposition personal funds amount in order to give notification of this amount to the candidate in the initial notification. To calculate the opposition personal funds amount, one must have data from both candidates (i.e., about expenditures from personal funds by both candidates). See 11 CFR 400.10. The purpose of the notification requirements in the statute seems to be to provide the candidate with all the data necessary to calculate the opposition personal funds amount. The regulatory interpretation in paragraph (b) of new 11 CFR 400.30 thus accomplishes the apparent purpose of the statute.

Under the Millionaires' Amendment, one of the advantages that may be granted to a candidate to allow response to expenditures from personal funds by the opposing candidate is unlimited coordinated party expenditures on the candidate's behalf. See 2 U.S.C. 441a(i)(1)(C)(iii)(III) (Senate); 2 U.S.C. 441a-1(a)(1)(C) (House of Representatives). Paragraph (c) of new 11 CFR 400.30 applies to national and State committees of a political party (including Congressional campaign

committees), and makes it clear that such party committees may not make unlimited coordinated party expenditures on behalf of a candidate until that candidate has received the initial notification.

The Commission is aware that, under some circumstances, candidates, authorized committees, and party committees may not actually receive initial and additional notifications sent by opposing candidates in a timely manner due to technological difficulties, faulty equipment, or other reasons. To enable candidates and authorized committees to accept contributions and party committees to make coordinated expenditures under the increased limits as soon as possible once expenditures from personal funds above the threshold amount have been made, the Commission is adding the concept of "constructive notification" to paragraphs (b) and (c) of 11 CFR 400.30. Under paragraph (d), a candidate, authorized committee, or party committee is considered to have received constructive notice of the filing of an opposing candidate's initial or addition notification of expenditures from personal funds when they obtain a copy of such notification that is received by the Commission.

#### *2. 11 CFR 400.31 Preventing Disproportionate Advantage Resulting From Increased Contribution and Coordinated Party Expenditure Limits*

Congress placed several checks on the operation of the Millionaires' Amendment. Among these checks is the so-called "proportionality provision." 147 Cong. Rec. S2538 (daily ed. March 20, 2001) (Sen. DeWine). The proportionality provision ensures that the advantages of the increased contribution and coordinated party spending limits allowed to the candidate facing a self-financed opponent do not tip the scales disproportionately in favor of the candidate enjoying the increased limits. 2 U.S.C. 441a(i)(2)(A)(ii) (Senate); 2 U.S.C. 441a-1(a)(3)(A)(ii) (House of Representatives). New 11 CFR 400.31 implements the statutory proportionality provision.

The proportionality provision requires a candidate and his or her authorized committee that accepts contributions under the increased limits, and a political party committee that makes coordinated party expenditures on behalf of the candidate under the increased limits, to monitor a certain proportion. The numerator of the proportion is the running total of contributions previously accepted and coordinated party expenditures

previously made under the increased limits. The denominator of the proportion is the opposition personal funds amount. 2 U.S.C. 441a(i)(2)(A)(ii) (Senate); 2 U.S.C. 441a-1(a)(3)(A)(ii) (House of Representatives).

In the Senate version of the proportionality provision, a candidate and his or her authorized committee must not accept a contribution "to the extent" the contribution causes the proportion to exceed 110 percent. Similarly, a national or State political party committee must not make a coordinated party expenditure on behalf of the candidate "to the extent" that the expenditure causes the proportion to exceed 110 percent. 2 U.S.C. 441a(i)(2)(A)(ii). The House of Representatives version operates in an almost identical manner. The only difference in the House of Representatives version is that the proportion must not exceed 100 percent. 2 U.S.C. 441a-1(a)(3)(A)(ii).

Thus, the effect of the proportionality provision on the increased individual contribution limits is to cause the contribution limits to revert to the applicable limit in 11 CFR 110.1(b)(1) from the increased limits specified by the Millionaires' Amendment once the advantages of the increased limits reach a specified level that is disproportionate to the opposing candidate's expenditures from personal funds. Similarly, the effect of the proportionality provision on the suspension of coordinated party expenditure limits is to reintroduce the limit on national and State coordinated party expenditures in 11 CFR 109.32(b) when the advantages of the increased coordinated spending limits also become disproportionate.

Paragraph (a) of new 11 CFR 400.31 clarifies that the proportionality provision applies to both Senate and House of Representatives elections. Paragraph (b) identifies those who have responsibilities under the proportionality provision: Any candidate and his or her authorized committee that accepts contributions under the increased limits, and any party committee that makes coordinated party expenditures on behalf of such a candidate under the increased limits. The Commission seeks comment on whether holding candidates personally liable for violations of 11 CFR 400.31 is consistent with Congressional intent.

Paragraph (c) sets out the information that must be monitored by the candidates and authorized committees that accept contributions from individuals under the increased coordinated spending limits, and the party committees that make coordinated

party expenditures on behalf of candidates under the increased limits. This information consists of the three elements necessary to compute the proportion required by the statute: (1) The aggregate amount of contributions previously accepted by the candidate under the increased limits (paragraph (c)(1)); (2) the aggregate amount of coordinated party expenditures in connection with the general election campaign of the candidate previously made by any political party committee under the increased limits (paragraph (c)(2)); and (3) the opposition personal funds amount (paragraph (c)(3)).

Paragraph (d) of 11 CFR 400.31 applies to Senate elections. Paragraph (d)(1)(i) provides that a candidate must not accept that part of a contribution that exceeds the applicable limit (*see* 11 CFR 400.7) if the contribution would cause the proportion to exceed 110%. Note that, under this circumstance, the candidate would be able to accept that part of the contribution up to the applicable limit. This would be so because, even if the increased limits do not apply because of the proportionality provision, contributions up to the applicable limit are still permitted under 11 CFR 110.1(b).

*Example:* A contributor who had made no prior contributions delivered a check for \$6,000 to a Senate candidate who had been accepting contributions up to that amount under the increased limits. *See* 2 U.S.C. 441a(i)(1)(C)(i)(I). The candidate determines that accepting the entire amount of the contribution would cause the proportion of the sum of the contributions previously accepted under the increased individual limits, plus coordinated party expenditures previously made under the increased limits, to the opposition personal funds amount to exceed 110%. Therefore, the candidate may accept the first \$2,000 of the contribution, but not the amount above that.

Paragraph (d)(1)(ii) states that the candidate or the candidate's authorized committee has an affirmative duty to notify the national and State committees of their political party and the Commission, by facsimile machine or electronic mail, within 24 hours of when the aggregate amounts described in 11 CFR 400.31(c)(1) plus the aggregate amounts described in 11 CFR 400.31(c)(2) equals 110 percent of the opposition personal funds amount. The purpose of this requirement is to ensure that national and State committees of the candidate's political party and the Commission are put on notice that the committees may no longer make coordinated party expenditures in connection with the candidate's general election campaign that exceed the

ordinary expenditure limitations in 11 CFR 109.32(b).

Paragraph (d)(2) prohibits national and State committees of political parties from making coordinated party expenditures in excess of the expenditure limits in 11 CFR 109.32(b) in connection with a candidate's general election campaign when the sum of the aggregate amounts described in 11 CFR 400.31(c)(1) and the aggregate amounts described in 11 CFR 400.31(c)(2) reach the proportionality provision threshold. Again, as provided in the statute, the obligation is on the party committee not to make any coordinated party expenditures pursuant to the increased limits if the amount of that expenditure would cause the proportion of the sum of the contributions previously accepted under the increased limits, plus coordinated party expenditures previously made under the increased limits, to the opposition personal funds amount to exceed 110%.

Paragraphs (e)(1) and (e)(2) operate analogously to paragraphs (d)(1) and (d)(2), respectively, in the context of House of Representatives elections. It is important to note that, like their Senate counterparts, candidates for the House of Representatives or their authorized committees have an affirmative duty, under 11 CFR 400.31(e)(2)(B), to notify the national and State committees of their political party and the Commission, by facsimile machine or electronic mail, within 24 hours of when the aggregate amounts described in 11 CFR 400.31(c)(1) plus the aggregate amounts described in 11 CFR 400.31(c)(2) reach the proportionality provision threshold. In House of Representatives elections, however, the proportionality provision threshold is 100 percent of the opposition personal funds amount, not 110 percent, as in Senate elections.

### 3. 11 CFR 400.32 Effect of the Withdrawal of an Opposing Candidate

One of the checks placed on the operation of the Millionaires' Amendment by Congress comes into play when a candidate, whose expenditures of personal funds has triggered increased limits for another candidate, ceases to be a candidate. 2 U.S.C. 441a(i)(2)(B) (Senate); 2 U.S.C. 441a-1(a)(3)(B) (House of Representatives). 11 CFR 400.32 implements these provisions of the Millionaires' Amendment.

Paragraph (a)(1) clarifies that this new rule applies to both Senate and House of Representatives elections. Paragraph (a)(2) sets out the conditions under which the section operates. It is critical to determine when a candidate "ceases

to be a candidate" within the meaning of the statute. To this end, paragraph (a)(2) of new 11 CFR 400.32 follows the approach of existing 11 CFR 110.3(c)(4)(iv), which defines when a candidate ceases to be a candidate for purposes of certain other contribution limits in the Act. This may occur, for example, when a candidate publicly withdraws from the race, or fails to file by the filing date specified in State law, or fails to qualify for a run-off election under State law.

Paragraph (b) of 11 CFR 400.32 applies to candidates and their authorized committees. It provides that candidates must not accept contributions under the increased individual contribution limits after the opposing candidate, whose expenditures from personal funds triggered the increased limits, ceases to be a candidate. Paragraph (c) applies to national and State political party committees. It provides that such committees must not make any coordinated party expenditures under the increased spending limits after the opposing candidate, whose expenditures from personal funds triggered the increased limits, ceases to be a candidate. Given that the events triggering the end of both the increased contribution limits and unrestricted coordinated party expenditures are matters of public knowledge, the opposing candidate need not provide notification of these events to any candidate or political party committee, as all candidates and party committees will be deemed to have constructive knowledge of these events.

### 4. Additional Reporting Issue

The Commission seeks comment on whether candidates and authorized committees that are entitled to accept contributions under the increased limits pursuant to 11 CFR part 400 should be required, at regular intervals (such as daily or weekly), to notify the Commission, of the opposition personal funds amount, the aggregate amount of contributions received to date under the increased limits, and the aggregate coordinated party expenditures made to date in connection with their campaign for election.

### 5. Additional Issue Regarding Repayment of Outstanding Debts to Vendors

The Commission seeks comments on the following issue. An authorized committee of a candidate that is opposing a self-financed candidate incurs debts to vendors in anticipation of being able to raise contributions above the applicable limit under 11 CFR

part 400 because the self-financed candidate's expenditures from personal funds allow the authorized committee to accept contributions under the increased limit. After the self-financed candidate ceases to be a candidate, either because the candidate has withdrawn from the campaign or the election has taken place, should the authorized committee be able to continue to raise funds under the increased limits to pay off the outstanding debts?

### Calculating the Increased Limits

The rules in new subpart C of part 400 address the determination as to when, if ever, a candidate for the House of Representatives or Senate may accept contributions under the increased limits, and when, if ever, a political party committee may make coordinated party expenditures on behalf of the candidate under the increased limits. The regulations in subpart D go to determining the amounts of the increased limits.

Under 2 U.S.C. 441a(i) (Senate) and 2 U.S.C. 441a-1 (House of Representatives), when the relevant thresholds are triggered the contribution limit in 2 U.S.C. 441a(a)(1)(A) is increased. The Commission notes that 2 U.S.C. 441a(a)(1)(A) applies to *all* persons and is not limited to individuals. The Commission has decided to limit the increased contribution limit to individuals, however, based on the titles given to the Millionaires' Amendment provisions in BCRA and on the legislative history of the Millionaires' Amendment. *See, e.g.*, BCRA Secs. 304 and 319 (entitled "Modification of *individual* contribution limits in response to expenditures from personal funds" and "Modification of *individual* contribution limits for House candidates in response to expenditures from personal funds," respectively) (emphasis added); 147 CR S2537 (daily ed. Mar. 20, 2001) (statement of Sen. Domenici); 147 CR S2538 (daily ed. Mar. 20, 2001) (statement of Sen. DeWine) (explaining effect of triggering threshold amount on *individual* contribution limits). The Commission seeks public comment, however, on whether, despite provisions' titles in BCRA and the legislative history of the Millionaires' Amendment, the Commission should expand the availability of the increased contribution limit to include all persons and not only individuals.

### 1. 11 CFR 400.40 Calculating the Increased Limits for Senate Elections

Although the Senate and House of Representatives versions of the Millionaires' Amendment are similar in many respects, they differ in the amounts of the increased limits once those increased limits are triggered. 11 CFR 400.40 implements the increased limits for Senate elections. (11 CFR 400.41, below, implements the increased limits for House of Representatives elections.) Paragraph (a) of 11 CFR 400.40 states that the section applies to Senate elections.

Paragraph (b) states conditions on the operation of the increased limits as calculated under this section. Paragraph (b)(1) cross-references the conditions and restrictions in new subpart C. Paragraph (b)(2) clarifies that the amount limitations on contributions by persons other than multicandidate political committees under the increased limits are indexed for inflation, just as are the underlying applicable limits in 2 U.S.C. 441a(a)(1)(A) on which they are based. *See* 2 U.S.C. 441a(c).

Paragraph (c) outlines the procedure for calculating the increased contribution and coordinated party expenditure limits. Paragraph (c)(1) cross-references 11 CFR 400.10 and instructs the calculator to determine the opposition personal funds amount. Paragraph (c)(2) cross-references 11 CFR 110.18 and directs the calculator to determine the voting age population ("VAP") of the candidate's State. Once those numbers have been determined, paragraph (c)(3) directs the calculator to a table containing formulas for computing the applicable increased contribution and coordinated party expenditure limits.

While the formulas in the table in paragraph (c)(3) may appear to differ from those provided in the statute, the resulting calculations are the same. If the Commission were to simply incorporate the language of the statutory formulas into the table, those seeking to calculate the increased limits would first have to perform a separate calculation to determine the relevant threshold amount before they would be able to make use of the formulas in the table. The Commission has determined that it is preferable to provide a table that synthesizes all of the calculations of the relevant thresholds needed to determine the increased contribution limits in one place.

### 2. 11 CFR 400.41 Calculating the Increased Limits for House of Representatives Elections

Unlike the increased limits in Senate elections, which vary according to increasing level of expenditures from personal funds by the opposing candidate, the increased limits in House of Representatives elections are fixed. If the opposing candidate's expenditures from personal funds cause the opposition personal funds amount to exceed the threshold amount, \$350,000, a single set of increased limits is triggered. 2 U.S.C. 441a-1(a)(1)(A)-(C). 11 CFR 400.41 implements these increased limits.

Paragraph (a) clarifies that the section applies to House of Representatives elections. Paragraph (b) states the increased limits. Paragraph (b)(1) sets the increased contribution limit for individuals at \$6,000, *i.e.*, three times the applicable limit in 2 U.S.C. 441a(a)(1)(A). 2 U.S.C. 441a-1(a)(1)(A). Paragraph (b)(2) states that the limit on coordinated party expenditures in 11 CFR 109.32(b) does not apply. 2 U.S.C. 441a-1(a)(1)(B).

### 3. 11 CFR 400.42 Effect of Increased Limits on the Aggregate Contribution Limits for Individuals

Under the Act, an individual may not contribute, in the aggregate, more than \$37,500 to candidates and their authorized committees during the period which runs from January 1 of an odd-numbered year and ends on December 31 of the next even-numbered year. 2 U.S.C. 441a(a)(3)(A). Both the Senate and House of Representatives versions of the Millionaires' Amendment provide, however, that contributions made under the increased limits do not count against the aggregate contribution limit in section 441a(a)(3)(A). 2 U.S.C. 441a(i)(1)(C)(i)(II), 2 U.S.C. 441a(i)(1)(C)(ii)(II) (Senate); 2 U.S.C. 441a-1(a)(1)(B). New 11 CFR 400.42 implements these statutory provisions.

Paragraph (a) clarifies that this section applies to all elections covered by the part, that is, both Senate and House of Representatives elections.

Both the Senate and the House of Representatives provisions of the Millionaires' Amendment provide that the 2 U.S.C. 441a(a)(3) aggregate contribution limit "shall not apply with respect to any contribution made with respect to a candidate" if such contribution is lawfully made under the increased limits. 2 U.S.C. 441a(i)(1)(C)(i)(II), 2 U.S.C. 441a(i)(1)(C)(ii)(II) (Senate); 2 U.S.C. 441a-1(a)(1)(B) (House of



Representatives). The Commission is interpreting these provisions to mean that the amount of the contribution that exceeds the individual contribution limit in 11 CFR 110.1 does not count when aggregating contributions for purposes of 11 CFR 110.5, taking into account previous contributions made during the election cycle. New 11 CFR 400.5 allows an individual to include only the first \$2,000 he or she contributes, regardless of whether it was a prior contribution or part of a contribution accepted under the increased limit, in the biannual aggregate contribution limit.

*Example:* In 2004, the contribution limit under 11 CFR 110.1 is \$2,000. Contributor X contributes \$1,500 to Candidate Y in April for the general election. Because Candidate Y is opposing a self-financed candidate, she can accept up to \$6,000 under the increased limit. After learning this, Contributor X contributes an additional \$3,000 to Candidate Y's campaign in May for the general election. Under 11 CFR 400.5, Contributor X should count the initial \$1,500 contribution and \$500 of the subsequent contribution towards the biannual aggregate limit. The remaining \$2,500 of the \$3,000 contribution accepted in May should not count towards that limit.

The Commission, however, seeks comment on whether 2 U.S.C. 441a(i)(1)(C) (i)(II) and (ii)(II) (Senate) and 2 U.S.C. 441a-1(a)(1)(B) (House of Representatives) should be interpreted in an alternative manner. Does the plain language of these statutory sections indicate that no part of a contribution accepted under the increased limits counts against the aggregate contribution limit in section 441a(a)(3), regardless of whether the contributor has made prior contributions to the candidate for that election? Under this alternative interpretation, Contributor X in the above example would not include any of the \$3,000 contribution accepted in May in the biannual aggregate limit.

Paragraph (c) addresses situations where an individual contributor has contributed the maximum permitted under the aggregate biannual contribution limitation for individuals in 11 CFR 110.5, but has not contributed the maximum under the increased limits of 11 CFR part 400. Under this circumstance, a contributor may make contributions that, in the aggregate, do not exceed the applicable increased limit under 11 CFR 400.40(b) or 400.41(b) minus the applicable limit as defined in 11 CFR 400.5.

*Example:* Between January 1, 2003 and June 30, 2004, Contributor X has already contributed \$37,500 to various candidates including \$1,000 to Candidate Y. On July 10, 2004, Candidate Y determined that she could accept up to \$6,000 under 11 CFR 400.40(b)(3) and solicited Contributor X for a

\$6,000 contribution. The applicable limit in 2004 is \$2,000. Because Contributor X has already reached his aggregate biannual contribution limit, he may contribute up to \$4,000 to Candidate Y (\$6,000 - \$2,000).

### Disposal of Excess Contributions

BCRA added two identical provisions to FECA, one for the Senate and one for the House of Representatives, requiring candidates and their authorized committees to refund excess contributions that are not spent in connection with their elections. 2 U.S.C. 441a(i)(3) and 441a-1(a)(4). Subpart E of 11 CFR part 400, implements the requirements of these BCRA provisions.

#### 1. 11 CFR 400.50 Definition of "Excess Contributions"

The first section in subpart E defines the term "excess contributions." BCRA describes the term "excess contributions" as "the aggregate amount of contributions accepted by a candidate or a candidate's authorized committee under the increased limit \* \* \* and not otherwise expended in connection with the election with respect to which such contributions relate \* \* \*." 2 U.S.C. 441a(i)(3) (Senate); 2 U.S.C. 441a-1(a)(4) (House of Representatives). By referencing back to the definition of "increased limit" in 11 CFR 400.6, the regulatory definition of "excess contribution" allows candidates and their authorized committees to exclude the amount of a contribution, when added to previous contributions made by a person, that is less than or equal to the regular contribution limitations of 11 CFR 110.1 from the computation of excess contributions. This allows the candidates and their authorized committees the benefit of contributions that they would have received regardless of whether the increased limit provisions of the Millionaires' Amendment were triggered.

#### 2. 11 CFR 400.51 Relation of Excess Contributions to the Election in Which They Are Made

The purpose of new 11 CFR 400.51 is to make clear that contributions accepted under the increased limit, that are accepted during an election cycle, whether a primary election cycle or a general election cycle, can only be spent for that election. A primary election is treated as an election separate from the general election. Thus, paragraph (a) requires that any excess contributions made during the primary election cycle must be refunded to the original contributor within 50 days of the primary election. Paragraph (b) contains a similar provision for the general election.

Paragraph (c) creates an exception from paragraphs (a) and (b) for run-off elections. Run-off elections will be considered as extensions of the elections that resulted in the run-off elections. Thus, candidates and their authorized committees are able to use contributions made under the increased limit during the applicable election cycle for the run-off election. Refunds of all excess contributions must be made within 50 days of the run-off election.

The Commission seeks comments on whether treating run-off elections as extensions of the elections that resulted in the run-off elections is an appropriate approach. Should the Commission, instead, treat run-off elections as separate elections and require that excess contributions be refunded within 50 days of the applicable primary or general election? Conversely, should the Commission treat the primary, general, and any run-off elections as one election with the refund period being within 50 days of the general election? Under this approach, however, candidates who do not participate in the general election would be required to refund excess contributions within 50 days of the primary election.

#### 3. 11 CFR 400.52 Prohibition Against Redesignation of Excess Contributions

New 11 CFR 400.52 prohibits candidates and their authorized committees from seeking redesignation of contributions made under the increased limits to another election. It also prohibits contributors from redesignating a contribution made under the increased limits once the contribution has been made. The focus of the Millionaires' Amendment is on the fundraising ability of the candidate facing an opposing candidate who is a self-financed. The Commission concludes that nothing in BCRA suggests that once the election is over, the candidate should be able to carry over the benefit of the increased contribution limits into the next election where he or she would be opposing an entirely different candidate. In addition, BCRA (2 U.S.C. 441a(i)(3) and 441a-1(a)(4)) provides for only one method of disposing of excess contributions and that is the refund of the excess contributions to the original contributors, which is incorporated into the interim final rules. Nevertheless, the Commission seeks comments on whether to amend the interim final rules by adding a similar prohibition against reattribution to a joint contributor of a contribution made under the increased limits in accordance with 11 CFR 110.1(k).

#### 4. 11 CFR 400.53 Disposal of Excess Contributions

As stated above, BCRA (2 U.S.C. 441a(i)(3) and 441a-1(a)(4)) requires candidates and their authorized committees to refund excess contributions to the original contributors within 50 days of the election. New 11 CFR 400.53 implements this requirement.

Paragraph (a) states that the candidate's authorized committee must refund the excess contributions to individuals who made contributions to the candidate or the candidate's authorized committee under 11 CFR part 400. This ensures that only those contributors who actually made contributions to the candidate under the increased individual contribution limit provided for by the Millionaires' Amendment may receive refunds. Paragraph (a) also states that the refund to each individual must not exceed that individual's aggregate contributions to the candidate or the candidate's authorized committee for the relevant election cycle. This restriction prohibits authorized committees from refunding more money to an individual than that individual actually contributed.

Paragraph (b) of 11 CFR 400.53 addresses the situation where contributors do not cash, deposit, or otherwise negotiate the refund checks sent to them under 11 CFR 400.53(a). Authorized committees will be required to disgorge to the United States Treasury an amount equal to the aggregate amount of any refund checks not cashed, deposited, or otherwise negotiated within six months of the date of the refund checks. Authorized committees will be required to disgorge this amount within nine months of the election. This would allow for 50 days after the election to make the refunds and for six months for contributors to cash, deposit, or otherwise negotiate the refund checks with an additional 40 days to determine the disgorgement amount and send the check to the United States Treasury.

#### 5. 11 CFR 400.54 Notification of Disposal of Excess Contributions

BCRA requires that candidates dispose of excess contributions within 50 days of the election. 2 U.S.C. 441a(i)(3) and 441a-1(a)(4) (*See* Explanation and Justification for new 11 CFR 400.50, above.) BCRA also requires that, in the first regular report after the election, the candidate or the authorized committee report the source and amount of each excess contribution and the manner in which the candidate or the authorized committee used such funds.

2 U.S.C. 441a(i)(3) and 441a-1(a)(4). New 11 CFR 400.54 largely tracks the wording of the statute with two modifications. First, rather than requiring that the "source" of excess contributions be reported, the new rule requires the "identification," as defined in 11 CFR 100.12, of the contributor of each excess contribution.

The second modification addresses an inconsistency in the statute. While 2 U.S.C. 441a(i)(3) (Senate) and 2 U.S.C. 441a-1(a)(4) (House of Representatives) require that excess contributions be disposed of within 50 days of the election, 2 U.S.C. 434(a)(6)(C) (Senate) and 2 U.S.C. 441a-1(b)(2) (House of Representatives) require that candidates or their authorized committees report the source of each excess contribution and the manner in which it was used. Note that the first regular report after a primary election would be the quarterly report for the quarter in which the primary was held, and the first regular report after the general election would be the post-general election report. In the case of a primary election, the next quarterly report may be due *before* the expiration of the 50 day post-election time period for the election in which the candidate who must dispose of excess contributions has run, depending on the date the primary election is held. In the case of a general election, the next regular report after the election, the post-general election report, would most definitely be due *before* the expiration of the 50 day post-election time period for the election in which the candidate who must dispose of excess contributions has run.

To reconcile these two provisions of BCRA, 11 CFR 400.54 requires principal campaign committees to report the identification of the contributors of excess contributions and the manner in which such funds were refunded in the first regular report due *after* the 50 day time for disposing of such funds has expired. For example, in the case of a primary election, the principal campaign committee would have to report the excess contributions and the manner in which they were refunded in the first report that quarterly filers are required to file after the 50-day post-primary time period has elapsed. For example, for a primary on May 31, the principal campaign committee would report the excess funds and the manner in which they were refunded in its third quarterly report rather than its second quarterly report because the 50-day post-primary time period would elapse on July 20, five days after the second quarterly report was due. Thus, the principal campaign committee would report this information with its third

quarterly report, due on October 15. Similarly, for the general election, the principal campaign committee would report the excess funds and the manner in which they were refunded not in the post-general report, but rather in the year-end report.

The Commission requests comments on this inconsistency and the Commission's reconciliation, as well as an alternative interpretation. To avoid reading an inconsistency in BCRA, the requirement that authorized committees report the source and amount of excess campaign funds and the manner in which they were "used", 2 U.S.C. 434(a)(6)(C) (Senate) and 2 U.S.C. 441a-1(b)(2) (House of Representatives), could be read as requiring the reporting of whether and, if so, to what extent funds raised under the increased contribution limits were spent. Consequently, the Commission seeks comment on a reading of the foregoing statutory provisions that would require an authorized committee taking advantage of the increased contribution limits to identify in the first report following each election the identity of each contributor of a contribution in excess of the normal limits, the aggregate amount raised and how much of that was spent in connection with the election. It is plausible that Congress intended to capture in a single report the identity of all "excess" contributors and the extent to which campaign spending was affected by the increased contribution limits. This reading would resolve the conflict between the requirement to dispose of excess contributions within 50 days under 2 U.S.C. 441a(i)(3) (Senate) and 2 U.S.C. 441a-1(a)(4) (House of Representatives) and the reporting of excess contributions, prior to that deadline.

#### Part 9035—Expenditure Limitations

##### 11 CFR 9035.2 Limitation on Expenditures From Personal or Family Funds

The Commission is changing a cross-reference in 11 CFR 9035.2(c) to the definition of "personal funds." As explained in greater detail above, the Commission is changing the definition of "personal funds" in former 11 CFR 110.10 and moving it to 11 CFR 100.33 (*see* Explanation and Justification for former 11 CFR 110.10, above). The new definition of "personal funds" in 11 CFR 100.33 applies only to the Commission's rules implementing Title 2 of the U.S. Code, however, and not to the Commission's rules implementing Title 26 of the U.S. Code.

Current 11 CFR 9003.2 includes a definition of "personal funds" that is

nearly identical to the definition in former 11 CFR 110.10. Because that definition remains appropriate in the context of the Title 26 regulations, the Commission is adopting the definition of "personal funds" in 11 CFR 9003.2 for purposes of 11 CFR 9035.2. Accordingly, rather than changing the cross-reference in 11 CFR 9035.2(c) from former 11 CFR 110.10 to new 11 CFR 100.33, the Commission is changing the cross-reference to the existing Title 26 definition of "personal funds" in 11 CFR 9003.2.

### Millionaires' Amendment Hypothetical

In an effort to provide a better understanding of the manner in which the various provisions of the Millionaires' Amendment would operate in the context of a primary and general election, the Commission presents the following hypothetical example. All candidates in the following example are fictional and any similarities to past or present candidates or elections for Federal office are purely coincidental. The contribution and coordinated party expenditure limits in the example will probably be different in subsequent years due to indexing for inflation.

#### Statement of Candidacy

For months, local newspapers had been speculating about the possibility that Frank Rogers, an independently wealthy investment banker from New Franklin was planning to enter the race for the Democratic Party's nomination for the U.S. Senate. Some of Rogers's most ardent supporters had already formed a committee, called the "Draft Frank Rogers Committee" and had been soliciting contributions on behalf of his potential candidacy. By February 1, 2003, the Draft Frank Rogers Committee ("Committee") had received contributions aggregating in excess of \$5,000. On February 15, 2003, Rogers received a letter from the Federal Election Commission ("FEC" or "Commission") notifying him of the Committee's efforts on his behalf and informing Rogers that, unless he disavowed the Committee's activities within 30 days of receiving the Commission's notification, the Commission would consider Frank Rogers to be a candidate, under 11 CFR 100.3(a).

On March 3, 2003, Frank Rogers filed a Statement of Candidacy on FEC Form 2 and designated a principal campaign committee by filing a Statement of Organization on FEC Form 1, pursuant to 11 CFR 102.12 and 102.2, respectively. Because Rogers was running for the Senate, he was required

to file the original FEC Form 2 and FEC Form 1 with the Secretary of the United States Senate, under 11 CFR 105.2. Rogers noticed that he was also required to send a copy of FEC Form 2 (but not FEC Form 1) to the Commission and to each opposing candidate in the same election, under 11 CFR 400.20.

When he began to fill out the forms, Rogers noticed that they had changed since the last time he had seen them, a year earlier, when he considered but decided against a race for Federal office. In addition to the information Form 2 used to require (name, address, party affiliation, office sought, etc.), he was now also required to state a dollar figure representing the amount of his personal funds that he intended to spend on behalf of his campaign in excess of a certain "threshold amount," as defined in 11 CFR 400.9. In addition, the new Form 1 required Rogers' principal campaign committee to provide either its electronic mail address or its facsimile number. Rogers completed Form 1 first and then turned his attention to FEC Form 2.

Rogers retrieved his copy of the Code of Federal Regulations and determined that, for Senate candidates like him, the threshold amount was equal to the sum of \$150,000 plus the product of the voting age population of his State (as certified under 11 CFR 110.18) multiplied by \$0.04. After looking at 11 CFR 110.18, Rogers realized that, in order to determine the voting age population of New Franklin, he needed to search the **Federal Register** for the most recent voting age population estimate published annually by the Department of Commerce. Considering that the voting age population of New Franklin was listed as 24,800,000, he calculated the threshold amount, as follows:

$$\begin{aligned} \$150,000 + (24,800,000 \times \$0.04) = \\ \$1,142,000. \end{aligned}$$

Rogers's personal fortune was estimated to be at least \$500 million. Frank Rogers had determined that his campaign would need an initial infusion of \$7.5 million of his personal funds. Rogers sincerely hoped he would not have to spend any more of his personal funds, but he was willing to spend more if necessary. Thus, on FEC Form 2, Rogers stated his intention to exceed the threshold amount by \$6,358,000 (\$7,500,000 - \$1,142,000 threshold amount). In addition to filing the original FEC Form 2 and FEC Form 1 with the Secretary of the Senate, Rogers faxed a copy of FEC Form 2 to the Commission as required by 11 CFR 400.20. Considering that Rogers was the only candidate in the race at that point,

he was not required to fax or e-mail a copy of FEC Form 2 to any opposing candidates.

On March 31, 2003, Arlene Miller announced her intention to oppose Frank Rogers for the Democratic Party's nomination for the U.S. Senate. Although Miller was not nearly as wealthy as Frank Rogers, she stated on her FEC Form 2 that she intended to exceed the threshold amount (\$1,142,000) by \$1,858,000. This meant that Miller intended to make expenditures from personal funds totaling \$3,000,000 (\$1,858,000 + \$1,142,000 threshold amount). Miller also designated a principal campaign committee on FEC Form 1. Miller filed her original FEC Form 2 and FEC Form 1 with the Secretary of the Senate, faxed a copy of FEC Form 2 to the Commission, and sent an electronic copy of FEC Form 2 to opposing candidate Frank Rogers as an attachment to an e-mail message.

On April 3, 2003, Jim Hyer entered the Democratic primary race. Given his position as Chairman of the New Franklin Democratic Party, Hyer had high name recognition among party activists but almost no money. He was counting on his popularity with the state's Democratic Party activists to carry him to victory in the June 1, 2004, primary election. Within 15 days of becoming a candidate, Hyer filed his original FEC Form 2 and FEC Form 1 with the Secretary of the Senate, and faxed copies of FEC Form 2 to the Commission and to the Rogers and Miller campaigns. On FEC Form 2, Hyer indicated that he did not intend to spend any of his personal funds on the race.

On April 15, 2003, James Rockford, a venture capitalist, announced his intention to seek the Republican Party's nomination for the U.S. Senate. Rockford had made a fortune in the technology boom of the late 1990s (he was worth an estimated \$20 billion) and was extremely well known throughout the state for his support of a popular statewide referendum, Proposition 895. At the time that Rockford announced his candidacy, he was the only candidate seeking the Republican Party's nomination. Within 15 days of becoming a candidate, Rockford filed his original FEC Form 2 and FEC Form 1 with the Secretary of the Senate. On FEC Form 2, Rockford stated that he intended to exceed the threshold amount (\$1,142,000) by \$148,858,000. This meant that Rockford intended to spend \$150 million of his personal funds on the race (\$148,858,000 = \$150,000,000 - \$1,142,000 threshold amount). The same day, Rockford

deposited \$50 million in his authorized committee's account and filed an initial notification of expenditures from personal funds on FEC Form 10 with the Secretary of the Senate. Given that there were no opposing candidates vying for the Republican nomination, Rockford satisfied his remaining reporting obligations by faxing copies of his FEC Form 2 and FEC Form 10 to the Commission.

#### *Initial Notification of Expenditure From Personal Funds*

On April 4, 2003, the day after Hyer entered the race, Rogers immediately pumped \$7.5 million of his personal funds into his authorized committee's account. Because \$7.5 million was more than two times the threshold amount of \$1,142,000, within 24 hours of depositing the funds, Rogers filed an initial notification of expenditures from personal funds on FEC Form 10 with the Secretary of the Senate and faxed a copy of the form to the FEC and to the Miller and Hyer campaigns, as required by 11 CFR 400.21, 400.23, and 400.24.

Miller's campaign received Rogers's notification on April 5, 2003. Miller responded by contributing to her authorized committee \$3,000,000. Because a contribution from a candidate to the candidate's authorized committee was considered an expenditure of personal funds under 11 CFR 400.4 and because the total contribution amount (\$3,000,000) exceeded two times the threshold amount ( $2 \times \$1,142,000 = \$2,284,000$ ), within 24 hours of making the loan, Miller was required to file a notification of expenditures from personal funds on FEC Form 10. On April 6, 2003, Miller filed her original FEC Form 10 with the Secretary of the Senate and faxed copies of the form to the Commission and to the Rogers and Hyer campaigns.

Miller was aware that once she received Rogers's initial notification, it was possible for her authorized committee to begin receiving contributions from individuals in excess of the usual \$2,000 limit. She scrambled to do the necessary calculations to determine the increased limit. According to the procedure outlined in 11 CFR 400.40, Miller first needed to determine the "opposition personal funds amount," the computation of which is explained at 11 CFR 400.10.

#### *Calculating the Opposition Personal Funds Amount for the Miller Campaign*

Miller quickly noticed that there were three different formulas for calculating the opposition personal funds amount and that the appropriate formula depended on the date of calculation.

Because the date was April 7, 2003, she determined that the first formula was the correct one to use because April 7, 2003, was prior to July 16 of the year preceding the year in which the general election was to be held. (The general election was scheduled to be held on November 8, 2004.) According to the formula, the opposition personal funds amount on April 6, 2003 was equal to the greatest aggregate amount of expenditures from personal funds made by her opposing candidate (Rogers) minus the greatest aggregate amount of expenditures from personal funds made by her. Thus, as of April 7, 2003, the opposition personal funds amount was \$7,500,000 minus \$3,000,000, or \$4,500,000. Miller notified her national and State party committees and the Commission of this calculation, as required by 11 CFR 400.30(b).

#### *Calculating the Increased Contribution and Coordinated Party Expenditure Limits for the Miller Campaign*

Miller returned to the table in 11 CFR 400.10 to continue calculating the increased limit. According to the table, if the opposition personal funds amount (\$4,500,000) was greater than the sum of the product of \$0.08 times the voting age population of New Franklin (24,800,000) plus \$300,000 but less than or equal to the sum of the product of \$0.16 times the voting age population of New Franklin (24,800,000) plus \$600,000, then her authorized committee may accept three times the ordinary contribution limit of \$2,000, or \$6,000.

Miller made the following calculations:

$$(\$0.08 \times 24,800,000) + \$300,000 = \$2,284,000$$

$$(\$0.16 \times 24,800,000) + \$600,000 = \$4,568,000.$$

Because the opposition personal funds amount (\$4,500,000) was between \$2,284,000 and \$4,568,000, the increased limit for individual contributions to Miller's authorized committee was \$6,000 (three times the ordinary limit). According to the table, Miller's national party committee was also able to make coordinated expenditures on behalf of her campaign in connection with the general election. Miller located a copy of the March 2002 FEC Record, which contained a table showing the coordinated party expenditure limits for 2002 Senate nominees. Miller found the amount for New Franklin, \$1,781,136, which represented \$0.02 times the voting age population of New Franklin (24,800,000), indexed for inflation. Given that her national and State party

committees have a policy of not making coordinated expenditures before the primary election when there are multiple candidates vying for the Democratic Party's nomination, Miller knew that she could not count on any assistance from either committee until the general election.

#### *Calculating the Proportionality Provision Amount for the Miller Campaign*

Miller was all set to call her closest supporters to begin soliciting \$6,000 checks when she suddenly realized that she and her authorized committee were required, under 11 CFR 400.31 to constantly monitor a certain proportion to make sure that the aggregate amount of contributions made under the increased limit never exceeded 110 percent of the opposition personal funds amount (\$4,500,000). Miller made the calculation as follows:  $1.10 \times \$4,500,000 = \$4,950,000$ . She immediately started making calls, realizing that she could accept contributions under the increased limits only until the aggregate amount of such contributions to her campaign equaled \$4,950,000.

#### *Calculating the Opposition Personal Funds Amount for the Hyer Campaign*

Having received Rogers's initial notification of expenditure from personal funds on April 5, 2003, and Miller's initial notification on April 6, 2003, Hyer set out to determine the increased contribution and coordinated party expenditure limits applicable to his campaign. In order to perform the necessary calculations, Hyer first needed to determine the opposition personal funds amount as of April 5, 2003.

Under 11 CFR 400.10, the opposition personal funds amount prior to June 30 of the year preceding the year in which the general election is held is the difference between the greatest aggregate amount of expenditures from personal funds made by the opposing candidate and the candidate himself in the same election. Hyer considered for a minute which of the three announced Senate candidates, Rogers, Miller, or Rockford, was his "opposing candidate," for purposes of the formula. He quickly ruled out Rockford because he realized that in the primary election cycle, he and Rockford were not seeking the nomination of the same political party.

Of the two remaining candidates, Hyer concluded that the contribution and coordinated expenditure limits would be much higher if Rogers were the opposing candidate. As of April 6, 2003, the aggregate amount of Rogers's

expenditures from personal funds was \$7.5 million while the aggregate amount of Miller's expenditures from personal funds was \$3 million. Unlike Arlene Miller, Hyer had not yet made any expenditures from personal funds, so the aggregate amount of his expenditures was \$0.00. Plugging these numbers into the formula, Hyer calculated the possible opposition personal funds amounts as follows:

Opposing candidate Rogers: \$7,500,000  
 - \$0.00 = \$7,500,000  
 Opposing candidate Miller: \$3,000,000  
 - \$0.00 = \$3,000,000

Thus, Hyer concluded that it would be to his advantage to consider Rogers to be his "opposing candidate" for purposes of determining the opposition personal funds amount. According to his calculations, the applicable opposition personal funds amount as of April 6, 2003, was \$7.5 million. Hyer notified his national and State party committees and the Commission of this calculation, as required by 11 CFR 400.30(b).

#### *Calculating the Increased Contribution and Coordinated Party Expenditure Limits for the Hyer Campaign*

Hyer proceeded to calculate the increased contribution and coordinated party expenditure limits pursuant to the formulas in 11 CFR 400.40. Doing the necessary calculations according to the formulas in the table (illustrated below), Hyer determined that because the opposition personal funds amount (\$7,500,000) was between \$4,568,000 and \$11,420,000, the increased limit for individual contributions to his campaign was \$12,000 (six times the applicable limit (\$2,000)).

$(\$0.16 \times 24,800,000 \text{ (VAP of New Franklin)}) + \$600,000 = \$4,568,000$   
 $(\$0.40 \times 24,800,000 \text{ (VAP of New Franklin)}) + \$1,500,000 = \$11,420,000$

Hyer also determined that the increased coordinated party expenditure limit applicable to his campaign was \$1,781,136 (the greater of \$20,000 or \$0.02 times the voting age population of the State of New Franklin (24,800,000), as adjusted for inflation). Like Miller, Hyer was well aware of his party committees' policy of not making coordinated expenditures prior to the date of nomination when there was a contested primary.

#### *Calculating the Proportionality Provision Amount for the Hyer Campaign*

Before soliciting \$12,000 checks, however, Hyer decided it would be wise to figure out the aggregate amount of contributions his committee could

accept under the increased limit before it would become necessary, under 11 CFR 400.31, to refuse that portion of contributions made under the increased limit that exceeded the ordinary limit of \$2,000. Given that the opposition personal funds amount as of April 6, 2003, was \$7,500,000, Hyer made the following calculation:  $1.10 \times \$7,500,000 = \$8,250,000$ . Hyer began fundraising at once, knowing that he could accept contributions under the increased limits only until the aggregate amount all such contributions received by his campaign equaled \$8,250,000.

#### *Additional Notification of Expenditure from Personal Funds*

Meanwhile, Frank Rogers was starting to flounder. His campaign had already spent the \$7.5 million he had deposited on April 4th plus an additional \$1,000,000 in contributions his authorized committee had received to date. He decided that, in order to remain competitive with Miller and Hyer, he had no choice but to commit more of his personal funds to the race. So, on June 30, 2003, Rogers deposited an additional \$2,500,000 into his authorized committee's account. Because this expenditure from personal funds exceeded \$10,000, within 24 hours of depositing the funds, Rogers was required to file an additional notification of expenditure from personal funds on FEC Form 10, under 11 CFR 400.22. As he did with the initial notification, Rogers filed the original form with the Secretary of the Senate, and faxed copies of the form to the FEC and the Miller and Hyer campaigns. Although this amount was in excess of the amount stated on Roger's FEC Form 2, he was *not* required to amend that form.

#### *Calculating the New Opposition Personal Funds Amount for the Miller and Hyer Campaigns*

The Miller and Hyer campaigns received Rogers's additional notification of expenditures from personal funds on July 1, 2003. The Miller and Hyer campaigns endeavored to determine how Rogers's increase in spending from personal funds might affect their increased contribution limits. Before figuring out their new limits, however, each campaign first had to recalculate the opposition personal funds amount.

Turning to the formulas in 11 CFR 400.10, each candidate realized that as soon as July 16 the applicable formula would no longer be the one that applied prior to July 16, 2003. With vacations taking many staffers and potential contributors away, both committees elected to wait until the new formulas

were in effect before accepting any contributions. Once it was July 16, 2003, which was between July 16 of the year preceding the year in which the general election would be held and February 1 of the year in which the general election would be held, the formula required that the gross receipts advantage be taken into account.

#### *Opposition Personal Funds Amount—Miller Campaign*

To calculate the opposition personal funds amounts for the Miller campaign as of July 16, 2003, the following formula had to be used:  $a - b - ((c - d) + 2)$ , where:

(a) Represented the greatest amount of expenditures from personal funds made by the opposing candidate (Rogers) in the same election;

(b) Represented the greatest amount of expenditures from personal funds made by Miller in the same election;

(c) Represented the aggregate amount of the gross receipts of Miller's authorized committee, minus any contributions by Miller from personal funds, during any election cycle that may be expended in connection with the primary election, as determined on June 30 of the year (2003) preceding the year in which the general election was to be held (2004); and

(d) Represented the aggregate amount of the gross receipts of Rogers's authorized committee, minus any contributions by Rogers from personal funds, during any election cycle that may be expended in connection with the primary election, as determined on June 30, 2003.

#### *Variable (a)—Miller Campaign*

Considering each variable in turn, as of June 30, 2003, Rogers had made aggregate expenditures from personal funds in the amount of \$10 million. So, as of that date, variable (a) in the formula for the Miller campaign equaled \$10,000,000.

#### *Variable (b)—Miller Campaign*

As of June 30, 2003, Miller had made aggregate expenditures from personal funds in the amount of \$3,000,000. Thus, as of that date, variable (b) in the formula for Miller's campaign equaled \$3,000,000.

#### *Variable (c)—Miller Campaign*

As of June 30, 2003, Miller's authorized committee had received contributions in connection with the primary election totaling \$4,000,000 and Miller's aggregate contributions from personal funds totaled \$3,000,000. Accordingly, as of June 30, 2003, variable (c) in the formula for the Miller

campaign equaled \$4,000,000 – \$3,000,000, or \$1,000,000.

*Variable (d)—Miller Campaign*

As of June 30, 2003, Rogers's authorized committee had received contributions in connection with the primary election totaling \$11,000,000 and Rogers's aggregate contributions from personal funds totaled \$10,000,000. Accordingly, as of June 30, 2003, variable (d) in the formula for the Miller campaign equaled \$11,000,000 – \$10,000,000, or \$1,000,000.

Plugging the above numbers into the applicable formula ( $a - b - ((c - d) \div 2)$ ), the opposition personal funds amount for the Miller campaign as of June 30, 2003, was \$7,000,000, calculated as follows:

$$\begin{aligned} & \$10,000,000 - \$3,000,000 - \\ & ((\$1,000,000 - \$1,000,000) \div 2) = \\ & \$7,000,000. \end{aligned}$$

*Opposition Personal Funds Amount—Hyer Campaign*

To calculate the opposition personal funds amounts for the Hyer campaign as of July 16, 2003, the following formula had to be used:  $a - b - ((c - d) \div 2)$ , where:

(a) Represented the greatest amount of expenditures from personal funds made by the opposing candidate (Rogers) in the same election;

(b) Represented the greatest amount of expenditures from personal funds made by Hyer in the same election;

(c) Represented the aggregate amount of the gross receipts of Hyer's authorized committee, minus any contributions by Hyer from personal funds, during any election cycle that may be expended in connection with the primary election, as determined on June 30 of the year (2003) preceding the year in which the general election was to be held (2004); and

(d) Represented the aggregate amount of the gross receipts of Rogers's authorized committee, minus any contributions by Rogers from personal funds, during any election cycle that may be expended in connection with the primary election, as determined on June 30, 2003.

*Variable (a)—Hyer Campaign*

Considering each variable in turn, as of June 30, 2003, Rogers had made aggregate expenditures from personal funds in the amount of \$10 million. So, as of that date, variable (a) in the formula for the Hyer campaign equaled \$10,000,000.

*Variable (b)—Hyer Campaign*

As of June 30, 2003, Hyer had not made any expenditures from personal funds. Accordingly, as of that date, variable (b) in the formula for Hyer's campaign equaled \$0.

*Variable (c)—Hyer Campaign*

As of June 30, 2003, Hyer's authorized committee had received contributions in connection with the primary election totaling \$1,000,000 and Hyer's aggregate contributions from personal funds totaled \$0. Accordingly, as of June 30, 2003, variable (c) in the formula for the Hyer campaign equaled \$1,000,000 – \$0, or \$1,000,000.

*Variable (d)—Hyer Campaign*

As of June 30, 2003, Rogers's authorized committee had received contributions in connection with the primary election totaling \$11,000,000 and Rogers's aggregate contributions from personal funds totaled \$10,000,000. Accordingly, as of June 30, 2002, variable (d) in the formula for the Hyer campaign equaled \$11,000,000 – \$10,000,000, or \$1,000,000.

Plugging the above numbers into the applicable formula ( $a - b - ((c - d) \div 2)$ ), the opposition personal funds amount for the Hyer campaign as of June 30, 2003, was \$10,000,000, calculated as follows:

$$\begin{aligned} & \$10,000,000 - \$0 - ((\$1,000,000 - \\ & \$1,000,000 \div 2) = \$10,000,000. \end{aligned}$$

Both Miller and Hyer notified their national and state party committees and the Commission of their calculations, as required by 11 CFR 400.30(b).

*Calculating the New Contribution Limits for the Miller and Hyer Campaigns*

After calculating the new opposition personal funds amount, the Miller and Hyer campaigns recalculated the new individual contribution limits as follows:

*Contribution Limit—Miller Campaign*

Because the opposition personal funds amount of \$7,000,000 was greater than:

$$\begin{aligned} & \$4,568,000 = (\$0.16 \times 24,800,000 \text{ (VAP} \\ & \text{of New Franklin)}) + \$600,000 \end{aligned}$$

But less than or equal to:

$$\begin{aligned} & \$11,420,000 = (\$0.40 \times 24,800,000 \text{ (VAP} \\ & \text{of New Franklin)}) + \$1,500,000 \end{aligned}$$

Miller determined that the new increased contribution limit for the Miller campaign was:

$$\begin{aligned} & \$12,000 = 6 \times \$2,000 \text{ (the applicable} \\ & \text{limit)}. \end{aligned}$$

*Contribution Limit—Hyer Campaign*

Because the opposition personal funds amount of \$10,000,000 was greater than:

$$\begin{aligned} & \$4,568,000 = (\$0.16 \times 24,800,000 \text{ (VAP} \\ & \text{of New Franklin)}) + \$600,000 \end{aligned}$$

But less than or equal to:

$$\begin{aligned} & \$11,420,000 = (\$0.40 \times 24,800,000 \text{ (VAP} \\ & \text{of New Franklin)}) + \$1,500,000 \end{aligned}$$

Hyer determined that the new increased contribution limit for the Hyer campaign was the same as the old increased contribution limit:

$$\begin{aligned} & \$12,000 = 6 \times \$2,000 \text{ (the applicable} \\ & \text{limit)}. \end{aligned}$$

*Calculating the New Proportionality Provision Amount for the Miller and Hyer Campaigns*

Before calling to solicit contributions under the new increased limits, however, both the Miller and Hyer campaigns sought to determine the maximum amount they could accept before being in danger of exceeding 110 percent of the new opposition personal funds amount in violation of the proportionality provision (11 CFR 400.31).

*Proportionality Provision Amount—Miller Campaign*

Taking into account the new opposition personal funds amount (\$7,000,000), the Miller campaign determined that the new proportionality provision amount was \$7,700,000, calculated as follows:

$$1.10 \times \$7,000,000 = \$7,700,000$$

As of July 16, 2003, the Miller campaign had received \$4,500,000 in contributions, \$1,500,000 from contributors plus the \$3,000,000 contribution from Miller's personal funds. Of the \$1,500,000, the Miller Committee received \$500,000 under the increased limits. Only this \$500,000 of her committee's gross receipts counted towards the proportionality provision limit. Accordingly, the Miller campaign determined that it could receive another \$7,200,000 (\$7,700,000 limit – \$500,000 already received) in contributions under the increased limit without violating the proportionality provision.

*Proportionality Provision Amount—Hyer Campaign*

As of July 16, 2003, the Hyer campaign had received \$1,000,000 in contributions, \$400,000 of which was received under the increased limits, well short of the old \$5,500,000 maximum proportionality provision amount. Taking into account the new opposition personal funds amount

(\$10,000,000), the Hyer campaign determined that the new proportionality provision amount was \$11,000,000, calculated as follows:

$$1.10 \times \$10,000,000 = \$11,000,000$$

Accordingly, the Hyer campaign determined that it could receive another \$10,600,000 (\$11,000,000 limit – \$400,000 already received) in contributions under the increased limit without violating the proportionality provision.

#### *Withdrawal of Opposing Candidate*

As summer turned into fall and fall faded into winter, the polls consistently showed Miller with a double-digit lead over Rogers. The Hyer campaign polled in the single digits.

Rogers had already spent \$10 million of his personal funds and, although willing to spend more, he did not want to do so unless there was a real chance that he might make some headway against Miller. Rogers figured that he could not gain ground against Miller. So, on December 20, 2003, Rogers held a press conference and announced his decision to quit the race.

Once the initial shock of Rogers's withdrawal from the race wore off, both Miller and Hyer realized that his departure might have a significant impact on their ability to raise funds for the last seven months of the primary campaign. Under 11 CFR 400.32, Rogers ceased to be a candidate on December 20, 2003, the date he publicly announced his withdrawal from the race. From that day forward, Miller was prohibited from accepting that portion of contributions made under the increased limits that exceeded the applicable limit (\$2,000 per person) because it was Rogers's expenditures from personal funds that had allowed her to receive contributions above the applicable limit in the first place. While her campaign was permitted to continue accepting contributions up to the applicable limit (\$2,000 per individual), it would have to refuse any portion of any contribution above the applicable limit. Any amount above the applicable limit would have to be refunded to the contributor.

#### *Calculating the New Opposition Personal Funds Amount for the Hyer Campaign*

Rogers's withdrawal from the race affected the Hyer campaign differently than the Miller campaign. With Rogers out of the race, Hyer must now consider Miller to be his "opposing candidate" for purposes of calculating the opposition personal funds amount and the increased contribution limits. To

determine the new opposition personal funds amount as of December 20, 2003, Hyer used the same formula he had used on July 16, 2003 ( $a - b - ((c - d) \div 2)$ ), substituting Miller for Rogers, where:

(a) Represented the greatest amount of expenditures from personal funds made by the opposing candidate (Miller) in the same election;

(b) Represented the greatest amount of expenditures from personal funds made by Hyer in the same election;

(c) Represented the aggregate amount of the gross receipts of Hyer's authorized committee, minus any contributions by Hyer from personal funds, during any election cycle that may be expended in connection with the primary election, as determined on June 30 of the year (2003) preceding the year in which the general election was to be held (2004); and

(d) Represented the aggregate amount of the gross receipts of Miller's authorized committee, minus any contributions by Miller from personal funds, during any election cycle that may be expended in connection with the primary election, as determined on June 30, 2003.

#### *Variable (a)—Hyer Campaign*

Considering each variable in turn, as of June 30, 2003, Miller had made aggregate expenditures from personal funds in the amount of \$3,000,000. So, as of that date, variable (a) in the formula for the Hyer campaign equaled \$3,000,000.

#### *Variable (b)—Hyer Campaign*

As of June 30, 2003, Hyer had not made any expenditures from personal funds. Accordingly, as of that date, variable (b) in the formula for Hyer's campaign equaled \$0.

#### *Variable (c)—Hyer Campaign*

As of June 30, 2003, Hyer's authorized committee had received contributions in connection with the primary election totaling \$1,000,000 and Hyer's aggregate contributions from personal funds totaled \$0. Accordingly, as of June 30, 2003, variable (c) in the formula for the Hyer campaign equaled \$1,000,000 – \$0, or \$1,000,000.

#### *Variable (d)—Hyer Campaign*

As of June 30, 2003, Miller's authorized committee had received contributions in connection with the primary election totaling \$4,000,000 and Miller's aggregate contributions from personal funds totaled \$3,000,000. Accordingly, as of June 30, 2003, variable (d) in the formula for the Hyer

campaign equaled \$4,000,000 – \$3,000,000, or \$1,000,000.

Inserting the above numbers into the applicable formula ( $a - b - ((c - d) \div 2)$ ), the opposition personal funds amount for the Hyer campaign as of December 20, 2003, was \$3,000,000, calculated as follows:

$$\$3,000,000 - \$0 - ((\$1,000,000 - \$1,000,000) \div 2) = \$3,000,000$$

Hyer notified his national and State party committees and the Commission of this calculation, as required by 11 CFR 400.30(b).

#### *Calculating the New Increased Contribution Limit for the Hyer Campaign*

Hyer was optimistic that he would still be able to receive contributions above the applicable limit. Hyer performed the following calculations and determined that with the new opposition personal funds amount of \$3,000,000, the new contribution limit applicable to his campaign was three times the applicable limit, or \$6,000:

Opposition personal funds amount of \$3,000,000 was more than \* \* \*

$$\$2,284,000 = (\$0.08 \times 24,800,000 \text{ (VAP of New Franklin)}) + \$300,000$$

But less than or equal to \* \* \*

$$\$4,568,000 = (\$0.16 \times 24,800,000 \text{ (VAP of New Franklin)}) + \$600,000$$

#### *Calculating the New Proportionality Provision Amount for the Hyer Campaign*

Before calling to solicit contributions under the new increased limit, however, the Hyer campaign sought to determine the maximum amount he could accept before being in danger of exceeding 110 percent of the new opposition personal funds amount in violation of the proportionality provision (11 CFR 400.31).

As of December 20, 2003, the Hyer campaign had received \$1,200,000 in contributions, \$750,000 of which was received under the increased limits. Taking into account the new opposition personal funds amount (\$3,000,000), the Hyer campaign determined that the new proportionality provision amount was \$3,300,000, calculated as follows:

$$1.10 \times \$3,000,000 = \$3,300,000$$

Accordingly, the Hyer campaign determined that it could receive \$2,550,000 (\$3,300,000 limit – \$750,000 already received) in contributions under the increased limit without violating the proportionality provision.



*Reporting of Gross Receipts as of December 31, 2003*

On January 31, 2004, the principal campaign committees of Arlene Miller, Jim Hyer, and James Rockford filed the reports required under 11 CFR 104.19(b)(2) disclosing gross receipts as of December 31, 2003. Frank Rogers's principal campaign committee did not have to file a report because he had withdrawn from the election.

Arlene Miller's principal campaign committee reported that it had received \$6 million in gross receipts in connection with the primary. That \$6 million included her \$3 million contribution from personal funds. The committee also reported that it had \$2 million in gross receipts that could be spent on the general election. This amount came from contributions it had received under the applicable limit that had been designated for the general election. Miller did not make any contribution from personal funds for the general election.

Jim Hyer's principal campaign committee disclosed that it had \$1.2 million in gross receipts that could be spent for the primary. He did not make any contribution from personal funds. Additionally, the committee reported that it had no gross receipts for the general election.

James Rockford was a candidate for the Republican nomination for the Senate. His principal campaign committee was also required to file this report. It disclosed that it had received \$50.3 million in gross receipts in connection with the primary including a \$50 million contribution from Rockford's personal funds. The committee also reported that, as of December 31, 2003, it had \$1.1 million in gross receipts for the general election, \$1 million of which was a contribution from Rockford's personal funds made on December 15, 2003. The remaining \$100,000 of the committee's gross receipts represented contributions from contributors other than Rockford.

The remaining months of the primary campaign were brutal. As the primary election day neared, polls showed Miller and Hyer in a statistical dead heat. On June 1, 2004, Miller received 47% of the vote, Hyer received 43% of the vote, and, despite the fact that he withdrew from the race more than five months before the primary election, 10% of New Franklin's Democratic primary voters wrote in Frank Rogers name. Because neither Miller nor Hyer received 50% or more of the vote, New Franklin law required that a run-off election be held.

The run-off election was scheduled for July 1, 2004. Neither campaign had much money left at this point because both had spent nearly every available dollar on a last-minute advertising blitz. The Miller campaign, however, was in a better position than the Hyer campaign. Whereas Hyer's authorized committee had only \$25,000 cash on hand, Miller's authorized committee had \$2,075,000 total cash on hand, but only \$75,000 was available for the primary run-off. Both candidates wondered whether they were permitted to use any of these funds for the run-off election, though, considering that they were raised in the primary election cycle under the increased contribution limits. They turned to the definition of "election cycle" at 11 CFR 400.2, however, and determined that a run-off election was considered to be an extension of the election cycle containing the election that necessitated the run-off election. Thus, the Miller and Hyer campaigns were permitted to use the funds remaining from the primary election for the July 1, 2004, run-off election because the July 1, 2004, run-off was considered to be part of the June 1, 2004, primary election cycle.

On July 1, 2004, Arlene Miller won the run-off election and prepared to face off against James Rockford in the general election. Rockford ran unopposed in the Republican primary and managed to secure the Republican Party's nomination without spending more than \$1 million of his personal funds. After winning the Republican endorsement, Rockford's authorized committee refunded the remaining \$49 million to the candidate. (His contribution on December 15th of \$1 million was for the general election.) Miller's authorized committee was completely out of primary cash by the time the run-off election ended.

*General Election Campaign*

The general election cycle got off to a raucous start. On July 2, 2004, Rockford used his own funds to purchase \$20 million in air time, locking up key commercial slots in every major media market in the state through Labor Day. As required by 11 CFR 400.21, within 24 hours of executing the air time contract, Rockford filed an initial notification of expenditures from personal funds on FEC Form 10. He filed the original form with the Secretary of the Senate and faxed copies to the Commission and the Miller campaign.

When Miller received Rockford's initial notification on July 3, 2004, she scrambled to determine the opposition

personal funds amount, under 11 CFR 400.10, and the increased contribution and party expenditure limits under 11 CFR 400.40.

*Calculating the Opposition Personal Funds Amount for the Miller Campaign*

Given that the date of computation was on or after December 31 of the year preceding the year in which the general election was to be held, the applicable formula was the one outlined in 11 CFR 400.10(a)(3) (a - b - ((e - f) ÷ (2)), where:

(a) Represented the greatest aggregate amount of expenditures from personal funds made by Rockford in the general election (\$21 million);

(b) Represented the greatest amount of expenditures from personal funds made by Miller in the general election (\$0);

(e) Represented the aggregate amount of gross receipts of Miller's authorized committee (\$2 million), minus any contributions by Miller from personal funds (Note: This amount is \$0, because the \$3 million Miller contributed to her authorized committee on April 5, 2003 was made in connection with the primary and entirely spent), during any election cycle that may be expended in connection with the general election, as determined on December 31, 2003; and

(f) Represented the aggregate amount of gross receipts of Rockford's authorized committee (\$1.1 million), minus any contributions by Rockford from personal funds (\$1 million), during any election cycle that may be expended in connection with the general election, as determined on December 31, 2003, so the July 2, 2004, \$20 million expenditure is *not* included.

Miller determined the value of each variable as follows:

(a) = \$21,000,000

(b) = \$0.00

(e) = \$2,000,000 (\$2,000,000 - \$0)

(f) = \$100,000 (\$1,100,000 - \$100,000)

Inserting these above values into the applicable formula (a - b - ((e - f) ÷ (2)), Miller determined that the opposition personal funds amount was \$20,050,000, calculated as follows:

$$\$21,000,000 - \$0 - ((\$2,000,000 - \$100,000) \div (2)) = \$20,050,000$$

Miller notified her national and State party committees and the Commission of this calculation, as required by 11 CFR 400.30(b).

*Calculating the Increased Contribution and Coordinated Party Expenditure Limits for the Miller Campaign*

Having determined that the opposition personal funds amount was \$20,050,000, Miller determined that, because the opposition personal funds

amount was more than \$11,420,000 ( $\$0.40 \times 24,800,000$  (VAP of New Franklin) + \$1,500,000), the following increased contribution and coordinated party expenditure limits applied to her campaign, under 11 CFR 400.40:

*Increased contribution limit*

\$12,000 (6 × \$2,000 (applicable limit))

*Coordinated party expenditure limit*

Unlimited

*Calculating the Proportionality Provision Amount for the Miller Campaign*

Miller next calculated the aggregate amount of contributions her authorized committee would be able to receive before being in danger of exceeding 110 percent of the opposition personal funds amount (\$20,050,000), under 11 CFR 400.31:

$$1.10 \times \$20,050,000 = \$22,055,000$$

Miller started raising money in earnest. By the end of July, her campaign had managed to raise \$4,500,000, \$2,300,000 of which was received under the increased limits. In addition, sometime in the middle of the month, someone from the DSCC called to say they had not made any independent expenditures on her behalf, and wanted to make coordinated party expenditures to help her out. The DSCC official wanted to know what sort of help Miller needed most. Miller told the DSCC official that her campaign desperately needed air time in all of New Franklin's major media markets in order to compete with Rockford. The DSCC immediately purchased as much air time as was available between July 15, 2004, and Labor Day. The DSCC notified Miller that the total cost of the air time that the DSCC purchased on Miller's behalf was \$19,753,000 above the coordinated party expenditure limit. Although the New Franklin State Democratic Committee could also spend above the ordinarily-applicable \$1,781,136 coordinated party spending limit, Miller was told they planned to make no coordinated party expenditures on her behalf.

On August 1, 2004, Arlene Miller received a telephone call from Rex Duncan, an old college friend. Duncan said that he knew Miller was running against a self-financed candidate and he wanted to send her a contribution but he wasn't sure how much he was allowed to give. Duncan explained that, since Election Day 2002, he had made a number of contributions to other Federal candidates. As of August 1, 2004, the aggregate amount of Duncan's contributions was \$35,500, just \$2,000 shy of the aggregate 2-year limit of \$37,500 for individual contributions to

Federal candidate committees under 2 U.S.C. 441a(a)(3)(A). He asked Miller how much he would be allowed to contribute to her campaign. Miller informed Duncan that only the first \$2,000 of his contribution to any one Federal candidate counted against his 2-year aggregate limit, pursuant to 11 CFR 400.42. Any amount above the applicable limit given to candidates running against self-financing candidates was excluded from the calculation.

Nevertheless, Miller suspected that Duncan could not send her \$12,000, however, because she knew that her campaign was getting close to a crucial limit of its own under the proportionality provision. Miller told Duncan that she would have to call him back after she figured out how much of his money her campaign could legally accept. Miller calculated the aggregate amount of contributions already received and coordinated party expenditures already made under the increased limits, as follows: \$2,300,000 (contributions) + \$19,753,000 (coordinated expenditures) = \$22,053,000.

After performing these calculations, Miller realized that she could only accept \$2,000 from Duncan above the applicable limit of \$2,000. This meant that her campaign could accept a check from Duncan in the amount of \$4,000 because, although the first \$2,000 of his contribution *would* count against his 2-year aggregate limit of \$37,500, it *would not* count against the Miller campaign's proportionality provision limit of \$22,055,000. Miller called Duncan back and asked him to send her a check for \$4,000.

Realizing that, under 11 CFR 400.31(d)(1)(ii), Miller or her authorized committee was required to notify the national and State committees of her political party and the Commission within 24 hours of the time her campaign reached the proportionality provision limit, Miller immediately sent electronic mail messages to the DSCC, the New Franklin Democratic Federal Campaign Committee, and the Commission. Both committees were now on notice that they could no longer make coordinated expenditures on behalf of Miller's general election campaign in excess of the coordinated expenditure limitation in 11 CFR 109.32(b).

Miller realized that, unless Rockford spent more of his personal funds on behalf of his campaign, from that point forward, her campaign could only accept contributions up to the applicable limit (\$2,000 per individual). In addition, the national party

committee would be prohibited from making any more coordinated expenditures on behalf of the Miller campaign, although it could still contribute up to \$35,000 directly to her principal campaign committee.

On August 3, 2004, Rockford reluctantly used his personal funds to purchase \$30 million worth of air time between Labor Day and Election Day. Disappointed that he was again using personal funds, Rockford deemed \$20 million a contribution and \$10 million a personal loan. As required, Rockford filed his original FEC Form 10 with the Secretary of the Senate and faxed copies of the form to the Commission and the Miller campaign. Miller scrambled to recalculate the new opposition personal funds amount and increased contribution and coordinated party expenditure limits.

*Calculating the New Opposition Personal Funds Amount for the Miller Campaign*

Given that the date of computation (August 4, 2004) was on or after February 1 of the year in which the general election was to be held, the applicable formula was the one outlined in 11 CFR 400.10(a)(3) ( $a - b - ((e - f) \div 2)$ ), where:

(a) Represented the greatest aggregate amount of expenditures from personal funds made by Rockford in the general election (\$51 million);

(b) Represented the greatest amount of expenditures from personal funds made by Miller in the general election (\$0);

(e) Represented the aggregate amount of gross receipts of Miller's authorized committee (\$2 million), minus any contributions by Miller from personal funds (\$0), during any election cycle that may be expended in connection with the general election, as determined on December 31, 2003; and

(f) Represented the aggregate amount of gross receipts of Rockford's authorized committee (\$1.1 million), minus any contributions by Rockford from personal funds (\$1 million), during any election cycle that may be expended in connection with the general election, as determined on December 31, 2003.

Miller determined the value of each variable as follows:

$$(a) = \$51,000,000$$

$$(b) = \$0$$

$$(e) = \$2,000,000 (\$2,000,000 - \$0)$$

$$(f) = \$100,000 (\$1,100,000 - \$1,000,000)$$

Plugging these values into the applicable formula, Miller determined that the opposition personal funds amount was \$45,750,000, calculated as follows:

$\$51,000,000 - \$0 -$   
 $(\$2,000,000 - \$100,000) \div 2 =$   
 $\$50,050,000$

Miller notified her national and State party committees and the Commission of this calculation, as required by 11 CFR 400.30(b).

*Calculating the New Increased Contribution and Coordinated Party Expenditure Limits for the Miller Campaign*

Having determined that the opposition personal funds amount was \$50,050,000, Miller determined that, because the opposition personal funds amount was more than \$11,420,000 ( $\$0.40 \times 24,800,000$  (VAP of New Franklin) + \$1,500,000), the following increased contribution and coordinated party expenditure limits applied to her campaign, under 11 CFR 400.40:

*Increased contribution limit—Miller campaign*  
 $\$12,000$  ( $6 \times \$2,000$  (applicable limit))  
*Coordinated party expenditure limit—Miller campaign*  
 Unlimited

*Calculating the New Proportionality Provision Amount for the Miller Campaign*

Miller next calculated the aggregate amount of contributions her authorized committee would be able to receive before being in danger of exceeding 110 percent of the opposition personal funds amount (\$45,750,000), under 11 CFR 400.31:

$1.10 \times \$50,050,000 = \$55,055,000$

As of August 4, 2004, the aggregate amount of contributions received under the increased limits (including Duncan's \$2,000) and coordinated party expenditures made under the increased limits equaled \$22,055,000. Accordingly, Miller's campaign could now receive an additional \$33,000,000 ( $\$55,055,000 - \$22,055,000$ ) in contributions and/or coordinated party expenditures. Miller immediately called her old friend Rex Duncan and told him that he could now send her campaign an additional \$8,000 if he still wished to support her. Miller then received a call from a multicandidate political committee (PAC) wanting to know how much it could contribute to her campaign. She told the PAC's treasurer that she could accept up to \$5,000, as the PAC's contribution limits had not been raised.

*Prohibition on Redesignation of Contributions Received Above the Applicable Limit to Another Election Cycle*

When the election was over, Miller's authorized committee had \$50,000 in

contributions accepted under the increased limit left in its campaign account. Looking ahead to the 2010 primary and general elections, Miller wondered whether it would be possible to redesignate the \$50,000 to a future race, in the manner prescribed under 11 CFR 110.1(b)(5). Miller quickly determined, however, that redesignation of contributions received under the increased limits was strictly prohibited, under 11 CFR 400.52.

*Disposal of Excess Contributions Received Above the Applicable Limit*

Miller was puzzled about what her authorized committee was supposed to do with the extra \$50,000 in contributions her committee had received during the general election cycle. Under 11 CFR 400.51, Miller's authorized committee was required to refund the excess contributions within 50 days of the general election. Miller's committee refunded the \$50,000 in excess contributions to those individuals who had made increased contributions during the general election cycle, being careful to make sure that no individual contributor received a refund that exceeded the aggregate amount of their contributions to the Miller campaign, pursuant to 11 CFR 400.53.

Miller's committee was required to notify the Commission about the disposition of these excess contributions under 11 CFR 400.54. Information about the source and amount of these excess contributions and the manner in which the committee used the funds had to be included in the first report that was due more than 50 days after the general election. According to the regulation, the report had to be submitted with Miller's FEC Form 3. Miller noted that the first report due more than 50 days after the November 8, 2004, general election was not the post-general report, which was due on December 8, 2004, but the year-end report, due on January 31, 2005.

*Repayment of Rockford's Personal Loan*

Rockford's authorized committee spent every available dollar on the general election campaign and, after the election was over, had no funds remaining to repay Rockford's \$10 million personal loan. Rockford wondered whether his authorized committee could use funds raised after the date of the election to repay the loan. He quickly realized, however, that BCRA set a limit on the amount of personal loans that may be repaid with funds raised after the end of an election cycle. The Commission's regulation at 11 CFR 116.11, implementing the new

statutory limit, prohibited Rockford from using more than \$250,000 in contributions received after the date of the election to pay off his \$10 million personal loan. See 2 U.S.C. 441a(j). This meant, of course, that Rockford would never be able to recover the remaining \$9,750,000 (\$10,000,000 personal loan - \$250,000 limit) he lent his authorized committee during the general election cycle.

**Certification of No Effect Pursuant to 5 U.S.C. 605(b) (Regulatory Flexibility Act)**

The attached interim final rules will not have a significant economic impact on a substantial number of small entities. Although the interim final rules add new substantive provisions to the current regulations, those provisions, which are mandated by BCRA, generally represent a relaxation of current limitations on contributions to candidates for Federal office in certain, specified circumstances. Therefore, the attached interim final rules will not have a significant economic impact on a substantial number of small entities.

**List of Subjects**

*11 CFR Part 100*

Elections.

*11 CFR Part 101*

Political candidates, Reporting and recordkeeping requirements.

*11 CFR Part 104*

Campaign funds, Political committees and parties, Reporting and recordkeeping requirements.

*11 CFR Part 110*

Campaign funds, Political committees and parties.

*11 CFR Part 116*

Administrative practice and procedure, Business and industry, Credit, Elections, Political candidates, Political committees and parties.

*11 CFR Part 400*

Campaign funds, Elections, Political candidates, Political committees and parties, Reporting and recordkeeping requirements.

*11 CFR Part 9035*

Campaign funds, Reporting and recordkeeping requirements.

For the reasons set out in the Explanation and Justification, the Commission amends Subchapters A, C, and E of Chapter I of Title 11 of the Code of Federal Regulations as follows:

acceptable and unacceptable purpose descriptions to be reported by authorized committees. Paragraph (B) requires authorized committees, when itemizing certain disbursements for which reimbursements are required, to provide a brief explanation of the activity for which reimbursement is required. These provisions have been in Title 11 of the **Code of Federal Regulations** since 1980 and 1995, respectively, and were not affected by the recent statutory changes to the election cycle reporting requirements.

#### Need for Correction

As published, the final rules inadvertently omit two paragraphs describing information to be reported by authorized committees of Federal candidates.

All committees must report the purpose of itemized disbursements (i.e., those disbursements aggregating in excess of \$200). Omitted paragraph (A) contains examples of suitably specific purpose descriptions as well as examples of those descriptions that are unacceptably vague. This paragraph is inconsistent with the reporting of rules for unauthorized committees (committees other than candidate committees) in 11 CFR 104.3(b)(3).

Omitted paragraph (B) is used in administering the "personal use" rules in 11 CFR 113.1. Federal candidates are barred from using campaign funds for personal benefit. Paragraph (B) requires authorized committees of Federal candidates itemizing disbursements for which partial or total reimbursement is required under 11 CFR 113.1(g)(1)(iii)(C) or (D) to provide a brief explanation of the activity for which the reimbursement is made.

Section 801 of Title 5 of the United States Code requires Federal agencies to submit regulations to Congress. These regulations were submitted to the Speaker of the House of Representatives and the President of the Senate on November 26, 2001.

#### Certification of No Effect Pursuant to 5 U.S.C. § 605(b) [Regulatory Flexibility Act]

This correction will not have significant economic impact on a substantial number of small entities. The basis of this certification is that this correction only requires political committees to once again add information to the reports they are required to file. These regulations were in 11 CFR since 1980 and 1995, respectively, before being inadvertently omitted in 2000.

#### List of Subjects in 11 CFR Part 104

Campaign funds, Political committees and parties, Reporting and recordkeeping requirements.

Accordingly, 11 CFR part 104 is corrected by making the following correcting amendment:

#### PART 104—REPORTS BY POLITICAL COMMITTEES

1. The authority citation for part 104 continues to read as follows:

**Authority:** 2 U.S.C. 431(1), 431(8), 431(9), 432(i), 434, 438(a)(8), 438(b), 439a.

#### § 104.3 Contents of reports (2 U.S.C. 434(b), 439a).

\* \* \* \* \*

2. In § 104.3 add the following paragraphs (b)(4)(i)(A) and (B):

(b) \* \* \*

(4) \* \* \*

(i) \* \* \*

(A) As used in this paragraph, *purpose* means a brief statement or description of why the disbursement was made. Examples of statements or descriptions which meet the requirements of this paragraph include the following: dinner expenses, media, salary, polling, travel, party fees, phone banks, travel expenses, travel expense reimbursement, and catering costs. However, statements or descriptions such as *advance*, *election day expenses*, *other expenses*, *expenses*, *expense reimbursement*, *miscellaneous*, *outside services*, *get-out-the-vote* and *voter registration* would not meet the requirements of this paragraph for reporting the purpose of an expenditure.

(B) In addition to reporting the purpose described in paragraph (b)(4)(i)(A) of this section, whenever an authorized committee itemizes a disbursement that is partially or entirely a personal use for which reimbursement is required under 11 CFR 113.1(g)(1)(ii)(C) or (D), it shall provide a brief explanation of the activity for which reimbursement is required.

\* \* \* \* \*

Dated: November 26, 2001.

**Danny L. McDonald,**  
Chairman, Federal Election Commission.  
[FR Doc. 01-29679 Filed 11-29-01; 8:45 am]  
**BILLING CODE 6715-01-P**

#### FEDERAL ELECTION COMMISSION

#### 11 CFR Part 111

#### [Notice 2001-18]

#### Extension to Administrative Fines

**AGENCY:** Federal Election Commission.

**ACTION:** Final rule; revision of the sunset date.

**SUMMARY:** The Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the expiration date in which the Federal Election Commission (hereinafter "the Commission") may assess civil money penalties for violations of the reporting requirements of section 434(a) of the Federal Election Campaign Act (hereinafter "the Act" or "FECA").

**DATES:** Effective on December 31, 2001.

**FOR FURTHER INFORMATION CONTACT:** Ms. Rosemary C. Smith, Assistant General Counsel, or Ms. Mai T. Dinh, Attorney, 999 E Street, NW., Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

#### SUPPLEMENTARY INFORMATION:

#### Explanation and Justification

Section 640 of the Treasury and General Government Appropriations Act, 2000, Pub. L. No. 106-58, 106th Cong., 113 Stat. 430, 476-77 (1999), amended § 309(a)(4) of the FECA, 2 U.S.C. 437g(a)(4), to provide for a modified enforcement process for violations of reporting requirements. Under § 437g(a)(4)(C) of the FECA, the Commission may assess a civil money penalty for violations of the reporting requirements of 2 U.S.C. 434(a). This authority, however, was to sunset on December 31, 2001. Pub. L. No. 106-58, 106th Cong., § 640(c). Recently, § 642 of the Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the sunset date to include all reports that cover activity between January 1, 2000, to December 31, 2003.

The Commission published final rules on May 19, 2000, to implement the amendment contained in the Treasury and General Government Appropriations Act, 2000. Section 111.30 of the regulations reflects the sunset provision of Pub. L. No. 106-58, 106th Cong., § 640(c). Therefore, the Commission is issuing this final rule to amend section 111.30 to extend the application of the administrative fine regulations, 11 CFR part 111, subpart B, to include all violations relating to reports that cover the period between January 1, 2000, to December 31, 2003.

The Commission is promulgating this final rule without notice or opportunity for comment because it falls under the "good cause" exemption of the Administrative Procedures Act, 5 U.S.C. 553(b)(B). The exemption allows

## PART 123—RULES OF PRACTICE GOVERNING PROCEEDINGS UNDER THE VIRUS-SERUM-TOXIN ACT

73. The authority citation for part 123 is revised to read as follows:

**Authority:** 7 U.S.C. 8301–8317; 21 U.S.C. 151–159; 7 CFR 2.22, 2.80, and 371.4.

## PART 124—PATENT TERM RESTORATION

74. The authority citation for part 124 continues to read as follows:

**Authority:** 35 U.S.C. 156; 7 CFR 2.22, 2.80, and 371.4.

75. In § 124.2, the definition of *informal hearing* is revised to read as follows:

### § 124.2 Definitions.

\* \* \* \* \*

*Informal Hearing.* A hearing that is not subject to the provisions of 5 U.S.C. 554, 556, and 557 and that is conducted as provided in 21 U.S.C. 321(x).

\* \* \* \* \*

## PART 130—USER FEES

76. The authority citation for part 130 is revised to read as follows:

**Authority:** 5 U.S.C. 5542; 7 U.S.C. 1622 and 8301–8317; 21 U.S.C. 136 and 136a; 31 U.S.C. 3701, 3716, 3717, 3719, and 3720A; 7 CFR 2.22, 2.80, and 371.4.

### § 130.51 [Amended]

77. In § 130.51, paragraph (d) is amended by removing the citation “30 U.S.C. 3717” and adding the citation “31 U.S.C. 3717” in its place.

## PART 145—NATIONAL POULTRY IMPROVEMENT PLAN

78. The authority citation for part 145 is revised to read as follows:

**Authority:** 7 U.S.C. 8301–8317; 7 CFR 2.22, 2.80, and 371.4.

## PART 147—AUXILIARY PROVISIONS ON NATIONAL POULTRY IMPROVEMENT PLAN

79. The authority citation for part 147 is revised to read as follows:

**Authority:** 7 U.S.C. 8301–8317; 7 CFR 2.22, 2.80, and 371.4.

## PART 160—DEFINITION OF TERMS

80. The authority citation for part 160 is revised to read as follows:

**Authority:** 7 U.S.C. 8301–8317; 15 U.S.C. 1828; 7 CFR 2.22, 2.80, and 371.4.

## PART 161—REQUIREMENTS AND STANDARDS FOR ACCREDITED VETERINARIANS AND SUSPENSION OR REVOCATION OF SUCH ACCREDITATION

81. The authority citation for part 161 is revised to read as follows:

**Authority:** 7 U.S.C. 8301–8317; 15 U.S.C. 1828; 7 CFR 2.22, 2.80, and 371.4.

### § 161.4 [Amended]

82. In § 161.4, paragraph (d) is amended by removing the citation “18 U.S.C. 1001, 21 U.S.C. 117, 122, 127, and 134e” and adding the citation “7 U.S.C. 8313, 18 U.S.C. 1001” in its place.

## PART 162—RULES OF PRACTICE GOVERNING REVOCATION OR SUSPENSION OF VETERINARIANS’ ACCREDITATION

83. The authority citation for part 162 is revised to read as follows:

**Authority:** 7 U.S.C. 8301–8317; 15 U.S.C. 1828; 7 CFR 2.22, 2.80, and 371.4.

## PART 166—SWINE HEALTH PROTECTION

84. The authority citation for part 166 is revised to read as follows:

**Authority:** 7 U.S.C. 3801–3813; 7 CFR 2.22, 2.8, and 371.4.

### § 166.14 [Amended]

85. In § 166.14, paragraph (a)(3) is amended by removing the citation “(7 U.S.C. 135 *et seq.*)” and adding the citation “(7 U.S.C. 136 *et seq.*)” in its place.

Done in Washington, DC, this 4th day of February 2003.

**Peter Fernandez,**

*Acting Administrator, Animal and Plant Health Inspection Service.*

[FR Doc. 03–3058 Filed 2–6–03; 8:45 am]

**BILLING CODE 3410–34–P**

## FEDERAL ELECTION COMMISSION

### 11 CFR Part 110

[Notice 2002–27–A]

### Coordinated and Independent Expenditures; Correction

**AGENCY:** Federal Election Commission.

**ACTION:** Final rules; correction.

**SUMMARY:** The Federal Election Commission published final rules on January 3, 2003, regarding payments for communications that are coordinated with a candidate, a candidate’s authorized committee, or a political

party committee. The final rules also addressed expenditures by political party committees that are made either in coordination with, or independently from, candidate. The final rules implemented several requirements of the Bipartisan Campaign Reform Act of 2002 (“BCRA”). Two amendatory instructions were incorrect. This document corrects the amendatory instructions. There is no substantive change to the final rules.

**EFFECTIVE DATE:** February 3, 2003.

**FOR FURTHER INFORMATION CONTACT:** Mr. John Vergelli, Acting Assistant General Counsel, 999 E Street, NW., Washington, DC, 20463, (202) 694–1650 or (800) 424–9530.

**SUPPLEMENTARY INFORMATION:** In rule FR Doc 03–90 published on January 3, 2003 (68 FR 421), make the following corrections. On page 457, first and second columns, correct the amendatory instructions 11 and 12, and correct the amendments to §§ 110.8 and 110.14, to read as follows:

11. In section 110.8, paragraph (a) is amended as follows:

(a) Paragraph (a)(1) is redesignated as paragraph (a)(1)(i);

(b) The introductory text is redesignated as paragraph (a)(1);

(c) Paragraph (a)(2) is redesignated as paragraph (a)(1)(ii);

(d) A new paragraph (a)(2) is added; and

(e) A new paragraph (a)(3) is added. The revised text reads as follows:

Sec. 110.8 Presidential candidate expenditure limitations.

(a) \* \* \*

(2) The expenditure limitations in paragraph (a)(1) of this section shall be increased in accordance with 11 CFR 110.17.

(3) Voting age population is defined at 11 CFR 110.18.

\* \* \* \* \*

12. Section 110.14 is amended as follows:

(a) Paragraph (f)(2)(i) introductory text is revised;

(b) Paragraphs (f)(2)(ii) introductory text and (f)(2)(ii)(B) are revised;

(c) Paragraph (f)(3)(iii) is revised;

(d) Paragraph (i)(2)(i) introductory text is revised;

(e) Paragraph (i)(2)(ii) is revised;

(f) Paragraph (i)(3)(iii) is revised.

The revised text reads as follows:

Sec. 110.14 Contributions to and expenditures by delegates and delegate committees.

(f) \* \* \*

(2) \* \* \*

(i) Such expenditures are independent expenditures under 11 CFR 100.16 if they are made for a communication

expressly advocating the election or defeat of a clearly identified Federal candidate that is not a coordinated communication under 11 CFR 109.21.

\* \* \* \* \*

(ii) Such expenditures are independent expenditures under 11 CFR 100.16 if they are made for a communication expressly advocating the election or defeat of a clearly identified Federal candidate that is not a coordinated communication under 11 CFR 109.21.

\* \* \* \* \*

(B) The delegate shall report the portion of the expenditure allocable to the Federal candidate as an independent expenditure in accordance with 11 CFR 109.10.

(3) \* \* \*

(iii) Such expenditures are not chargeable to the presidential candidate's expenditure limitation under 11 CFR 110.8 unless they were coordinated communications under 11 CFR 109.21.

\* \* \* \* \*

(i) \* \* \*

(2) \* \* \*

(i) Such expenditures are in-kind contributions to a Federal candidate if they are coordinated communications under 11 CFR 109.21.

\* \* \* \* \*

(ii) Such expenditures are independent expenditures under 11 CFR 100.16 if they are made for a communication expressly advocating the election or defeat of a clearly identified Federal candidate that is not a coordinated communication under 11 CFR 109.21.

(A) Such independent expenditures must be made in accordance with the requirements of 11 CFR part 100.16.

(B) The delegate committee shall report the portion of the expenditure allocable to the Federal candidate as an independent expenditure in accordance with 11 CFR 109.10.

(3) \* \* \*

(iii) Such expenditures are not chargeable to the presidential candidate's expenditure limitation under 11 CFR 110.8 unless they were coordinated communications under 11 CFR 109.21.

\* \* \* \* \*

Dated: February 4, 2003.

**Rosemary C. Smith,**

*Acting Associate General Counsel, Federal Election Commission.*

[FR Doc. 03-3127 Filed 2-6-03; 8:45 am]

BILLING CODE 6715-01-P

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 39

[Docket No. 2002-NM-326-AD; Amendment 39-13048; AD 2003-03-23]

RIN 2120-AA64

#### **Airworthiness Directives; Empresa Brasileira de Aeronautica S.A. (EMBRAER) Model EMB-135 and -145 Series Airplanes**

**AGENCY:** Federal Aviation Administration, DOT.

**ACTION:** Final rule; request for comments.

**SUMMARY:** This amendment adopts a new airworthiness directive (AD) that is applicable to certain EMBRAER Model EMB-135 and -145 series airplanes. This action requires replacement of the horizontal stabilizer control units (HSCUs) with new upgraded HSCUs, and corrective actions if necessary. This action is necessary to prevent reversal of the pilot's pitch trim command for the horizontal stabilizer, which could result in reduced controllability of the airplane. This action is intended to address the identified unsafe condition.

**DATES:** Effective February 24, 2003.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of February 24, 2003.

Comments for inclusion in the Rules Docket must be received on or before March 10, 2003.

**ADDRESSES:** Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM-114, Attention: Rules Docket No. 2002-NM-326-AD, 1601 Lind Avenue, SW., Renton, Washington 98055-4056. Comments may be inspected at this location between 9 a.m. and 3 p.m., Monday through Friday, except Federal holidays. Comments may be submitted via fax to (425) 227-1232. Comments may also be sent via the Internet using the following address: *9-anm-iarcomment@faa.gov*. Comments sent via the Internet must contain "Docket No. 2002-NM-326-AD" in the subject line and need not be submitted in triplicate. Comments sent via fax or the Internet as attached electronic files must be formatted in Microsoft Word 97 for Windows or ASCII text.

The service information referenced in this AD may be obtained from Empresa Brasileira de Aeronautica S.A. (EMBRAER), P.O. Box 343—CEP 12.225,

Sao Jose dos Campos—SP, Brazil. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

#### **FOR FURTHER INFORMATION CONTACT:**

Robert D. Breneman, Aerospace Engineer, International Branch, ANM-116, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055-4056; telephone (425) 227-1263; fax (425) 227-1149.

**SUPPLEMENTARY INFORMATION:** The Departamento de Aviacao Civil (DAC), which is the airworthiness authority for Brazil, recently notified the FAA that an unsafe condition may exist on certain EMBRAER Model EMB-135 and -145 series airplanes. The DAC advises that, during EMBRAER production flight tests on a Model EMB-145 airplane, there were two occurrences of pitch trim system malfunction. Such malfunction resulted in reversed actuation of the horizontal stabilizer surface in response to nose down pitch trim command through the yoke switches. Investigation has revealed that the pitch trim system malfunction is due to failure of an internal component of the horizontal stabilizer control unit (HSCU). Reversal of the pilot's pitch trim command for the horizontal stabilizer could result in reduced controllability of the airplane.

#### **Issuance of Brazilian Airworthiness Directives**

The DAC issued emergency Brazilian airworthiness directive 2001-12-04, dated December 21, 2001, to address the identified unsafe condition on airplanes of Brazilian registry. As interim action to alleviate the identified unsafe condition, EMBRAER and Parker Hannifin (the manufacturer of the subject HSCUs) had developed a "burn-in" test designed to identify discrepant HSCUs. The "burn-in" test had already been accomplished on six airplanes of U.S. registry, and no discrepant HSCUs were found. Therefore, the FAA did not issue a corresponding AD.

Subsequently, the DAC issued two Brazilian airworthiness directives: 2001-12-04R1, dated March 11, 2002, and 2001-12-04R2, dated May 27, 2002, which require replacement of certain HSCUs with new upgraded HSCUs.

#### **Explanation of Relevant Service Information**

EMBRAER has issued the following service bulletins:

- Service Bulletin 145-27-0091, Change 01, dated June 17, 2002; and

acceptable and unacceptable purpose descriptions to be reported by authorized committees. Paragraph (B) requires authorized committees, when itemizing certain disbursements for which reimbursements are required, to provide a brief explanation of the activity for which reimbursement is required. These provisions have been in Title 11 of the **Code of Federal Regulations** since 1980 and 1995, respectively, and were not affected by the recent statutory changes to the election cycle reporting requirements.

#### Need for Correction

As published, the final rules inadvertently omit two paragraphs describing information to be reported by authorized committees of Federal candidates.

All committees must report the purpose of itemized disbursements (i.e., those disbursements aggregating in excess of \$200). Omitted paragraph (A) contains examples of suitably specific purpose descriptions as well as examples of those descriptions that are unacceptably vague. This paragraph is inconsistent with the reporting of rules for unauthorized committees (committees other than candidate committees) in 11 CFR 104.3(b)(3).

Omitted paragraph (B) is used in administering the "personal use" rules in 11 CFR 113.1. Federal candidates are barred from using campaign funds for personal benefit. Paragraph (B) requires authorized committees of Federal candidates itemizing disbursements for which partial or total reimbursement is required under 11 CFR 113.1(g)(1)(iii)(C) or (D) to provide a brief explanation of the activity for which the reimbursement is made.

Section 801 of Title 5 of the United States Code requires Federal agencies to submit regulations to Congress. These regulations were submitted to the Speaker of the House of Representatives and the President of the Senate on November 26, 2001.

#### Certification of No Effect Pursuant to 5 U.S.C. § 605(b) [Regulatory Flexibility Act]

This correction will not have significant economic impact on a substantial number of small entities. The basis of this certification is that this correction only requires political committees to once again add information to the reports they are required to file. These regulations were in 11 CFR since 1980 and 1995, respectively, before being inadvertently omitted in 2000.

#### List of Subjects in 11 CFR Part 104

Campaign funds, Political committees and parties, Reporting and recordkeeping requirements.

Accordingly, 11 CFR part 104 is corrected by making the following correcting amendment:

#### PART 104—REPORTS BY POLITICAL COMMITTEES

1. The authority citation for part 104 continues to read as follows:

**Authority:** 2 U.S.C. 431(1), 431(8), 431(9), 432(i), 434, 438(a)(8), 438(b), 439a.

#### § 104.3 Contents of reports (2 U.S.C. 434(b), 439a).

\* \* \* \* \*

2. In § 104.3 add the following paragraphs (b)(4)(i)(A) and (B):

(b) \* \* \*  
(4) \* \* \*  
(i) \* \* \*

(A) As used in this paragraph, *purpose* means a brief statement or description of why the disbursement was made. Examples of statements or descriptions which meet the requirements of this paragraph include the following: dinner expenses, media, salary, polling, travel, party fees, phone banks, travel expenses, travel expense reimbursement, and catering costs. However, statements or descriptions such as *advance*, *election day expenses*, *other expenses*, *expenses*, *expense reimbursement*, *miscellaneous*, *outside services*, *get-out-the-vote* and *voter registration* would not meet the requirements of this paragraph for reporting the purpose of an expenditure.

(B) In addition to reporting the purpose described in paragraph (b)(4)(i)(A) of this section, whenever an authorized committee itemizes a disbursement that is partially or entirely a personal use for which reimbursement is required under 11 CFR 113.1(g)(1)(ii)(C) or (D), it shall provide a brief explanation of the activity for which reimbursement is required.

\* \* \* \* \*

Dated: November 26, 2001.

**Danny L. McDonald,**  
*Chairman, Federal Election Commission.*  
[FR Doc. 01-29679 Filed 11-29-01; 8:45 am]  
**BILLING CODE 6715-01-P**

#### FEDERAL ELECTION COMMISSION

#### 11 CFR Part 111

[Notice 2001-18]

#### Extension to Administrative Fines

**AGENCY:** Federal Election Commission.

**ACTION:** Final rule; revision of the sunset date.

**SUMMARY:** The Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the expiration date in which the Federal Election Commission (hereinafter "the Commission") may assess civil money penalties for violations of the reporting requirements of section 434(a) of the Federal Election Campaign Act (hereinafter "the Act" or "FECA").

**DATES:** Effective on December 31, 2001.

**FOR FURTHER INFORMATION CONTACT:** Ms. Rosemary C. Smith, Assistant General Counsel, or Ms. Mai T. Dinh, Attorney, 999 E Street, NW., Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

#### SUPPLEMENTARY INFORMATION:

#### Explanation and Justification

Section 640 of the Treasury and General Government Appropriations Act, 2000, Pub. L. No. 106-58, 106th Cong., 113 Stat. 430, 476-77 (1999), amended § 309(a)(4) of the FECA, 2 U.S.C. 437g(a)(4), to provide for a modified enforcement process for violations of reporting requirements. Under § 437g(a)(4)(C) of the FECA, the Commission may assess a civil money penalty for violations of the reporting requirements of 2 U.S.C. 434(a). This authority, however, was to sunset on December 31, 2001. Pub. L. No. 106-58, 106th Cong., § 640(c). Recently, § 642 of the Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the sunset date to include all reports that cover activity between January 1, 2000, to December 31, 2003.

The Commission published final rules on May 19, 2000, to implement the amendment contained in the Treasury and General Government Appropriations Act, 2000. Section 111.30 of the regulations reflects the sunset provision of Pub. L. No. 106-58, 106th Cong., § 640(c). Therefore, the Commission is issuing this final rule to amend section 111.30 to extend the application of the administrative fine regulations, 11 CFR part 111, subpart B, to include all violations relating to reports that cover the period between January 1, 2000, to December 31, 2003.

The Commission is promulgating this final rule without notice or opportunity for comment because it falls under the "good cause" exemption of the Administrative Procedures Act, 5 U.S.C. 553(b)(B). The exemption allows



to calculate future fund needs. A licensee, whose rates for decommissioning costs cover only a portion of these costs, may make use of this method only for the portion of these costs that are collected in one of the manners described in this paragraph, (e)(1)(ii). This method may be used as the exclusive mechanism relied upon for providing financial assurance for decommissioning in the following circumstances:

(A) By a licensee that recovers, either directly or indirectly, the estimated total cost of decommissioning through rates established by "cost of service" or similar ratemaking regulation. Public utility districts, municipalities, rural electric cooperatives, and State and Federal agencies, including associations of any of the foregoing, that establish their own rates and are able to recover their cost of service allocable to decommissioning, are assumed to meet this condition.

(B) By a licensee whose source of revenues for its external sinking fund is a "non-bypassable charge," the total amount of which will provide funds estimated to be needed for decommissioning pursuant to §§ 50.75(c), 50.75(f), or 50.82 of this part.

\* \* \* \* \*

Dated at Rockville, Maryland, this 11th day of March, 2003.

For the Nuclear Regulatory Commission.

**Michael T. Lesar,**

*Federal Register Liaison Officer.*

[FR Doc. 03-6287 Filed 3-14-03; 8:45 am]

BILLING CODE 7590-01-P

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## FEDERAL ELECTION COMMISSION

### 11 CFR Part 111

#### [NOTICE 2003-6]

#### Administrative Fines

**AGENCY:** Federal Election Commission.

**ACTION:** Final rules and transmittal of regulations to Congress.

**SUMMARY:** The Commission is amending its administrative fines regulations to reduce the civil money penalties for political committees with less than \$50,000 in financial activity in a reporting period that file reports late or that do not file them at all. The revised rules create two additional levels-of-activity brackets for such committees to make further distinctions in the amount of the civil money penalty assessed. The amendments also change the method for calculating the "level of activity" on which civil money penalties are based

for unauthorized committees by excluding certain non-Federal activity from the calculation. Additionally, these amended rules: clarify how late filers and non-filers will be notified of reason-to-believe findings, final determinations and other actions; and clarify the factors that will not be considered "extraordinary circumstances" when findings or penalties are challenged. Further information is provided in the **SUPPLEMENTARY INFORMATION** that follows.

**EFFECTIVE DATE:** April 16, 2003.

**FOR FURTHER INFORMATION CONTACT:** Ms. Mai T. Dinh, Acting Assistant General Counsel, or Ms. Dawn M. Odrowski, Attorney, at 999 E Street, NW., Washington, DC., 20463, (202) 694-1650 or (800) 424-9530.

**SUPPLEMENTARY INFORMATION:** The Commission is issuing final rules to make certain revisions to its administrative fines program. The program enables the Commission to adjudicate reporting violations of section 434(a) of the Federal Election Campaign Act of 1971, as amended ("FECA" or "Act"), 2 U.S.C. 431 *et seq.*, by political committees and their treasurers who fail to file, or untimely file, required campaign finance disclosure reports. The adjudication employs a streamlined procedure that affords respondents due process rights and assesses a civil money penalty for violations based on published penalty schedules. The Commission established the administrative fines program in July 2000 pursuant to 2 U.S.C. 437g(a)(4). See Treasury and Government Appropriations Act, 2000, Pub. L. 106-58, 106th Cong. § 640, 113 Stat. 430, 476-77 (1999), as amended by the Treasury and General Government Appropriations Act, 2002, Pub. L. 107-67, 107th Cong. § 642, 115 Stat. 514, 555 (2001) and Explanation and Justification for Administrative Fines, 65 FR 31787 (May 19, 2000) and 66 FR 59680 (November 30, 2001). The sunset date of the program is December 31, 2003. See 11 CFR 111.30.

Under the Administrative Procedures Act, 5 U.S.C. 553(d), and the Congressional Review of Agency Rulemaking Act, 5 U.S.C. 801(a)(1), agencies must submit final rules to the Speaker of the House of Representatives and the President of the Senate and publish them in the **Federal Register** at least 30 calendar days before they take effect. The final rules on administrative fines were transmitted to Congress on March 7, 2003.

#### Explanation and Justification

The Commission initiated this rulemaking by publishing a Notice of Proposed Rulemaking ("NPRM") on April 25, 2002 in which it sought comment on proposed rules amending the current administrative fines regulations based on its experience with the program. 67 FR 20461 (April 25, 2002). The NPRM sought comment on proposed amendments to lower the civil money penalties for all late- and non-filers, and to clarify how it notifies respondents in the administrative fines program of reason-to-believe findings and final determinations. The NPRM also sought comment generally on: (1) Whether to limit the scope of the civil money penalty reduction to those committees with less than \$50,000 in financial activity in a reporting period, or alternatively, to limit reduction to the fine schedule applicable to late- or non-filed non-election sensitive reports; (2) Whether to clarify that certain circumstances do not constitute "extraordinary circumstances" for purposes of challenging a reason-to-believe finding; and (3) Whether to revise the method of calculating the "level of activity" on which civil money penalties are based to exclude certain non-Federal activity.

The comment period closed on May 28, 2002. Comments were received from FEC Watch and from the law firm of Sandler, Reiff and Young.

*11 CFR 111.35 If the Respondent Decides to Challenge the Alleged Violation Or the Proposed Civil Money Penalty, What Should the Respondent Do?*

11 CFR 111.35(b) sets forth the requirements for written responses that a respondent may choose to make to challenge a reason-to-believe finding or a proposed civil money penalty. It contains specific circumstances that the Commission will consider in determining whether to levy a civil money penalty, including the existence of "extraordinary circumstances" that were beyond the respondents' control, that continued for at least 48 hours, and that prevented the timely filing of a report. Paragraph (b)(4) provides four broad examples of circumstances that the Commission will not consider to be "extraordinary." Respondents have raised a number of other defenses that the Commission has determined are not "extraordinary circumstances."

The NPRM sought comment as to whether 11 CFR 111.35 should be revised to state more specifically the kinds of circumstances that the Commission will not accept as an

“extraordinary circumstances” defense. Neither of the commenters addressed this issue.

In the final rules that follow, the Commission adds to section 111.35(b)(4) two more examples of circumstances that are not considered extraordinary. Specifically, paragraph (b)(4)(iii) of 11 CFR 111.35 is being amended to include, in addition to staff illness, staff “inexperience” and “unavailability.” The revision also clarifies that the term “staff” includes the treasurer. The Commission strongly encourages political committees to name an assistant treasurer so that their financial activities will not be disrupted, thus avoiding violating the reporting requirements when their treasurer is unavailable.

### *11 CFR 111.43 What are the Schedules of Penalties?*

#### 1. Revised Civil Money Penalty Schedules

The NPRM proposed amendments to the civil money penalty schedule for election sensitive and non-election sensitive reports that would have lowered civil money penalties for all late- and non-filed reports. The Commission was concerned that, based on its experience with the administrative fines program, the published fines schedules for political committees with lower levels of financial activity, generally below \$50,000 in a reporting period, may have been too high. Committees in this category are often those of candidates who have lost an election or who have withdrawn from the race and fail to continue filing the required disclosure reports until they are eligible to terminate. Fines for these committees can be relatively high due to their failure to file because the civil money penalties are calculated using the estimated level of activity from previously filed reports. Therefore, the fines may create a hardship for some authorized committees and their treasurers since many unsuccessful campaigns lack fundraising ability and their treasurers, who are sometimes volunteers, are legally liable for the fines.

The Commission was also concerned that the civil money penalty schedules at all levels of activity may result in fines that are substantial compared with civil penalties for other types of FECA violations that the Commission approves in conciliation agreements reached through the traditional enforcement process. See 2 U.S.C. 437g(a). The concern was exacerbated by the fact that the 25% recidivist factor

was beginning to take effect for repeat violations.

The Commission sought comment in the NPRM on the impact of lowering civil money penalties across the board, specifically: Whether the proposed reductions would still provide an incentive for committees to file timely their reports and not become merely a cost of doing business, and whether reductions would affect committees’ decisions to challenge reason-to-believe findings and proposed civil money penalties. The Commission specifically sought comment on two alternatives to lowering the civil money penalties across the board: Lowering the penalties only for committees with levels of financial activity below \$50,000 per report, or lowering the penalties only for non-election sensitive reports.

One of the commenters generally agreed with more lenient treatment for committees with minimal financial activity during a reporting period because such committees are often “defunct, moribund or winding down and are often staffed by volunteer treasurers who are not able to deal with complex federal election laws and regulations.” This commenter did not specifically address reducing fines overall but rather urged a change in calculating the “level of activity” on which the administrative fines are based. (See below).

The other commenter generally disagreed with lowering the civil money penalties “until an adequate administrative record can be established.” The commenter rejected as a justification for lowering fines across the board the concern that civil penalties in the administrative fines program were high relative to civil penalties approved in conciliation agreements for other types of FECA violations. The commenter argued that this disparity could also be interpreted as evidence that civil penalties in conciliation agreements are too low. The commenter also suggested that the recidivist factor could be lowered if the Commission was concerned it might contribute to disproportionately high civil penalties. This commenter further urged that the standard applied in adjusting the fines should be whether the fines are higher than necessary to serve as incentive to file reports timely. The commenter referred to an April 25, 2002, Commission press release that credited the administrative fines program with reducing the percentage of late filers from 24% to 11% between 1998 and 2000. The commenter noted that, although 11% non-compliance is still too high, these gains in disclosure should not be undermined without

substantial justification. Finally, the commenter urged that if the Commission reduced the fines, it should selectively target the reduction at committees with lower levels of financial activity where, according to the NPRM, the most undesirable results have occurred.

Neither commenter opined on whether lowering the fines would affect committees’ decisions to challenge reason-to-believe findings or proposed civil money penalties.

Based on its continued experience with the administrative fines program, the Commission has decided to target the reductions in the civil money penalty schedules to committees with levels of financial activity below \$50,000 per report. As of January 31, 2003, 60% of the political committees against whom the Commission made reason-to-believe findings and proposed a civil money penalty had under \$50,000 of financial activity on the late- or non-filed report. As noted in the NPRM, many committees in this category are winding down, or are established by candidates who have lost, or have withdrawn from, an election. The concern that a reduction in fines will serve as a disincentive to file timely future reports is not as relevant for such committees. Moreover, the fact that these committees still face a fine continues to provide an incentive for them to file a final report.

Although the Commission has decided not to reduce civil money penalties “across the board,” it notes that it has revised its method of calculating the “level of activity” to exclude receipts and disbursements for unauthorized committees that report a non-Federal share of allocated Federal/non-Federal activity. This change, discussed below, will effectively lower “across the board” penalties faced by certain unauthorized committees that allocate expenses between Federal and non-Federal accounts. This will result in penalties that are more reflective of a committee’s level of participation in Federal elections.

Accordingly, the final rules at amended 11 CFR 111.43 include two sets of civil money penalty schedules. Paragraphs (a)(1) and (b)(1) maintain the previous penalty schedules for non-election sensitive and election sensitive reports, respectively, with due dates before the effective date of these rules. Paragraphs (a)(2) and (b)(2) include new schedules that reduce civil money penalties for non-election sensitive and election sensitive reports of committees with less than \$50,000 in activity. These new schedules will apply to reports that

are due on or after the effective date of these rules.

The previous and current civil money penalty schedules for late filers have two components: A base amount that increases with the level of activity reflected in a report and an additional charge for each day a report is late. The previous and current schedules for nonfilers consist of a base amount that increases with the level of activity. Both late and nonfilers are subject to a recidivist escalator that increases the penalty by 25% for each previous violation.

The reduction in civil money penalties for committees with levels of activity below \$50,000 is being accomplished in two ways. First, the bracket previously covering levels of activity of under \$25,000 is now divided

into three brackets covering levels of activity of \$1-\$4,999.99, \$5,000-\$9,999.99 and \$10,000-\$24,999.99, respectively. This subdivision makes more refined distinctions in penalties for committees at the lowest levels of financial activity. Second, the base amount and/or the per day charge is being reduced in each level of activity bracket below \$50,000. The civil money penalty reductions at these levels are identical to the reductions proposed in the NPRM. The civil money penalty schedules for committees with levels of activity of \$50,000 and above are unchanged from former 11 CFR 111.43(a) and (b).

For late-filed non-election sensitive reports with levels of activity of \$1-\$4,999.99, the per day charge is being reduced from \$25 to \$5 and the base

penalty is being reduced from \$100 to \$25; for reports with levels of activity of \$5,000-\$9,999.99, the per day charge is being reduced from \$25 to \$5 and the base penalty is being reduced from \$100 to \$50; for reports with levels of activity of \$10,000-\$24,999.99, the per day charge is being reduced from \$25 to \$5 and the base penalty remains at \$100; and for reports with levels of activity of \$25,000-\$49,999.99, the per day charge is being reduced from \$50 to \$20 and the base penalty remains at \$200. Reductions in the civil money penalties for late-filed non-election sensitive reports with less than \$50,000 of activity range between 12% and 79.4%. A chart illustrating the penalty reductions for late-filed non-election sensitive reports follows:

| Level of activity in report     | Civil money penalty for late-filed non-election sensitive reports due before April 16, 2003.                          | Civil money penalty for late filed non-election sensitive reports due on or after April 16, 2003.                     |
|---------------------------------|---|---|
| \$1-4,999.99 <sup>a</sup> ..... | $[\$100 + (\$25 \times \text{Number of days late})] \times [1 + (.25 \times \text{Number of previous violations})]$ . | $[\$25 + (\$5 \times \text{Number of days late})] \times [1 + (.25 \times \text{Number of previous violations})]$ .   |
| \$5,000-\$9,999.99 .....        | $[\$100 + (\$25 \times \text{Number of days late})] \times (.25 \times \text{Number of previous violations})]$ .      | $[\$50 + (\$5 \times \text{Number of days late})] \times [1 + (.25 \times \text{Number of previous violations})]$ .   |
| \$10,000-\$24,999.99 .....      | $[\$100 + (\$25 \times \text{Number of days late})] \times [1 + (.25 \times \text{Number of previous violations})]$ . | $[\$100 + (\$5 \times \text{Number of days late})] \times [1 + (.25 \times \text{Number of previous violations})]$ .  |
| \$25,000-49,999.99 .....        | $[\$200 + (\$50 \times \text{Number of days late})] \times [1 + (.25 \times \text{Number of previous violations})]$ . | $[\$200 + (\$20 \times \text{Number of days late})] \times [1 + (.25 \times \text{Number of previous violations})]$ . |

Non-election sensitive reports are deemed not filed if they are filed more than 30 days late or not filed at all. The final rule at 11 CFR 111.43(a)(2)(iii) reduces the base penalty for reports with levels of activity of \$1-\$4,999.99 from \$900 to \$250; for reports with

levels of activity of \$5,000-\$9,999.99 from \$900 to \$300; for reports with levels of activity of \$10,000-\$24,999.99 from \$900 to \$500; and for reports with levels of activity of \$25,000-\$49,999.99 from \$1800 to \$900. Reductions in the civil money penalties for non-filed non-

election sensitive reports with less than \$50,000 in activity range between 50% and 72%. A chart illustrating the penalty reductions for non-filed non-election sensitive reports follows:

| Level of activity in report | Civil money penalty for non-election sensitive non-filed reports due before April 16, 2003. | Civil money penalty for non-election sensitive non-filed reports due on or after April 16, 2003. |
|-----------------------------|---|--|
| \$1-4,999.99 .....          | $\$900 \times [1 + (.25 \times \text{Number of previous violations})]$ .                    | $\$250 \times [1 + (.25 \times \text{Number of previous violations})]$ .                         |
| \$5,000-9,999.99 .....      | $\$900 \times [1 + (.25 \times \text{Number of previous violations})]$ .                    | $\$300 \times [1 + (.25 \times \text{Number of previous violations})]$ .                         |
| \$10,000-24,999.99 .....    | $\$900 \times [1 + (.25 \times \text{Number of previous violations})]$ .                    | $\$500 \times [1 + (.25 \times \text{Number of previous violations})]$ .                         |
| \$25,000-49,999.99 .....    | $\$1800 \times [1 + (.25 \times \text{Number of previous violations})]$ .                   | $\$900 \times [1 + (.25 \times \text{Number of previous violations})]$ .                         |

For late-filed election sensitive reports with levels of activity of \$1-\$4,999.99, the per day charge is being reduced from \$25 to \$10 and the base penalty is being reduced from \$150 to \$50; for reports with levels of activity of \$5,000-\$9,999.99, the per day charge is being reduced from \$25 to \$10 and the base penalty is being reduced from \$150

to \$100; for reports with levels of activity of \$10,000-\$24,999.99, the per day charge is being reduced from \$25 to \$10 and the base penalty remains at \$150; and for reports with levels of activity of \$25,000-\$49,999.99, the per day charge is being reduced from \$50 to \$25 and the base charge remains at \$300. Reductions in the civil money

penalties for late-filed election sensitive reports with less than \$50,000 of activity range between 7.1% and 65.7%. A chart illustrating the penalty reductions for late-filed election sensitive reports follows:

| Level of activity in report | Civil money penalty for late-filed election sensitive reports due before April 16, 2003. | Civil money penalty for late-filed election sensitive reports due on or after April 16, 2003. |
|-----------------------------|--|---|
| \$1–\$4,999.99 .....        | [\$150 + (\$25 × Number of days late)] [1 + (.25 × Number of previous violations)].      | [\$50 + (\$10 × Number of days late)] × [1 + (.25 × Number of previous violations)]           |
| \$5,000–\$9,999.99 .....    | [\$150 + (\$25 × Number of days late)] × [1 + (.25 × Number of previous violations)].    | [\$100 + (\$10 × Number of days late)] × [1 + (.25 × Number of previous violations)]          |
| \$10,000–\$24,999.99 .....  | [\$150 + (\$25 × Number of days late)] × [1 + (.25 × Number of previous violations)].    | [\$150 + (\$10 × Number of days late)] × [1 + (.25 × Number of previous violations)]          |
| \$25,000–\$49,999.99 .....  | [\$300 + (\$50 × Number of days late)] × [1 + (.25 × Number of previous violations)].    | [\$300 + (\$25 × Number of days late)] × [1 + (.25 × Number of previous violations)]          |

Election sensitive reports are deemed not filed if they are not filed prior to four days before an election. The final rule at 11 CFR 111.43(b)(2)(iii) reduces the base penalty for these reports with levels of activity of \$1–\$4,999.99 from

\$1,000 to \$500; for levels of activity of \$5,000–\$9,999.99 from \$1,000 to \$600; for levels of activity of \$10,000–\$24,999.99 from \$1,000 to \$900; and for levels of activity of \$25,000–\$49,999.99 from \$2,000 to \$1,400. Reductions in the

civil money penalties for non-filed election sensitive reports with less than \$50,000 of activity range between 10% and 50%. A chart illustrating the penalty reductions for non-filed election sensitive reports follows:

| Level of activity in report | Civil money penalty for election sensitive non-filed reports due before April 16, 2003. | Civil money penalty for election sensitive non-filed reports due on or after April 16, 2003. |
|-----------------------------|---|--|
| \$1–\$4,999.99 .....        | 1,000 × [1 + (.25 × Number of previous violations)].                                    | 500 × [1 + (.25 × Number of previous violations)]  |
| \$5,000–\$9,999.99 .....    | 1,000 × [1 + (.25 × Number of previous violations)].                                    | 600 × [1 + (.25 × Number of previous violations)]  |
| \$10,000–\$24,999.99 .....  | 1,000 × [1 + (.25 × Number of previous violations)].                                    | 900 × [1 + (.25 × Number of previous violations)]  |
| \$25,000–\$49,999.99 .....  | 2,000 × [1 + (.25 × Number of previous violations)].                                    | 1,400 × [1 + (.25 × Number of previous violations)]  |

2. Revised Calculation of the “Level of Activity” and “Estimated Level of Activity”

The Commission calculates civil money penalties by applying the civil money penalty schedules at 11 CFR 111.43 to a political committee’s “level of activity.” Under the previous rule at 11 CFR 111.43(d), the “level of activity” is defined as the “total amount of receipts and disbursements for the period covered by the late-filed report.” If the report is not filed, the “level of activity” is based on the “estimated level of activity,” which is an estimate of total receipts and disbursements based on previously reported amounts.

The NPRM reflected the Commission’s concern, based on its experience with the administrative fines program, that using total receipts and disbursements as the basis for the penalty calculation may have unfairly resulted in higher fines for political committees that finance non-Federal activity through their Federal accounts. For example, unauthorized committees that finance activities in connection with both Federal and non-Federal elections must allocate disbursements for those activities between their Federal and non-Federal accounts and must pay for those expenses from their Federal account or from a separate Federal allocation account. See generally 11 CFR 106.6 and 106.7. Non-

Federal funds must be transferred into the Federal accounts to pay for the non-Federal share of the activity, thereby resulting in higher total receipts and disbursements for those committees than for political committees that do not have allocable activity.

The NPRM sought comment on whether the Commission should alter the way it calculates the level of activity. 67 FR 20463. The Commission sought comment generally on whether the level of activity should exclude all receipts or disbursements that are not for the purpose of influencing a Federal election. In addition to the receipt of non-Federal transfers to pay for the non-Federal share of allocable activity, the Commission asked whether other types of disbursements should be excluded and gave several examples, such as disbursements by an authorized committee made to influence the election of candidates to State or local office.

One of the commenters urged the Commission to exclude from the “level of activity” definition those disbursements for the non-Federal portion of allocated Federal/non-Federal activity, such as certain generic get-out-the-vote drives, as well as the receipt of non-Federal fund transfers to pay for those disbursements. The commenter maintained that including these receipts and disbursements “unfairly punished” State and local political party

committees, whose activities are focused more on State and local elections. The commenter illustrated this point by using an example of a local party committee. Using a similar example under the current allocation regime for State and local party committees, depending on the election cycle, only 15% to 36% of allocable activity under 11 CFR 106.7 is considered Federal. Under the Commission’s allocation regulations, such a committee must make disbursements from its Federal account to cover the 64% to 85% of the activity that is attributable to non-Federal elections and then reimburse the Federal account via transfers from its non-Federal account. Under the prior rules, the civil money penalty was based on the total of Federal and non-Federal activity since both are reported. As an alternative to changing the way “level of activity” is calculated, the commenter argued that the Commission should create a separate, more lenient schedule for committees that allocate expenses.

The other commenter disagreed with that approach. It noted that the Explanation and Justification (“E&J”) for the administrative fines rules issued in May 2000 rejected a suggestion that the “level of activity” be based on contributions and expenditures rather than total receipts and disbursements. The E&J noted that 2 U.S.C. 437g(a)(4), which permits the Commission to

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

Commission regulations and may be pursued by the Commission in an enforcement action under subpart A of 11 CFR part 111.

*11 CFR 111.45 What Actions Will Be Taken to Collect Unpaid Civil Penalties?*

11 CFR 111.45 is being revised to correct citations to regulations establishing the Federal Claims Collection Standards. After the Commission's administrative fines rules were promulgated on May 19, 2000, the Department of Justice and the Department of Treasury, in place of the General Accounting Office, revised and recodified the Federal Claims Collection Standards at 31 CFR parts 900 through 904. See 65 FR 70390 (November 22, 2000). No comments were received on this revision.

*11 CFR 111.46 How Will the Respondent Be Notified of Actions Taken by the Commission and the Reviewing Officer?*

Respondents who have challenged reason-to-believe findings in the administrative fines program have sometimes maintained that they did not receive notification because it was sent to an old address even though the Commission sent the notification to the political committee's address of record in the Statement of Organization on file with the Commission.

In the NPRM, the Commission proposed revisions to four regulations to clarify how notifications and other communications called for in subpart B of 11 CFR part 111 would be delivered to respondents. 67 FR 20464. Neither of the commenters addressed this issue.

The Commission has since concluded that this issue may be addressed more efficiently by adding a new regulation rather than by amending several current regulations. New 11 CFR 111.46 addresses how respondents will be notified of reason-to-believe findings, final determinations and all other communications authorized in subpart B of part 111 governing the administrative fines program. The final rule clarifies that unless a respondent has filed a statement designating counsel in accordance with 11 CFR 111.23, all notifications or other communications from the Commission or the administrative fines reviewing officer will be sent to a respondent political committee and its treasurer at the committee address listed in the most recent Statement of Organization or amendment thereto, filed with the Commission. If counsel has been designated, all contact will be with counsel unless the respondent

authorizes direct contact in writing. See 11 CFR 111.23. The substantive effect of new section 111.46 is identical to the revisions proposed in the NPRM.

This new rule is supported by the statute and case law. 2 U.S.C. 433(c) requires a political committee to file any changes in a previously filed Statement of Organization, including an address, within ten days after the change. Moreover, in a recent case in which a respondent in the administrative fines program challenged the Commission's final determination, the district court held that mailing a notification to the committee's last known address constitutes constitutionally significant notice. See *Cunningham v. FEC*, 2002 WL 31431557, at \*4 (S.D. Ind.)(2002).

**Certification of No Effect Pursuant to 5 U.S.C. 605(b) (Regulatory Flexibility Act)**

The Commission certifies that the attached final rules will not have a significant economic impact on a substantial number of small entities. The basis for this certification for any small entities subject to the amended rules is that the civil money penalties are lower than those previously assessed and are scaled to better take into account the amount of financial activity on reports filed by political committees. Thus, committees with lower levels of financial activity are subject to lower fines than political committees with higher amounts. Moreover, the calculation of the civil money penalty has been revised so that it better takes into account the level of Federal activity for committees that finance allocable Federal and non-Federal activity. These committees would also be subject to lower civil penalties since they are now based only on the portion of their finances attributable to Federal activity. Finally, some entities affected by the rules, such as political committee treasurers and committees of the two major political parties, are not small entities under 5 U.S.C. 601 because they are not small businesses, organizations or small governmental jurisdictions.

**List of Subjects in 11 CFR Part 111**

Administrative practice and procedures, Elections, Law enforcement.

For the reasons set forth in the preamble, the Federal Election Commission amends subchapter A of Chapter I of Title 11 of the Code of Federal Regulations as follows:

**PART 111—COMPLIANCE PROCEDURES (2 U.S.C. 437g, 437d(a))**

1. The authority citation for part 111 continues to read as follows:

**Authority:** 2 U.S.C. 437g, 437d(a), 438(a)(8).

2. Section 111.35 is amended by revising paragraph (b)(4)(iii) to read as follows:

**§ 111.35 If the respondent decides to challenge the alleged violation or proposed civil money penalty, what should the respondent do?**

\* \* \* \* \*

(b) \* \* \*

(4) \* \* \*

(iii) Illness, inexperience, or unavailability of staff, including the treasurer;

\* \* \* \* \*

3. Section 111.43 is amended by:

a. Revising paragraph (a);

b. Revising paragraph (b); and

c. Amending paragraph (d) by removing the definitions of *estimated level of activity* and *level of activity*.

The revised text reads as follows:

**§ 111.43 What are the schedules of penalties?**

(a) The civil money penalty for all reports that are filed late or not filed, except election sensitive reports and pre-election reports under 11 CFR 104.5, shall be calculated as follows:

(1) For reports due before April 16, 2003:

(i) *Level of activity* means the total amount of receipts and disbursements for the period covered by the late report. If the report is not filed, the level of activity is the estimated level of activity as set forth in paragraph (a)(1)(ii) of this section.

(ii) *Estimated level of activity* means total receipts and disbursements reported in the current two-year election cycle divided by the number of reports filed to date covering the activity in the current two-year election cycle. If the respondent has not filed a report covering activity in the current two-year election cycle, estimated level of activity means total receipts and disbursements reported in the prior two-year election cycle divided by the number of reports filed covering the activity in the prior two-year election cycle.

(iii) The civil money penalty shall be calculated in accordance with the following schedule:

acceptable and unacceptable purpose descriptions to be reported by authorized committees. Paragraph (B) requires authorized committees, when itemizing certain disbursements for which reimbursements are required, to provide a brief explanation of the activity for which reimbursement is required. These provisions have been in Title 11 of the **Code of Federal Regulations** since 1980 and 1995, respectively, and were not affected by the recent statutory changes to the election cycle reporting requirements.

#### Need for Correction

As published, the final rules inadvertently omit two paragraphs describing information to be reported by authorized committees of Federal candidates.

All committees must report the purpose of itemized disbursements (i.e., those disbursements aggregating in excess of \$200). Omitted paragraph (A) contains examples of suitably specific purpose descriptions as well as examples of those descriptions that are unacceptably vague. This paragraph is inconsistent with the reporting of rules for unauthorized committees (committees other than candidate committees) in 11 CFR 104.3(b)(3).

Omitted paragraph (B) is used in administering the "personal use" rules in 11 CFR 113.1. Federal candidates are barred from using campaign funds for personal benefit. Paragraph (B) requires authorized committees of Federal candidates itemizing disbursements for which partial or total reimbursement is required under 11 CFR 113.1(g)(1)(iii)(C) or (D) to provide a brief explanation of the activity for which the reimbursement is made.

Section 801 of Title 5 of the United States Code requires Federal agencies to submit regulations to Congress. These regulations were submitted to the Speaker of the House of Representatives and the President of the Senate on November 26, 2001.

#### Certification of No Effect Pursuant to 5 U.S.C. § 605(b) [Regulatory Flexibility Act]

This correction will not have significant economic impact on a substantial number of small entities. The basis of this certification is that this correction only requires political committees to once again add information to the reports they are required to file. These regulations were in 11 CFR since 1980 and 1995, respectively, before being inadvertently omitted in 2000.

#### List of Subjects in 11 CFR Part 104

Campaign funds, Political committees and parties, Reporting and recordkeeping requirements.

Accordingly, 11 CFR part 104 is corrected by making the following correcting amendment:

#### PART 104—REPORTS BY POLITICAL COMMITTEES

1. The authority citation for part 104 continues to read as follows:

**Authority:** 2 U.S.C. 431(1), 431(8), 431(9), 432(i), 434, 438(a)(8), 438(b), 439a.

#### § 104.3 Contents of reports (2 U.S.C. 434(b), 439a).

\* \* \* \* \*

2. In § 104.3 add the following paragraphs (b)(4)(i)(A) and (B):

(b) \* \* \*  
(4) \* \* \*  
(i) \* \* \*

(A) As used in this paragraph, *purpose* means a brief statement or description of why the disbursement was made. Examples of statements or descriptions which meet the requirements of this paragraph include the following: dinner expenses, media, salary, polling, travel, party fees, phone banks, travel expenses, travel expense reimbursement, and catering costs. However, statements or descriptions such as *advance*, *election day expenses*, *other expenses*, *expenses*, *expense reimbursement*, *miscellaneous*, *outside services*, *get-out-the-vote* and *voter registration* would not meet the requirements of this paragraph for reporting the purpose of an expenditure.

(B) In addition to reporting the purpose described in paragraph (b)(4)(i)(A) of this section, whenever an authorized committee itemizes a disbursement that is partially or entirely a personal use for which reimbursement is required under 11 CFR 113.1(g)(1)(ii)(C) or (D), it shall provide a brief explanation of the activity for which reimbursement is required.

\* \* \* \* \*

Dated: November 26, 2001.

**Danny L. McDonald,**  
*Chairman, Federal Election Commission.*  
[FR Doc. 01-29679 Filed 11-29-01; 8:45 am]  
**BILLING CODE 6715-01-P**

#### FEDERAL ELECTION COMMISSION

#### 11 CFR Part 111

#### [Notice 2001-18]

#### Extension to Administrative Fines

**AGENCY:** Federal Election Commission.

**ACTION:** Final rule; revision of the sunset date.

**SUMMARY:** The Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the expiration date in which the Federal Election Commission (hereinafter "the Commission") may assess civil money penalties for violations of the reporting requirements of section 434(a) of the Federal Election Campaign Act (hereinafter "the Act" or "FECA").

**DATES:** Effective on December 31, 2001.

**FOR FURTHER INFORMATION CONTACT:** Ms. Rosemary C. Smith, Assistant General Counsel, or Ms. Mai T. Dinh, Attorney, 999 E Street, NW., Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

#### SUPPLEMENTARY INFORMATION:

#### Explanation and Justification

Section 640 of the Treasury and General Government Appropriations Act, 2000, Pub. L. No. 106-58, 106th Cong., 113 Stat. 430, 476-77 (1999), amended § 309(a)(4) of the FECA, 2 U.S.C. 437g(a)(4), to provide for a modified enforcement process for violations of reporting requirements. Under § 437g(a)(4)(C) of the FECA, the Commission may assess a civil money penalty for violations of the reporting requirements of 2 U.S.C. 434(a). This authority, however, was to sunset on December 31, 2001. Pub. L. No. 106-58, 106th Cong., § 640(c). Recently, § 642 of the Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the sunset date to include all reports that cover activity between January 1, 2000, to December 31, 2003.

The Commission published final rules on May 19, 2000, to implement the amendment contained in the Treasury and General Government Appropriations Act, 2000. Section 111.30 of the regulations reflects the sunset provision of Pub. L. No. 106-58, 106th Cong., § 640(c). Therefore, the Commission is issuing this final rule to amend section 111.30 to extend the application of the administrative fine regulations, 11 CFR part 111, subpart B, to include all violations relating to reports that cover the period between January 1, 2000, to December 31, 2003.

The Commission is promulgating this final rule without notice or opportunity for comment because it falls under the "good cause" exemption of the Administrative Procedures Act, 5 U.S.C. 553(b)(B). The exemption allows



# Rules and Regulations

Federal Register

Vol. 68, No. 66

Monday, April 7, 2003

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

## FEDERAL ELECTION COMMISSION

### 11 CFR Part 110

[Notice 2003-7]

#### Administrative Fines: Correction

**AGENCY:** Federal Election Commission.

**ACTION:** Final rule; correction.

**SUMMARY:** This document contains a correction to the final rules governing the Administrative Fines program that were published in the **Federal Register** on March 17, 2003. The correction relates to a technical amendment updating a citation to the Federal Claims Collection Standards.

**DATES:** The correction is effective March 17, 2003.

**FOR FURTHER INFORMATION CONTACT:** Ms. Mai T. Dinh, Acting Assistant General Counsel or Dawn M. Odrowski, Attorney, 999 E Street, NW., Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

**SUPPLEMENTARY INFORMATION:** On March 17, 2003, the Federal Election Commission published in the **Federal Register** final rules governing the Administrative Fines program. See Administrative Fines; final rules, 68 FR 12572 (March 17, 2003). These final rules included a technical amendment to 11 CFR 111.45 to correct a citation to the Federal Claims Collection Standards ("the Standards") in response to the revision and recodification of the Standards after the original Administrative Fines regulations were published in May 2000. In the March 17, 2003, **Federal Register** publication, instruction number 4 incorrectly identified "General Accounting Office" rather than "Government Accounting Office" as the language that is removed from 11 CFR 111.45.

## Correction of Publication

■ Accordingly, the publication of final regulations that were the subject of FR Doc. 2003-6, published on March 17, 2003 (68 FR 12572), is corrected as follows:

### PART 111—COMPLIANCE PROCEDURES (2 U.S.C. 437g, 437d(a))

■ On page 12580, column 1, correct instruction number 4 to read as follows:

#### § 111.45 [Corrected]

"4. Section 111.45 is amended by removing in the second sentence the phrase, '4 CFR parts 101 through 105' and by adding in its place, '31 CFR parts 900 through 904,' and by removing in the second sentence the phrase, 'Government Accounting Office' and adding in its place, 'U.S. Department of the Treasury.'"

Dated: April 1, 2003.

**Ellen L. Weintraub,**

*Chair, Federal Election Commission.*

[FR Doc. 03-8307 Filed 4-4-03; 8:45 am]

**BILLING CODE 6715-01-P**

## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

### Office of Federal Housing Enterprise Oversight

#### 12 CFR Part 1730

RIN 2550-AA25

#### Public Disclosure of Financial and Other Information

**AGENCY:** Office of Federal Housing Enterprise Oversight, HUD.

**ACTION:** Final regulation.

**SUMMARY:** The Office of Federal Housing Enterprise Oversight is issuing a final regulation that sets forth public disclosure requirements with respect to financial and other information by the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation.

**EFFECTIVE DATE:** April 30, 2003.

**FOR FURTHER INFORMATION CONTACT:** David W. Roderer, Deputy General Counsel, or Christine C. Dion, Associate General Counsel, telephone (202) 414-6924 (not a toll-free number); Office of Federal Housing Enterprise Oversight,

Fourth Floor, 1700 G Street, NW., Washington, DC 20552. The telephone number for the Telecommunications Device for the Deaf is (800) 877-8339.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

###### A. Introduction

Title XIII of the Housing and Community Development Act of 1992, Pub. L. 102-550, entitled the "Federal Housing Enterprises Financial Safety and Soundness Act of 1992" (Act) (12 U.S.C. 4501 *et seq.*), established OFHEO as an independent office within the Department of Housing and Urban Development to ensure that the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac) (collectively, the Enterprises) are capitalized adequately and operate safely and in compliance with applicable laws, rules, and regulations.

The relationship of the government-sponsored enterprises to financial markets is critical to their viability. To accomplish their missions, the Enterprises must have access to capital markets. In supporting the primary mortgage markets, secondary market players, including the Enterprises, access domestic and global financing sources and offer a variety of issuances demanded by these markets. The Enterprises are significant as participants in mortgage-backed securities and agency debt markets, and in related hedging activities, and as issuers and guarantors of securities.

As users of and participants in the financial markets, the success of the Enterprises in meeting their public policy missions and in maintaining their safe and sound operations is inextricably tied to full and robust disclosure.<sup>1</sup> Disclosure may provide information about the corporate operations of a firm, the intricacies of a given securities offering, or specialized information concerning particular events or business practices. In addition, Enterprise securities have become increasingly significant to

<sup>1</sup> See, *Freddie Mac and Fannie Mae Enhancements to Capital Strength, Disclosure and Market Discipline*, 3-4 News, Archives (October 19, 2000), available at <http://www.freddiemac.com/>; and *Franklin Raines, FDIC Panel: "The Rise of Risk Management: Challenges for Policy Makers,"* 1, 6 Media, Speeches (July 31, 2002), available at <http://www.fanniemae.com/>.

acceptable and unacceptable purpose descriptions to be reported by authorized committees. Paragraph (B) requires authorized committees, when itemizing certain disbursements for which reimbursements are required, to provide a brief explanation of the activity for which reimbursement is required. These provisions have been in Title 11 of the **Code of Federal Regulations** since 1980 and 1995, respectively, and were not affected by the recent statutory changes to the election cycle reporting requirements.

#### Need for Correction

As published, the final rules inadvertently omit two paragraphs describing information to be reported by authorized committees of Federal candidates.

All committees must report the purpose of itemized disbursements (i.e., those disbursements aggregating in excess of \$200). Omitted paragraph (A) contains examples of suitably specific purpose descriptions as well as examples of those descriptions that are unacceptably vague. This paragraph is inconsistent with the reporting of rules for unauthorized committees (committees other than candidate committees) in 11 CFR 104.3(b)(3).

Omitted paragraph (B) is used in administering the "personal use" rules in 11 CFR 113.1. Federal candidates are barred from using campaign funds for personal benefit. Paragraph (B) requires authorized committees of Federal candidates itemizing disbursements for which partial or total reimbursement is required under 11 CFR 113.1(g)(1)(iii)(C) or (D) to provide a brief explanation of the activity for which the reimbursement is made.

Section 801 of Title 5 of the United States Code requires Federal agencies to submit regulations to Congress. These regulations were submitted to the Speaker of the House of Representatives and the President of the Senate on November 26, 2001.

#### Certification of No Effect Pursuant to 5 U.S.C. § 605(b) [Regulatory Flexibility Act]

This correction will not have significant economic impact on a substantial number of small entities. The basis of this certification is that this correction only requires political committees to once again add information to the reports they are required to file. These regulations were in 11 CFR since 1980 and 1995, respectively, before being inadvertently omitted in 2000.

#### List of Subjects in 11 CFR Part 104

Campaign funds, Political committees and parties, Reporting and recordkeeping requirements.

Accordingly, 11 CFR part 104 is corrected by making the following correcting amendment:

#### PART 104—REPORTS BY POLITICAL COMMITTEES

1. The authority citation for part 104 continues to read as follows:

**Authority:** 2 U.S.C. 431(1), 431(8), 431(9), 432(i), 434, 438(a)(8), 438(b), 439a.

#### § 104.3 Contents of reports (2 U.S.C. 434(b), 439a).

\* \* \* \* \*

2. In § 104.3 add the following paragraphs (b)(4)(i)(A) and (B):

(b) \* \* \*

(4) \* \* \*

(i) \* \* \*

(A) As used in this paragraph, *purpose* means a brief statement or description of why the disbursement was made. Examples of statements or descriptions which meet the requirements of this paragraph include the following: dinner expenses, media, salary, polling, travel, party fees, phone banks, travel expenses, travel expense reimbursement, and catering costs. However, statements or descriptions such as *advance*, *election day expenses*, *other expenses*, *expenses*, *expense reimbursement*, *miscellaneous*, *outside services*, *get-out-the-vote* and *voter registration* would not meet the requirements of this paragraph for reporting the purpose of an expenditure.

(B) In addition to reporting the purpose described in paragraph (b)(4)(i)(A) of this section, whenever an authorized committee itemizes a disbursement that is partially or entirely a personal use for which reimbursement is required under 11 CFR 113.1(g)(1)(ii)(C) or (D), it shall provide a brief explanation of the activity for which reimbursement is required.

\* \* \* \* \*

Dated: November 26, 2001.

**Danny L. McDonald,**  
Chairman, Federal Election Commission.  
[FR Doc. 01-29679 Filed 11-29-01; 8:45 am]  
**BILLING CODE 6715-01-P**

#### FEDERAL ELECTION COMMISSION

#### 11 CFR Part 111

#### [Notice 2001-18]

#### Extension to Administrative Fines

**AGENCY:** Federal Election Commission.

**ACTION:** Final rule; revision of the sunset date.

**SUMMARY:** The Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the expiration date in which the Federal Election Commission (hereinafter "the Commission") may assess civil money penalties for violations of the reporting requirements of section 434(a) of the Federal Election Campaign Act (hereinafter "the Act" or "FECA").

**DATES:** Effective on December 31, 2001.

**FOR FURTHER INFORMATION CONTACT:** Ms. Rosemary C. Smith, Assistant General Counsel, or Ms. Mai T. Dinh, Attorney, 999 E Street, NW., Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

#### SUPPLEMENTARY INFORMATION:

#### Explanation and Justification

Section 640 of the Treasury and General Government Appropriations Act, 2000, Pub. L. No. 106-58, 106th Cong., 113 Stat. 430, 476-77 (1999), amended § 309(a)(4) of the FECA, 2 U.S.C. 437g(a)(4), to provide for a modified enforcement process for violations of reporting requirements. Under § 437g(a)(4)(C) of the FECA, the Commission may assess a civil money penalty for violations of the reporting requirements of 2 U.S.C. 434(a). This authority, however, was to sunset on December 31, 2001. Pub. L. No. 106-58, 106th Cong., § 640(c). Recently, § 642 of the Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the sunset date to include all reports that cover activity between January 1, 2000, to December 31, 2003.

The Commission published final rules on May 19, 2000, to implement the amendment contained in the Treasury and General Government Appropriations Act, 2000. Section 111.30 of the regulations reflects the sunset provision of Pub. L. No. 106-58, 106th Cong., § 640(c). Therefore, the Commission is issuing this final rule to amend section 111.30 to extend the application of the administrative fine regulations, 11 CFR part 111, subpart B, to include all violations relating to reports that cover the period between January 1, 2000, to December 31, 2003.

The Commission is promulgating this final rule without notice or opportunity for comment because it falls under the "good cause" exemption of the Administrative Procedures Act, 5 U.S.C. 553(b)(B). The exemption allows

**FEDERAL ELECTION COMMISSION**

**11 CFR Parts 104, 107, 110, 9001, 9003, 9004, 9008, 9031, 9032, 9033, 9034, 9035, 9036, and 9038**

[Notice 2003–12]

**Public Financing of Presidential Candidates and Nominating Conventions**

**AGENCY:** Federal Election Commission.

**ACTION:** Final rules and transmittal of regulations to Congress.

**SUMMARY:** The Federal Election Commission is revising several portions of its regulations governing the public financing of Presidential candidates, in both primary and general election campaigns, and Presidential nominating conventions. These regulations implement the provisions of the Presidential Election Campaign Fund Act (“Fund Act”) and the Presidential Matching Payment Account Act (“Matching Payment Act”), which establish eligibility requirements for Presidential candidates and convention committees seeking public financing and indicate how funds received under the public financing system may be spent. The revised rules also implement the Bipartisan Campaign Reform Act of 2002, as it applies particularly to the Fund Act and the Matching Payment Act. The revised rules reflect the Commission’s experience in administering these programs, particularly during the 2000 election cycle, and anticipate some questions that may arise during the 2004 Presidential election cycle. Further information is contained in the Supplementary Information that follows.

**EFFECTIVE DATE:** Further action, including the publication of a document in the **Federal Register** announcing an effective date, will be taken after these regulations have been before Congress for 30 legislative days pursuant to 26 U.S.C. 9009(c).

**FOR FURTHER INFORMATION CONTACT:** Ms. Rosemary C. Smith, Acting Associate General Counsel, Mr. J. Duane Pugh Jr., Senior Attorney, Mr. Robert M. Knop, or Ms. Delanie DeWitt Painter, Attorneys, 999 E Street, NW., Washington, DC 20463, (202) 694–1650 or (800) 424–9530.

**SUPPLEMENTARY INFORMATION:** The Commission is publishing today the final text of revisions to its regulations governing the public financing of Presidential campaigns, 11 CFR parts 9001 through 9039, to more effectively administer the public financing program

during the 2004 election cycle. These rules implement 26 U.S.C. 9001–13 and 26 U.S.C. 9031–42. The revised rules apply certain provisions of the Bipartisan Campaign Reform Act of 2002, Pub. L. 107–155, 116 Stat. 81 (2002) (“BCRA”), to Presidential nominating convention financing. The revised rules also: (1) Limit the use of public funds for winding down costs for both primary and general election Presidential candidates; (2) clarify rules concerning the attribution of expenses to the expenditure limitations for Presidential primary candidates and repayments based on expenditures in excess of those limitations; (3) modify several aspects of General Election Legal and Accounting Compliance Funds; (4) require Presidential committees to notify the Commission prior to changing their non-election year reporting schedules; (5) create a new “shortfall bridge loan exemption” from a primary candidate’s overall expenditure limitation; (6) define “municipal funds” to eliminate the former distinction between permissible host committee activity that was impermissible for municipal funds; (7) subject municipal funds to the same disclosure rules as host committees; (8) delete the requirements that only “local” individuals and “local” entities may donate to host committees and municipal funds; and (9) make technical changes.

The Commission published a Notice of Proposed Rulemaking on April 15, 2003, 68 FR 18484. Written comments were due by May 23, 2003. The names of commenters and their comments are available at <http://www.fec.gov/register.htm> under “Public Financing of Presidential Candidates and Nominating Conventions.” The Commission held a public hearing on June 6, 2003 at which it heard testimony from 12 witnesses. Transcripts of the hearing are available at the Web site identified above. Please note that, for purposes of this document, the terms “commenter” and “comment” apply to both written comments and oral testimony at the public hearing.

Under the Administrative Procedures Act, 5 U.S.C. 553(d), and the Congressional Review of Agency Rulemaking Act, 5 U.S.C. 801(a)(1), agencies must submit final rules to the Speaker of the House of Representatives and the President of the Senate, and publish them in the **Federal Register** at least 30 calendar days before they take effect. In addition, 26 U.S.C. 9009(c) requires that any rules or regulations prescribed by the Commission to carry out the provisions of the Fund Act be transmitted to the Speaker of the House of Representatives and the President of

the Senate 30 legislative days before they are finally promulgated. The final rules that follow were transmitted to Congress on July 31, 2003.

**Explanation and Justification**

**11 CFR Part 104—Reports by Political Committees**

*11 CFR 104.5(b)(1)—Election Year Reports*

The regulation at 11 CFR 104.5(b)(1) establishes the filing dates for reports by principal campaign committees (“PCC”s) of Presidential candidates, during election years in accordance with 2 U.S.C. 434(a)(3)(A). This rule is being revised to correct several citations to reflect changes to 11 CFR 104.5(a) promulgated when the Commission implemented BCRA’s new reporting requirements. The new citations refer to the same pre- and post-election reports so the reporting requirements are not changed. Specifically, the reference in 11 CFR 104.5(b)(1)(i)(C) is being changed from 11 CFR 104.5(a)(1)(i) to “paragraph (a)(2)(i) of this section” and the reference to 11 CFR 104.5(a)(1)(ii) is being changed to “paragraph (a)(2)(ii) of this section.” In 11 CFR 104.5(b)(1)(ii), the reference to 11 CFR 104.5(a)(1) is being changed to “paragraphs (a)(1) and (2) of this section.”

Section 104.5(b)(1)(ii) operates with two other provisions, § 104.5(b)(1)(i) and (iii), to specify the circumstances under which a Presidential PCC is not required to file monthly reports during the Presidential election year. A Presidential PCC must report monthly during an election year if contribution receipts or expenditures exceed or are anticipated to exceed \$100,000. 11 CFR 104.5(b)(1)(i) and (iii). In order for the three provisions to work harmoniously, all four conditions listed in § 104.5(b)(1)(ii) must be satisfied before a PCC is relieved of the monthly filing requirement. Therefore, section 104.5(b)(1)(ii) is being revised to replace the disjunctions “or” with the conjunctions “and” in three instances.

*11 CFR 104.5(b)(2)—Non-Election Year Reports: Quarterly and Monthly Reporting Requirements*

Section 104.5(b)(2) provides that principal campaign committees of Presidential candidates may file campaign reports in non-election years on either a monthly or a quarterly basis. The previous rules did not explain how PCCs may change their reporting frequency during a non-election year from monthly to quarterly or *vice versa*.

The Commission is revising § 104.5(b)(2) to set forth requirements for PCCs of Presidential candidates

seeking to change reporting frequency. One commenter stated that this change fills a gap in the regulations and provides a procedure for switching reporting similar to that for unauthorized committees, which will be beneficial even though Presidential candidates' PCCs will seldom switch reporting schedules. The revised rule at § 104.5(b)(2) allows a PCC to change its filing schedule in a non-election year only after notifying the Commission in writing of its intention at the time it files a required report under its current filing frequency. The Presidential candidate's PCC is then required to file the next required report under its new filing frequency. In addition, a PCC may change its filing frequency no more than once in a calendar year. This rule establishes the same requirements as are found in 11 CFR 104.5(c) for unauthorized committees. The Commission notes that Presidential candidates' PCCs are not permitted to change their filing frequency during election years under 2 U.S.C. 434(a)(3)(A), except that a PCC that files quarterly reports must begin filing monthly reports at the next reporting period after it receives contributions or makes expenditures in excess of \$100,000.

#### **11 CFR Part 107—Presidential Nominating Convention, Registration and Reports**

##### *11 CFR 107.2—Registration and Reports by Host Committees and Municipal Funds*

The NPRM proposed revising the host committee and municipal fund registration and reporting requirements in 11 CFR 107.2 in two respects to reflect proposed changes to other Commission regulations. 68 FR at 18512. First, the NPRM proposed changing the title of section 107.2 as well as a reference in the text of the section to reflect the new definition of "municipal fund" it had proposed for 11 CFR 9008.50(c). Second, the NPRM proposed adding a sentence to 11 CFR 107.2 to reflect a revision it proposed for 11 CFR 9008.51 to require that host committee and municipal fund reports contain the information specified in 11 CFR part 104.

For the reasons explained in greater detail below, the Commission has decided to modify both 11 CFR 9008.50 and 11 CFR 9008.51 as proposed. See Explanation and Justification for new 11 CFR 9008.50(c) and 11 CFR 9008.51(b)(1), below. Accordingly, the Commission has decided to change the title of section 107.2 from "Registration and reports by host committees and

committees, organizations or other groups representing a state, city or other local government agency" to "Registration and reports by host committees and municipal funds." See new 11 CFR 107.2. Similarly, the Commission has decided to change the phrase used to describe municipal funds in the text of the section from "each committee or other organization or group of persons which represents a State, municipality, local government agency or other political subdivision in dealing with officials of a national political party with respect to matters involving a Presidential nominating convention" to "municipal fund." In addition, the Commission has decided to add the proposed sentence to § 107.2 requiring that host committee and municipal fund reports "shall contain the information specified in 11 CFR part 104." None of the commenters addressed these changes.

#### **11 CFR Part 110—Contribution and Expenditure Limitations and Prohibitions**

##### *11 CFR 110.2—Contributions by Multicandidate Political Committees (2 U.S.C. 441a(a)(2))*

For a full discussion of pre-candidacy expenditures by multicandidate political committees that are deemed in-kind contributions, see the Explanation and Justification for 11 CFR 9034.10 below. The language in the final rules at 11 CFR 110.2(l) varies from the language at 11 CFR 9034.10 because the candidate involved would not be publicly funded and, therefore, the consequence of a reimbursement would be simply to convert the payment from an in-kind contribution to an expenditure of the candidate. The qualified campaign expense concept and the attendant spending limit provisions are not implicated for candidates who are not publicly funded.

#### **11 CFR Part 9001—Scope**

##### *11 CFR 9001.1—Scope*

The Commission is making two technical amendments to this section to update the references to its other regulations.

#### **11 CFR Part 9003—Eligibility for Payments**

##### *11 CFR 9003.1—Candidate and Committee Agreement*

The Commission is making a technical amendment to the regulations on candidate agreements in § 9003.1 to update the reference to other regulations. Under revised paragraph (b)(8), candidates and their authorized

committees must agree to comply with the Commission's rules through 11 CFR part 400.

##### *11 CFR 9003.3—Allowable Contributions; General Election Legal and Accounting Compliance Fund*

The Commission is revising its rule governing General Election Legal and Accounting Compliance Funds ("GELACs") in several respects.

##### *11 CFR 9003.3(a)(1)—Sources*

#### 1. Solicitation of GELAC Funds

Regulations issued in 1999 barred the solicitation and deposit of GELAC contributions prior to June 1 of the calendar year of a Presidential general election. See former 11 CFR 9003.3(a)(1)(i) and (a)(1)(i)(A). Deposits earlier than June 1 were permitted only for excessive primary contributions that had been redesignated for the GELAC under the previous rules. The NPRM sought comment on whether to change the date to either April 1 or May 1. One commenter supported the greater flexibility that would be provided with an earlier date, but nonetheless described the proposed change as a relatively insignificant step. The only other commenter to address this issue saw no reason to change the June 1 date.

The 1999 explanation and justification stated that the June 1 rule was intended to address two issues. The first was that candidates who do not receive their party's nomination must return all GELAC contributions, which can be difficult if some have been used to defray overhead expenses or to solicit additional GELAC contributions. The second concern was to ensure that GELAC funds are not improperly used to make primary election expenditures. See *Explanation and Justification to the Rules Governing Public Financing of Presidential Primary and General Election Candidates*, 64 FR 49355, 49356 (Sept. 13, 1999). The Commission selected the June 1 date because "barring unforeseen circumstances, this is the point when a party's prospective nominee can be reasonably assured that he or she will need to raise funds for a GELAC" and the date gives prospective nominees "sufficient time to raise the funds that will be needed." *Id.* Because the effective date of these regulatory amendments was June 1, 2000, the pre-June 1 solicitation prohibition was not operative for the 2000 election cycle.

The Commission has decided to change the starting date for GELAC solicitations and most deposits to April 1. The earlier primary dates for some states in the 2004 Presidential election cycle are likely to lead to an earlier

resolution of nomination contests, even though the later than usual dates for the Presidential nominating conventions in 2004 will mean that the official start of the general election campaigns will be later in the cycle than usual. Therefore, the June 1 date in the former 11 CFR 9003.3(a)(1)(i) and (a)(1)(i)(A) is changed to April 1 of the election year as the starting date for GELAC solicitations and most deposits.

## 2. Redesignation of Excessive Contributions to the GELAC

The Commission is revising its rules governing the sources of GELAC funds at 11 CFR 9003.3(a)(1) to reflect its recent changes to its rules concerning the redesignation of excessive contributions at 11 CFR 110.1(b)(5)(ii)(B). See *Explanation and Justification for the Rules Governing Contribution Limitations and Prohibitions*, 67 FR 69928, 69930–32 (Nov. 19, 2002). These changes allow authorized committees to redesignate excessive primary contributions to the general election without obtaining a signed written document from the contributor under certain circumstances. Section 110.1(b)(5)(ii)(B) allows the candidate's committee to presume that the contributor of an excessive primary contribution would not object to a redesignation of any excessive amount to that candidate's general election, without obtaining written agreement from the contributor for the redesignation. *Id.* at 69931. The explanation and justification for this rule elaborated that "if a presidential candidate's authorized committee accepts public funding in the general election, the presumption is available to any such committees only to the extent they are permitted to accept contributions to a general election legal and accounting compliance fund." *Id.* at 69930–31.

The NPRM proposed revisions to 11 CFR 9003.3(a)(1)(i), (a)(1)(i)(C) and (a)(1)(v) to permit publicly funded Presidential candidates to presume that those making excessive contributions for the primary election would consent to the redesignation of their contributions to the candidate's GELAC. The three commenters who addressed this issue supported these proposed changes.

The Commission has decided to revise its rules to reflect the adoption of the presumptive redesignations for the GELAC, with several changes from proposed 11 CFR 9003.3(a)(1) to clarify the operation of the rule and presumptive redesignations. Section 9003.3(a)(1)(i) is being revised to delete the phrase "by the contributor" to

permit the deposit of contributions redesignated by presumption into GELACs. Section 9003.3(a)(1)(i)(C) is not being revised because the NPRM's revisions for this provision incorrectly suggested that a contribution redesignated by presumption is considered a contribution designated in writing.

Section 9003.3(a)(1)(ii)(A), which the NPRM would not have revised, applies by its terms to "contributions made during the matching payment period that do not exceed the contributor's limit for the primary election." Because presumptive redesignations are limited to excessive contributions, contributions under this provision can only be redesignated in writing, so the reference to "redesignations" in section 9003.3(a)(1)(ii)(A)(3) is being revised to "written redesignations." Similarly, the citation to 11 CFR 110.1(b)(5) in § 9003.3(a)(1)(ii)(A)(4) is being revised to refer only to the provisions for written redesignations, which are 11 CFR 110.1(b)(5)(i) and (ii)(A). The recordkeeping requirements in 11 CFR 110.1(l) continue to be incorporated by citation into § 9003.3(a)(1)(ii)(A)(4).

Section 9003.3(a)(1)(iv) continues to require that contributions that are made after the beginning of the expenditure report period but that are not designated in writing for the GELAC must first be used to satisfy any primary committee debts or repayment obligations before they can be redesignated in writing for the GELAC. This approach constitutes an exception to the usual approach, which would consider these contributions as made with respect to the general election (*i.e.*, chronologically the next election under 11 CFR 110.1(b)(2)(i)). The Commission believes that the priority for primary committee obligations should be continued for these contributions. Consequently, the provision is being revised to state explicitly that these contributions are considered made with respect to the primary election. Additionally, § 9003.3(a)(1)(iv)(C) is being revised to state that the redesignation must be written; it is not presumptive. The contributions subject to redesignation under section 9003.3(a)(1)(iv) are those that do not exceed the contributor's limit for the primary election. These revisions were not in the NPRM, but they are consistent with the proposal, which would not have revised the primary preference and would have limited presumptive redesignation to excessive contributions.

Revisions to § 9003.3(a)(1)(v) make clear that excessive primary contributions can be presumptively

redesignated for the GELAC pursuant to 11 CFR 110.1(b)(5)(ii)(B). This applies to contributions made during the matching payment period or, pursuant to 11 CFR 9003.3(a)(1)(iv), during the expenditure report period. In order to do so, the phrase "obtains the contributor's redesignation for the GELAC" is being replaced with "redesignates the contribution for the GELAC," and the citation to 11 CFR 110.1 is being clarified to 11 CFR 110.1(b)(5)(i) and (ii)(A) or (ii)(B). This provision is also amended to note specifically that the timing requirement in the presumptive redesignation regulation, 11 CFR 110.1(b)(5)(ii)(B)(1), does not apply in this instance due to the operation of section 9003.3(a)(1)(iv).

Contributions made during the expenditure report period that are considered made with respect to the primary election may not be submitted for matching. See 11 CFR 9034.3(i). Although one commenter supported the matchability of such contributions, the Commission continues to consider these contributions to be unmatchable. As presumptively redesignated contributions, they were made for a purpose other than influencing the results of a primary election, and section 9034.3(i) prohibits matching such contributions.

Thus, considered as a whole, the revised 11 CFR 9003.3(a)(1) allows a candidate to treat all or part of an excessive primary contribution as a GELAC contribution, as long as the contribution meets the following requirements: (1) The contribution was not designated for a particular election; (2) the contribution would exceed the primary election contribution limitations if it were treated as a primary contribution; (3) the redesignation would not cause the contributor to exceed the contribution limitations; and (4) the treasurer provides a written notification to the contributor within 60 days of receipt of the contribution of the amount that was redesignated to the GELAC and that the contributor may request a refund. The Commission notes that presumptively redesignated contributions to the GELAC must be refunded if the contributor requests a refund or, as with all other contributions accepted for the GELAC, within 60 days of a candidate's date of ineligibility ("DOI") if the candidate does not become the nominee. See 11 CFR 9003.3(a)(1)(i)(A).

The NPRM also sought comment on expressly allowing excessive contributions to a GELAC to be presumptively redesignated to a Presidential candidate's authorized committee for the primary election,

based on the conditions delineated at 11 CFR 110.1(b)(5)(ii)(C). The Commission's rules at 11 CFR 110.1(b)(5)(ii)(C) allow authorized committees to redesignate excessive contributions presumptively to the primary election, under certain conditions. One commenter supported the proposal to apply these rules to the GELAC.

The Commission has determined that no further changes to §9003.3(a)(1) in this regard are necessary because there are no other GELAC contributions that could be presumptively redesignated for the primary election. Contributions that are designated in writing by the contributors for the GELAC would be ineligible for redesignation by presumption pursuant to 11 CFR 110.1(b)(5)(ii)(C)(2). Contributions that are not designated in writing for the GELAC will be considered made with respect to the primary election, except when the conditions for depositing them in the GELAC pursuant to 11 CFR 9003.3(a)(1)(iv) are satisfied. If these contributions exceed the contributor's primary election contribution limit, they may be presumptively redesignated pursuant to revised §9003.3(a)(1)(v).

#### *11 CFR 9003.3(a)(2)—Uses*

The rule on the uses of GELAC funds is being revised to update the permissible uses of GELAC funds consistent with BCRA and to otherwise improve the rule.

#### *11 CFR 9003.3(a)(2)(i)(D)—Primary Repayments*

The NPRM proposed amending the rule on the permissible uses of GELAC funds to permit Presidential candidates to use GELAC funds to make any repayments owed by their authorized committee for the primary election. GELACs are permitted to make general election repayments under 11 CFR 9007.2, and the proposed revisions at 11 CFR 9003.3(a)(2)(i)(D) specified that GELACs may also make primary campaign repayments required under 11 CFR 9038.2 or 9038.3. One commenter stated the revision is justified, provided the rule does not require that repayments must be made before other permissible uses of GELAC funds under paragraphs (a)(2)(i)(A) through (H). The only other commenter opposed the proposed revision, based on an expressed opposition to GELACs in general.

The Commission has decided to revise 11 CFR 9003.3(a)(2)(i)(D) to specify that the GELAC may be used to make repayments owed by the candidate's primary campaign committee pursuant to 11 CFR 9038.2

and 9038.3 in addition to general election repayments under 11 CFR 9007.2. This amendment to the GELAC rules is based on the Commission's interpretation of 2 U.S.C. 439a(a)(1), which permits contributions to be used "for otherwise authorized expenditures in connection with the campaign for Federal office of the candidate or individual." This statutory language is sufficiently broad to encompass primary election repayments. The effect of this revision, combined with the revisions to 11 CFR 9003.3(a)(2)(iv) described below, is to require Presidential candidates to use their GELAC funds for their primary committee repayments before any funds remaining in the GELAC can be dispensed pursuant to 2 U.S.C. 439a. Thus, this revision imposes an obligation on GELACs as much as it permits such funds to be used to satisfy debts to the United States Treasury.

#### *11 CFR 9003.3(a)(2)(i)(I)—Winding Down Expenses*

The NPRM proposed revisions to 11 CFR 9003.3(a)(2)(i) to restore a provision related to the use of GELACs for general election winding down expenses. In 1995, the Commission adopted 11 CFR 9004.4(a)(4)(iii), which stated that 100% of salary, overhead, and computer expenses incurred by a campaign after the end of the expenditure report period may be paid from a GELAC, and that such expenditures will be presumed to be solely to ensure compliance with the FECA and the Fund Act. 60 FR 31875 (June 16, 1995). This paragraph was included in the 1996 through 1999 editions of the Code of Federal Regulations, but was inadvertently omitted from the 2000 through 2003 editions. The Commission is reinstating this important provision, with certain revisions discussed below, and moving it to 11 CFR 9003.3(a)(2)(i)(I). No commenters addressed this rule.

In addition, the Commission has decided to add primary election winding down costs incurred after the end of the expenditure report period to the rule on permissible uses of GELAC funds at new 11 CFR 9003.3(a)(2)(i)(I). Two commenters addressed this proposal. One commenter expressed opposition to GELACs in general and, by extension, any expansion of permissible uses of GELACs. Another commenter thought it unfair to permit candidates who run in both the primary and the general elections to use GELACs to pay primary winding down costs, while primary candidates who do not compete in the general election are required to refund GELAC contributions. This commenter also faulted the use of any GELAC funds for

expenditures subject to the primary expenditure limit.

In reaching its decision, the Commission considered that the primary and general election campaign committees are simultaneously winding down following the expenditure report period and often share salary, overhead, and computer expenses. In addition, the primary and general election committees often share winding down expenses related to legal and accounting compliance such as attorneys and accountants. The regulation at 11 CFR 9034.4(a)(3)(iii) recognizes that a significant amount of winding down activity during this period is related to compliance and allows primary campaigns to treat 100% of salary, overhead, and computer costs during this period as legal and accounting compliance expenses exempt from the expenditure limitations. Similarly, former 11 CFR 9004.4(a)(4)(iii) presumed these expenses were for compliance and therefore exempted them from the general election expenditure limitation pursuant to 11 CFR 9002.11(b)(5). Permitting the GELAC to pay salary, overhead, and computer costs after the end of the expenditure report period for both the primary and general election committees will allow candidates who run in both the primary and general elections to choose to pay these costs from the GELAC. Because these expenses are exempt from both the primary and general election expenditure limits, the concerns about one publicly financed campaign funding another are reduced. Any primary winding down costs not entitled to the compliance exemption will be subject to the primary expenditure limit, even if paid by the GELAC. Primary winding down costs paid by the GELAC must be included on the Statement of Net Outstanding Campaign Obligations pursuant to 11 CFR 9034.5(a)(1). A receivable from the GELAC must also be listed for any primary winding down costs paid with GELAC funds. 11 CFR 9034.5(a)(2)(iii). Any winding down costs paid by the GELAC will not count toward either winding down limitations in new 11 CFR 9004.11(b) or 9034.11(b).

The Commission acknowledges that primary candidates who do not compete in the general election will not have GELAC funds available for their winding down costs. This result is unavoidable, however, because FECA's contribution limits are per election. See 2 U.S.C. 441a. Thus, contributors to candidates who compete only in the primary are limited to contributing for that election only; while contributors to candidates who compete in both the

primary and general elections may contribute the full amount for both the primary election and the GELAC. The authorization to use GELAC funds to pay primary winding down expenses does not cause the different treatment, and it cannot justify permitting primary candidates to receiving contributions of twice the per-election limit.

*11 CFR 9003.3(a)(2)(iv)—Funds Remaining in the GELAC*

The rule at 11 CFR 9003.3(a)(2)(iv) concerning the use of GELAC funds is being revised to update the permissible uses of GELAC funds consistent with BCRA. The previous rule at 11 CFR 9003.3(a)(2)(iv) stated that if there are “excess campaign funds” after payment of all expenses set forth in §9003.3(a)(2)(i), such funds may be used for any purpose permitted under 2 U.S.C. 439a and 11 CFR part 113, including payment of primary election debts.

BCRA amended 2 U.S.C. 439a to eliminate its reference to “excess campaign funds,” and the Commission revised 11 CFR part 113 accordingly. *See Disclaimers, Fraudulent Solicitation, Civil Penalties, and Personal Use of Campaign Funds*, 67 FR 76962, 76978–79 (Dec. 13, 2002). The rule governing the use of GELAC funds is being revised to replace the reference to “excess campaign funds” in 11 CFR 9003.3(a)(2)(iv) with “funds remaining in the GELAC” to clarify that only funds that are not needed for GELAC expenses may be used for the purposes permitted under 2 U.S.C. 439a and 11 CFR part 113. All of the commenters who addressed this proposed change supported it, provided the purposes permitted under 2 U.S.C. 439a and 11 CFR part 113 continue to be permissible uses of funds remaining in the GELAC, which they are.

The Commission also is revising 11 CFR 9003.3(a)(2)(iv) to state expressly that GELAC funds must not be used for the purposes permitted under 2 U.S.C. 439a and 11 CFR part 113 that are beyond the uses listed in 11 CFR 9003.3(a)(2) until the completion of the audit and repayment process, which includes making any repayments owed. No commenters addressed this provision.

*11 CFR 9003.5—Documentation of Disbursements*

Commission regulations in 11 CFR 102.9(b) describe the requirements for the documentation of disbursements applicable to all political committees. Additional documentation requirements for publicly funded general election committees are set forth in 11 CFR

9003.5. Section 9003.5 is being revised to clarify that publicly funded general election candidates must comply with both the general rules at §102.9(b), as well as the specific rules applicable to publicly funded general election candidates governing the documentation of disbursements in 11 CFR 9003.5(b). No commenters addressed this revision.

**11 CFR Part 9004—Entitlement of Eligible Candidates to Payments; Use of Payments**

*11 CFR 9004.4—Use of Payments; Examples of Qualified Campaign Expenses and Non-Qualified Campaign Expenses*

Section 9004.4, which concerns qualified and non-qualified campaign expenses, is being revised in several respects. First, the section heading for 11 CFR 9004.4 is being modified to indicate that it contains examples of qualified campaign expenses and non-qualified campaign expenses. Previous §9004.4(a)(4)(ii) is being renumbered as §9004.4(a)(5) to clarify that accounts payable costs are a separate type of qualified campaign expense from winding down costs. There were no comments on these changes.

Second, the rules on winding down costs are being moved from paragraph (a)(4) to new §9004.11. Revised 11 CFR 9004.4(a)(4) provides that payments from the Presidential Election Campaign Fund may be used to defray winding down costs pursuant to 11 CFR 9004.11, which contains new rules on winding down costs and is discussed below.

*11 CFR 9004.4(a)(6)—Gifts and Bonuses*

The NPRM proposed revising the rules governing payment of gifts and bonuses by general election candidates at newly redesignated 11 CFR 9004.4(a)(6). The rules allow gifts and bonuses to be treated as qualified campaign expenses for general election candidates if they meet certain conditions. Under 11 CFR 9004.4(a)(6), gifts for committee employees, consultants and volunteers in recognition of campaign-related activities or services are limited to \$150 per individual recipient and a total of \$20,000 for all gifts. Monetary bonuses for employees and consultants in recognition of campaign-related activities or services must be provided for pursuant to a written contract made prior to the general election and must be paid no later than 30 days after the end of the expenditure report period. *Id.* The NPRM sought comment as to whether to limit the amounts of gifts and bonuses, whether to retain the requirement of a

written contract for monetary bonuses, and whether to create possible additional or different controls.

The Commission has decided to narrow the requirements with respect to when a written contract will be required for monetary bonuses. Because the Commission does not require written contracts for other employer-employee relationships, the new rule is more narrowly tailored to address the purpose of the restriction. The previous regulation was promulgated in reaction to a publicly funded campaign paying large monetary bonuses after the election upon discovery of excess public funds. The new rule addresses that abuse more directly while not otherwise limiting employment arrangements, in recognition of the absence of an incentive to waste public funds before the date of the election. Therefore, the new rule requires a written contract only when monetary bonuses are paid after the election.

*11 CFR 9004.4(b)(3)—Non-Qualified Campaign Expenses*

Section 9004.4(b) lists non-qualified campaign expenses. Paragraph (b)(3) previously stated that any expenditures incurred after the close of the expenditure report period were not qualified campaign expenses except to the extent permitted as winding down costs or accounts payable under 11 CFR 9004.4(a)(4). Section 9004.4(b)(3) is being clarified to state specifically that accounts payable pursuant to newly redesignated 11 CFR 9004.4(a)(5) and winding down costs pursuant to new §9004.11, discussed below, are considered qualified campaign expenses. There were no comments on these changes.

*11 CFR 9004.11—Winding Down Costs*

During the audit and repayment process, Presidential committees and the Commission’s auditors estimate costs associated with terminating the campaign and complying with the post-election requirements of the Fund Act and FECA, and may sometimes reach substantially disparate winding down estimates. Issues have arisen as to the appropriate amounts and types of winding down expenses and as to the length of time committees need to wind down. These disputes have lengthened the audit and repayment processes for some campaigns. Both actual and estimated future winding down costs are included in a general election candidate’s Statement of Net Outstanding Qualified Campaign Expenses (“NOQCE”). Consequently, if the Commission auditors’ figures are lower than the committee’s estimates, a



dispute may arise in determining the candidate's NOQCE and any surplus funds or resulting repayment. Disallowed winding down expenses can increase the amount of any surplus funds and the resulting repayment determination, or for primary election candidates, the disallowed expenses can decrease a candidate's entitlement to additional matching funds.

To avoid these disputes in the future, the Commission has decided to place certain reasonable restrictions on the amount of public funds used for winding down expenses. Thus, a new rule in 11 CFR 9004.11 is being added regarding general election candidates' winding down expenses. A comparable new rule applicable to primary election candidates is located in new 11 CFR 9034.11, which is discussed below.

*11 CFR 9004.11(a)—Definition of "Winding Down Costs"*

New 11 CFR 9004.11(a) contains the definition of winding down costs previously found in 11 CFR 9004.4(a)(4). The new definition is not significantly changed from the previous one, except that it clarifies that winding down costs include post-election requirements of both FECA and the Fund Act.

*11 CFR 9004.11(b)—Winding Down Limitation*

The NPRM proposed two restrictions for general election winding down costs: a temporal restriction and a monetary limitation of 2.5% of the general election spending limit.

Several commenters opposed the restrictions proposed in the NPRM. Some believed publicly funded Presidential campaigns do not have an incentive to inflate their winding down expenses because primary candidates would prefer to repay the ratio portion of any surplus funds, in order to have flexibility in spending the remaining surplus, and because general election candidates would prefer to use limited public funds over the course of the election.

The Commission disagrees. In the Commission's experience, some candidates might have incentives to prolong and increase their winding down activity, either to maximize their entitlement or to consume any remaining public funds while minimizing potential surplus repayments. Although primary candidates have more flexibility in spending surplus funds after making a *pro rata* repayment, this benefit is outweighed by the possibility of significantly reducing a potential repayment by contesting it. Similarly,

although general election candidates may not plan to reserve much money from active campaigning for winding down expenses, to the extent some of them have remaining public funds after the election, using them for winding down costs may be preferable to repaying them.

One commenter noted that the candidate's burden to demonstrate and document that winding down costs are qualified campaign expenses to avoid a repayment deters unreasonable winding down expenses. Others pointed out that winding down costs are not necessarily related to the amount of expenditures made by a campaign and that under-funded campaigns may have high winding down expenses because they did not have sufficient funds for compliance during the campaign and might need to spend more on post-election record reconstruction. Some noted that the costs of defending a campaign in enforcement matters, audits, repayment determinations, and other legal proceedings are unrelated to the amount of the candidate's expenditures, and that complaints and law suits may be politically motivated. Some expressed concern that winding down restrictions would result in numerous surplus repayments by primary candidates after their winding down in excess of the restrictions is disallowed, and candidates would have to raise private funds to defend themselves and defray winding down costs long after the election is over. Another argument against the winding down limit was that public funding is intended to reduce reliance on private contributions and that limiting winding down while allowing winding down costs to be paid from the GELAC would encourage candidates to rely more heavily upon private funds in the GELAC to meet legitimate and unavoidable campaign expenses.

On the other hand, one commenter argued that the three general election campaigns in 2000 that wound down for less than the proposed limit show that the limit is unnecessary because candidates would only exceed the limit under extraordinary circumstances.

**1. Monetary Limit**

The Commission has decided to adopt new 11 CFR 9004.11(b), which establishes a monetary limitation on the total amount of general election winding down expenses that may be paid for with public funds. In considering this issue, the Commission reviewed the amounts spent for winding down costs by publicly funded candidates during the 2000 election cycle and compared their approximate winding down costs

to the proposed winding down limitation. Of three publicly funded general election candidates, one would have spent less than 1% of the expenditure limitation, the second would have spent less than 2% of his expenditures, while the third would have spent only slightly more than the winding down limitation of 2.5% of the expenditure limitation. The last committee paid some of its winding down expenses with GELAC funds, which reduced its winding down costs to less than 2% of the expenditure limitation.

The "winding down limitation" in new § 9004.11(b) limits the total amount of publicly funded winding down expenses for general election candidates to the lesser of: (1) 2.5% of the expenditure limitation; or (2) 2.5% of the total of: (A) the candidate's expenditures subject to the expenditure limitation as of the end of the expenditure report period; plus (B) the candidate's expenses exempt from the expenditure limitation, such as fundraising expenses, as of the end of the expenditure report period. Basing the winding down limitation on a candidate's expenditures or on the maximum expenditure limitation recognizes that larger campaigns will generally have more winding down expenses than smaller campaigns. Notwithstanding the amount determined based on these calculations, the new rule permits all general election candidates to spend at least \$100,000 on winding down costs. The \$100,000 allowance recognizes that all publicly funded committees incur certain winding down expenses related to the requirements of the audit and repayment process that do not vary with the total amount of the committees' expenditures.

Based in part on the 2000 winding down data and experience in prior election cycles, the Commission is satisfied that campaigns can wind down in compliance with the 2.5% limit without any hardship and that the limitation will affect only campaigns with unusually high winding down costs. The monetary limitation is necessary to ensure that publicly funded campaign committees wind down as quickly and efficiently as possible and do not inflate winding down costs in order to avoid a surplus repayment to the United States Treasury. The monetary limitation establishes a fair and readily determined amount to ensure that all campaigns are treated consistently with respect to winding down costs and that public funds are used in accordance with statutory purposes.

The Commission expects that most PCCs of Presidential candidates will incur winding down expenses substantially below the new dollar limitations. Campaigns with unusually high compliance costs may use their GELAC or a primary candidate's private funds after no public funds remain in the candidate's accounts to pay for such expenses. Paying winding down expenses with a GELAC is justified because a large amount of winding down expenses are related to compliance and most winding down expenses are not directly related to active campaigning.

In practice, the winding down limitation for fully funded major party general election candidates will be the maximum winding down limitation, 2.5% of the expenditure limitation for general election candidates under § 9004.11(b)(1). This maximum winding down limitation is calculated based upon a percentage of the general election candidate's expenditure limitation pursuant to 2 U.S.C. 441a(b), similar to the calculation of the 20% fundraising exemption or the 15% compliance exemption. See 11 CFR 100.146, 100.152, and 9002.11(b)(5). Currently, the general election expenditure limitation is equal to \$72,960,000, so the 2.5% limit would equal \$1,824,000.<sup>1</sup>

In contrast, the winding down limitation for most minor party general election candidates will equal 2.5% of their expenses during the expenditure report period under section 9004.11(c)(2).<sup>2</sup> The final rule addresses the calculation of the winding down limitation for those general election candidates who may solicit contributions by calculating the total of their expenditures subject to the limit, § 9004.11(b)(2)(i), plus their exempt expenses, § 9004.11(b)(2)(ii). The calculation includes exempt expenses such as fundraising and legal and accounting compliance costs to reflect the actual size of the campaign that is winding down. The fundraising exemption for general election candidates is applicable only to those candidates who may accept contributions to defray qualified campaign expenses pursuant to 26 U.S.C. 9003(b)(2) or 9003(c)(2), *i.e.*, minor party candidates and major party

candidates who may solicit contributions to make up a deficiency in public funds received. See 11 CFR 100.152, 9003.3(b) and (c). Those general election candidates who may solicit contributions may also exempt legal and accounting compliance expenses from their expenditure limitations. See 11 CFR 100.146, 9003.3(b) and (c). Expenses for transportation of Secret Service and national security staff and media transportation expenses that are reimbursed by the media do not count against the expenditure limitations. See 11 CFR 9004.6(a), 9034.6(a). Thus, the exempt expenses considered under § 9004.11(c)(2)(ii) will include all three of the types of exempt expenses.

For purposes of calculating the amount of the winding down limitation under § 9004.11(b)(2), a candidate's expenses will include both disbursements and accounts payable as of the end of the expenditure report period for the following categories of expenses (as listed on page 2 of FEC Form 3P): operating expenses (line 23), fundraising (line 25), exempt legal and accounting (line 26), and other disbursements (line 29). The following payments should not be included in the expenses used to calculate the winding down limitation: transfers to other authorized committees (line 24), loan repayments (line 27), or contribution refunds (line 28).

The winding down limitation calculation does not include any expenditures in excess of the general election candidate's expenditure limitation; thus, making expenditures or accepting in-kind contributions that exceed the expenditure limits would not provide a basis for an increased winding down limitation. In addition, the new rule restricts the expenses used to calculate the winding down limitation to the period prior to the end of a general election candidate's expenditure report period to prevent candidates from increasing their winding down limitation by spending more for winding down expenses.

## 2. Expenses Subject to Winding Down Limitation

All expenses incurred and paid by a candidate during the winding down period, including fundraising costs, are subject to the new winding down limitation in new 11 CFR 9004.11. Under the new rule, the use of public funds to pay for winding down expenses in excess of these restrictions will constitute a non-qualified campaign expense that may be subject to repayment. However, these restrictions apply to the use of public funds or a

mixture of public and private funds for winding down costs and will not limit the payment of winding down expenses from private contributions in a candidate's GELAC. Thus, expenses for legal and accounting compliance costs paid for with public funds count against the winding down limitation, but any winding down costs paid by a GELAC do not.

### 11 CFR 9004.11(c)—Allocation of Primary and General Winding Down Costs

Candidates who run in both the primary and general elections must allocate winding down expenses between the primary and general election campaigns. This can be complicated during the period after the general election because both campaigns are winding down simultaneously, often using the same staff, offices, equipment, vendors and legal representatives. To simplify the allocation, the NPRM proposed that committees could divide winding down costs between the primary and general campaigns using any allocation method, including allowing either the primary or the general campaign to pay 100% of winding down expenses.

One commenter advocated allowing campaigns to use any reasonable method that would require expenses indisputably related to one election be paid as winding down expenses of that election while shared winding down expenses such as legal fees could be allocated on any reasonable basis reflecting a good-faith estimate.

The final rules in new 11 CFR 9004.11(c) allow a candidate who runs in both the primary and general election to divide winding down costs between the primary and general campaigns using any reasonable allocation method. The final rule also specifies that an allocation method will be considered reasonable if it divides the total winding down costs between the primary and general election committees and results in no less than one third of total winding down costs allocated to each committee. With this provision, the Commission has created a range of winding down cost allocations between a candidate's primary and general election authorized committees that will be considered *per se* to be the result of a reasonable method and therefore in compliance with this requirement. If particular circumstances require a candidate to allocate winding down costs so that one of the two committees is allocated less than one third of the total costs, with the other necessarily being allocated more than two thirds, those committees will be required to

<sup>1</sup> Before the 2004 general election, the general election expenditure limit under 2 U.S.C. 441a(b)(1)(B) is subject to an additional annual adjustment under 2 U.S.C. 441a(c).

<sup>2</sup> If major party candidates were required to solicit contributions to make up a deficiency in public funds, the winding down limitation would also equal 2.5% of their expenses during the expenditure report period.

demonstrate that their allocation method was reasonable. This new rule will give candidates the flexibility to allocate their winding down expenses based on the particular circumstances of their campaigns. Winding down activity for some candidates may be largely or entirely focused on one election. For example, candidates who do not receive public funds for the general election might concentrate winding down activity on their publicly funded primary committee. In addition, candidates might concentrate winding down efforts and expenses on the committee that must address more difficult and complex issues in the audit and repayment process or that have larger potential repayments. Any winding down costs paid by the GELAC can be allocated to either the primary or the general election committees for this purpose, although they will not count toward either winding down limitation in new 11 CFR 9004.11(b) or 9034.11(b).

#### *Temporal Limits*

The NPRM proposed a temporal restriction on winding down expenses, the "winding down period," based on the length of a committee's audit and repayment process, including the administrative review of the repayment determination. Several commenters opposed these temporal limits because after the expiration of this period, campaigns may be involved in enforcement actions, repayment determination court challenges, investigations by other government entities, or other lawsuits.

The Commission believes that the winding down monetary limitation will be sufficient to address its concerns that winding down be completed expeditiously. Therefore, the Commission has decided not to include any temporal limitation in the final rule at 11 CFR 9004.11. Because the Commission is not including the temporal limit in the final rule, it is also not making the conforming changes proposed in the NPRM to 11 CFR 9004.9(a)(4) and 9034.5(b)(2) that would have referred to the winding down period in the sections discussing NOQCE and NOCO statements.

#### *Other Winding Down Proposals*

The NPRM also proposed increasing allowable winding down expenses to reflect the number of compliance actions involving a Presidential candidate's campaign committee.

One commenter stated that the Commission should not limit the use of public funds for costs related to compliance actions because candidates do not elect these expenses, and the

compliance process is often used for political ends. This commenter further noted that campaigns and the Commission regularly dispute factual and legal issues, and responding to a compliance matter is an unwanted diversion that does not advance the candidate's campaign. The commenter also suggested that candidates should have the option of a separate legal defense account similar to a GELAC. In addition, this commenter suggested that recent changes to the public financing rules, such as the limitation on the timing for creating a GELAC, limiting legal and compliance costs to 15% of the primary spending limit and the new limits on winding down costs, discourage spending money on compliance.

As discussed above, winding down costs resulting from compliance actions were considered in determining the winding down limitations. This new rule allows candidates to classify compliance matters arising from the campaign as winding down costs. To the extent that such costs fall within the specified limitations, candidates may use public funds to pay for them. This rule is consistent with the Commission's prior practice. In addition, new 11 CFR 9004.11(a) clarifies that winding down costs include the costs of complying with both the FECA and the Fund Act (*e.g.*, costs related to the audit and repayment processes and reporting and recordkeeping, as well as costs incurred in responding to compliance matters). If a general election candidate exceeds the winding down limitations, private funds will be available through their GELAC for compliance expenses related to enforcement matters. For primary candidates, private funds will be available once the public funds in the candidates' accounts have been exhausted.

#### *Combining Primary and General Winding Down Limitations*

The Commission also considered whether to allow candidates who accept public funds for both the primary and general elections to combine their primary and general election winding down limitations into a joint monetary limit for the total winding down expenses of both committees. The Commission decided not to make this change because primary and general election winding down expenses are legally distinct and a candidate's primary and general election committees are generally treated as separate entities; thus, they should be required to adhere to separate winding down limitations. See new 11 CFR 9004.11(a) and 9034.11(a).

#### *Alternative Proposals to Winding Down Restrictions*

The NPRM sought comment on disallowing the use of public funds to pay any winding down costs. Under such an alternative, a primary election candidate would not have been permitted to use public funds to pay for any expenses incurred after the candidate's DOI or any expenses for goods or services to be used after the DOI. A general election candidate would not have been permitted to use public funds to pay for any expenses incurred after the end of the expenditure report period or any expenses for goods or services to be used after the end of the expenditure report period.

Two commenters opposed this proposal. One commenter argued that 26 U.S.C. 9038(b)(3), which requires candidates to retain matching funds "for the liquidation of all obligations to pay qualified campaign expenses for a period not exceeding 6 months after the end of the matching payment period" and "promptly" to repay a ratio of any surplus funds, is not determinative as to whether winding down costs are qualified campaign expenses because the statute contemplates a completely different system than the current audit process administered by the Commission. This commenter asserted that the statute envisioned that all issues related to the campaign, including the audit, repayment and enforcement matters would conclude within six months and advocated a complete overhaul of the audit and related enforcement process if winding down costs were to be limited. Another commenter stated that winding down expenses are unavoidable costs of a campaign, and that changing the rules would make candidates spend more time raising private funds to pay for these unavoidable costs, which could prolong the life of losing campaigns that must seek contributions to pay winding down costs.

The Commission is retaining its long-standing treatment of winding down costs as qualified campaign expenses. Although winding down costs are a category of qualified campaign expenses not specifically identified in the Fund Act or the Matching Payment Act, it is necessary to allow them to ensure that candidates may respond adequately during the audit, repayment and enforcement processes.

The NPRM also presented a second alternative approach to winding down costs which would have more precisely delineated the types of winding down costs that are permissible, consisting of

staff salaries, legal and accounting services, office space rental, utilities, computer services, other overhead expenses, consultants, storage, insurance, office supplies and fundraising expenses. One commenter said this alternative could be useful if the list is not intended to be exhaustive, because of the possibility of unforeseen but legitimate types of winding down costs.

The Commission has decided not to adopt this alternative approach because it is unlikely to resolve the issues that have arisen and could generate more issues. Disputes over winding down expenses often concern the appropriate amounts spent for particular expenses, the appropriate length of time a campaign should continue to need certain goods or services, and whether the campaign committee has provided sufficient documentation of expenses rather than focusing on the type of expenditure. A list of permissible winding down expenses would not address these frequently disputed issues, nor would it reduce the amount of winding down expenses.

Please note that the Commission made no changes to 11 CFR 9008.10(g)(7), governing winding down costs of convention committees.

### **11 CFR Part 9008—Federal Financing of Presidential Nominating Conventions**

#### *11 CFR 9008.3—Eligibility for Payments; Registration and Reporting*

The Commission has decided to revise the convention committee reporting requirements in 11 CFR 9008.3 to require convention committees to submit a copy of all written contracts and agreements they make with the cities, counties, or States hosting the convention or any host committee or municipal fund. See new 11 CFR 9008.3(b)(1)(ii). Convention committees, host committees, and municipal funds are also required to submit any subsequent modifications to a previous contract or agreement.

The Commission believes that it is necessary to have copies of all such agreements in order to understand fully the obligations that each of those entities has agreed to assume with respect to the convention. Such contracts must be submitted with the report for the applicable reporting period. Related changes are also being made to the host committee and municipal fund reporting requirements. See Explanation and Justification for 11 CFR 9008.51, below. The wording of the final rule is being slightly clarified from the proposed rule, which was not addressed by any of the commenters.

#### *11 CFR 9008.7(a)(4)(xii)—Use of Funds—Gifts and Bonuses*

The NPRM sought comment on revising the rules governing the payment of gifts and bonuses by primary and general election candidates and by convention committees. The Commission has decided to make changes to 11 CFR 9008.7(a)(4)(xii), governing gifts and bonuses for convention committees, to make that section more consistent with the rules governing primary and general election committees. See newly redesignated 11 CFR 9004.4(a)(6) and 9034.4(a)(5). Specifically, the structure of the section is being changed to separate the requirements for gifts from those for bonuses. The new paragraph on bonuses requires that bonuses paid after the last date of the convention to committee staff and consultants in recognition of convention-related activities or services must be provided for pursuant to a written contract made prior to the date of the convention, and must be paid no later than 30 days after the convention.

#### *11 CFR 9008.8—Limitation of Expenditures*

The NPRM proposed two revisions to 11 CFR 9008.8. The first proposal was to revise references in the title and text of paragraph (b)(2) to reflect the proposed new definition of “municipal fund” in 11 CFR 9008.50(c). 68 FR at 18508. As explained below, the Commission is adopting the proposed definition of “municipal fund.” See Explanation and Justification for new 11 CFR 9008.50(c). Thus, the Commission is revising 11 CFR 9008.8(b)(2) to change the references in this provision from “municipal corporations” to “municipal funds.” The NPRM also proposed deleting “government agencies.” However, because some State or local governments may directly make convention expenditures, the references to government agencies are retained.

The second proposal in the NPRM was to revise 11 CFR 9008.8(b)(4)(ii)(B) to permit convention committees to establish separate legal and accounting compliance funds (“CLAF”). 68 FR at 18512. Under this proposal, contributions to CLAFs would only have been permitted to be used to pay for legal and accounting services related to compliance with FECA and the Fund Act. Disbursements from the CLAF for legal and accounting compliance services would not have been considered “expenditures” and, therefore, would not have counted against the convention committee’s expenditure limit in 11 CFR 9008.8. The CLAF would have had a separate

contribution limit from the national committee’s limit.

The NPRM also sought comment on the contribution limit that should apply to contributors who wish to contribute to both the CLAF and to the political committees established and maintained by the same national political party. The only commenter to address this issue argued that allowing convention committees to establish CLAFs would amount to effectively doubling the national party contribution limit in 2 U.S.C. 441a(a)(1)(B) by allowing a donor to make two contributions up to the national party limit, one to the national party itself and the other to the CLAF. The commenter challenged the Commission’s authority to allow convention committees to establish CLAFs because the receipt of public money by convention committees is conditioned on their abiding by set spending limits. The commenter also asserted that CLAFs would allow “the infusion of private money into a system where Congress intended the party spending to be fully financed with public funds.”

The Commission has decided that permitting the national party committees to pay compliance expenses of the convention committee under 11 CFR 9008.8(b)(4)(ii) adequately addresses this issue. Therefore, the Commission has decided not to allow convention committees to establish separate legal and accounting compliance funds as proposed in the NPRM.

In addition to the proposals in the NPRM, the Commission is revising 11 CFR 9008.8(b)(4)(ii)(B), which previously stated the contribution limits for contributions to national political party committees from persons and from multicandidate committees. BCRA amended the first of those two limits and indexed the limitation to inflation. Therefore, the Commission is revising the regulation to refer to the amounts permitted under 11 CFR 110.1(c) and 110.2(c).

#### *11 CFR 9008.10—Documentation of Disbursements; Net Outstanding Convention Expenses*

The requirements for the documentation of disbursements applicable to all committees are described in 11 CFR 102.9(b). Additional documentation requirements for publicly funded convention committees are set forth in 11 CFR 9008.10. The introductory language in section 9008.10 is being revised to state that the requirements in this section are in addition to the requirements of 11 CFR 102.9(b) governing the

documentation of disbursements. Adding this reference to 11 CFR 102.9(b) will assist the reader in locating these other pertinent provisions.

#### *11 CFR 9008.12—Repayments*

The Commission is revising 11 CFR 9008.12(b)(7) to reflect changes in other portions of the convention regulations. First, two references within paragraph (b)(7) are being changed to reflect the new definition of “municipal fund” in 11 CFR 9008.50(c). See Explanation and Justification for 11 CFR 9008.50, below.

Second, the Commission is deleting the final clause in paragraph (b)(7), which had identified donations from a nonlocal businesses as impermissible host committee/municipal fund contributions, to reflect its deletion of the requirement in 11 CFR 9008.52(c) and 11 CFR 9008.53(b) that only local entities and individuals may make donations to host committees and municipal funds to defray convention expenses. See Explanation and Justification for 11 CFR 9008.52 and 11 CFR 9008.53, below. The final rules substantially follow the proposed rules, which were not addressed by any of the commenters.

### **Subpart B—Host Committees and Municipal Funds Representing a Convention City**

#### *11 CFR 9008.50—Scope and Definitions*

The NPRM noted that host committees and municipal funds have evolved to the point where their roles in convention financing are increasingly similar but the Commission’s rules had treated them differently. 68 FR at 18507. The NPRM sought public comment on whether host committees and municipal funds should be treated the same.

One discrepancy in the regulations relating to host committees and municipal funds was that the rules defined “host committee,” in 11 CFR 9008.52(a), but did not define “municipal fund.” 68 FR at 18507–08. The NPRM proposed to add a definition of “municipal fund” in new paragraph (c) of 11 CFR 9008.50, and to move the definition of “host committee” from 11 CFR 9008.52(a) to paragraph (b) of 11 CFR 9008.50. The proposal defined a “municipal fund” as “any separate fund or account of a government agency, municipality, or municipal corporation whose principal purpose is the encouragement of commerce in the municipality and whose receipt and use of funds is subject to control of officials of the State or local government.”

The NPRM stated that any municipal fund that accepted donations and made disbursements related to convention

activities would be required, under the proposed definition, to use a separate account for such purposes. Comment was sought on whether any other restrictions should be imposed on municipal funds to ensure that funds received or disbursed by municipal funds are used solely for the purpose of promoting the city and its commerce, such as limiting them to accounts subject to audit by State or local public agencies.

No commenters addressed this topic. The Commission believes that it is helpful to add a definition of “municipal fund.” Accordingly, the Commission has decided to adopt the proposed definition of “municipal fund,” which is located in paragraph (c) of 11 CFR 9008.50. This provision defines a municipal fund as a fund or account of a government agency, municipality, or municipal corporation.

The definition distinguishes a municipal fund from a host committee, in part, by limiting municipal funds to those funds or accounts of a government agency, municipality, or municipal corporation, and “whose receipt and use of funds is subject to the control of officials of the State or local government.” When engaged in activities that promote an area and its commerce, State and local governments participate in a wide variety of organizations that often permit the private sector to participate in some role. The Commission intends that municipal funds will be limited to the group of such organizations whose funds are under the control of State or local government officials acting in their official capacities when they receive and disburse funds. Any organizational structure that includes public officials in some capacity but does not keep the funds under governmental control cannot qualify as a municipal fund, but may qualify as a host committee. For example, if a local civic association includes a city’s mayor as an officer, but the association’s funds are not maintained in a city account, the local civic association could not be a municipal fund, but it could be a host committee, if it met the requirements of new 11 CFR 9008.50(b).

The Commission has decided to move the definition of “host committee” to paragraph (b) of 11 CFR 9008.50, so that the definitions are grouped together.

#### *11 CFR 9008.51—Registration and Reports*

##### *11 CFR 9008.51(a)(1)—Registration Requirements*

The Commission has decided to make a number of changes to the host

committee and municipal fund registration and reporting requirements. With respect to the registration requirements, 11 CFR 9008.51(a) is being revised to require host committees and municipal funds to file FEC Form 1 (Statement of Organization) within ten days of the date on which the national party chooses the convention city or ten days after the host committee or municipal fund is formed, whichever date occurs later.

These new registration requirements differ from the former requirements in two respects. First, the former provision required host committees and municipal funds to file a “Convention Registration Form,” not a Statement of Organization. Second, the former provision required host committees and municipal funds to register within ten days of the date on which the party selected the convention city.

The NPRM sought comment on the change in the registration deadline, as well as an alternative deadline that would have required host committees and municipal funds to register within 10 days of when they first solicit or accept donations or make disbursements for convention activities. No commenters specifically addressed the proposed changes to the host committee and municipal fund registration requirements in 11 CFR 9008.51(a).

With respect to the proposal to require host committees and municipal funds to register using FEC Form 1, the Commission notes that host committees and municipal funds typically use this form already. Therefore, the Commission has decided to adopt the proposed change requiring host committees and municipal funds to register using Form 1.

The Commission is adopting the proposal to require host committees and municipal funds to file within 10 days of their formation or within 10 days of convention city selection, whichever date occurs later. This change represents a more realistic timeframe, in that it accounts for the possibility that not all host committees or municipal funds are established within 10 days of when the convention city is selected. The Commission is not adopting the alternative that would have required host committees and municipal funds to register within 10 days of soliciting, accepting, or disbursing funds for convention activities. The alternative could have made it difficult to determine when particular host committee or municipal fund registration statements would actually be due.

*11 CFR 9008.51(a)(3)—Submission of Convention Committee, Host Committee, and Municipal Fund Agreements*

As discussed above, the NPRM proposed to require convention committees, host committees, and municipal funds to submit a copy of all agreements that any one of those organizations makes with the city, county, or State hosting the convention or any of the other convention-related organizations. See Explanation and Justification for 11 CFR 9008.3(b)(ii), above; see also 68 FR at 18512. For the reasons stated above, the Commission has decided to adopt this proposed rule.

Accordingly, the Commission is revising 11 CFR 9008.51 to require host committees and municipal funds to submit any and all such written contracts and agreements with the report covering the reporting period during which the agreement is executed. See 11 CFR 9008.51(a)(3). As explained below, this will usually be the post-convention report. Host committees and municipal funds must also submit any subsequent modifications to a previous agreement. However, host committees and municipal funds need not submit contracts made with convention committees that have already been filed by the convention committees themselves. No commenters addressed these revisions.

*11 CFR 9008.51(b)—Reporting Requirements*

The NPRM proposed a number of changes to the reporting requirements applicable to host committees and municipal funds in 11 CFR 9008.51(b) and (c). First, the NPRM proposed to apply the same reporting requirements to both host committees and municipal funds. Under previous Commission regulations, different reporting requirements applied to host committees and municipal funds. While host committees were required to file a post convention report on FEC Form 4, municipal funds were only required to file a post convention letter, which did not need to contain all of the information required on FEC Form 4. Compare former 11 CFR 9008.51(b)(1) with former 11 CFR 9008.51(c). In addition, host committees were required to continue filing quarterly reports as long as they continued to accept funds or make disbursements after filing the post convention report, but municipal funds were not subject to such a requirement. Former 11 CFR 9008.51(b)(2). Furthermore, host committees were required to file a final report within 10 days of ceasing

reportable activity, but municipal funds were not. Former 11 CFR 9008.51(b)(3).

One commenter contended that it was in the public interest to require municipal funds to file reports with the same frequency and containing the same level of detail regarding receipts and disbursements as those filed by host committees. The Commission agrees, especially because it is dropping the former restrictions on municipal fund fundraising and permitting municipal funds to accept donations under the same conditions as host committees. See Explanation and Justification for 11 CFR 9008.53. Accordingly, the Commission is revising 11 CFR 9008.51 to state that the reporting provisions in paragraphs (b)(1), (2), and (3) apply to both host committees and municipal funds.

The NPRM also proposed two other changes to the host committee reporting requirements in 11 CFR 9008.51(b)(1). First, noting that paragraph (b)(1) of § 9008.51 did not provide a date for the close of books for host committees' post-convention reports, the NPRM proposed revising 11 CFR 9008.51(b)(1) to set the close of books as 15 days prior to the date of filing. No commenters specifically addressed this date. The Commission believes that the proposed time frame is reasonable, in that it should provide sufficient time for host committees and municipal funds to prepare their reports. In addition, the Commission believes that it makes sense to apply the same time frame to host committees and municipal fund reports that currently applies to convention committee reports under 11 CFR 9008.3(b)(2)(ii). Accordingly, the Commission is revising 11 CFR 9008.51(b)(1) to establish the close of books for host committee and municipal fund reports as 15 days prior to the due date for filing these reports.

Second, the NPRM proposed revising 11 CFR 9008.51(b)(1) to require that reports filed pursuant to 2 U.S.C. 437 must contain the information specified in 11 CFR part 104. The statutory authority for 11 CFR part 104 is based in 2 U.S.C. 434. Host committee and municipal fund reporting is required by 2 U.S.C. 437, which explicitly allows the Commission to require a "full and complete financial statement, in such form and detail as it may prescribe." Requiring host committee and municipal fund reports to be presented in the same format as other reports that are filed with the Commission significantly enhances the public disclosure of convention-related financial activity. No commenters addressed this proposed change. Accordingly, the Commission is revising 11 CFR 9008.51(b)(1) to state that host

committee and municipal fund post-convention reports must "disclose all the information required by 11 CFR part 104."

The NPRM also sought comment on whether requiring host committees and municipal funds to file quarterly reports after the 60-day post-convention report is required by and consistent with 2 U.S.C. 437, which refers to a single financial statement. No commenters addressed this question.

The Commission concludes that it does have the authority to require further reports by municipal funds. Section 437 states that host committees and municipal funds must, "within 60 days following the end of the convention (but not later than 20 days prior to the date on which presidential and vice-presidential electors are chosen), file with the Commission a full and complete financial statement, in such form and detail as [the Commission] may prescribe, of the sources from which it derived its funds, and the purpose for which such funds were expended." 2 U.S.C. 437. The Commission's experience with convention financing indicates that it is often not possible for host committees and municipal funds to provide a full and complete financial statement within the prescribed time frame because receipts and invoices pertaining to the convention tend to continue to arrive after the convention has ended and even after the November general election. The Commission believes that 2 U.S.C. 437 in conjunction with 26 U.S.C. 9009, which grants the Commission the authority to require the submission of "such books, records, and information, as it deems necessary to carry out the functions and duties imposed on it by this chapter," provides the Commission with sufficient statutory authority to require both host committees and municipal funds to continue filing reports with the Commission as long as they receive or spend funds relating to the conventions. Furthermore, the Commission notes that the reporting obligation beyond the initial report is expressly conditioned on further convention-related activity, which means that the obligation will only apply when the initial report is *not* a "full and complete financial statement," as required by 2 U.S.C. 437.

The NPRM also sought comment on the form that convention committees, host committees, and municipal funds should be required to use for their reports. Convention committees and host committees were required to report using FEC Form 4, while municipal funds were not required to use any particular form. See 11 CFR

9008.3(b)(2)(i) (convention committees); former 11 CFR 9008.51(b)(1) (host committees); and former 11 CFR 9008.51(c) (municipal funds). The NPRM indicated that the Commission was considering requiring convention committees, host committees, and municipal funds to use FEC Form 3P instead of FEC Form 4. FEC Form 3P is the report of receipts and disbursements filed by Presidential and Vice-Presidential candidates.

No commenters specifically addressed this issue. Given the familiarity that convention committees already have with FEC Form 4, the Commission has decided that the most prudent course is to continue requiring convention committees and host committees to file FEC Form 4. Accordingly, the Commission has decided to retain the references to Form 4 in 11 CFR 9008.3(b)(2)(i) and revised 11 CFR 9008.51(b)(1). The requirement to file using FEC Form 4 will also apply to municipal funds. This is consistent with the Commission's other parallel treatment of host committees and municipal funds as similar.

*11 CFR 9008.51(c)—Post Convention Statements by State and Local Government Agencies*

States, cities, and other local government agencies often provide facilities and services to Presidential nominating conventions under 11 CFR 9008.53, which are in addition to what may be provided by a separate municipal fund. When States, cities and local governments provide such facilities and services, they generally file letters with the Commission identifying the categories of facilities and services provided for the convention and the origin of the funds used for such facilities and services under 11 CFR 9008.51(c). Because the NPRM proposed that municipal funds would be made subject to the same reporting requirements as host committees under 11 CFR 9008.51(b), the NPRM proposed deleting 11 CFR 9008.51(c). No comments were received on this issue.

The Commission has decided, instead, to retain 11 CFR 9008.51(c) and revise it to require these letters to be filed only by those government agencies at the State, municipal, or local levels, or any other political subdivision, that use their general revenues to provide convention facilities or services pursuant to 11 CFR 9008.53. If a city directly makes convention expenditures with its own funds, it must report under 11 CFR 9008.51(c) but would not be required to report the same transactions

on a municipal fund report under § 9008.51(b).

*11 CFR 9008.52—Receipts and Disbursements of Host Committees; Proposed Restructuring of 11 CFR 9008.52*

The Commission has decided to move the definition of "host committee" from 11 CFR 9008.52(a) to 11 CFR 9008.50(b). See Explanation and Justification for revised 11 CFR 9008.50, above.

Accordingly, the Commission is restructuring 11 CFR 9008.52 as follows: Former paragraph (b) is being redesignated as paragraph (a) and former paragraph (c) is being redesignated as paragraph (b).

*Proposed Relocation of Commercial Vendor Provisions*

The NPRM proposed moving the provisions in former 11 CFR 9008.9(b) and (c) to 11 CFR 9008.52(a). However, because the Commission has decided not to amend 11 CFR 9008.9, the corresponding changes proposed for 11 CFR 9008.52 are unnecessary. See Explanation and Justification for 11 CFR 9008.55, below.

*Proposed Revisions to Permissible Expenses*

The NPRM proposed a number of substantive revisions to the list of permissible host committee expenses in former 11 CFR 9008.52(c)(1).<sup>3</sup> The proposed revisions were intended to clarify and add specificity to the list of permissible expenses.

The NPRM proposed combining the expenses in former 11 CFR 9008.52(c)(1)(i) and (c)(1)(x). Former § 9008.52(c)(1)(i) allowed host committees to defray expenses incurred for the purpose of promoting the suitability of the city as a convention site whereas § 9008.52(c)(1)(x) permitted host committees to provide accommodations and hospitality for those responsible for choosing the convention site. The proposed combined list would have permitted host committees and municipal funds to "defray those expenses incurred for the purpose of promoting the city as a convention site, including accommodations and hospitality for officials and employees of the convention and national party committees who are responsible for choosing the sites of the conventions."

The NPRM also proposed narrowing permissible host committee expenses for providing convention committees with

the use of an auditorium or convention center. Whereas the former rule at 11 CFR 9008.52(c)(1)(v) permitted host committees and municipal funds to provide both construction- and convention-related services for convention committees, the proposal sought to limit them to providing only construction-related services that are clearly related to designing, creating, or installing the physical or technological infrastructure of the convention facility. The proposed rule would have deleted the reference to convention-related services and added a non-exhaustive list of permissible construction-related services.

In addition, the NPRM proposed narrowing the description of transportation services that may be provided by host committees and municipal funds in former 11 CFR 9008.52(c)(1)(vi) to permit the provision of only those transportation services that were made "widely available to convention delegates and other individuals attending the convention." See proposed 11 CFR 9008.52(b)(6). Conversely, the proposed rules would have broadened the types of law enforcement services that host committees and municipal funds may provide to allow not only those necessary "to assure orderly conventions" but also other "law enforcement and security services, facilities, and personnel, including tickets, badges, and passes."

Another proposal would have addressed the provision related to hotel rooms in former 11 CFR 9008.52(c)(1)(ix). Whereas the former and current provision states that host committees and municipal funds may provide hotel rooms "at no charge or a reduced rate on the basis of the number of rooms actually booked for the convention," the proposed provision would have permitted the provision of hotel rooms at the rate paid by the host committee or municipal fund. This proposal would have allowed host committees and municipal funds to pass through to convention committees any discounts they received based on the number of rooms rented but would have prohibited host committees or municipal funds from subsidizing the actual cost of such accommodations.

The NPRM also proposed eliminating the final, catchall expense category in former 11 CFR 9008.52(c)(1)(xi), which allowed host committees and municipal funds to provide "other similar convention-related facilities and services," and proposed adding a new list of *impermissible* host committee and municipal fund expenses. Proposed 11 CFR 9008.52(c)(1) would have

<sup>3</sup> Under both previous and revised 11 CFR 9008.53(b)(1), municipal funds are permitted to pay the same types of expenses as host committees.



prohibited host committees and municipal funds from providing "anything of value" to a convention committee, national party committee, or other political committee, except those items that were expressly described in proposed 11 CFR 9008.52(b)(1) and (b)(5) through (b)(8). Proposed 11 CFR 9008.52(c)(2) would have prohibited host committees and municipal funds from defraying any expenses related to "creating, producing, or directing convention proceedings."

The NPRM also sought public comment on whether there was any need to continue to provide a list of permissible convention expenses, or whether the definition of "convention expenses," standing alone, gives sufficient guidance to convention committees regarding what they may or may not pay. Comment was also sought on whether to refine the current list of permissible convention expenses, by deleting some examples and/or adding others.

The Commission also sought comment on whether BCRA requires that the list of permissible host committee and municipal fund expenses in former 11 CFR 9008.52 must be modified to ensure that convention committees will not receive "a contribution, donation, or transfer of funds or any other thing of value \* \* \* that are not subject to the limitations, prohibitions, and reporting requirements of (FECA)." 2 U.S.C. 441i(a)(1). In many of the transactions contemplated by 11 CFR 9008.52(c)(1), host committees provide something of value to convention delegates, other attendees, press, local businesses, and the local community, but in these transactions the convention committee is a bystander, not a recipient of something of value. When a host committee provides, for example, a shopping and dining guide, to convention attendees, it is difficult to conclude that the convention committee received anything of value. One commenter advocated a variation on this approach.

In addition to the proposed substantive revisions, the NPRM proposed two alternative locations for the revised list of permissible host committee and municipal fund expenses located in former 11 CFR 9008.52(c)(1). The list of permissible convention committee expenses in 11 CFR 9008.7(a)(4) would have been affected by the proposed reorganization as well. The NPRM proposed either deleting the non-exhaustive list of thirteen permissible convention expenses that may be paid by convention committees, or in the

alternative retaining the list of permissible convention expenses but moving them to a new section.

With respect to the proposed substantive and structural changes, a number of commenters believed that the current regulations work well and are not in need of additional clarification. These commenters expressed concern that any changes to the list of permissible expenses this close to the 2004 election would be extremely disruptive, would invite confusion, and would interfere with the obligations that host committees have already agreed by contract to undertake for the 2004 national nominating conventions. In their opinion, no deficiencies in the current list that warrant either of the proposed alternative changes had been identified. A number of the commenters also stated that there was no indication that Congress, in enacting BCRA, intended to restrict or modify the range of permissible convention committee, host committee, and municipal fund expenses prior to BCRA.

After carefully considering the concerns raised by these commenters, the Commission has decided not to adopt any of the proposed substantive or structural revisions to the list of permissible convention committee, host committee and municipal fund expenses. The Commission is mindful of the potentially disruptive effect of modifying existing regulations regarding the expenses that may be paid by convention committees, host committees, and municipal funds in such close proximity to the 2004 conventions. See *Explanation and Justification for Public Financing of Presidential Primary and General Election Candidates*, 64 FR 49355, 49358 (Sept. 13, 1999) (declining to modify the existing list of permissible convention committee and host committee expenses "given that the party committees have already entered into contractual agreements with the sites selected"). Accordingly, the list of permissible host committee and municipal fund expenses will remain in 11 CFR 9008.52. The list is substantively identical to that in current 11 CFR 9008.52(c)(1), however, as explained above, it will be re-designated as 11 CFR 9008.52(b) in light of other changes to section 9008.52.

With respect to the reorganization of permissible convention expenses in 11 CFR 9008.7(a)(4), the Commission is persuaded that it should retain the current non-exhaustive list of permissible convention expenses. In addition, rather than relocating the list to two different paragraphs in a new section, the Commission has decided to

keep the list intact in paragraph (a)(4) of 11 CFR 9008.7. The Commission concludes that the list of permissible convention expenses has worked reasonably well in practice. The Commission also concludes that the proposed changes would not add sufficient clarity or precision to justify the possible confusion and disruption they may engender at a time when preparations for the 2004 conventions are well advanced, and further concludes that none of the proposed changes are required by BCRA.

#### *Definition of "Local" Businesses, Labor Organizations, Other Organizations, and Individuals*

The NPRM proposed to eliminate the requirement, in former 11 CFR 9008.52(c)(1) and 11 CFR 9008.53(b)(1), that only "local" businesses, labor organizations, other organizations, and individuals are permitted to make donations to host committees and municipal funds.

The NPRM sought comment on whether eliminating that restriction would make it more feasible for smaller or mid-sized cities to host a Presidential nominating convention. Comment was also sought on two alternative proposals. Under the first alternative proposal, the locality requirements in former 11 CFR 9008.52(c)(1) and (c)(2) and former 11 CFR 9008.53(b)(1) and (b)(2) would have been retained, but modified to permit only those donations made by "individuals who maintain a local residence or who work for the local office of a business, labor organization, or other organization." Under the second alternative approach, the locality restrictions in both 11 CFR 9008.52(c)(1) and 11 CFR 9008.53(b)(1) would have been revised to permit donations only from those individuals who have a local residence.

Most of the commenters who addressed this issue favored deletion of the locality requirement. They pointed out that the physical location of a business is a poor indicator of the extent of a company's commercial interests in a particular geographic region, especially in light of the increasingly global nature of the economy. These commenters believed the restriction frustrated the ability of host committees to raise funds for the legitimate purpose of promoting the host city. They argued that deleting this restriction would make it easier for smaller cities, without large local business communities, to bid successfully for a future convention.

These commenters also maintained that donors to host committees and municipal funds are motivated by legitimate commercial considerations or

by civic pride, not by political considerations. They contended that many businesses that do not maintain an office in or near the convention city nevertheless have a legitimate commercial interest in supporting large-scale events such as conventions in the host city, such as developing business in the convention city or showcasing their products to a prominent national audience. They pointed out that many corporations also make sizeable donations to host committees for other large-scale events such as host committees for the Super Bowl and the Olympics. One commenter suggested that the motive of those making donations to host committees is irrelevant because such donors have no control over how the host committee spends the funds.

On the other hand, a different commenter opposed the Commission's proposal to delete the locality requirement in 11 CFR 9008.52(c)(1) and 11 CFR 9008.53(b)(1), expressing the view that the locality restriction already was too permissive and should not be eliminated.

After careful consideration of the viewpoints expressed by the commenters on this issue, the Commission has decided to eliminate the locality requirement from 11 CFR 9008.52 and 11 CFR 9008.53. The Commission is persuaded that this restriction no longer serves a meaningful purpose because the disbursements that host committees and municipal funds are permitted to make are consistent with the narrow purpose of promoting commerce in, and the suitability of, the convention city. The Commission notes that the requirement that donors be local has resulted in reliance on Metropolitan Areas to draw difficult and seemingly arbitrary distinctions in specific cases. Accordingly, under the revised rules at 11 CFR 9008.52(b) (host committees) and 11 CFR 9008.53(a) (municipal funds), businesses, labor organizations, other organizations, and individuals are permitted to donate funds or make in-kind donations to host committees and municipal funds, regardless of their geographic locations.

#### *11 CFR 9008.53—Receipts and Disbursements of Municipal Funds*

As discussed in greater detail above, the NPRM proposed to eliminate many of the differences in the manner that the Commission's regulations treat host committees and municipal funds. (See Explanation and Justification for 11 CFR 9008.50, above.) One of these differences was that municipal funds were subject to certain fundraising

requirements that did not apply to host committees. Former 11 CFR 9008.53(b)(1)(i) and (ii) provided that neither the municipal fund itself nor the donations the municipal fund received or solicited could be restricted to use in connection with a particular convention. Host committees were not subject to these fundraising restrictions.

These disparate requirements limited the ability of host committees and municipal funds to raise funds in concert with one another. The NPRM acknowledged that the restrictions on municipal fund fundraising were based on Commission decisions in Advisory Opinion ("AO") 1982-27 and AO 1983-29. Comment was sought on deleting these requirements on municipal funds. In the alternative the NPRM proposed retaining the restrictions and clarifying the appropriate standard for determining whether a municipal fund itself, or the funds it receives, are impermissibly restricted to the Presidential nominating convention.

No commenters addressed this topic. The Commission has concluded that the former restrictions serve little or no purpose, while, at the same time, they unnecessarily hamper the ability of host committees and municipal funds to undertake joint fundraising activities. Accordingly, the Commission has decided to eliminate the restrictions on municipal fund fundraising in former 11 CFR 9008.53(b)(1)(i) and (ii).

The NPRM also proposed eliminating the requirement, in 11 CFR 9008.53(b)(1), that only "local" businesses, labor organizations, other organizations, and individuals are permitted to make donations to municipal funds. For the reasons stated above, the Commission has decided to eliminate this limitation on donations to municipal funds as well as host committees. See Explanation and Justification for 11 CFR 9008.52.

#### *11 CFR 9008.55—Funding for Convention Committees, Host Committees and Municipal Funds*

The Commission is adopting a new §9008.55 to explain the application of BCRA to convention committees, host committees, and municipal funds. This new regulation should be viewed in the overall context of the legal structure of public financing and the development of the Commission's regulatory approach regarding the role of host committees and municipal funds.

The national committees of both major and minor political parties are entitled to receive public funds to defray their expenses incurred in connection with a Presidential nominating convention under 26 U.S.C.

9008(b). Major party committees may receive an inflation-adjusted payment from the Presidential Election Campaign Fund for their national nominating conventions. 26 U.S.C. 9008(b)(1).<sup>4</sup> For the 2004 conventions, the major party committees received \$14,880,000 in July 2003 and are entitled to receive an additional payment in 2004 for an inflation adjustment, subject to all applicable requirements.<sup>5</sup> A national committee of a major party may not make expenditures related to the convention that exceed the expenditure limitations, which are equal to the full amount of the payment to major parties. 26 U.S.C. 9008(d). Thus, the major party convention committees that accept public funding may not receive any contributions, as defined in 2 U.S.C. 431(8), that would count towards their expenditure limit if they accepted the full Federal payment.

#### *Development of Commission Rules on Host Committees and Municipal Funds*

As mentioned in the discussion of 11 CFR 9008.50, above, the Commission has historically allowed host committees and municipal funds to raise and spend money for activities related to conventions. The NPRM provided a detailed history of the development of the Commission's policy in this area. Although a convention committee is precluded from receiving contributions, the Commission has held that host committees and municipal funds may solicit and receive funds because such funds "are not politically motivated but are undertaken chiefly to promote economic activity and good will of the host city." *Explanation and Justification for 1977 Amendments to the Federal Election Campaign Act of 1971*, H.R. Doc. No. 95-44, 136 (1977).

Similarly, the Commission has allowed donations to these entities from sources prohibited from making contributions under 2 U.S.C. 441b, because such donations are "sufficiently akin to commercial transactions to fall outside the scope of that prohibition." *Explanation and Justification of Presidential Election Campaign Fund and Federal Financing of Presidential*

<sup>4</sup> Minor party committees may receive a proportional amount of that payment based on the number of votes the party's candidate received in the last presidential election compared to the average number of votes received by the major party candidates. 26 U.S.C. 9008(b)(2). No candidate (other than the major party candidates) received a sufficient number of votes in the 2000 presidential general election to provide his or her party with minor party status in 2004.

<sup>5</sup> In 2000, the Democratic and Republican National Committees each received \$13,512,000 for their national nominating convention.

*Nominating Conventions*, 44 FR 63036, 63037–38 (Nov. 1, 1979).

The Commission has repeatedly endorsed the use of these funds for convention-related activities. Recent testimony on behalf of the 2004 host committees amply supports the Commission's long-held view that "businesses and organizations that donate to municipal funds are motivated by commercial and civic reasons, rather than election-influencing purposes." *Explanation and Justification of Presidential Election Campaign Fund and Federal Financing of Presidential Nominating Conventions*, 59 FR 33606, 33615 (June 29, 1994).

#### Application of BCRA's Non-Federal Funds Provisions to Convention Committees, Host Committees and Municipal Funds

Title I of BCRA includes several provisions potentially applicable to Presidential nominating convention financing. Under BCRA, "[a] national committee of a political party \* \* \* may not solicit, receive, or direct to another person a contribution, donation, or transfer of funds or any other thing of value, or spend any funds, that are not subject to the limitations, prohibitions, and reporting requirements of (FECA)." 2 U.S.C. 441i(a)(1). BCRA also prohibits officers and agents of the national party committees and entities that are "directly or indirectly established, financed, maintained, or controlled" by national party committees from soliciting, receiving, directing, or spending such non-Federal funds. 2 U.S.C. 441i(a)(2).

BCRA prohibits national party committees, their officers and agents, and entities directly or indirectly established, financed, maintained, or controlled by them from raising any funds for, or making or directing any donations to, certain tax exempt organizations. 2 U.S.C. 441i(d). This prohibition extends only to organizations that are described in section 501(c) of the Internal Revenue Code of 1986 and that are exempt from taxation under section 501(a) of such Code (or that have submitted an application for determination of tax exempt status under such section) ("501(c) organizations") and that make "expenditures or disbursements in connection with an election for Federal office (including expenditures or disbursements for Federal election activity)." *Id.*

BCRA also prohibits Federal candidates and officeholders, their agents, and entities directly or indirectly established, financed, maintained, or

controlled by or acting on behalf of one or more Federal candidate or officeholder from soliciting, receiving, directing, transferring, or spending funds in connection with an election for Federal office that do not comply with the limitations, prohibitions, and reporting requirements of FECA. 2 U.S.C. 441i(e)(1)(A). With respect to fundraising for non-profit organizations, BCRA provides two exceptions. Under the exception relevant here, BCRA permits Federal candidates and officeholders to make "general solicitations" of funds on behalf of organizations described in section 501(c) of the Internal Revenue Code, other than entities whose principal purpose is to conduct certain types of Federal election activity (including voter registration, voter identification, and get-out-the-vote activity), where the solicitations do not specify how the funds will or should be spent. 2 U.S.C. 441i(e)(4)(A).<sup>6</sup> Convention committees, host committees, and municipal funds are unlikely to engage in these types of Federal election activity.

#### 11 CFR 9008.55(a)—Convention Committees Are Subject to 2 U.S.C. 441i(a)(1)

Convention committees are, as a matter of law, entities directly established, financed, maintained, or controlled by national party committees. The Commission's regulations at 11 CFR 9008.3(a)(2) require national party committees to "establish a convention committee which shall be responsible for conducting the day to day arrangements and operations of that party's Presidential nominating convention." In addition, under 11 CFR 9008.3(a)(2), convention committees are required to receive the national party's entitlement to public funds and are responsible for making "[a]ll expenditures on behalf of the national committee for convention expenses." Typically, convention committees list the national party committees as an affiliated committee on their Statements of Organization.

Convention committees are also "agents" of the national party committees. Under the Commission's definition of "agent," a principal cannot be held liable for the actions of an agent

<sup>6</sup> BCRA also permits Federal candidates and officeholders to make "specific solicitations" on behalf of organizations described in Section 501(c) of the Internal Revenue Code, where the entities' principal purpose is to conduct certain Federal election activities or where the solicitation is "explicitly to obtain funds" for certain Federal election activities. 2 U.S.C. 441i(e)(4)(B). Such "specific solicitations" may only be made to individuals in amounts not exceeding \$20,000 per calendar year. *Id.*

unless (1) the agent has actual authority, (2) the agent is acting on behalf of the principal, and (3), with respect to national party committees, the agent is soliciting, directing, or receiving any contribution, donation or transfer of funds on behalf of the national party committee. 11 CFR 300.2(b). Given that a convention committee is authorized by law to receive the national party committee's convention funds, this aspect of their relationship is sufficient to make the convention committee an agent of the relevant national party committee under 11 CFR 300.2(b).

The NPRM proposed that BCRA's ban in 2 U.S.C. 441i(a)(1) on national parties soliciting, receiving, directing, and spending funds that do not comply with the source prohibitions and amount limitations should apply to convention committees by operation of 2 U.S.C. 441i(a)(2) and 11 CFR 300.10(c). One of the national party committees commenting on this proposal agreed that convention committees are required by law to be established by national party committees, which triggers 2 U.S.C. 441i(a)(2). No other commenter addressed this issue.

The Commission concludes that as a matter of law convention committees are subject to 2 U.S.C. 441i(a)(1) and 11 CFR 300.10(a) by operation of 2 U.S.C. 441i(a)(2) and 11 CFR 300.2(b), (c) and 11 CFR 300.10(c). Accordingly, under new 11 CFR 9008.55(a), all convention committees established pursuant to 11 CFR 9008.2(a)(2) are subject to the national party committee prohibitions in 11 CFR 300.10(a).

#### 11 CFR 9008.55(a)—Donations From Host Committees and Municipal Funds to Convention Committees

The Commission sought comment on whether BCRA bars convention committees from accepting many of the in-kind donations typically provided by host committees and municipal funds. The current rules on permitted expenditures of host committees and convention committees overlap, which reflects the fact that some host committee disbursements are for goods or services related to the conduct of a convention, and not merely the promotion of their cities. *See, e.g.*, revised 11 CFR 9008.52(b)(5), discussed above. There was no consensus among the commenters on this issue.

Several commenters argued that there is no language in BCRA that compels or even anticipates changes to the long-standing regulations regarding convention financing. Some commenters also emphasized the non-political nature of host committee activities and that nothing in BCRA

requires or justifies the Commission to alter its conclusion that donations to host committees are commercially, not politically, motivated. According to some commenters, the provision of goods and services by a host committee has never been considered an in-kind contribution, and BCRA did not amend the statutory definition of in-kind contribution in 2 U.S.C. 431(8)(A)(i). A commenter also pointed out that another provision of BCRA repealed certain Commission regulations. Because Congress did not similarly address the convention financing regulations, its silence is "a conclusive indication that there was no Congressional intent that the Commission modify these regulations in any way," according to this commenter. One commenter argued that BCRA's prohibitions in 2 U.S.C. 441(a) are limited to national party committees, their agents, and any entity that is established, financed, maintained, or controlled by the national party committees. In this commenter's view, host committees do not constitute any of these covered persons, so host committees should be permitted to continue accepting and using non-Federal funds to pay for certain convention related costs.

Other commenters advocated for the exact opposite position, citing BCRA's unqualified prohibition on the national party committees' accepting any non-Federal funds. These commenters construed both FECA and BCRA to prohibit a convention committee from accepting in-kind contributions from a host committee funded by corporate donations. These commenters also contended that conventions have become vehicles for the infusion of massive amounts of non-Federal funds into both political parties and to their candidates and officeholders. Another commenter argued that the changes to the Commission's host committee regulations in 1977, 1979, 1994, and 1999 make continued reliance on the original justification unwarranted. More than 1,100 timely, essentially identical, comments that the Commission received by e-mail expressed support for the use of tax dollars to fund party conventions "precisely so that parties may turn away other sources of inappropriate funds."

For many of these same reasons, a petition for rulemaking sought the repeal or revision of the Commission's regulations that permit host committees to accept corporate and labor organization funds and to use these funds for expenses incurred in conducting a nominating convention.

One commenter presented data that it claimed challenged some of the

assumptions upon which the Commission's host committee rules are based. This commenter argued that the tremendous escalation of private contributions to finance host committees, traced over the course of several conventions, is inconsistent with the assumptions that the host committee and municipal fund exception to the expenditure limit is a "very narrow exception" and that such donations are not politically motivated. However, the commenter also documented that party leaders at the State and local level have been active in raising funds for conventions held in their cities to nominate candidates of the opposing party.

Other commenters challenged the data and conclusions drawn by this commenter. They argued that the increase in corporate funding reflects a general trend of increasing corporate sponsorship for large-scale civic events. A decreased willingness or ability of State and local governments to assist endeavors of this scale was also cited as a potential explanation for rising private donations.

The Commission's consideration of these issues begins with consideration of BCRA's language. Nothing in the text of BCRA, however, expressly addresses convention financing.

The Commission then looked to BCRA's legislative history on these issues. In light of the sparse and inconclusive legislative history, the NPRM sought comment as to whether Congress intended BCRA to change the rules for convention financing, and it cited the very few statements on this topic made during the Senate's consideration of BCRA. For example, Senator Mitch McConnell said the bill "will end national party conventions as we have known them." 148 Cong. Rec. S2122 (daily ed. Mar. 20, 2002).

Only two commenters addressed these remarks. One noted that the Supreme Court and other courts have found the views of legislative opponents to be an unreliable guide to the construction of a statute, citing *National Labor Relations Board v. Fruit & Vegetable Packers, Local 760*, 377 U.S. 58, 66 (1964); *Bryan v. United States*, 525 U.S. 384, 196 (1998) (quoting *Schwegman Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394-95 (1951)); and *Illinois Commerce Comm'n v. Interstate Commerce Comm'n*, 879 F.2d 917, 923 n. 47 (D.C. Cir. 1989). The only other commenter to address these remarks stated that they show that Congress understood that BCRA's national party and Federal candidate provisions would prohibit non-Federal funds in relation to Presidential nominating conventions.

Because of the scarcity of comment indicating the pre-enactment intent of those who wrote or voted for the bill, the Commission affords little weight to the single passing comment made in the waning hours of floor debate. See *NLRB v. Fruit & Vegetable Packers, Local 760*, 377 U.S. 58, 66 (1964) (noting that legislative opponents, "[i]n their zeal to defeat a bill, \* \* \* understandably tend to overstate its reach").

BCRA's principal sponsors in Congress did not file comments in response to the NPRM in this rulemaking. However, in comments filed in the Non-Federal Funds rulemaking, the sponsors did address convention financing. The Commission declines to rely on a single post-enactment statement in a separate rulemaking that unspecified "tight restrictions" exist as a basis to determine that BCRA effectively prohibits a major source of funding for the Presidential nominating conventions.

In considering whether BCRA bars convention committees from accepting in-kind donations from host committees and municipal funds, the Commission considered several other factors as well. Title I of BCRA, entitled "Reduction of Special Interest Influence" and the cornerstone of BCRA, begins with the prohibition on national party committees. BCRA, sec. 101(a), 116 Stat. at 82. Presidential nominating conventions are the only publicly funded endeavors of a national party committee. Underlying the convention public funding program is an elaborate statutory regime, 26 U.S.C. 9008, which Congress created. Moreover, Members of Congress often play substantial roles in Presidential nominating conventions. In fact, since 1996, all Democratic Members of Congress have served as automatic delegates to their party's convention, according to one of the commenters.

The Commission's regulations on host committees have been in effect since the earliest days of the Commission. Despite other changes to the host committee regulations, the Commission has consistently maintained that donations of funds to host committees are, as a matter of law, distinct from other donations by prohibited sources in that they are motivated by a desire to promote the convention city and hence are not subject to the absolute ban on corporate contributions in 2 U.S.C. 441b. This conclusion is buttressed by the fact that frequently members of the opposite political party have played prominent and active roles in convention host committees. For example, in 2000 David L. Cohen, a

longtime aide to Ed Rendell (who was then mayor of Philadelphia, and now is the Democratic Governor of Pennsylvania), chaired the host committee for the Republican National Convention. Mr. Rendell was also actively involved in the 2000 Philadelphia host committee's activities. In addition, Noelia Rodriguez, former Deputy Mayor to Mayor Richard Riordan, and now Press Secretary for First Lady Laura Bush, served as Executive Director of the Los Angeles host committee for the 2000 Democratic National Convention. Furthermore, the co-chair of the host committee for the 1996 Democratic National Convention in Chicago was Richard Notebaert, who has been a major contributor to Republican candidates and to the Republican Party. The fact that historically members of the opposite political party have played key roles in convention host committees strongly supports the Commission's conclusion that host committee activity is motivated by a desire to promote the convention city and not by political considerations. While it is always difficult to interpret Congressional silence, the Commission does note that BCRA specifically repealed another of the Commission's regulations, BCRA, sec. 214(b), 116 Stat. at 94, and yet did not similarly repeal or otherwise address the Commission regulations on convention financing. Congress has also declined other opportunities to disapprove of the Commission's regulations regarding host committees. These regulations were submitted to Congress in 1977, 1994, and 1999, and Congress has not taken action to invalidate the regulations. In those regulations, one of only two subparts is devoted to host committees and municipal funds, 11 CFR part 9008, subpart B, which provides host committees a legal prominence in the regulatory structure as well.

Courts have recognized that when it is not clear whether statutory amendments affect past agency interpretations, agencies are left with their ordinary ability to interpret the law as amended, subject to deferential judicial review. *See, e.g., Chisholm v. FCC*, 538 F.2d 349, 366 (D.C. Cir. 1976) (noting court's obligation to defer to agency's interpretation even if it is not the only interpretation permissible). Thus, the Commission must decide whether to maintain its interpretation of 2 U.S.C. 441b and 26 U.S.C. 9008(d) and extend it to 2 U.S.C. 441i(a) or to overturn the regulatory system governing convention financing.

In light of all of these specific circumstances described above—the

absence in BCRA of an express reference to conventions, the dearth of legislative history on the subject of convention financing, the prominence of conventions for the parties, the role of Members of Congress in convention activities, the extensive, existing regulations for convention financing, and the Commission's long-standing regulatory position regarding host committee funds, which has never been repudiated by Congress—the Commission declines to interpret the general prohibitions in 2 U.S.C. 441i(a) to eliminate the Commission's discretion to interpret 2 U.S.C. 441b, 441i(a), and 26 U.S.C. 9008(d) to permit the financing regime established by its rules in 11 CFR part 9008.

In considering whether to maintain the current convention financing system, the Commission evaluated the relationship between the convention committee and the localities hosting the convention. This relationship is established by an arms-length agreement negotiated by independent actors. There is keen competition among cities to host conventions, and on more than one occasion, cities have sought the conventions of both major national parties. The highly detailed contract underlying this relationship calls for the city, its host committee, its municipal fund, or some combination of the three to provide very specific facilities and services to the convention committee in exchange for the convention committee agreement to bring the Presidential convention to that city instead of any other. In turn, the city and region receive a significant economic benefit from the commerce that directly results from the convention.

For these reasons, the Commission concludes that convention committees may continue to receive in-kind donations from host committees and municipal funds of the convention expenses described in 11 CFR 9008.52. The Commission is adopting new 11 CFR 9008.55(a), stating in part that convention committees may accept in-kind donations that are in compliance with 11 CFR 9008.52 or 9008.53 from host committees or municipal funds. The Commission emphasizes that this interpretation is limited to the unique circumstances of Presidential nominating convention financing.

*11 CFR 9008.55(b)—Historically, Host Committees and Municipal Funds Are Not "Agents" of National Party Committees*

BCRA's ban on national parties soliciting, receiving, directing, transferring and spending non-Federal funds also applies to "agents" of

national party committees. In the Non-Federal Funds Final Rules, the Commission defined an "agent," for purposes of 11 CFR part 300, as "any person who has actual authority, either express or implied \* \* \* to solicit, direct, or receive any contribution, donation, or transfer of funds" on behalf of a national committee of a political party. 11 CFR 300.2(b)(1)(i). Section 300.2(b)(1) therefore requires a fact-specific determination of the nature of any authority conferred by a national party committee.

The NPRM sought comment on whether host committees and municipal funds satisfy the definition of "agents" under 11 CFR 300.2(b)(1) with respect to the national political party committees or their convention committees. Comment was also sought on whether host committees and municipal funds should be treated as *per se* agents of national party committees. Such an approach would have limited permissible funds for a host committee or municipal fund to funds subject to FECA's limitations, prohibitions, and reporting requirements, regardless of how the host committees and municipal funds function in practice, and regardless of their actual relationship with the national party committees. An alternative approach would have treated host committees and municipal funds as *per se* not agents of national party committees and, therefore, not subject as a matter of law to 2 U.S.C. 441i(a)(2) or 11 CFR 300.10(c)(1), no matter how such host committees and municipal funds actually operate or interact with the national party committees. The commenters were divided on these issues.

Some commenters argued that host committees are independent from convention committees and should therefore not be considered agents of convention committees. Both host committees for the 2004 Presidential nominating conventions for the two major parties assured the Commission that their sole purpose was to encourage commerce in their cities and project a favorable image of their cities to the convention attendees. Counsel to one host committee explained that the committee conducts its own fundraising by its own staff and consultants, without national party committee participation. Counsel to the other host committee stated that the committee does not raise funds on behalf of the national party committee holding its convention in that city. Conversely, other commenters would treat host committees as agents. One commenter reasoned that because host committees raise funds to pay for convention

expenses, they are in essence raising funds for the convention committee, which would make host committees agents under 11 CFR 300.2(b)(1)(i).

The Commission has decided that the regulatory definition of "agent" of a national committee of a political party in 11 CFR 300.2(b)(1) sufficiently addresses the issue of when a host committee will be considered an agent of a national committee of a political party. It provides for a fact-specific determination, rather than a *per se* rule applicable to all host committees and municipal funds. Accordingly, the Commission has decided to adopt a new provision, 11 CFR 9008.55(b), simply stating that host committees and municipal funds are not agents of national party committees, except as provided in 11 CFR 300.2(b)(1).

The Commission's experience is that host committees typically do not have authority to solicit, direct, or receive any contribution, donation, or transfer of funds on behalf of the national committees of political parties. Thus, as long as host committees and convention committees conduct their affairs as they have in the past, host committees will not be considered agents of convention committees. National party committees, convention committees, and host committees should look to 11 CFR 300.2(b)(1) for guidance on under what circumstances a host committee would be an agent of a national party committee or convention committee. In effect, this approach amounts to a presumption that host committees and municipal funds are not agents of the national party committee. Such a presumption could be rebutted by a showing that the conditions of §300.2(b)(1)(i) or (ii) are satisfied by the relationship of a particular host committee and convention committee. If a particular host committee or municipal fund were to become an "agent" of a national party committee, then it, like the national party committee itself, would be prohibited from soliciting, receiving, directing, or spending non-Federal funds by operation of 2 U.S.C. 441i(a)(1) and (2) and 11 CFR 300.10(a) and (c)(1).

*11 CFR 9008.55(c)—Historically, Host Committees and Municipal Funds Are Not Entities "Directly or Indirectly Established, Financed, Maintained, or Controlled" by National Party Committees*

The prohibitions on national party committees under BCRA also apply to entities that are "directly or indirectly established, financed, maintained, or controlled" by a national party committee. 2 U.S.C. 441i(a)(2); 11 CFR

300.10(c)(2). As noted above, 11 CFR 300.2(c) provides a non-exhaustive list of factors that may be considered in determining whether an entity is directly or indirectly established, financed, maintained, or controlled by a national party committee. 11 CFR 300.2(c). *See Non-Federal Funds Final Rules*, 67 FR at 49084 ("the affiliation factors laid out in 11 CFR 100.5(g) properly define 'directly or indirectly established, financed, maintained, or controlled' for purposes of BCRA"). The resolution of this issue requires a fact-specific evaluation of the circumstances.

The NPRM sought comment on whether host committees and municipal funds satisfy the factors listed in 11 CFR 300.2(c) and should, therefore, be considered entities that are directly or indirectly established, financed, maintained, or controlled by the national party committees holding conventions in the relevant cities. The NPRM posed the corresponding *per se* alternatives on this question as it did on the agency issue, discussed above.

The commenters divided on this issue as well. Some commenters contended that the party committees control or coordinate with host committees so closely that host committees are affiliates of the national party committees. One commenter argued that the rules should not presume the organizations affiliated, but should instead rely on the factors listed in 11 CFR 300.2(c). This commenter also noted that two of those factors nearly always exist between the host committee and the convention committee. The two factors are that the party committees provide funds in a significant amount to host committees by virtue of selecting their cities to host the conventions, 11 CFR 300.2(c)(1)(vii), and that the party committees and host committees have a similar pattern of receipts that indicate a formal or ongoing relationship under 11 CFR 300.2(c)(1)(x). Other commenters disagreed; they argued that host committees are not directly or indirectly established, financed, maintained, or controlled under 11 CFR 300.2(c)(1). Both host committees cited detailed facts about their organizations to show that their organizations' relationship with the respective national party committees do not satisfy the factors listed in the definition of "directly or indirectly establish, finance, maintain, or control." 11 CFR 300.2(c)(2)(i) through (x).

The Commission has decided that the regulatory definition of "directly or indirectly establish, finance, maintain or control" by a national committee of a political party in 11 CFR 300.2(c)(1)

sufficiently addresses the issue. Section 300.2(c)(1) provides for a fact-specific evaluation of particular circumstances, rather than a *per se* rule applicable to all host committees and municipal funds. The Commission has decided therefore to adopt a new provision, 11 CFR 9008.55(c), stating that host committees and municipal funds are not directly or indirectly established, financed, maintained, or controlled by a national political party, except as provided in 11 CFR 300.2(c).

The Commission's experience is that host committees typically would not meet the affiliation test established in 11 CFR 300.2(c)(1). Thus, so long as host committees and convention committees conduct their affairs as they have in the past, host committees will not be considered directly or indirectly established, financed, maintained, or controlled by a national party committee. In effect, this approach amounts to a presumption that host committees are not directly or indirectly established, financed, maintained, or controlled by a national party committee. Such a presumption could be rebutted by a showing that the conditions of 11 CFR 300.2(c) are satisfied by the relationship of a particular host committee or municipal fund and a national party committee.

*11 CFR 9008.55(d)—National Party Solicitations of Funds for Host Committees and Municipal Funds*

BCRA prohibits national party committees, their officers and agents acting on their behalf, and entities directly or indirectly established, financed, maintained, or controlled by them from soliciting any funds for, or making or directing any donations to, certain tax-exempt organizations. 2 U.S.C. 441i(d). These prohibitions extend to funds solicited or directed for only certain tax-exempt organizations described in 26 U.S.C. 501(c) that make "expenditures or disbursements in connection with an election for Federal office (including expenditures or disbursements for Federal election activity)" and organizations described in 26 U.S.C. 527. *Id.*; 11 CFR 300.2(a).

A "disbursement" is defined, in 11 CFR 300.2(d), as "any purchase or payment made by: (1) A political committee; or (2) any other person, including an organization that is not a political committee, that is subject to (FECA)." FECA defines "election" to include nominating conventions. 2 U.S.C. 431(1)(B). The Commission's previous treatment of permissible host committee and municipal fund disbursements has been that they are not "contributions or expenditures"

under 2 U.S.C. 441b because they are not made “in connection with” an election. However, BCRA reaches beyond expenditures and requires only “disbursements in connection with an election” to make a 501(c) organization subject to the prohibition in 2 U.S.C. 441i(d)(1). In light of these definitions and the previous treatment of host committees and municipal funds, the Commission sought comment on whether, as a matter of law, host committees and municipal funds make “disbursements” “in connection with an election for Federal office,” even as they adhere to the requirements in current 11 CFR 9008.52.

Two commenters stated that because host committees have not been considered political committees, host committees cannot be considered to make “disbursements in connection with an election.” However, the Commission notes that FECA defines “political committee,” in part, as any committee that receives contributions or makes *expenditures* aggregating in excess of \$1,000 during a calendar year. 2 U.S.C. 431(4). The definitions of “contribution,” 2 U.S.C. 431(8)(A)(i), and “expenditure,” 2 U.S.C. 431(9)(A)(i), both include the requirement that the transaction be “for the purpose of influencing any election for Federal office.” Thus, the determination that host committees are not political committees does not resolve the question of whether they make “*disbursements in connection with a Federal election.*”

One commenter also asserted that, in litigation challenging BCRA, the Commission explained that 2 U.S.C. 441i(d) reflected Congressional recognition that some tax-exempt organizations engage in campaign activities to benefit Federal candidates. The commenter suggested that because this purpose is not relevant to host committees, the Commission should not consider solicitations for host committees subject to 2 U.S.C. 441i(d). The Commission disagrees. The passage of the government’s brief quoted by this commenter did not purport to be an exhaustive list of activities prohibited by 2 U.S.C. 441i(d). Indeed, later in the same brief, the wider effect of the provision was made clear: “Moreover, donations solicited or directed by national party committees to benefit tax-exempt organizations that conduct political activities create the same potential problems of corruption that other unregulated fund-raising by the national party engenders. \* \* \*” Brief of Defendants, at 118, *McConnell v. FEC*, 251 F. Supp. 2d 176 (D.D.C. 2003);

*prob. juris. noted*, 123 S.Ct. 2268 (U.S. 2003).

The Commission has determined that host committee and municipal fund disbursements related to convention activities are not “disbursements in connection with an election” sufficient to trigger the prohibition in 2 U.S.C. 441i(d) with respect to those host committee and municipal funds that are 501(c) organizations. Therefore, the Commission is not promulgating a new rule at 11 CFR 9008.55(d) in order to apply 11 CFR part 300 to the solicitation of funds for those host committees or municipal funds that have 26 U.S.C. 501(c) status. Further, host committees and municipal funds therefore will not be required to make any certification pursuant to 11 CFR 300.11(d) or 300.50(d).

The Commission concluded that consistent with the longstanding rationale for not treating host committee and municipal fund activity “in connection with” an election for purposes of 2 U.S.C. 441b, it should similarly apply the “in connection with” language at 2 U.S.C. 441i(d). As noted earlier, the overriding purpose of permissible host committee and municipal fund activity is commercial or civic in nature.

Even though the restrictions of 441i(d) may not apply, national party agents will still be bound by the broad proscription at 2 U.S.C. 441i(a). This will mean that such agents may not solicit any funds not subject to the limits, prohibitions, and reporting requirements of the statute. In effect, such agents will be able to solicit funds that would be subject to the contribution limit for “any other political committee” (*i.e.*, \$5,000 per year pursuant to 2 U.S.C. 441a(a)(1)(C), (2)(C)), but no donations from prohibited sources could be solicited, and the funds would have to be reported by the recipient host committee or municipal fund.

#### 11 CFR 9008.55(e)—Candidate Solicitations for Host Committee and Municipal Funds

BCRA also prohibits Federal candidates and individuals holding Federal office<sup>7</sup> from soliciting,

<sup>7</sup> An “individual holding Federal office” is defined as “an individual elected to or serving in the office of President or Vice President of the United States; or a Senator or a Representative in, or Delegate or Resident Commissioner to, the Congress of the United States.” 11 CFR 300.2(o). It does not include those “who are appointed to positions such as the secretaries of departments in the executive branch, or other positions that are not filled by election.” Non-Federal Funds Final Rules, 67 FR at 49,087. This definition is identical to the

receiving, directing, transferring, or spending funds in connection with an election for Federal office unless the funds are subject to the limitations, prohibitions, and reporting requirements of FECA. 2 U.S.C. 441i(e)(1)(A). BCRA extends these prohibitions to agents acting on their behalf of either Federal candidates or individuals holding Federal office, as well as to entities directly or indirectly established, financed, maintained, or controlled by such candidates or officeholders. 2 U.S.C. 441i(e)(1).

BCRA creates two exceptions from that general rule in 2 U.S.C. 441i(e)(4), only one of which is relevant to Presidential nominating conventions. BCRA allows Federal candidates, individuals holding Federal office, and individuals who are agents acting on behalf of either to make “general solicitations,” without source or amount restrictions, for a 501(c) organization, other than organizations whose “principal purpose” is to conduct certain Federal election activity, so long as the solicitation does not specify how the funds will or should be spent. 2 U.S.C. 441i(e)(4)(A). The “Federal election activity” referenced in this exception is voter registration within 120 days of a Federal election and voter identification, GOTV activities, or generic campaign activity conducted in connection with an election in which a candidate for Federal office appears on the ballot. 2 U.S.C. 441i(e)(4)(A) (*citing* 2 U.S.C. 431(20)(A)(i) and (ii)).

The principal purpose of a host committee or municipal fund is to promote and generate commerce in the host city; its principal purpose is not to conduct the specified types of Federal election activity that would trigger the exception to the rule permitting general solicitations for 501(c) organizations. Therefore, under 2 U.S.C. 441i(e)(4)(A), Federal candidates and officeholders may make general solicitations of funds on behalf of any host committee or municipal fund that is a 501(c) organization where such solicitations do not specify how the funds will or should be spent and where the Federal candidates and officeholders do not establish, finance, maintain, or control these organizations.<sup>8</sup>

The final rule at 11 CFR 9008.55(e) is modified from the proposed rule to state that Federal candidates and officeholders and their agents may make

definition of “Federal officeholder” in 11 CFR 113.2(c).

<sup>8</sup> In AO 2003–12, the Commission determined that the exceptions in 2 U.S.C. 441i(e)(4) do not apply to a section 501(c) organization established, financed, maintained, or controlled by a Federal candidate or officeholder, or agent of either.



general solicitations on behalf of host committees or municipal funds that are section 501(c) organizations, provided the solicitations do not specify how the funds will or should be spent and provided that the solicitations are otherwise permitted by 2 U.S.C. 441i(e)(4)(A).<sup>9</sup>

### Other Convention-Related Issues

#### A. Goods and Services Provided to Convention Committees by Commercial Vendors

The NPRM also sought comment on proposed changes to the rule on convention committees receiving goods and services from commercial vendors, 11 CFR 9008.9. Some commenters argued that nothing in BCRA should change the conclusion that the provision of these goods and services is permissible. In contrast, a different commenter argued that this exception violates both FECA and BCRA, citing many of the same reasons some commenters used to argue that the Commission's current host committee and municipal regulations are contrary to FECA and BCRA. For the same reasons stated above regarding the host committee and municipal fund exception, the Commission has determined that no change to 11 CFR 9008.9 is required by BCRA.

#### B. Offsets

The NPRM sought comment on whether BCRA required any reevaluation of the practice of permitting convention committees to "offset" in-kind contributions received from host committees that are deemed impermissible in post-convention audits. Under this practice, rather than require repayment of 100% of these receipts, the convention committee is permitted to offset the impermissible in-kind contributions with convention committee expenditures that could have been paid by the host committee. The Commission has concluded that under BCRA convention committees may continue to receive in-kind donations from host committees and municipal funds provided the in-kind donations are in accordance with 11 CFR 9008.52

<sup>9</sup> The new regulations at 11 CFR 300.52 and 300.65 could be read to restrict a broader range of general solicitations made on behalf of 501(c) organizations than does the related provision of BCRA, 2 U.S.C. 441(e)(4)(A). Specifically, the regulations appear to bar general solicitations on behalf of 501(c) organizations for any election activity, including certain types of Federal election activity; section 441(e)(4)(A), however, bars only those general solicitations on behalf of 501(c) organizations whose principal purpose is to conduct these specified types of Federal election activity. The regulations should be read as barring only those solicitations covered by the statute.

and 9008.53. See new 11 CFR 9008.55(a). Therefore, the Commission has also determined that convention committees may offset host committee or municipal fund impermissible in-kind contributions. Accordingly, no revisions need be made in the final rules.

#### C. Private Hospitality Events

The NPRM also sought comment on whether BCRA requires regulation of private hospitality events held by corporations, labor organizations, and other groups in the convention city during the convention. Such events are typically held in locations outside the convention venue, but often in close proximity to it. Convention attendees including delegates, Federal candidates and officeholders, and political party officials are often invited to these events, and such individuals frequently speak or are recognized at such events.

Four commenters addressed this issue, and they all agreed that BCRA does not require regulatory language regarding these hospitality events. One of the commenters noted that these events could be subject to regulation on some other basis, if, for example, the events were also fundraisers for a political committee under the Act.

The Commission has concluded that BCRA does not change the determination that the temporal and geographic proximity of these events to Presidential nominating conventions does not subject the events to regulation under FECA solely because of that proximity. The Commission notes that FECA regulation could be triggered nonetheless by such events if, for example, a Federal political committee holds a fundraising event.

#### D. Host Committee Audits

The NPRM sought comment on whether the examination and audit authority set forth in current 11 CFR 9008.54 has an adequate statutory basis under FECA or the Fund Act. This section mandates audits of all host committees. The Fund Act gives the Commission the authority "to conduct such examinations and audits (in addition to the examinations and audits required by section 9007(a)) \* \* \* as it deems necessary to carry out the functions and duties imposed on (the Commission) by this chapter." 26 U.S.C. 9009(b).

When the predecessor to the current version of 11 CFR 9008.54 was promulgated in 1979, the Commission determined it was necessary to audit host committees because host committees are allowed to accept donations to defray convention

expenses and, therefore, the Commission had a responsibility to insure that such donations "were properly raised and spent." *Explanation and Justification for Presidential Election Campaign Fund and Federal Financing of Presidential Nominating Conventions*, 44 FR 63036, 63038 (Nov. 1, 1979).

Two commenters argued that the Commission does not have statutory authority to conduct routine audits of host committees. In their view, the Commission's routine audit authority is limited to candidates and committees that receive public funds, and is meant to ensure that such candidates and committees do not misspend those public funds. One commenter stated that routine audits of host committees are unwarranted because host committees do not receive public funds. Both commenters favored repealing 11 CFR 9008.54.

After considering the comments, the Commission has concluded that it possesses authority to audit host committees on a routine basis. The Commission notes that the audit authority in 26 U.S.C. 9009(b) is broad. That section grants the Commission the power "to conduct such examinations and audits" as it deems necessary to carry out the responsibilities with which the Commission has been charged. Unlike 26 U.S.C. 9007(a), which requires the Commission to conduct routine audits of publicly-financed candidates and convention committees, section 9009(b) does not require the Commission to audit host committees. It does, however, grant the Commission the discretion to do so. Given the increasingly vital role that host committees play in financing the national nominating conventions, the Commission continues to find it necessary to conduct routine host committee audits to ensure that such entities do not provide "anything of value" to convention committees, except as expressly permitted in 11 CFR 9008.52(b).

#### E. Municipal Fund Audits

While the NPRM proposed to eliminate many of the discrepancies in the manner that the Commission's regulations applied to host committees and municipal funds, it did not propose extending the routine audit provision applicable to host committees, 11 CFR 9008.54, to municipal funds as well.

While the NPRM did not propose to conduct routine audits of municipal funds, it indicated that the Commission retains the authority to conduct a detailed and thorough review of municipal fund transactions if such an

examination is necessary in particular circumstances. Comment was sought on whether, because municipal funds are already subject to government oversight, as well as for the sake of comity between Federal and State or local agencies, the Commission should decline to revise 11 CFR 9008.54 to extend its audit authority to cover municipal funds. One commenter opposed subjecting municipal funds to automatic audits.

The Commission has decided not to extend the audit authority set forth in 11 CFR 9008.54 to municipal funds because routine, full-scale audits of municipal funds are unnecessary, given that municipal funds' financial transactions are already subject to careful scrutiny by local authorities. The Commission does, however, retain the authority to conduct detailed and thorough examinations of municipal fund transactions and accounts related to the convention when warranted.

#### **11 CFR Part 9031—Scope**

##### *11 CFR 9031.1—Scope*

The Commission is making two technical amendments to this section to update the references to its other regulations.

#### **11 CFR Part 9032—Definitions**

##### *11 CFR 9032.9—Qualified Campaign Expenses*

Section 9032.9 defines qualified campaign expenses. One technical correction is being made in § 9032.9(c). Previously, this rule stated that expenditures incurred “before the beginning of the expenditure report period” are qualified campaign expenses if they meet the requirements of 11 CFR 9034.4(a), which addresses, *inter alia*, testing the waters expenses prior to the date an individual becomes a candidate. The reference to “expenditure report period” was an error because that term applies to general election candidates. See 11 CFR 9002.12. This reference is being changed to “prior to the date the individual becomes a candidate,” the same wording used in 11 CFR 9034.4(a)(2), governing testing the waters expenses. No commenters addressed this topic.

#### **11 CFR Part 9033—Eligibility for Payments**

##### *11 CFR 9033.1—Candidate and Committee Agreements*

Similar to the technical amendment to 11 CFR 9003.1(b)(8) discussed above, the Commission is revising § 9033.1. The reference to 11 CFR parts 100–116 in paragraph (b)(10) is amended to

encompass all the regulations up to and including 11 CFR part 400 among the regulations with which candidates and their authorized committees agree to comply.

##### *11 CFR 9033.11—Documentation of Disbursements*

The changes to § 9033.11 follow the changes to 11 CFR 9003.5 discussed above.

#### **11 CFR Part 9034—Entitlements**

##### *11 CFR 9034.4—Use of Contributions and Matching Payments; Examples of Qualified Campaign Expenses and Non-Qualified Campaign Expenses*

Section 9034.4, which concerns the use of contributions and matching payments for qualified and non-qualified campaign expenses, is being amended in several respects. First, the heading for this section is being modified by adding the words “examples of qualified campaign expenses and nonqualified campaign expenses” to assist the reader in locating these examples.

##### *11 CFR 9034.4(a)(3)(i)—Definition of “Winding Down Costs”*

The Commission is revising 11 CFR 9034.4 to move provisions from paragraph (a)(3)(i) to the new rule on winding down costs in 11 CFR 9034.11, discussed below. Revised § 9034.4(a)(3)(i) indicates that winding down costs that satisfy new 11 CFR 9034.11 are qualified campaign expenses.

##### *11 CFR 9034.4(a)(3)(ii)—Private Contributions Received After DOI*

The Commission is also revising 11 CFR 9034.4(a)(3)(ii) to clarify the rules governing ineligible primary election Presidential candidates who continue to campaign after their dates of ineligibility. Previously, paragraph (a)(3)(ii) provided that these candidates may use “contributions received after” the DOI to continue to campaign. However, 11 CFR 9034.5(a)(2)(i) provides that a candidate's cash on hand on the NOCO Statement should include “all contributions dated on or before” the DOI, whether or not submitted for matching. Thus, contributions that were dated on or before the DOI but received after the DOI were subject to both rules, and the previous rules did not make clear how they should be treated. Section 9034.4(a)(3)(ii) is being revised to eliminate the overlap by stating that only a contribution that is dated after a candidate's DOI may be used to continue to campaign.

In addition, the Commission is deleting the sentence in former § 9034.4(a)(3)(ii) that stated: “The candidate shall be entitled to receive the same proportion of matching funds to defray net outstanding campaign obligations as the candidate received before his or her date of ineligibility.” In practice, each submission for matching funds is reviewed individually; thus, a candidate receives a different proportion of matching funds for each submission. Deleting this sentence makes clear that candidates will continue to receive matching funds based on the Commission's review of each matching fund submission, rather than on the proportion of matching funds the candidate received for any previous submission. Revised 11 CFR 9034.4(a)(3)(ii) also includes a new reference to 11 CFR 9034.11. No comments were received regarding these changes to § 9034.4(a)(3)(ii).

##### *11 CFR 9034.4(a)(3)(iii)*

As discussed below in the explanation and justification of 11 CFR 9035.1(c)(1), paragraph (a)(3)(iii) is being moved from § 9034.4 to § 9035.1(c)(1).

##### *11 CFR 9034.4(a)(5)—Gifts and Bonuses*

The NPRM sought comment on revising 11 CFR 9034.3(a)(5) regarding gifts and bonuses paid to campaign employees, consultants, and volunteers. For the reasons explained above in the explanation and justification for newly redesignated 11 CFR 9004.4(a)(6), the Commission has decided to make a similar change to 11 CFR 9034.4(a)(5).

##### *11 CFR 9034.4(a)(6)—Convention Expenses of Ineligible Candidates*

The NPRM proposed adding a new section 11 CFR 9034.4(a)(6) to reflect its decision in AO 2000–12 permitting certain convention expenses incurred by Presidential primary candidates after their dates of ineligibility to be considered qualified campaign expenses. In AO 2000–12, the Commission permitted ineligible candidates to treat as qualified campaign expenses certain costs related to meetings and events at the national nominating conventions subject to some restrictions. Specifically, the Commission allowed costs related to meetings and receptions to thank delegates and supporters to be treated as qualified campaign expenses, but did not also allow travel costs related to such events to be considered qualified campaign expenses. The Commission also permitted ineligible candidates to incur qualified campaign expenses related to specific fundraising events at

the national nominating conventions, as well as travel expenses to attend such events.

One commenter agreed that the expenses in AO 2000–12 should be treated as qualified campaign expenses, and suggested that the rule should be extended to cover most convention expenses of primary candidates incurred after DOI. This commenter asserted that reasonable convention expenses are in connection with a candidate's campaign for nomination both for candidates who continue to campaign past their eligibility date and those who withdraw or suspend their campaigns. Candidates who withdraw or suspend their campaigns might restart their campaigns depending on changed circumstances. The commenter suggested a ceiling of \$100,000 to \$250,000 for such expenses.

The Commission is adding new 11 CFR 9034.4(a)(6) to provide a simpler approach in which a candidate may treat expenses related to the national nominating convention of up to \$50,000 as qualified campaign expenses. This rule recognizes that ineligible candidates have interests in participating in their parties' national nominating convention related to their candidacy for the nomination. Thus, it is reasonable to allow candidates to use public funds to participate in their party's national nominating convention. This bright line rule avoids the necessity of considering whether convention expenses are in fact necessary for fundraising activities or are genuinely to thank those who assisted the campaign as required by AO 2002–12.

The new rule in 11 CFR 9034.4(a)(6) provides that an ineligible candidate may treat up to \$50,000 in expenses related to the national nominating convention as qualified campaign expenses. Any costs reasonably related to the candidate's attendance, participation or activities at the Presidential nominating convention would be a qualified campaign expense under the new rule, including travel and lodging costs of the candidate, his or her family, and campaign staff, consultants and volunteers to attend the convention, the costs of hosting receptions and events, and other convention-related costs. Any amount in excess of \$50,000 will not be considered a qualified campaign expense and may be subject to repayment. The \$50,000 cap is based on the Commission's experience as to how much is reasonably necessary for this purpose. Apart from the \$50,000 cap, any candidate who is in a deficit position after DOI may incur additional qualified campaign expenses related to

fundraising events at the national nominating conventions to retire campaign debt.

#### *11 CFR 9034.4(b)(3)—Non-Qualified Campaign Expenses*

Revisions are being made to 11 CFR 9034.4(b)(3) to more clearly state that winding down costs addressed in paragraph (a)(3) of this section are qualified campaign expenses. The revised rules also indicate that certain convention expenses permitted under paragraph (a)(6) of this section are qualified campaign expenses. As proposed in the NPRM, § 9034.4(b)(3) would have also referred to continuing to campaign costs; however, in the final rules, it does not refer to continuing to campaign costs because those costs are not qualified campaign expenses.

#### *11 CFR 9034.10—Pre-Candidacy Payments by Multicandidate Political Committees Deemed In-kind Contributions and Qualified Campaign Expenses; Effect of Reimbursement*

In the NPRM, the Commission proposed adding language at 11 CFR 9034.10 to treat certain expenses incurred by multicandidate committees as in-kind contributions benefiting publicly funded Presidential candidates. Similar language was proposed at 11 CFR 110.2(l) to reach a similar result where multicandidate committees incur such expenses benefiting Presidential candidates who are not publicly funded. These provisions were designed to address situations where unauthorized political committees closely associated with a particular individual planning to run for President defray costs that are properly treated as in-kind contributions unless reimbursed by the Presidential campaign.

Two commenters addressed this topic. One commenter generally supported the proposed rule, but noted that it did not address similar issues in Congressional campaigns. The other commenter suggested that in this context even polling that did not mention a particular Presidential candidate should be covered.

The Commission is adopting final rules that use much of the approach set forth in the proposed rules. The final rules, though, narrow their focus so they are clearer in application and better targeted to the situations that truly present the potential for evasion of the contribution and spending limits. The final rules also provide a mechanism for a Presidential campaign to achieve compliance with the law by promptly reimbursing the multicandidate committee. If there is full and timely reimbursement, the multicandidate

political committee's payment is not to be treated as an in-kind contribution for either entity, but rather the reimbursement is an expenditure of the candidate's campaign and is a qualified campaign expense of the candidate's campaign (in the case of a publicly funded candidate).

One distinction built into the final rules is that they cover only payments by multicandidate political committees before the individual benefiting actually becomes a *candidate* within the meaning of 2 U.S.C. 431(2) and 26 U.S.C. 9032(2). The Commission's experience is that after an individual becomes a candidate for the Presidency by virtue of receiving more than \$5,000 in contributions or making more than \$5,000 in expenditures, and taking into account the "testing the waters" allowances at 11 CFR 100.72 and 100.131, the candidate's principal campaign committee or other authorized committee would pay the types of expenses involved here. The focus of the final rules, therefore, is those expenses paid by multicandidate political committees prior to actual candidacy under the law, *i.e.*, during the "testing the waters" phase and before. For other situations not addressed in new § 110.2(l) or § 9034.10, including when expenditures are paid for by multicandidate committees after candidacy, the general provisions describing in-kind contributions at 11 CFR 100.52(a) and (d), 109.20, 109.21, 109.23, and 109.37 would apply. The covered expenses in the new rules at 11 CFR 110.2(l) and 9034.10 would not trigger candidacy themselves, but would count as contributions in-kind and/or qualified campaign expenses if and when the individual benefiting becomes a candidate, including by operation of 11 CFR 100.72(b) and 100.131(b).

Both final rules narrow the types of expenses covered in the proposed rules by qualifying each. For example, only polling expenses that involve measuring the favorability, name recognition, or relative support of the person who becomes a Presidential candidate are subject to the rules. General polling solely regarding issues would not be covered. Compensation and office expenses would be covered only to the extent they relate to activities in states where Presidential primaries, caucuses, or preference polls are yet to be conducted.

Both final rules also narrow the coverage to situations where there is some involvement of the benefiting candidate. It became apparent that there may be some multicandidate political committee payments of the type described that are undertaken without

any involvement of the individual who becomes a Presidential candidate. For example, some multicandidate committees might independently undertake polling to test the relative support of various potential candidates for President in order to make decisions about which candidate to support with contributions or independent expenditures. Other committees might be setting up staffed offices in States that will be conducting Presidential primaries, but have no involvement whatsoever with a person who becomes a Presidential candidate.

The Commission decided to refer to standards already in the regulations to reach only those expenditures that properly should be treated as in-kind contributions and/or qualified campaign expenses. Thus, the final rules cover only those situations where the benefiting candidate "accepted or received" the goods or services, "requested or suggested" the goods or services, had "material involvement" in the decision to provide the goods or services, or was involved in "substantial discussions" about providing the goods or services. See 11 CFR 106.4(b); 109.21(b)(2), (d)(1), (d)(2), (d)(3). This approach was driven, in part, by the fact that the Commission did not in these rules want to try to differentiate between various types of multicandidate committees, such as those commonly referred to as "leadership PACs." However, without some nexus with a particular benefiting candidate, the rules would reach too broadly. As a practical matter, the final rules probably will have the most impact on so called "leadership PACs," but other types of multicandidate political committees will be covered as well.

If reimbursement is made by the Presidential campaign within 30 days after the benefiting candidate becomes a candidate, the multicandidate political committee's payment will not be deemed an in-kind contribution. Because some such payments may fall within the last 30 days of a multicandidate committee's and a Presidential candidate's reporting period, and before the reimbursement has been made, the question of whether to initially report the payment as a contribution in-kind arises. Because of the nature of these expenses, and the fact that treatment as an in-kind contribution does not arise unless and until the benefiting Presidential aspirant legally becomes a candidate, the Commission will not require the payment to be treated as an in-kind contribution under these circumstances. After the reimbursement opportunity has passed, though (30 days after

candidacy), the payment must be treated as an in-kind contribution, and any such payments not previously reported as such would have to be so reported through the amendment process.

Please note that nothing in these final rules alters the application of 11 CFR 109.21(b)(2) or 109.37(a)(3) or (b). The Commission also notes that these final rules in no way address situations where the Commission determines that the multicandidate political committee and the candidate's principal campaign committee are affiliated under 11 CFR 100.5(g)(4).

#### *11 CFR 9034.11—Winding Down Costs*

This new section addresses winding down costs for primary election candidates. For the reasons stated in the explanation and justification for new 11 CFR 9004.11, which addresses winding down costs for general election candidates, the Commission is adopting a similar approach to winding down costs of primary candidates in new § 9034.11, with some differences described below.

#### *11 CFR 9034.11(a)—Definition of "Winding Down Costs"*

The definition of "winding down costs" in new § 9034.11(a) is similar to the definition in § 9004.11(a) except that the costs are related to the candidate's campaign for nomination rather than the candidate's general election campaign. New § 9034.11(a) includes a revised version of the first sentence of previous 11 CFR 9034.4(a)(3)(i) to clarify that winding down costs are limited to costs associated with the termination of political activity related to seeking that candidate's nomination for election. This change helps to clarify that primary election campaign winding down expenses are legally distinct from general election campaign winding down expenses.

#### *11 CFR 9034.11(b)—Winding Down Limitation*

In the NPRM the Commission proposed placing a 5% amount limitation on winding down costs for primary election candidates similar to the limit proposed for general election candidates. One commenter opposed the 5% limit, noting that in the 2000 election cycle a number of candidates would have exceeded this limitation. The commenter viewed winding down costs as fixed costs. The commenter stated that media costs become an increasingly larger percentage of a campaign's expenditures as money becomes available, while the percentage of expenditures for accounting, legal services, office space and supplies

diminishes because such costs are often provided at a fixed price for the anticipated duration of the service and are not directly dependent upon whether the campaign is active or closing down.

As it did with the 2000 general election candidates, the Commission compared the approximate winding down costs of the primary election candidates to the proposed winding down limitations. Ten primary candidates received matching funds in 2000. Three of these primary candidates' winding down limitations would have been calculated based on the maximum winding down limitation. Of these, only one would have exceeded the proposed winding down limitation, having spent approximately 8% of the expenditure limitation. Six primary candidates' winding down limitations would have been calculated based on their expenditures. Of these, four candidates would have exceeded the 5% winding down limitation proposed in the NPRM, with winding down costs ranging between approximately 13% and 42% of their expenditures. One candidate who would have been subject to the minimum winding down limitation of \$100,000 spent substantially less than that amount. Thus, of the ten publicly funded primary committees in the 2000 Presidential elections, five committees had winding down expenses that would have exceeded the proposed limitation. One of these had sufficient funds in its related GELAC that could have paid the excessive winding down expenses. The other four committees would have received less matching funds after their DOIs.<sup>10</sup>

The Commission also considered the results of the hypothetical application to the 2000 candidates of a 10% winding down limitation for primary election candidates. This percentage would allow most campaigns, particularly small campaigns of unsuccessful candidates, to pay necessary winding down costs without exceeding the winding down limitation, and ensure that only campaigns with extraordinarily high winding down expenses exceed the winding down limitation. Although four of the ten 2000 election cycle primary candidates would have spent more than a 10% limitation, two of those candidates spent close to that amount (13% and 14%) and might have been able to adjust their expenditures to fall within the new

<sup>10</sup>Of course, this comparison is hypothetical, and the committees might have curbed certain expenses had the new rules been in effect.

limitation; only two candidates spent far in excess of a 10% limitation.

Accordingly the Commission is adopting a winding down limitation for primary election candidates in new § 9034.11(b). Specifically, the new primary election winding down limitation is (1) 10% of the overall expenditure limitation; or (2) 10% of the total of the candidate's expenditures subject to the overall expenditure limitation as of the candidate's DOI, plus the candidate's expenses exempt from the overall expenditure limitation as of DOI, such as fundraising, legal and accounting compliance expenses and other expenses. Like general election candidates, all primary candidates may spend a minimum of \$100,000 on winding down costs.

This limitation only applies to the use of public funds or a mixture of public and private funds for winding down costs. The final rule allows a primary candidate who is in a deficit position at the DOI to pay for winding down costs in excess of the limitation after the committee's accounts no longer contain any matching funds. See 11 CFR 9038.2(b)(2)(iii)(B) and (iv). Primary candidates who have a surplus at the DOI will be required to make a surplus repayment to the United States Treasury before they may use private funds for winding down costs in excess of the limitation. See 11 CFR 9038.3(c). The rule restricts the expenses used to calculate the winding down limitation to the period prior to a primary candidate's DOI to prevent candidates from increasing their winding down limitation by spending more for winding down expenses.

In practice, the winding down limitation for primary candidates with large campaigns would be the maximum winding down limitation: 10% of the overall expenditure limitation. Currently, the primary election expenditure limitation is equal to \$36,480,000, so the 10% limit would equal \$3,648,000.<sup>11</sup> For primary candidates with smaller campaigns, the winding down limitation would equal 10% of their expenses prior to DOI. For purposes of calculating the amount of the winding down limitation based on a primary candidate's expenses, a candidate's expenses include both disbursements and accounts payable as of the DOI for the same categories of expenses that are listed above in the discussion of the general election candidate limitation at 11 CFR

9004.11(b). In addition, taxes on non-exempt function income such as interest, dividends and sale of property are exempt from a primary candidate's overall expenditure limitation. See 11 CFR 9034.4(a)(4).

After a primary candidate's accounts no longer contain public funds, including after making any required surplus repayments, private funds may be used to pay for expenses in excess of the winding down limitation without resulting in non-qualified campaign expenses. In addition, as discussed above, the new rule will permit a candidate's GELAC to pay the primary committee's winding down expenses under certain conditions.

One commenter argued that the Commission has the authority to create a fund for primary candidates like the GELAC and could provide clear guidance as to the permissible expenses from the fund, which would create an incentive for candidates to adopt strong compliance procedures. The Commission disagrees. Fully funded general election candidates may not accept private contributions; thus, the GELAC allows such candidates to accept contributions, but only for limited legal and compliance costs. See 11 CFR 9003.3. General election candidates are also permitted some expenses that do not count toward the expenditure limitations and the GELAC is a source of funds for these exempt expenditures. Primary candidates may accept private contributions. To the extent that primary candidates are not in a surplus position and no longer retain any matching funds in their accounts, they may use private contributions for winding down expenses in excess of the new restrictions without having to make a repayment for non-qualified campaign expenses. Thus, a separate compliance fund is not necessary for primary candidates. In addition, there is no basis for permitting primary candidates to have more than one contribution limitation for the same election by allowing a separate contribution limitation for a legal defense fund or legal and accounting compliance fund.

For these reasons, the Commission does not believe that a new primary legal defense fund for enforcement matters and other legal proceedings or a primary legal and compliance fund similar to a GELAC is necessary or appropriate for primary election candidates.

#### *11 CFR 9034.11(c)—Allocation of Primary and General Election Winding Down Costs*

The rules in new 11 CFR 9034.11(c) on the allocation of primary and general election winding down costs follow the new rules in 11 CFR 9004.11(c).

#### *11 CFR 9034.11(d)—Candidates Who Run in Both Primary and General Elections*

The Commission is revising its rules to clarify which costs constitute primary winding down costs for candidates who participate in both the primary and general elections. The Commission's rules in former 11 CFR 9034.4(a)(3)(i) and (iii) allowed only candidates who do not accept public funding in the general election to begin to incur winding down costs and to treat winding down expenses for salary, overhead and computer costs as 100% compliance costs beginning immediately after their DOI. The former rule, however, did not expressly address the situation of a candidate who runs in both the primary and general elections and does not receive public funding for the general election. In the 2000 election, questions arose about how to treat administrative expenses incurred during the general election expenditure report period by a publicly funded primary election candidate who also ran in the general election but did not receive public funds for the general election.

The Commission believes that candidates who are actively campaigning in the general election should not be considered to be terminating political activity and winding down their primary campaigns. Candidates who run in the general election, whether or not they receive public funds for that election, must wait until 31 days after the general election, which is the first day after the end of the expenditure report period for publicly financed general election candidates, before they may begin to incur and pay winding down expenses or allocate them as 100% compliance expenses. Consequently, the new rule at 11 CFR 9034.11(d) expressly applies without regard to whether candidates' general election campaigns are publicly funded. Expenses incurred during the expenditure report period for publicly funded general election candidates or the equivalent time period ending 30 days after the general election for other general election candidates, are general election expenses, rather than primary winding down costs. This rule prevents the use of primary matching funds for non-qualified expenses related to the

<sup>11</sup> Before the 2004 primary elections, the primary election expenditure limit under 2 U.S.C. 441a(b)(1)(A) is subject to an additional annual adjustment under 2 U.S.C. 441a(c).

general election. See 11 CFR 9032.9(a) and 9034.4(b). Although this revised rule may result in general election campaigns incurring a small amount of administrative costs related to terminating the primary campaign during the general election period, in practice, these expenses are offset by general election start up costs that are incurred and paid by the primary committee prior to the candidate's DOI. This approach is also consistent with the Commission's bright line rules for allocating expenses between primary and general campaigns at 11 CFR 9034.4(e), which allow some primary related expenses to be paid by the general election committee and *vice versa*.

One commenter believed that this approach addresses the danger of primary funds paying for general election activity but fails to address the situation where a candidate only receives public funds in the general election and could use primary campaign funds to defray general election expenses. The Commission does not agree that this is a problem because a candidate is not permitted to supplement the general election grant by paying general election expenses with primary funds.

New paragraph 11 CFR 9034.11(d) is based on former 11 CFR 9034.4(a)(3)(i) with certain revisions. The new rule at 11 CFR 9034.11(d) states that a candidate who runs in the general election must wait until the day following the date 30 days after the general election before using matching funds for primary winding down costs, regardless of whether the candidate receives public funds for the general election. This rule also clarifies that no expenses incurred prior to 31 days after the general election by candidates who run in the general election may be considered primary winding down costs or paid with matching funds. Other portions of former § 9034.4(a)(3)(i) are discussed below in the explanation and justification for 11 CFR 9035.1(c)(i).

#### **11 CFR Part 9035—Expenditure Limitations**

##### *11 CFR 9035.1—Campaign Expenditure Limitation; Compliance and Fundraising Exemptions*

Section 9035.1(a)(1) of the Commission's regulations implements the spending limit for primary election candidates and their authorized committees in 2 U.S.C. 441a(b)(1)(A). Section 9035.1(a)(2) prescribes how the amounts of expenditures attributed to the spending limits will be calculated. The NPRM proposed to clarify 11 CFR

9035.1(a) to provide guidance on the extent to which coordinated expenditures, coordinated communications, coordinated party expenditures, party coordinated communications and other in-kind contributions will count against the spending limits in § 9035.1(a)(1). The Commission has decided to adopt the proposed additions to the rules at 11 CFR 9035.1.

The Commission has generally treated the receipt of in-kind contributions by Presidential primary candidates as expenditures made by those candidates subject to the expenditure limitations and has included such in-kind contributions in the total amount of a candidate's expenditures subject to the limits in calculating repayments based on excessive expenditures. In one repayment determination arising from an audit of a 1988 candidate, the Commission concluded that in-kind contributions for testing-the-waters expenses from a multicandidate political committee associated with that candidate, which was considered his "leadership PAC," were subject to the candidate's state-by-state spending limits. The Commission considered in-kind contributions to be part of the mixed pool of public and private funds, and thus, these expenditures were included in calculating the amount in excess of the limitations subject to repayment. The final rules amend 11 CFR 9035.1(a) and 9038.2(b)(2) (discussed below) to reflect this approach.

In the BCRA rulemaking on coordinated and independent expenditures, the Commission defined the terms "coordinated," "coordinated communication," and "party coordinated communications" in 11 CFR 109.20, 109.21, and 109.37, respectively. See *Explanation and Justification for Final Rules on Coordinated and Independent Expenditures*, 68 FR 421 (Jan. 3, 2003). These rules also describe circumstances in which coordinated expenditures and coordinated communications are treated as in-kind contributions.

Under 11 CFR 109.21(b)(2) and 11 CFR 109.37(a)(3), some coordinated expenditures are made by a person or party committee, but are not received or accepted by a candidate. Specifically, expenditures that meet the conduct standards for a common vendor at 11 CFR 109.21(d)(4) or a former employee or independent contractor at 11 CFR 109.21(d)(5) are not treated as received or accepted by a candidate, unless the candidate, authorized committee, or their agent engages in the conduct described in 11 CFR 109.21(d)(1)

(request or suggestion), 11 CFR 109.21(d)(2) (material involvement), or 11 CFR 109.21(d)(3) (substantial discussion). Thus, only certain, specific actions taken by the candidate or the candidate's authorized committee or agents, as set forth in 11 CFR 109.21 and 11 CFR 109.37, result in the receipt or acceptance of an in-kind contribution arising from a coordinated communication or a party coordinated communication. Only in-kind contributions received or accepted by the candidate or authorized committee or agent are treated as expenditures made by the candidate. See 11 CFR 109.20(b) (requiring a candidate to report coordinated expenditures as expenditures); 11 CFR 109.21(b)(1) (requiring a candidate to report received or accepted coordinated communications as expenditures); 11 CFR 109.37(a)(3) (stating that candidates are not required to report as expenditures party coordinated communications that do not constitute received or accepted in-kind contributions).

The final rules add new paragraph (a)(3) to § 9035.1 to specify that coordinated expenditures pursuant to 11 CFR 109.20, coordinated communications pursuant to section 109.21, coordinated party expenditures, party coordinated communications pursuant to section 109.37, and in-kind contributions count against the expenditure limitations and are included in the total amount of a publicly funded candidate's expenditures subject to the limits. New 11 CFR 9035.1(a)(3) states that the Commission will attribute to a candidate's overall and state-by-state expenditure limitations the total of all: (1) Coordinated expenditures under 11 CFR 109.20; (2) coordinated communications under 11 CFR 109.21 that are in-kind contributions received or accepted by the candidate, authorized committee or agent; (3) coordinated party expenditures, including party coordinated communications under 11 CFR 109.37 that are in-kind contributions received or accepted by the candidate, authorized committee or agent and that exceed the coordinated party expenditure limitation at 11 CFR 109.32(a); and (4) other in-kind contributions received or accepted by the candidate, authorized committee or agent. This new paragraph is consistent with the Commission's general past practice in audits of treating in-kind contributions as expenditures by the recipient Presidential candidates and their authorized committees.

The phrase "receive or accept" in 11 CFR 9035.1 is consistent with the

terminology used in 11 CFR 109.21(b)(2), 11 CFR 109.23(a) and 11 CFR 109.37(a)(3) to ensure that any coordinated expenditures that are not "received or accepted" by a candidate do not count against that candidate's expenditure limitations. One commenter stated that limiting the rule to in-kind contributions that the candidate has received or accepted under 11 CFR part 109 is a common sense extension of the existing rules, which provide that a person may make an excessive in-kind contribution but the intended beneficiary will not violate the law unless the candidate or committee accepts or receives the contribution. This commenter stated that it is appropriate to apply the legal principle that liability is the consequence of one's own acts and not the acts of others to regulations governing whether a candidate has made expenditures in excess of the limitations. The Commission is limiting the new rule to in-kind contributions received or accepted by the candidate, authorized committee or agents to be consistent with the rules in 11 CFR part 109.

Additionally, new paragraph (a)(4) provides that the value of an in-kind contribution is the usual and normal charge for the goods and services provided.

The revised rule in 11 CFR 9035.1 does not specifically list the dissemination, distribution or republication of campaign material prepared by a candidate, which is governed by 11 CFR 109.23. Section 109.23(a) provides that the candidate who prepared the campaign materials does not receive or accept an in-kind contribution, and need not report an expenditure, unless the dissemination, distribution, or republication of campaign materials is a coordinated communication under 11 CFR 109.21 or a party coordinated communication under 11 CFR 109.37. Thus, the cost of such campaign materials would not count against the candidate's expenditure limitations unless the candidate receives or accepts them as in-kind contributions in the form of coordinated communications or party coordinated communications, as provided in 11 CFR 109.21 and 11 CFR 109.37, respectively. Because the revised rule at 11 CFR 9035.1(a)(3) specifically includes coordinated communications and party coordinated communications that are received or accepted, a reference to the republication of campaign materials is unnecessary.

The Commission also notes that 11 CFR 109.32(a)(4) provides that any

coordinated party expenditures made under § 109.32(a), which specifies the limitations for coordinated party expenditures in Presidential elections, do not count against the candidate's expenditure limitations. However, any party coordinated expenditures exceeding the 2 U.S.C. 441a(d)(2) party expenditure limitations would count against the candidate's expenditure limitations. Thus, the new rule in 11 CFR 9035.1(a)(3) does not adversely affect coordinated party expenditures because § 9035.1(a)(3) applies only to amounts in excess of the statutory limitations in 2 U.S.C. 441a(d)(2).

Although coordinated party expenditures are made in connection with the general election campaign of a Presidential candidate, they may be made prior to the date of the candidate's nomination, pursuant to 11 CFR 109.34. Any coordinated party expenditures that are in excess of the coordinated party expenditure limitation at 11 CFR 109.32(a) may be attributable to a Presidential primary candidate's expenditure limitations based on the "bright line" rules at 11 CFR 9034.4(e) for attributing expenditures between the primary and general election spending limitations.

#### *11 CFR 9035.1(c)(1)—Compliance Exemption*

Section 11 CFR 9035.1(c)(1) addresses the legal and accounting compliance exemption to the expenditure limitations. For greater clarity, the Commission is revising the rule to include a revised version of former 11 CFR 9034.4(a)(3)(iii), related to the treatment of certain winding down expenses as 100% compliance costs. The revised regulation provides that only candidates who do not run in the general election may treat 100% of salary, overhead and computer expenses as exempt compliance expenses immediately after their date of ineligibility. Candidates who run in the general election must wait until 31 days after the general election to treat these expenses as exempt compliance costs. For further discussion of the treatment of winding down costs for candidates who run in both the primary and general elections, see the explanation and justification for 11 CFR 9034.11(d) above.

#### *11 CFR 9035.1(c)(3)—Shortfall Bridge Loan Exemption*

During recent election cycles, the Presidential Primary Matching Payment Account has occasionally contained insufficient funds to fully pay all of the matching funds to which primary candidates were entitled on the dates

payments were due. *See generally* 26 U.S.C. 9037(b); 11 CFR 9036.4(c)(2), 9037.1, 9037.2. The delay or deficiency in matching fund payments has resulted in inconvenience and additional costs for candidates, such as additional costs for "bridge loans" to pay for their expenses until they received their full entitlement of matching funds several months later. Such expenses currently count against a candidate's overall expenditure limitation, reducing the amount the candidate may spend on other campaign activities.

To mitigate the effect of a potential shortfall on candidates, the Commission is creating a new "shortfall bridge loan exemption" from a primary candidate's overall expenditure limitation at new 11 CFR 9035.1(c)(3). The NPRM proposed a flat exemption of 5% of the amount of all delayed or deficient payments of matching funds to which the candidate is entitled. One commenter supported this concept but noted the difficulty in choosing a fair formula that would not favor candidates whose payments are delayed over those who are less dependent on public funds. The commenter argued that a candidate's expenditure limitation should not be raised significantly over that applicable to other candidates unless the amount accurately reflects costs actually incurred by the candidate.

Rather than the flat percentage proposed in the NPRM, the Commission has decided to base the new exemption on the amount of interest charges accrued during a shortfall period on all bridge loans obtained by a candidate if the candidate experiences any delay or deficiency in matching fund payments due to a shortfall. Under new 11 CFR 9035.1(c)(3), only loans secured or guaranteed by matching funds will be eligible for this exemption. The interest charges that are exempt from the expenditure limit are those that accrued during a shortfall period, which the new rule defines as beginning when the shortfall first impacts the candidate—the first payment date on which the candidate does not receive the entire amount of matching funds certified by the Commission. The shortfall period ends on the date the candidate receives the last of the matching funds to which the candidate is entitled or becomes ineligible to receive them because the Commission revises the amount it previously certified.

If a candidate experiences a delay or deficiency in matching fund payments, the candidate need not demonstrate that any bridge loan was necessitated by the deficiency in matching fund payments to claim this exemption. In practice, it is difficult to distinguish between the



costs of bridge loans that are a direct result of a shortfall in matching funds and other loan expenses because a shortfall in public funds may be only one of several reasons a candidate needs to obtain a bridge loan. The new rule also requires that the candidate must provide documentation demonstrating the amount of interest charged on all loans guaranteed or secured by matching funds.

Finally, the Commission is not creating a similar exemption for general election candidates because payments of public funds to general election candidates and conventions receive priority over matching funds payments. While there has been a shortfall in matching fund payments in previous election cycles, there has never been a shortfall in payments to general election candidates.

#### **11 CFR Part 9036—Review of Matching Fund Submissions and Certification of Payments by Commission**

##### *11 CFR 9036.1—Matching Fund Submission*

In 2000, the Commission revised its rules at 11 CFR 104.3 to require authorized committees to aggregate, itemize, and report all receipts and disbursements on an election-cycle basis rather than on a calendar-year-to-date basis. See *Explanation and Justification for the Rules Governing Election Cycle Reporting by Authorized Committees*, 65 FR 42619 (July 11, 2000). The new rules, which reflect a 1999 amendment to 2 U.S.C. 434(b), apply to reporting periods beginning on or after January 1, 2001. See Pub. L. 106–58, section 641, 113 Stat. 430, 477 (1999); *Announcement of Effective Date for the Rules Governing Election Cycle Reporting by Authorized Committees*, 65 FR 70644 (Nov. 27, 2000). Under 11 CFR 100.3(b), an election cycle begins on the first day after the date of the previous general election for the office the candidate seeks or on the date an individual becomes a candidate and ends on the date of the next general election for that office. The election cycle is thus four years or less for Presidential candidates.

The Commission's rules regarding threshold submissions for matching funds in 11 CFR 9036.1(b)(1)(ii) previously required candidates to submit a contributor list including occupation and name of employer information for contributions from individuals aggregating in excess of \$200 per calendar year. Section 9036.1(b)(1)(ii) is being revised to specify that the matching fund submission and recordkeeping

requirements include occupation and employer information for those individuals who contribute more than \$200 in an election cycle, rather than in a calendar year, to reflect the statutory change. One commenter noted that these changes are not controversial and aim to reconcile the statute and regulations.

##### *11 CFR 9036.2—Additional Submissions for Matching Fund Payments*

The changes to the rules on additional submissions for matching funds at 11 CFR 9036.2(b)(1)(v) follow the changes made to 11 CFR 9036.1 regarding threshold submissions.

#### **11 CFR Part 9038—Examination and Audits**

##### *11 CFR 9038.2(b)(4)—Technical Correction*

Under 11 CFR 9038.2(b)(4), the Commission may determine that the net income derived from an investment or other use of surplus public funds after a candidate's DOI, less Federal, State and local taxes paid on that income, shall be paid to the Federal Treasury. However, the word "taxes" was inadvertently dropped from that paragraph in the previous regulations. This word is being restored in the final rule.

#### **Other Candidate Issues**

##### *A. Candidate Salary*

The Commission recently revised its rules governing personal use of campaign funds at 11 CFR part 113 to implement BCRA's changes to 2 U.S.C. 439a. In that rulemaking, the Commission decided to allow certain campaign funds to be used for candidate salaries, including privately funded Presidential candidates, under certain conditions delineated at 11 CFR 113.1(g)(1)(i)(I). See *Explanation and Justification for the Rules Governing Disclaimers, Fraudulent Solicitation, Civil Penalties, and Personal Use of Campaign Funds*, 67 FR 76962, 76971–73 (Dec. 13, 2002). The Explanation and Justification for 11 CFR 113.1(g) indicated that a salary payment to a candidate from campaign funds is personal use if the salary payment is "in excess of the salary paid to a Federal officeholder—U.S. House, U.S. Senate, or the Presidency." 67 FR at 76972. The Commission noted that a candidate's salary does not constitute a qualified campaign expense under 11 CFR 9002.11 and 9032.9. *Id.*

Sections 9004.4(b)(6) and 9034.4(b)(5) state that payments made to a publicly funded candidate by the candidate's

general election or primary campaign committee, other than to reimburse funds advanced by the candidate, are non-qualified campaign expenses. In promulgating these rules in 1987, the Commission explained that "no payments may be made to the candidate from accounts containing public funds" except for reimbursements, and candidates "may not receive a salary for services performed for the campaign nor may a candidate receive compensation for lost income while campaigning." See *Explanation and Justification for the Rules on Public Financing of Presidential Primary and General Election Candidates*, 52 FR 20864, 20866 and 20870 (June 3, 1987).

The NPRM for these Final Rules indicated that the Commission was considering whether to revise 11 CFR 9004.4 and 9034.4 to allow publicly funded primary and general election Presidential candidates to receive salaries paid, in whole or part, with Federal funds, and to treat salary payments to candidates as qualified campaign expenses under similar conditions as those for salary payments to other Federal candidates at 11 CFR 113.1(g)(1)(i)(I).

There was no consensus among the commenters on this issue. One commenter cautioned that this is a policy issue best left to Congress, and it could have an adverse effect on the public financing system by depressing public participation in the tax check-off system. In addition, this commenter observed that it may not be logical to allow public funds to be used to pay for candidate salary but not for household expenses, mortgages and tuition for the candidate's family. Conversely, other commenters agreed with the proposal, noting that currently, incumbent Members of Congress, Presidents and Vice Presidents maintain their salaries while they are Presidential candidates, but some challengers might be unable to do so. Some commenters believed the proposal had sufficient safeguards and disclosure to prevent Presidential candidates from receiving a windfall from a campaign, while others saw a potential for abuse.

The Commission has decided to maintain its longstanding rule that payments out of public funds to a Presidential candidate, except for campaign expense reimbursements, are not qualified campaign expenses. Because public funds are involved, the Commission believes that this issue is a policy question that is best addressed by Congress. Therefore, the rules in 11 CFR 9004.4(b) and 9034.4(b) will continue to treat salaries paid out of public funds to

publicly funded candidates as non-qualified campaign expenses.

#### B. Media Travel Expenses

The Commission's rules at 11 CFR 9004.6 and 9034.6 establish procedures for authorized committees of Presidential primary and general election candidates to obtain reimbursement for transportation and other services that are provided to the news media and the Secret Service over the course of a campaign. These rules contain a non-exhaustive list of such services. Sections 9004.6(a)(3) and 9034.6(a)(3) state that Presidential campaign committees may seek reimbursement from the news media only for the billable items specified in the White House Press Corps Travel Policies and Procedures issued by the (White House Travel Office, in conjunction with the White House Correspondents' Association ("White House Travel Manual"). Expenses for which a publicly-funded committee receives no reimbursement are considered qualified campaign expenses, and, with the exception of those expenses relating to Secret Service personnel and national security staff, are subject to the overall expenditure limitation under 11 CFR 9004.6(a)(2) and 9034.6(a)(2).

In the 1996 campaign, some Presidential campaign committees incurred significant expenses to reconfigure campaign aircraft. The expenses included both interior work, such as equipment installation, and exterior work such as campaign logos. However, these expenses were not included in the *White House Travel Manual* for 1996, which has not changed to date. The NPRM in this rulemaking sought comment on whether the Commission should revise the rules to permit Presidential campaign committees to obtain reimbursement for aircraft reconfiguration expenses from the news media.

One joint comment submitted by 23 news organizations supported continued use of the *White House Travel Manual*. It also argued that most previous aircraft reconfigurations have been minor and for the convenience for the campaign, so that any cost sharing should be negotiated by the campaign and the press organizations. Another commenter stated that the *White House Travel Manual* does not address aircraft reconfiguration because the needs of the press have been taken into consideration when government aircraft are originally designed or reconfigured, but candidates who do not travel on government aircraft should be able to make the necessary changes to an

aircraft and seek press reimbursement. This commenter stated that the use of the *White House Travel Manual* to determine reimbursable expenses is generally a wise policy, but advocated a mechanism for candidates to seek exceptions to the general rule if the candidate can demonstrate that an expense was incurred at the request of and to accommodate the press.

The Commission has determined that the aircraft reconfiguration expenses are not suitable for a rule of general applicability particularly because any reconfiguration will likely involve an airplane to be used by many members of the press on many different flights over the life of the campaign. Accordingly, it would be quite difficult to determine the appropriate amount of any monetary payment at a point when neither the press corps nor the campaign staff can predict the number of flights or their costs. The advisory opinion process, however, might serve as the appropriate means for the Commission to consider any particular arrangement for the sharing of these one-time expenses. Consequently, 11 CFR 9004.6 and 9034.6 are not being revised.

#### C. In-Kind Contributions and Repayments

The NPRM proposed amending 11 CFR 9038.2(b)(2)(ii)(A), which concerns repayments based on expenditures in excess of a Presidential primary candidate's expenditure limitations. Section 9038.2(b) would have provided that in-kind contributions, coordinated expenditures, coordinated communications, coordinated party expenditures and party coordinated communications that count against a candidate's expenditure limitations must be included in the total amount of expenditures for purposes of calculating repayment determinations for expenditures in excess of the limitations.

One commenter urged the Commission to state whether it will seek repayment for primary expenditures in excess of the expenditure limitations.

On a related issue, the NPRM also proposed revisions to 11 CFR 9038.2(b)(2)(iii) that would have included both total deposits and in-kind contributions received or accepted by the candidate in the calculation of the repayment ratio for non-qualified campaign expenses. One commenter stated that this change is consistent with the statute and regulations and that the change would reduce repayment amounts.

The Commission has decided to make no changes to the regulation at 11 CFR

9038.2(b)(2), which currently requires publicly funded Presidential primary campaigns to make repayments on the basis of exceeding the Congressionally-mandated spending limits. The current rule is not being changed at this time because there is no consensus in favor of changing the regulation. *See also Notice of Disposition for the Rules Governing Public Funding of Presidential Primary Candidates—Repayments*, 65 FR 15273 (Mar. 22, 2000).

#### Regulatory Flexibility Act— Certification of No Effect Pursuant to 5 U.S.C. 605(b)

The Commission certifies that the attached final rules will not have a significant economic impact on a substantial number of small entities. The basis for this certification is that few small entities will be affected by these rules, which apply only to Presidential candidates, their campaign committees, national party committees, host committees, and municipal funds. Most of these are not small entities. Most of the Presidential campaigns and convention committees receive full or partial funding from the Federal Government, and are subsequently audited by the Commission. The Commission amends these rules every four years to reflect its experience in the previous Presidential campaign. These rules propose no sweeping changes, and are largely intended to simplify this process. Many expand committee options; several are technical; and others codify past Commission practice. Those few proposals that might increase the cost of compliance by small entities would not do so in such an amount as to cause a significant economic impact.

#### List of Subjects

##### 11 CFR Part 104

Campaign funds, Political committees and parties, Reporting and recordkeeping requirements.

##### 11 CFR Part 107

Campaign funds, Political Committees and parties, Reporting and recordkeeping requirements.

##### 11 CFR Part 110

Campaign funds, Political committees and parties.

##### 11 CFR Part 9001

Campaign funds.

##### 11 CFR Part 9003

Campaign funds, Reporting and recordkeeping requirements.

acceptable and unacceptable purpose descriptions to be reported by au APPENDIX CURRENT REGULATIONS WITH PREVIOUSLY DIFFERENT CITATIONS requires authorized committees, when itemizing certain disbursements for which reimbursements are required, to provide a brief explanation of the activity for which reimbursement is required. These provisions have been in Title 11 of the Code of Federal Regulations since 1980 and 1995, respectively, and were not affected by the recent statutory changes to the election cycle reporting requirements.

**Need for Correction**

As published, the final rules inadvertently omit two paragraphs describing information to be reported by authorized committees of Federal candidates.

All committees must report the purpose of itemized disbursements (i.e., those disbursements aggregating in excess of \$200). Omitted paragraph (A) contains examples of suitably specific purpose descriptions as well as examples of those descriptions that are unacceptably vague. This paragraph is inconsistent with the reporting of rules for unauthorized committees (committees other than candidate committees) in 11 CFR 104.3(b)(3).

Omitted paragraph (B) is used in administering the "personal use" rules in 11 CFR 113.1. Federal candidates are barred from using campaign funds for personal benefit. Paragraph (B) requires authorized committees of Federal candidates itemizing disbursements for which partial or total reimbursement is required under 11 CFR 113.1(g)(1)(iii)(C) or (D) to provide a brief explanation of the activity for which the reimbursement is made.

Section 801 of Title 5 of the United States Code requires Federal agencies to submit regulations to Congress. These regulations were submitted to the Speaker of the House of Representatives and the President of the Senate on November 26, 2001.

**Certification of No Effect Pursuant to 5 U.S.C. § 605(b) [Regulatory Flexibility Act]**

This correction will not have significant economic impact on a substantial number of small entities. The basis of this certification is that this correction only requires political committees to once again add information to the reports they are required to file. These regulations were in 11 CFR since 1980 and 1995, respectively, before being inadvertently omitted in 2000.

**List of Subjects in 11 CFR Part 104**

Campaign funds, Political committees and parties, Reporting and recordkeeping requirements.

Accordingly, 11 CFR part 104 is corrected by making the following correcting amendment:

**PART 104—REPORTS BY POLITICAL COMMITTEES**

1. The authority citation for part 104 continues to read as follows:

**Authority:** 2 U.S.C. 431(1), 431(8), 431(9), 432(i), 434, 438(a)(8), 438(b), 439a.

**§ 104.3 Contents of reports (2 U.S.C. 434(b), 439a).**

\* \* \* \* \*

2. In § 104.3 add the following paragraphs (b)(4)(i)(A) and (B):

- (b) \* \* \*
- (4) \* \* \*
- (i) \* \* \*

(A) As used in this paragraph, *purpose* means a brief statement or description of why the disbursement was made. Examples of statements or descriptions which meet the requirements of this paragraph include the following: dinner expenses, media, salary, polling, travel, party fees, phone banks, travel expenses, travel expense reimbursement, and catering costs. However, statements or descriptions such as *advance, election day expenses, other expenses, expenses, expense reimbursement, miscellaneous, outside services, get-out-the-vote and voter registration* would not meet the requirements of this paragraph for reporting the purpose of an expenditure.

(B) In addition to reporting the purpose described in paragraph (b)(4)(i)(A) of this section, whenever an authorized committee itemizes a disbursement that is partially or entirely a personal use for which reimbursement is required under 11 CFR 113.1(g)(1)(ii)(C) or (D), it shall provide a brief explanation of the activity for which reimbursement is required.

\* \* \* \* \*

Dated: November 26, 2001.  
**Danny L. McDonald,**  
*Chairman, Federal Election Commission.*  
[FR Doc. 01-29679 Filed 11-29-01; 8:45 am]  
**BILLING CODE 6715-01-P**

**FEDERAL ELECTION COMMISSION**

**11 CFR Part 111**

**[Notice 2001-18]**

**Extension to Administrative Fines**

**AGENCY:** Federal Election Commission.

**ACTION:** Final rule; revision of the sunset date.

Authorized committees. Paragraph (B) SUMMARY: The Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the expiration date in which the Federal Election Commission (hereinafter "the Commission") may assess civil money penalties for violations of the reporting requirements of section 434(a) of the Federal Election Campaign Act (hereinafter "the Act" or "FECA").

**DATES:** Effective on December 31, 2001.

**FOR FURTHER INFORMATION CONTACT:** Ms. Rosemary C. Smith, Assistant General Counsel, or Ms. Mai T. Dinh, Attorney, 999 E Street, NW., Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

**SUPPLEMENTARY INFORMATION:**

**Explanation and Justification**

Section 640 of the Treasury and General Government Appropriations Act, 2000, Pub. L. No. 106-58, 106th Cong., 113 Stat. 430, 476-77 (1999), amended § 309(a)(4) of the FECA, 2 U.S.C. 437g(a)(4), to provide for a modified enforcement process for violations of reporting requirements. Under § 437g(a)(4)(C) of the FECA, the Commission may assess a civil money penalty for violations of the reporting requirements of 2 U.S.C. 434(a). This authority, however, was to sunset on December 31, 2001. Pub. L. No. 106-58, 106th Cong., § 640(c). Recently, § 642 of the Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the sunset date to include all reports that cover activity between January 1, 2000, to December 31, 2003.

The Commission published final rules on May 19, 2000, to implement the amendment contained in the Treasury and General Government Appropriations Act, 2000. Section 111.30 of the regulations reflects the sunset provision of Pub. L. No. 106-58, 106th Cong., § 640(c). Therefore, the Commission is issuing this final rule to amend section 111.30 to extend the application of the administrative fine regulations, 11 CFR part 111, subpart B, to include all violations relating to reports that cover the period between January 1, 2000, to December 31, 2003.

The Commission is promulgating this final rule without notice or opportunity for comment because it falls under the "good cause" exemption of the Administrative Procedures Act, 5 U.S.C. 553(b)(B). The exemption allows

routine serological surveillance of each participating breeding flock. A flock, and the hatching eggs and poult produced from it, will qualify for this classification when the Official State Agency determines that it has met one of the following requirements:

(1) It is a primary breeding flock in which a minimum of 30 birds has been tested negative for antibodies to the H5 and H7 subtypes of avian influenza by the agar gel immunodiffusion test specified in § 147.9 of this chapter when more than 4 months of age. To retain this classification:

(i) A sample of at least 30 birds must be tested negative at intervals of 90 days; or

(ii) A sample of fewer than 30 birds may be tested, and found to be negative, at any one time if all pens are equally represented and a total of 30 birds are tested within each 90-day period.

(2) It is a multiplier breeding flock in which a minimum of 30 birds has been tested negative for antibodies to the H5 and H7 subtypes of avian influenza by the agar gel immunodiffusion test specified in § 147.9 of this chapter when more than 4 months of age. To retain this classification:

(i) A sample of at least 30 birds must be tested negative at intervals of 180 days; or

(ii) A sample of fewer than 30 birds may be tested, and found to be negative, at any one time if all pens are equally represented and a total of 30 birds are tested within each 180-day period.

(3) For both primary and multiplier breeding flocks, if a killed influenza vaccine against avian influenza subtypes other than H5 and H7 is used, then the hemagglutinin and the neuraminidase subtypes of the vaccine must be reported to the Official State Agency for laboratory and reporting purposes.

\* \* \* \* \*

■ 9. In § 145.53, a new paragraph (e) is added to read as follows:

**§ 145.53 Terminology and classification; flocks and products.**

\* \* \* \* \*

(e) *U.S. Avian Influenza Clean*. This program is intended to be the basis from which the breeding-hatchery industry may conduct a program for the prevention and control of avian influenza. It is intended to determine the presence of avian influenza in waterfowl, exhibition poultry, and game bird breeding flocks through routine serological surveillance of each participating breeding flock. A flock, and the hatching eggs and chicks produced from it, will qualify for this classification when the Official State

Agency determines that it has met one of the following requirements:

(1) It is a primary breeding flock in which a minimum of 30 birds has been tested negative for antibodies to avian influenza by the agar gel immunodiffusion test specified in § 147.9 of this chapter when more than 4 months of age. To retain this classification:

(i) A sample of at least 30 birds must be tested negative at intervals of 90 days; or

(ii) A sample of fewer than 30 birds may be tested, and found to be negative, at any one time if all pens are equally represented and a total of 30 birds are tested within each 90-day period.

(2) It is a multiplier breeding flock in which a minimum of 30 birds has been tested negative for antibodies to avian influenza by the agar gel immunodiffusion test specified in § 147.9 of this chapter when more than 4 months of age. To retain this classification:

(i) A sample of at least 30 birds must be tested negative at intervals of 180 days; or

(ii) A sample of fewer than 30 birds may be tested, and found to be negative, at any one time if all pens are equally represented and a total of 30 unvaccinated sentinel birds are tested within each 180-day period.

\* \* \* \* \*

**PART 147—AUXILIARY PROVISIONS ON NATIONAL POULTRY IMPROVEMENT PLAN**

■ 10. The authority citation for part 147 continues to read as follows:

**Authority:** 7 U.S.C. 8301–8317; 7 CFR 2.22, 2.80, and 371.4.

■ 11. Section 147.12 is amended as follows:

■ a. In paragraph (b), introductory text, by adding the words “or the rapid detection method” after the word “procedures.”

■ b. By adding a new paragraph (b)(3) to read as set forth below.

**§ 147.12 Procedures for collection, isolation, and identification of Salmonella from environmental samples, cloacal swabs, chick box papers, and meconium samples.**

\* \* \* \* \*

(b) \* \* \*

(3) *Approved rapid detection method*. After selective enrichment, a rapid ruthenium-labeled *Salmonella* sandwich immunoassay may be used to determine the presence of *Salmonella*. Positive samples from the immunoassay are then inoculated to selective plates (such as BGN and XLT4). Incubate the

plates at 37 °C for 20 to 24 hours. Inoculate three to five *Salmonella*-suspect colonies from the plates into triple sugar iron (TSI) and lysine iron agar (LIA) slants. Incubate the slants at 37 °C for 20 to 24 hours. Screen colonies by serological (*i.e.*, serogroup) and biochemical (*e.g.*, API) procedures as shown in illustration 2. As a supplement to screening three to five *Salmonella*-suspect colonies on TSI and LIA slants, a group D colony lift assay may be utilized to signal the presence of hard-to-detect group D *Salmonella* colonies on agar plates.

\* \* \* \* \*

Done in Washington, DC, this 7th day of November, 2003.

**Peter Fernandez,**

*Acting Administrator, Animal and Plant Health Inspection Service.*

[FR Doc. 03–28511 Filed 11–13–03; 8:45 am]

**BILLING CODE 3410–34–P**

**FEDERAL ELECTION COMMISSION**

**11 CFR Parts 102 and 110**

[Notice 2003–19]

**Multicandidate Committees and Biennial Contribution Limits**

**AGENCY:** Federal Election Commission.

**ACTION:** Final rules and transmittal of regulations to Congress.

**SUMMARY:** The Federal Election Commission is revising its rules covering four areas: (1) Multicandidate political committee status, (2) annual contributions by persons other than multicandidate committees to national party committees, (3) contributions to candidates for more than one Federal office; and (4) biennial contribution limits for individuals. These final rules provide that once a political committee satisfies certain criteria, it automatically becomes a multicandidate committee and is required to notify the Commission of its new status. The final rules also update the limit on contributions from persons other than multicandidate committees to national party committees and to candidates running for more than one Federal office. In addition, the final rules adjust the attribution of contributions to candidates from individuals under the biennial limits. Further information is provided in the supplementary information that follows.

**EFFECTIVE DATE:** December 15, 2003.

**FOR FURTHER INFORMATION CONTACT:** Mr. John C. Vergelli, Acting Assistant General Counsel, Mr. Richard T. Ewell, Attorney, or Mr. Albert J. Kiss, Attorney,

999 E Street, NW., Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

**SUPPLEMENTARY INFORMATION:** These final rules address four different issues. First, the Commission confirms that political committees automatically become multicandidate committees once certain statutory requirements are met. Second, the Commission updates the annual limit on contributions from persons other than multicandidate committees to national party committees to conform to the change made by Congress in the Bipartisan Campaign Reform Act of 2002 ("BCRA"). Third, the Commission implements a separate conforming change to the limits on contributions to candidates running for more than one Federal office. Finally, the Commission corrects its rules governing the biennial limit on aggregate individual contributions in light of BCRA. These final rules implement the provisions of the Federal Election Campaign Act of 1971, as amended ("FECA" or the "Act"), 2 U.S.C. 431 *et seq.*

The Notice of Proposed Rulemaking ("NPRM"), on which these final rules are based, was published in the **Federal Register** on August 21, 2003. 68 FR 50,488 (August 21, 2003). The comment period was originally set to close on September 19, 2003, but the Commission extended the comment period until September 29, 2003. The Commission received seven comments on the proposed rules.<sup>1</sup> The Commission held a public hearing on this and three other rulemakings on October 1, 2003. Seven witnesses testified during the hearing. Transcripts of the hearing are available at <http://www.fec.gov/register.htm>. Please note that, for purposes of this document, the terms "commenter" and "comment" apply to both written comments and oral testimony at the public hearing.

Under the Administrative Procedures Act, 5 U.S.C. 553(d), and the Congressional Review of Agency Rulemaking Act, 5 U.S.C. 801(a)(1), agencies must submit final rules to the Speaker of the House of Representatives and the President of the Senate, and publish them in the **Federal Register** at least 30 calendar days before they take effect. The final rules that follow were transmitted to Congress on November 7, 2003.

<sup>1</sup> The Commission received written comments from: Perkins, Coie LLP; The Campaign Legal Center, National Republican Senatorial Committee, Republican National Committee; Sandler, Reiff & Young, P.C.; attorneys Lyn Utrecht, Eric Kleinfeld, Pat Fiori, and James Lamb of Ryan, Phillips, Utrecht & MacKinnon; and the Internal Revenue Service.

## Explanation and Justification

### 11 CFR 102.2 Statement of Organization; Forms and Committee Identification Number

Section 441a(a)(4) of the FECA provides that, "the term 'multicandidate political committee' means a political committee which has been registered with [the Commission or Secretary of the Senate] for a period of not less than six months, which has received contributions from more than 50 persons, and except for any State political party organization, has made contributions to 5 or more candidates for Federal office." 2 U.S.C. 441a(a)(4). On the basis of this statutory provision, the Commission's rules at 11 CFR 100.5(e)(3) define a "multicandidate committee" as a political committee meeting these three requirements.

To monitor compliance with the contribution limits for multicandidate political committees set out at 11 CFR 110.2, the Commission has required such committees to file FEC Form 1M to certify that they satisfied the criteria for becoming multicandidate political committees. See discussion below regarding revisions to 11 CFR 110.2. Specifically, 11 CFR 102.2(a)(3) formerly required that this certification be filed before a political committee may avail itself of the multicandidate committee contribution limits.

In the NPRM, the Commission proposed amending 11 CFR 102.2(a)(3) to eliminate the requirement that a political committee file Form 1M with the Commission before making any contributions under the increased contribution limits with respect to candidates in 11 CFR 110.2(b). The only comment on this issue indicated that the Commission's approach would be consistent with a determination that multicandidate status is mandatory rather than elective, but would not be consistent with a general rule permitting political committees to choose their status.

For the reasons stated in the Explanation and Justification for 11 CFR 110.2, the Commission views multicandidate committee status as automatic once all three necessary criteria are satisfied. Therefore, the Commission is revising 102.2(a)(3) to specify that a political committee must certify its status as a multicandidate committee within ten days of satisfying the requirements of 11 CFR 100.5(e)(3). This certification provides clear notice of the political committee's status to recipients of contributions from the committee, and to the Commission. The ten-day requirement was selected because it corresponds to the analogous

time requirement for a political committee to report any changes to its Statement of Organization. See 11 CFR 102.2(a)(2).

The Commission specifically sought comment on how it should address a situation where a political committee qualifies for multicandidate status, yet does not certify its status within ten days, and, once so qualified, makes a contribution exceeding \$2,000 to a candidate for Federal office. None of the commenters addressed this issue. Because the previous rule at 11 CFR 102.2(a)(3) required a committee to certify its multicandidate status prior to making a contribution in excess of the limit for non-multicandidate committees, failure to comply with the previous rule resulted in both a reporting violation and an excessive contribution. Given the removal of the ban on making contributions of (in the previous rule) more than \$1,000 without filing the certification, the Commission concludes that failure to comply with the new rule is a violation of the reporting requirements of 2 U.S.C. 433, but not an excessive contribution so long as the amount is within the contribution limits prescribed for political committees with multicandidate committee status.

### 11 CFR 110.1 Contributions by Persons Other Than Multicandidate Political Committees

#### A. 11 CFR 110.1(c) Contributions by Persons Other Than Multicandidate Committees to National Party Committees

In section 307(a)(2) of BCRA, Congress raised the annual aggregate limit on contributions by persons other than multicandidate political committees to national political party committees from \$20,000 to \$25,000. 2 U.S.C. 441a(a)(1)(B). The Commission proposed revising the corresponding regulation in 11 CFR 110.1(c)(3) to reflect this statutory change. 68 FR 50,490. The Commission received no comments on this proposal. The Commission is therefore revising 11 CFR 110.1(c)(3) as proposed in the NPRM to reflect accurately the new annual aggregate limit.

#### B. 11 CFR 110.1(f) Contributions to Candidates for More Than One Federal Office

In BCRA, Congress raised the per election limit on contributions to candidates from persons other than multicandidate committees from \$1,000 to \$2,000. 2 U.S.C. 441a(a)(1)(A). The Commission is accordingly revising 11 CFR 110.1(f) to conform its regulations

to this new statutory limit. Because the Commission's rules must accurately reflect Congress's decision to adjust this contribution limit, which took effect on January 1, 2003, it is appropriate to implement this higher limit in the final rules. This provision was not discussed in the NPRM. The Commission determines that, under section 553(b)(3) of the Administrative Procedure Act, good cause exists to implement this technical and conforming change without delay. It is not necessary to seek public comment at this point when the Commission obtained and fully considered public comment on the underlying rules at 11 CFR 110.1(a) implementing the contribution limits. See Final Rules and Explanation and Limitations and Prohibitions, 67 FR 69,928 (Nov. 19, 2002). Accordingly, the Commission is issuing this final rule without notice and comment.

#### 11 CFR 110.2 Contributions by Multicandidate Political Committees

11 CFR 110.2 sets forth contribution limits for multicandidate political committees in accordance with 2 U.S.C. 441a(a)(2). FECA, prior to BCRA, provided significantly higher limits on contributions to candidates for political committees with multicandidate status than for those without that status (\$5,000 per election versus \$1,000). BCRA raised and indexed for inflation the contribution limit for non-multicandidate committees (to \$2,000 per election). As the Commission explained in the NPRM, due to the inflation adjustment this non-multicandidate committee limit may eventually exceed the limit imposed on multicandidate committees. See 2 U.S.C. 441a(c). If this occurs, it will create a disincentive for attaining multicandidate political committee status.

In addition, BCRA increased the limit on non-multicandidate committee contributions to national party committees from \$20,000 to \$25,000 per year. Yet Congress did not similarly adjust the limit on multicandidate committee contributions to the same national party committees. That limit remains \$15,000 per year, as it was prior to BCRA. 2 U.S.C. 441a(a)(1)(B) and (2)(B). Furthermore, Congress did not index for inflation the contribution limit for multicandidate committees, which means that over time the current \$10,000 difference in the respective contribution limits to national party committees will increase. 2 U.S.C. 441a(c).

In light of these statutory changes, the Commission sought comment on

whether political committees may elect to opt out of multicandidate committee status even if they meet the three criteria of 2 U.S.C. 441a(a)(4) and 11 CFR 100.5(e)(3). Two commenters addressed this question. One commenter asserted that the language of 2 U.S.C. 441a(a)(4) clearly indicates that multicandidate status is automatically conferred when the three criteria are met. This commenter urged the Commission to adopt the changes to its regulations as proposed in the NPRM. While acknowledging the potential disadvantages of multicandidate status created by Congress through BCRA, this commenter observed that political committees may still elect to "opt out" of multicandidate status by refraining from meeting one or more of the three criteria (*i.e.*, by only contributing to 4 candidates).

On the other hand, a different commenter opposed mandatory status, arguing that the Commission should change its regulations to ensure that political committees are not forced to accept multicandidate status if they do not perceive that status as beneficial. The criteria in 2 U.S.C. 441a(a)(4), this commenter asserted, were "selected by Congress to identify committees entitled to preferred treatment" because "it believed that committees with these attributes were less likely to be employed by individuals for the purpose of circumventing the individual contribution limit." This commenter agreed with the Commission's assessment in the NPRM that post-BCRA multicandidate status could become a liability, rather than a benefit, in some circumstances. Therefore, this commenter cautioned that multicandidate status should not be mandatory unless the Commission is "extremely confident" that Congress now intends to disadvantage multicandidate committees.

The Commission notes that Congress did not take certain steps with regard to multicandidate committees that it took with regard to other political committees and individuals, such as indexing contribution limits for inflation and increasing the contribution limit to national party committees. The Senator who offered the amendment to increase the contribution limits for non-multicandidate committees explained its purpose shortly before the Senate voted to approve the BCRA in its near final form:

The Thompson-Feinstein amendment, by increasing the limit on individual and national party committee contributions to Federal candidates, will reduce the need for raising campaign funds from political action committees, PACs. Our amendment,

therefore, will reduce the relative influence of PACs, making it easier to replace PAC monies with funds raised from individual donors.

148 Cong. Rec. S2154 (daily ed. Mar. 20, 2002) (statement of Sen. Feinstein).

Accordingly, the final rules adopt the approach that best comports with the plain language of 2 U.S.C. 441a(a)(4): A political committee becomes a multicandidate committee once it has been registered with the Commission or Secretary of the Senate for a period of not less than six months, has received contributions from more than 50 persons, and has made contributions to 5 or more candidates for Federal office. Specifically, the Commission is adding a sentence to 11 CFR 110.2(a) to confirm this result. To address situations where a multicandidate political committee achieves multicandidate status through affiliation with a pre-existing multicandidate committee, the Commission is adding additional language to 11 CFR 110.2(a)(3) to specify that both affiliated committees would automatically be multicandidate committees at the time of affiliation.

It is important to note that the only "disadvantage" that multicandidate committees currently face is the lower limit on contributions to national political party committees. Notwithstanding the latter commenter's assertions that "[t]his unexplained different treatment is more likely the result of a political compromise than it is a product of a considered judgment," Congress clearly set lower limits even before BCRA for multicandidate committee contributions to national party committees than for other political committees' contributions to national party committees. The multicandidate committee contribution limits with respect to all Federal candidates, however, still remain \$3,000 per election higher than the contribution limits for other political committees. To the extent that some future disadvantage actually emerges from the fact that multicandidate committee contribution limits are not indexed for inflation, it would be for Congress to reconsider the contribution limits it established. The Commission has submitted a legislative recommendation urging Congress to do so. *FEC Annual Report 2002*, at 46. At present, the Commission implements what it deems the most straightforward reading of the language of 2 U.S.C. 441a(a)(4).

The same commenter also noted, under current law, State party committees are automatically treated as multicandidate committees regardless of whether they make contributions to five

or more candidates. See 11 CFR 100.5(e)(3). Thus, a State party committee could be negatively impacted to the same extent as other multicandidate committees by Congress's conspicuous choice to index one set of contribution limits to inflation but not the limits of multicandidate committees. The commenter urged the Commission to permit State party committees to opt out of multicandidate committee status for the same reasons set forth above. The Commission declines to do so for the reasons explained above.

*11 CFR 110.5(c) Application of the Aggregate Biennial Contribution Limitation for Individuals*

Prior to BCRA, total contributions by an individual were limited to \$25,000 in any calendar year. Also, any contribution made to a candidate with respect to an election in a year other than the calendar year in which the election is held was considered to be made during the calendar year in which the election is held. 2 U.S.C. 441a(a)(3) (2001). Thus, when individuals made contributions to candidates for elections to be held in years after the calendar year the contribution was made, those contributions counted against the contributor's \$25,000 annual contribution limit for the year of the future election, instead of the year the contribution was actually made. The Commission implemented this statutory provision in 11 CFR 110.5(c).

After BCRA, section 441a(a)(3) provides that contributions made in a specified two-year period (*i.e.*, "the period which begins on January 1 of an odd-numbered year and ends on December 31 of the next even-numbered year") may not exceed \$37,500, in the case of contributions to candidates and the authorized committees of candidates, and \$57,500 in the case of other contributions. Also, in BCRA, Congress removed the language of former section 441a(a)(3) that treated some contributions as made in a year other than the year in which actually made (*i.e.*, the year the election is held).

In the NPRM, the Commission noted that, despite these statutory changes, it had retained 11 CFR 110.5(c) when it revised section 110.5 in 2002 after passage of BCRA. See Contribution Limitations and Prohibitions; Final Rules, 67 FR 69,928 (November 19, 2002). The NPRM proposed to amend section 110.5(c) to state that, for purposes of the biennial contribution limits in section 441a(a)(3) and 11 CFR 110.5(b), a contribution to a candidate will be attributed to the two-year period in which the contribution is actually

made, regardless of when the election with respect to which it is made is held. 68 FR 50,488, 50,490.

In the final rules, the Commission has bifurcated 11 CFR 110.5(c) into two paragraphs. New paragraph (c)(1) of section 110.5 applies to contributions made on or after January 1, 2004. The Commission chose this date for two reasons. First, beginning the operation of the new rule with the new year will minimize confusion. Second, it will insure that the change will occur at the beginning of a reporting period for most filers. The final rule is otherwise the same as the proposed rule in the NPRM. New paragraph (c)(2) applies to contributions made before January 1, 2004. It otherwise is the same as the rule in previous 11 CFR 110.5(c). New paragraph (c)(2) is included in the final rules to preclude any question of the retroactive application of paragraph (c)(1) to contributions made before the effective date of the regulation in reliance on the Commission's previous interpretation of post-BCRA section 441a(a)(3).

For example, under new paragraph (c)(1) of section 110.5, a contribution made in 2004 to a candidate in a 2006 Senate race is attributed to the individual's biennial limit for the 2003–2004 period. Similarly, a contribution made in 2005 to a candidate in the 2008 presidential race is attributed to the individual's biennial limit for the 2005–2006 period. In addition, a contribution made during 2007 to retire debt from a 2006 House election is attributed to the individual's biennial limit for the 2007–2008 period. Under new paragraph (c)(2), as under the previous language of 11 CFR 110.5(c), a contribution made in 2003 to a candidate in a 2006 Senate race would be attributed to the individual's biennial limit for the 2005–2006 period.

There was no consensus among the commenters in response to the NPRM. One commenter supported the Commission's proposals, stating that the language of section 441a(a)(3) as amended "plainly attributes candidate contributions by individuals to the aggregate limit for the two-year period in which such contributions are actually made." This commenter opined that "conforming the FEC's regulation [at section 110.5(c)] to the revised statute's clear requirement that individuals' hard money contributions to candidates tally against their aggregate limit for the two-year period in which such contributions are actually made would eliminate the confusion (and inadvertent donor violations) that prevailed under the previous approach." As such, this commenter asserts that the NPRM's

proposed change would lessen, not increase confusion.

On the other hand, several commenters were opposed to the NPRM's proposed changes. Some commenters asserted that confusion will ensue for both contributors and recipient candidates. A commenter observed that if the proposed changes were made, contributors may have multiple contributions to the same candidate that would count toward different biennial limits and this may be very confusing to contributors. To mitigate any confusion, the Commission has decided to continue to apply the previous rule prior to January 1, 2004, and to apply the new rule on and after that date. This approach ensures that the new rules will not have retroactive application.

Some comments asserted that the Commission should not penalize donors who may have inadvertently exceeded the \$37,500 limit for the 2003–04 two-year period, to the extent that the donor exceeded the limit as a result of contributions made before the effective date of the Commission's proposed new rule to candidates that are not running in the 2003–04 two-year period. Because the Commission's final rule does not change the treatment of contributions made prior to the effective date of the new rule, contributors will not have inadvertently exceeded the \$37,500 limit for the 2003–04 two-year period based on the Commission's new rules.

Several commenters focused on the reliance interest that contributors, candidates and political committees have in the current language of section 110.5(c), and suggested either a deferred effective date for the new rule (*e.g.*, January 1, 2005), or adoption of a transition rule that fairly treats those who have reasonably relied upon the existing regulation. Commenters asserted that a deferred effective date is needed because changing the rule in the middle of an election cycle could cause inadvertent violations. In its final rule for § 110.5(c), the Commission accommodates contributors' reliance interest by preserving the previous language of section 110.5(c) for contributions made prior to January 1, 2004. However, the Commission does not interpret section 441a(a)(3), as amended by BCRA, to permit a transition period. The Commission is also concerned that any transition period is likely to engender additional confusion.

Some comments suggested that current section 110.5(c) is primarily related to candidates for the U.S. Senate, and that changing the provision would have an adverse impact on Senate



candidate fundraising, because the proposed rule will limit a Senator's ability to raise funds in the first four years of his or her term. For example, a contributor who intends to contribute \$37,500 every biennial period may be disinclined to contribute to a 2006 candidate during the 2004 election cycle if it counts against his or her 2004 aggregate biennial limit rather than the 2006 cycle limit. The Commission has considered these comments, but observes that it is required to respond to Congress's changes to section 441a(a)(3), and must give effect to Congress's deletion of the statutory provision on which the regulatory provision was based.

A commenter asserted that the Commission should not, before the effective date of the new rule, count contributions made to a candidate not running in the 2003–04 two-year period against the donor's aggregate limit for the cycle in which the candidate is running, asserting that such an application of the limit would "clearly be contrary to section 441a(a)(3)(A)." The Commission observes that under the previous language of section 110.5(c), a contribution made to a candidate not running in the 2003–04 two-year period was counted against the donor's aggregate limit for the two-year period in which the candidate is running. This comment suggests, in effect, that the Commission ignore, or suspend the operation of, the previous language of section 110.5(c) for contributions made before January 1, 2004. The Commission declines to either ignore or suspend the operation of the previous language of section 110.5(c) for contributions made before January 1, 2004.

**Certification of No Effect Pursuant to 5 U.S.C. 605(b) [Regulatory Flexibility Act]**

The attached rules will not have a significant economic impact on a substantial number of small entities. The basis of this certification is that State and local party committees of the two major political parties and most other political committees are not small entities under 5 U.S.C. 601 because they are not small businesses, small organizations, or small governmental jurisdictions. Further, individual citizens operating under these rules are not small entities.

To the extent that any persons subject to these rules may fall within the definition of "small entities," these rules do not impose a significant economic impact on those persons. These rules do not change the criteria for status as a multicandidate

committee; they merely confirm that this status acquired automatically when the existing criteria are met. The one modified filing requirement merely replaces a similar filing requirement that is removed, and no new compliance efforts are required. The remainder of the final rules are conforming changes updating existing regulations to new contribution limits set by Congress. As such, these updates require no new or increased disclosure, or other requirements that would increase compliance costs.

**List of Subjects**

*11 CFR Part 102*

Political committees and parties, Reporting and recordkeeping requirements.

*11 CFR Part 110*

Campaign funds, Political committees and parties.

■ For the reasons set out in the preamble, the Federal Election Commission is amending subchapter A of chapter 1 of title 11 of the Code of Federal Regulations as follows:

**PART 102—REGISTRATION, ORGANIZATION, AND RECORDKEEPING BY POLITICAL COMMITTEES (2 U.S.C. 433)**

■ 1. The authority citation for part 102 continues to read as follows:

**Authority:** 2 U.S.C. 432, 433, 434(a)(11), 438(a)(8), 441d.

■ 2. Section 102.2 is amended by revising paragraph (a)(3) to read as follows:

**§ 102.2 Statement of organization: Forms and committee identification number (2 U.S.C. 433(b), (c)).**

(a) \* \* \*

(3) A committee shall certify to the Commission that it has satisfied the criteria for becoming a multicandidate committee set forth at 11 CFR 100.5(e)(3) by filing FEC Form 1M no later than ten (10) calendar days after qualifying for multicandidate committee status.

\* \* \* \* \*

**PART 110—CONTRIBUTION AND EXPENDITURE LIMITATIONS AND PROHIBITIONS**

■ 3. The authority citation for part 110 continues to read as follows:

**Authority:** 2 U.S.C. 431(8), 431(9), 432(c)(2), 437d, 438(a)(8), 441a, 441b, 441d, 441e, 441f, 441g, 441h, and 441k.

■ 4. Section 110.1 is amended by:

■ a. revising paragraph (c)(3); and

■ b. revising the introductory language in paragraph (f).

The revisions and additions read as follows:

**§ 110.1 Contributions by persons other than multicandidate political committees (2 U.S.C. 441a(a)(1)).**

\* \* \* \* \*

(c) \* \* \*

(3) Each recipient committee referred to in 11 CFR 110.1(c)(2) may receive up to the \$25,000 limitation from a contributor, but the limits of 11 CFR 110.5 shall also apply to contributions made by an individual.

\* \* \* \* \*

(f) *Contributions to candidates for more than one Federal office.* If an individual is a candidate for more than one Federal office, a person may make contributions which do not exceed \$2,000 to the candidate, or his or her authorized political committees for each election for each office, as long as—

\* \* \* \* \*

■ 5. Section 110.2 is amended by revising paragraph (a)(1) to read as follows:

**§ 110.2 Contributions by multicandidate political committees (2 U.S.C. 441a(a)(2)).**

(a)(1) *Scope.* This section applies to all contributions made by any multicandidate political committee as defined in 11 CFR 100.5(e)(3). See 11 CFR 102.2(a)(3) for multicandidate political committee certification requirements. A political committee becomes a multicandidate committee at the time the political committee meets the requirements of 11 CFR 100.5(e)(3) or becomes affiliated with an existing multicandidate committee, whether or not the political committee has certified its status as a multicandidate committee with the Commission in accordance with 11 CFR 102.2(a)(3).

\* \* \* \* \*

■ 6. The section heading for section 110.5 is amended by removing "bi-annual" and adding "biennial" in its place.

■ 7. Section 110.5 is amended by revising paragraph (c) to read as follows:

**§ 110.5 Aggregate biennial contribution limitation for individuals (2 U.S.C. 441a(a)(3)).**

\* \* \* \* \*

(c)(1) Contributions made on or after January 1, 2004. Any contribution subject to this paragraph (c)(1) to a candidate or his or her authorized committee with respect to a particular election shall be considered to be made during the two-year period described in paragraph (b)(1) of this section in which the contribution is actually made,

acceptable and unacceptable purpose descriptions to be reported by au APPENDIX CURRENT REGULATIONS WITH PREVIOUSLY DIFFERENT CITATIONS requires authorized committees, when itemizing certain disbursements for which reimbursements are required, to provide a brief explanation of the activity for which reimbursement is required. These provisions have been in Title 11 of the Code of Federal Regulations since 1980 and 1995, respectively, and were not affected by the recent statutory changes to the election cycle reporting requirements.

**Need for Correction**

As published, the final rules inadvertently omit two paragraphs describing information to be reported by authorized committees of Federal candidates.

All committees must report the purpose of itemized disbursements (i.e., those disbursements aggregating in excess of \$200). Omitted paragraph (A) contains examples of suitably specific purpose descriptions as well as examples of those descriptions that are unacceptably vague. This paragraph is inconsistent with the reporting of rules for unauthorized committees (committees other than candidate committees) in 11 CFR 104.3(b)(3).

Omitted paragraph (B) is used in administering the "personal use" rules in 11 CFR 113.1. Federal candidates are barred from using campaign funds for personal benefit. Paragraph (B) requires authorized committees of Federal candidates itemizing disbursements for which partial or total reimbursement is required under 11 CFR 113.1(g)(1)(iii)(C) or (D) to provide a brief explanation of the activity for which the reimbursement is made.

Section 801 of Title 5 of the United States Code requires Federal agencies to submit regulations to Congress. These regulations were submitted to the Speaker of the House of Representatives and the President of the Senate on November 26, 2001.

**Certification of No Effect Pursuant to 5 U.S.C. § 605(b) [Regulatory Flexibility Act]**

This correction will not have significant economic impact on a substantial number of small entities. The basis of this certification is that this correction only requires political committees to once again add information to the reports they are required to file. These regulations were in 11 CFR since 1980 and 1995, respectively, before being inadvertently omitted in 2000.

**List of Subjects in 11 CFR Part 104**

Campaign funds, Political committees and parties, Reporting and recordkeeping requirements.

Accordingly, 11 CFR part 104 is corrected by making the following correcting amendment:

**PART 104—REPORTS BY POLITICAL COMMITTEES**

1. The authority citation for part 104 continues to read as follows:

**Authority:** 2 U.S.C. 431(1), 431(8), 431(9), 432(i), 434, 438(a)(8), 438(b), 439a.

**§ 104.3 Contents of reports (2 U.S.C. 434(b), 439a).**

\* \* \* \* \*

2. In § 104.3 add the following paragraphs (b)(4)(i)(A) and (B):

- (b) \* \* \*
- (4) \* \* \*
- (i) \* \* \*

(A) As used in this paragraph, *purpose* means a brief statement or description of why the disbursement was made. Examples of statements or descriptions which meet the requirements of this paragraph include the following: dinner expenses, media, salary, polling, travel, party fees, phone banks, travel expenses, travel expense reimbursement, and catering costs. However, statements or descriptions such as *advance, election day expenses, other expenses, expenses, expense reimbursement, miscellaneous, outside services, get-out-the-vote and voter registration* would not meet the requirements of this paragraph for reporting the purpose of an expenditure.

(B) In addition to reporting the purpose described in paragraph (b)(4)(i)(A) of this section, whenever an authorized committee itemizes a disbursement that is partially or entirely a personal use for which reimbursement is required under 11 CFR 113.1(g)(1)(ii)(C) or (D), it shall provide a brief explanation of the activity for which reimbursement is required.

\* \* \* \* \*

Dated: November 26, 2001.  
**Danny L. McDonald,**  
*Chairman, Federal Election Commission.*  
[FR Doc. 01-29679 Filed 11-29-01; 8:45 am]  
**BILLING CODE 6715-01-P**

**FEDERAL ELECTION COMMISSION**

**11 CFR Part 111**

**[Notice 2001-18]**

**Extension to Administrative Fines**

**AGENCY:** Federal Election Commission.

**ACTION:** Final rule; revision of the sunset date.

Authorized committees. Paragraph (B) SUMMARY: The Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the expiration date in which the Federal Election Commission (hereinafter "the Commission") may assess civil money penalties for violations of the reporting requirements of section 434(a) of the Federal Election Campaign Act (hereinafter "the Act" or "FECA").

**DATES:** Effective on December 31, 2001.

**FOR FURTHER INFORMATION CONTACT:** Ms. Rosemary C. Smith, Assistant General Counsel, or Ms. Mai T. Dinh, Attorney, 999 E Street, NW., Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

**SUPPLEMENTARY INFORMATION:**

**Explanation and Justification**

Section 640 of the Treasury and General Government Appropriations Act, 2000, Pub. L. No. 106-58, 106th Cong., 113 Stat. 430, 476-77 (1999), amended § 309(a)(4) of the FECA, 2 U.S.C. 437g(a)(4), to provide for a modified enforcement process for violations of reporting requirements. Under § 437g(a)(4)(C) of the FECA, the Commission may assess a civil money penalty for violations of the reporting requirements of 2 U.S.C. 434(a). This authority, however, was to sunset on December 31, 2001. Pub. L. No. 106-58, 106th Cong., § 640(c). Recently, § 642 of the Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the sunset date to include all reports that cover activity between January 1, 2000, to December 31, 2003.

The Commission published final rules on May 19, 2000, to implement the amendment contained in the Treasury and General Government Appropriations Act, 2000. Section 111.30 of the regulations reflects the sunset provision of Pub. L. No. 106-58, 106th Cong., § 640(c). Therefore, the Commission is issuing this final rule to amend section 111.30 to extend the application of the administrative fine regulations, 11 CFR part 111, subpart B, to include all violations relating to reports that cover the period between January 1, 2000, to December 31, 2003.

The Commission is promulgating this final rule without notice or opportunity for comment because it falls under the "good cause" exemption of the Administrative Procedures Act, 5 U.S.C. 553(b)(B). The exemption allows

regardless of the year in which the particular election is held. See 11 CFR 110.1(b)(6). This paragraph (c)(1) also applies to earmarked contributions and contributions to a single candidate committee that has supported or anticipates supporting the candidate.

(2) Contributions made prior to January 1, 2004.

(i) For purposes of this paragraph (c)(2), a contribution to a candidate or his or her authorized committee with respect to a particular election shall be considered to be made during the calendar year in which such election is held.

(ii) For purposes of this paragraph (c)(2), any contribution to an unauthorized committee shall not be considered to be made during the calendar year in which an election is held unless:

(A) The political committee is a single candidate committee which has supported or anticipates supporting the candidate; or

(B) The contribution is earmarked by the contributor for a particular candidate with respect to a particular election.

\* \* \* \* \*

Dated: November 7, 2003.

**Bradley A. Smith,**

*Vice Chairman, Federal Election Commission.*  
[FR Doc. 03-28469 Filed 11-13-03; 8:45 am]

**BILLING CODE 6715-01-P**

## FEDERAL ELECTION COMMISSION

### 11 CFR Part 106

[Notice 2003-20]

#### Party Committee Telephone Banks

**AGENCY:** Federal Election Commission.

**ACTION:** Final rule and transmittal of regulations to Congress.

**SUMMARY:** The Federal Election Commission is promulgating final rules regarding the attribution of political party committee disbursements for telephone bank communications made on behalf of a clearly identified Federal candidate. The final rules address the proper attribution of a party committee's or party organization's disbursements for communications that refer to a clearly identified Federal candidate when the party's other candidates are referred to generically, but not by name. The entire disbursement must be paid for with Federal funds. Further information is provided in the Supplementary Information that follows.

**EFFECTIVE DATE:** December 15, 2003.

**FOR FURTHER INFORMATION CONTACT:** Ms. Mai T. Dinh, Acting Assistant General Counsel, or Mr. Jonathan M. Levin, Senior Attorney, 999 E Street NW., Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

**SUPPLEMENTARY INFORMATION:** In the months leading up to a general election, political party committees, or party committees in conjunction with the principal campaign committees of Federal candidates, may conduct phone banks to get out the vote ("GOTV") or otherwise promote the party and its candidates. Such phone banks may involve the reading of scripted messages that include a statement asking the person called specifically to vote, or get their family and friends out to vote, for the named Federal candidate and that then make one or more general promotional references to the party's other candidates. An example would be: "Please tell your family and friends to come out and vote for President John Doe and our great Party team." Given that no other Federal or non-Federal candidates are specifically mentioned, the question is whether the entire cost of the communication, or only a portion of the cost, should be attributed to the Federal candidate. The Commission is issuing final rules to provide clear guidance on how to attribute the cost of these communications.

Under the Administrative Procedures Act, 5 U.S.C. 553(d), and the Congressional Review of Agency Rulemaking Act, 5 U.S.C. 801(a)(1), agencies must submit final rules to the Speaker of the House of Representatives and the President of the Senate and publish them in the **Federal Register** at least 30 calendar days before they take effect. The final rules on party committee phone banks were transmitted to Congress on November 7, 2003.

#### Explanation and Justification

The Commission published a Notice of Proposed Rulemaking ("NPRM") on September 4, 2003, in which it sought comment on proposed rules that would add a new section to 11 CFR part 106 to address telephone bank expenditures by political party committees and organizations. 68 FR 52529 (Sept. 4, 2003). The comment period was originally set to close on September 25, 2003, but the Commission extended the comment period until September 29, 2003. In addition to the comments concerning the proposed rules, the NPRM sought comments on a number of other issues including: (1) Whether the scope of the rulemaking should be expanded to include other types of

communications such as broadcast or print media and to include candidates for the Senate or House of Representatives; (2) whether the final rules should explicitly state that a State party committee's use of its coordinated party expenditure authority to pay for these phone banks is subject to the restrictions of 11 CFR 109.33; and (3) whether the final rules should explicitly state that party committees are prohibited from using contributions designated for a particular candidate to pay for these phone bank expenditures.

The Commission received one comment in response to the NPRM. The Commission did not receive any requests to testify on the subject of party committee's disbursements for telephone banks at its hearing on October 1, 2003.

#### *11 CFR 106.8 Allocation of Expenses for Political Party Committee Phone Banks That Refer to a Clearly Identified Federal Candidate*

The Commission is adding new section 106.8 to address the costs of phone banks conducted by national, State and local party committees and party organizations on behalf of clearly identified Federal candidates. In Federal election years, party committees and organizations conduct such phone banks to encourage voters to support the entire ticket. Although the specific mention of the clearly identified Federal candidate provides something of value to the candidate being promoted, it also provides the party with a benefit. The final rules, discussed below, reflect that such communications benefit both the candidate and the party.

#### 1. 11 CFR 106.8(a) Scope

New section 106.8(a) begins by stating the conditions under which the special attribution rule in paragraph (b) would apply. Paragraphs (a)(1) through (a)(5) of new section 106.8 describe the communications that are subject to the final rule. The proposed rules would have limited the scope of the new section 106.8 to presidential and vice presidential nominees, although the Commission asked whether they should be expanded to include candidates for the Senate and the House of Representatives. The commenter urged that the rules be extended to these candidates while noting that the underlying coordinated party expenditure limits would differ for these candidates. Because there is no apparent reason to distinguish presidential and vice presidential candidates from other Federal candidates, and to maintain a consistent approach for all Federal candidates, the

Commission is extending the final rules to all Federal candidates.

Consequently, the conditions set forth in 11 CFR 106.8(a)(1) through (a)(5) implement this approach. Under paragraph (a)(1) the communication must refer to a clearly identified Federal candidate. The term “clearly identified” is defined in 2 U.S.C. 431(18) and 11 CFR 100.17. Second, the communication must also refer to no other clearly identified Federal or non-Federal candidate under paragraph (a)(2). Third, under paragraph (a)(3), the communication must refer generically to the other candidates of the clearly identified Federal candidate’s party without clearly identifying them. Generic references to “our great Republican team” or “our great Democratic ticket” would satisfy the latter requirement. The commenter suggested that the final rules make clear that the generic reference is to other candidates and not to the clearly identified Federal candidate. For instance, according to the commenter, a reference to the “great Presidential Candidate X team” with no other generic reference to other candidates should not fall within the scope of the final rules because the word “team” should be treated as a reference to the presidential ticket and not as a reference to other candidates of the same party. The language in paragraph (a)(3) is slightly different from the proposed rule to make clear that the communication must include another reference that generically refers to other candidates and not the clearly identified Federal candidate.

Under paragraph (a)(4), the communication must not solicit contributions, donations, or any funds from any person for any Federal or non-Federal candidate, or for any political committee or political organization, or any entity disbursing funds in connection with a Federal or non-Federal election. If such a solicitation were made, it would change the nature of the communication and may require a different determination as to the attribution of the party’s spending for the communication among candidates or committees.

Under paragraph (a)(5), the phone bank must not be exempt from the definitions of “contribution” and “expenditure” under 11 CFR 100.89 and 100.149. These sections implement the statutory exceptions for certain voter registration and GOTV activities conducted by party committees under 2 U.S.C. 431(8)(B)(xi) and 431(9)(B)(ix). Consequently, a State or local party committee’s voter registration and GOTV activities, including phone banks

operated by volunteers under 11 CFR 100.89(e) or 100.149(e) conducted on behalf of a presidential or vice presidential nominee, which are exempt from the definitions of “contribution” and “expenditure,” are not affected by new section 106.8, provided that the conditions set forth in 11 CFR 100.89(a) through (g) or 100.149(a) through (g) are satisfied. Thus, State and local party committees may continue to spend on behalf of publicly financed presidential candidates for these purposes without making an expenditure or a contribution.

The Commission did not receive any comments in response to its question as to whether the final rules should specifically prohibit State and local party committees from using contributions that were designated for a particular Federal candidate to make expenditures for these phone banks. See 11 CFR 100.89(c) and 100.149(c). This situation is already governed by the “coattails” exception in 2 U.S.C. 431(8)(B)(xi) and (9)(B)(ix) and is not relevant to situations addressed in new section 106.8. The Commission therefore is not including this prohibition in the final rules. In answer to the Commission’s question of whether 11 CFR 106.8 should include other forms of communications such as broadcast or print media, the commenter urged the Commission to defer consideration of extending the final rules to include other forms of communications. The Commission has decided to limit the scope of new section 106.8 to phone banks at this time because each type of communication presents different issues that need to be considered in further detail before establishing new rules.

#### 2. 11 CFR 106.8(b) Attribution

The NPRM included two alternatives for new section 106.8(b) to establish the attribution of the party committee’s payments for the phone bank. Under Alternative A, party committees and organizations would have attributed fifty percent of the disbursement to clearly identified presidential and vice presidential nominees, and the remaining fifty percent would not have been attributable to any Federal or non-Federal candidate but would have to be paid solely with Federal funds. Alternative B would have provided that 100 percent of the disbursement must be attributed to the clearly identified presidential and vice presidential nominees.

The Commission sought comment on which of these two alternatives would be preferable, or on whether the percentage should be based on the

actual space or time used to refer to the presidential nominee, or some other factor. The commenter argued that a fifty percent attribution to the presidential or vice presidential nominee is permissible provided that the entire phone bank expenditure is paid for with Federal funds.

The Commission is incorporating Alternative A in the final rules. Because these phone bank communications contain two references—one to a clearly identified Federal candidate and one that generically refers to other candidates—it is appropriate that the disbursement for the communications be attributed evenly between the two references. Thus, new section 106.8(b)(1) states that fifty percent of the disbursement for the phone bank is not attributed to any candidate because the generic reference does not refer to any clearly identified candidate and therefore cannot be attributed to any specific candidate.

The Commission has determined that Federal funds must be used to pay for all disbursements for telephone banks that fall within the scope of new section 106.8, even the portion that is not attributed to any particular candidate. Barring the unlikely event that the phone bank will involve 500 or fewer calls, a message such as, “Please vote for President John Doe and our great Party team,” would be a public communication that refers to a clearly identified Federal candidate and promotes that candidate. It would thus be a form of Federal election activity that must be paid for entirely with Federal funds, pursuant to 11 CFR 300.33(c)(1), if conducted by a State, district, or local party committee. See 11 CFR 100.24(b)(3), 100.26 and 100.28. It must also be paid for entirely with Federal funds if conducted by a national party committee, which only has Federal funds under 2 U.S.C. 441i(a) and 11 CFR 300.10. The amount that is not attributed to a Federal candidate, however, is not considered an in-kind contribution to any candidate, a coordinated party expenditure, or an independent expenditure by the party committee or organization.

Section 106.8(b)(2) requires that the remaining fifty percent of the disbursement be attributed to the clearly identified Federal candidate and that this portion of the disbursement must be paid for with Federal funds. Generally, party committees have several options in how to treat the attributed portion of a disbursement “as an in-kind contribution, a coordinated party expenditure, or an independent expenditure, depending on the circumstances. They may also obtain

reimbursement from the clearly identified Federal candidate of some or the entire attributed portion of the disbursement. Consequently, paragraph (b)(2) allows party committees and organizations to treat the portions of disbursements attributed to clearly identified Federal candidates as in-kind contributions, or as coordinated or independent expenditures, or as expenses to be reimbursed by the clearly identified Federal candidates, or a combination of any of these. Under paragraph (b)(2)(i), if the disbursement is treated as an in-kind contribution, it is subject to the contribution limitations of 11 CFR 110.1 or 110.2.

The Commission notes that a State party committee would be able to make coordinated party expenditures (under 2 U.S.C. 441a(d)) to pay for phone bank communications on behalf of its presidential candidate subject to new 11 CFR 106.8 only if the national party committee has made a written assignment of a specific amount of its coordinated party expenditure authority to the State party committee. See 11 CFR 109.33(a). Similarly, a district or local party committee may spend some of the amount authorized by the national or the State party committee upon receiving a written authorization to do so. See 11 CFR 109.33(b). The Commission did not receive any comments in response to its question on whether the final rule should refer to this requirement or whether it is understood that this final rule would not exempt a State, district, or local party committee from these requirements. The Commission is including a reference to 11 CFR 109.33 as well as to section 109.32 in new section 106.8(b)(2)(ii) to ensure that party committees understand that these sections apply to disbursements for phone banks that are treated as coordinated expenditures.

New section 106.8(b)(2)(ii) also provides for the disbursements attributed to the clearly identified Federal candidate to be treated as independent expenditures. As independent expenditures, they are also subject to the requirements of 11 CFR 109.10, and a reference to that section is included in paragraph (b)(2)(ii). This paragraph also includes a reference to 11 CFR 109.35 requiring party committees to choose between making either coordinated party expenditures or independent expenditures, but not both, on behalf of a Federal candidate after the party has nominated that candidate. Once, a party committee makes a coordinated party expenditure on behalf of a Federal candidate, it may not make an independent expenditure on behalf

of that Federal candidate, and vice versa.

### 3. Examples

The following examples illustrate the scope and operation of new section 106.8.

**Example 1:** A week before the general election, a local party committee operates a phone bank through the use of volunteers and the message is: "You can show your support for the Green Party presidential nominee by going to the polls next Tuesday and contributing to the local party committee so that it can help others to get to the polls too."

The costs of the phone bank would not fall within the scope of 11 CFR 106.8 for three reasons. First, by using volunteers to run a phone bank that seeks to get out the vote for the presidential and vice presidential nominee, and by complying with other requirements in 11 CFR 100.89(e) and 100.149(e), the local party committee does not make a contribution or expenditure under 11 CFR 100.89 and 100.149, and, therefore, these costs are excluded from the provisions of section 106.8. Second, the communication only contains a reference to the clearly identified Federal candidate ("Green Party presidential nominee") and does not refer generically to other candidates. Thus, it does not meet the condition set forth in 11 CFR 106.8(a)(3). Finally, the message includes a solicitation for the local party committee, and, therefore, does not meet the condition set forth in section 106.8(a)(4).

**Example 2:** The Republican National Committee ("RNC") operates a phone bank and the message is: "When you vote for Representative Jane Smith on Tuesday, remember to vote for the other Republican candidates." The cost of operating this phone bank is \$20,000. The RNC has already made an independent expenditure on behalf of Representative Smith but has not made any contributions to her authorized committee.

The costs of the phone bank would come within the scope of 11 CFR 106.8 because the communication: (1) Contains a reference to a clearly identified Federal candidate ("Representative Jane Smith"); (2) contains a generic reference to other Republican candidates; (3) does not include a reference to any other clearly identified candidate; (4) does not solicit a contribution or donation from any person; and (5) is conveyed by paid workers, not volunteers, and is thus not exempt from the definitions of "contribution" and "expenditure." The RNC must attribute \$10,000 to Representative Smith. Because the RNC

has already made an independent expenditure on behalf of Representative Smith, it cannot treat this \$10,000 as a coordinated party expenditure. See 2 U.S.C. 441a(d)(4)(A)(i); 11 CFR 109.35(b)(1). Rather it may treat the entire amount as an independent expenditure provided that it has not coordinated with Representative Smith or her authorized committee or agents. If the RNC or its agents coordinated this phone bank with Representative Smith or her agents, then it may treat \$5,000 as an in-kind contribution to her authorized committee under the limits of 2 U.S.C. 441a(a)(2)(A), and it must seek reimbursement from her authorized committee for the other \$5,000. The remaining fifty percent of the expenditure (\$10,000) is not attributed to any candidate and the entire \$20,000 must be paid for with Federal funds.

**Example 3:** A State party committee operates a phone bank and the message is: "Show your support for Senator John Doe and the great Democratic team by voting for them." The cost of operating the phone bank is \$34,000. The State party committee's coordinated party expenditure limit under 2 U.S.C. 441a(d) is \$20,000 and it already spent \$5,000 in coordinated party expenditures on behalf of Senator Doe. The State party committee is a multicanidate committee and has made a \$1,000 contribution to his campaign.

The costs of this phone bank are within the scope of 11 CFR 106.8 because the communication: (1) Contains a reference to a clearly identified Federal candidate ("Senator John Doe"); (2) contains a generic reference to other Democratic candidates; (3) does not include a reference to any other clearly identified candidate; (4) does not solicit a contribution or donation from any person; and (5) does not qualify for the 11 CFR 100.89 and 100.149 exceptions. Because the State party committee has already made a coordinated party expenditure on behalf of Senator Doe after the nomination, the State party committee cannot make a subsequent independent expenditure on his behalf. See 2 U.S.C. 441a(d)(4)(A)(ii); 11 CFR 109.35(b)(2). The State party committee does not have to attribute \$17,000 to any candidate but must still use all Federal funds to pay for that \$17,000. The remaining \$17,000 must be attributed to Senator Doe and must also be paid for with Federal funds. The State party committee may treat \$15,000, which is equal to its remaining coordinated party spending authority, of the attributed amount as a coordinated party expenditure. The remaining \$2,000 may

be treated as an in-kind contribution because when aggregated with the earlier \$1,000 contribution, it does not exceed the State party committee's \$5,000 contribution limit under 11 CFR 110.2.

### Certification of No Effect Pursuant to 5 U.S.C. 605(b)

#### [Regulatory Flexibility Act]

The attached final rules do not have a significant economic impact on a substantial number of small entities. The basis for this certification is that few, if any, small entities are affected by these rules, which apply only to committees of political parties and other party organizations. National, State and many local party committees of the two major political parties and other political committees and organizations are not small entities under 5 U.S.C. 601 because they are not small businesses, small organizations, or small governmental jurisdictions. The final rules simplify the determination as to the amount of a party committee disbursement that must be attributed to a clearly identified Federal candidate in the case of certain telephone bank communications and clarify what funding is permissible. Any increase in the cost of compliance that might result from these proposed rules would not be in an amount sufficient to cause a significant economic impact.

#### List of Subjects in 11 CFR Part 106

Campaign funds, political committees and parties, political candidates.

■ For the reasons set out in the preamble, the Federal Election Commission amends subchapter A of chapter 1 of title 11 of the *Code of Federal Regulations* as follows:

### PART 106—ALLOCATIONS OF CANDIDATE AND COMMITTEE ACTIVITIES

■ 1. The authority citation for part 106 continues to read as follows:

**Authority:** 2 U.S.C. 438(a)(8), 441a(b), 441a(g).

■ 2. New section 106.8 is added to read as follows:

#### § 106.8 Allocation of expenses for political party committee phone banks that refer to a clearly identified Federal candidate.

(a) *Scope.* This section applies to the costs of a phone bank conducted by a national, State, district, or local committee or organization of a political party where—

(1) The communication refers to a clearly identified Federal candidate;

(2) The communication does not refer to any other clearly identified Federal or non-Federal candidate;

(3) The communication includes another reference that generically refers to other candidates of the Federal candidate's party without clearly identifying them;

(4) The communication does not solicit a contribution, donation, or any other funds from any person; and

(5) The phone bank is not exempt from the definition of "contribution" under 11 CFR 100.89 and is not exempt from the definition of "expenditure" under 11 CFR 100.149.

(b) *Attribution.* Each disbursement for the costs of a phone bank described in paragraph (a) of this section shall be attributed as follows:

(i) Fifty percent of the disbursement is not attributable to any other Federal or non-Federal candidate, but must be paid for entirely with Federal funds; and

(2) Fifty percent of the disbursement is attributed to the clearly identified Federal candidate and must be paid for entirely with Federal funds. This disbursement may be one or a combination of the following:

(i) An in-kind contribution, subject to the limitations set forth in 11 CFR 110.1 or 110.2; or

(ii) A coordinated expenditure or an independent expenditure, subject to the limitations, restrictions, and requirements of 11 CFR 109.10, 109.32, 109.33 and 109.35; or

(iii) Reimbursed by the clearly identified Federal candidate or his or her authorized committee.

Dated: November 7, 2003.

**Bradley A. Smith,**

*Vice Chairman, Federal Election Commission.*

[FR Doc. 03-28472 Filed 11-13-03; 8:45 am]

BILLING CODE 6715-01-P

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 23

[Docket No. CE200, Special Condition 23-140-SC]

#### Special Conditions: Honeywell, Inc., Pilatus PC-12/45; Protection of Systems for High Intensity Radiated Fields (HIRF)

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Final special conditions; request for comments.

**SUMMARY:** These special conditions are issued to Honeywell, Inc., 23500 W.

105th Street, Olathe, KS 66061, for a supplemental type certificate for the Pilatus PC-12/45 airplane. This airplane will have novel and unusual design features when compared to the state of technology envisaged in the applicable airworthiness standards. These novel and unusual design features include the installation of two electronic barometric altimeters, Model AM-250, manufactured by Honeywell for which the applicable regulations do not contain adequate or appropriate airworthiness standards for the protection of these systems from the effects of high intensity radiated fields (HIRF). These special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to the airworthiness standards applicable to these airplanes.

**DATES:** The effective date of these special conditions is October 31, 2003. Comments must be received on or before December 15, 2003.

**ADDRESSES:** Comments may be mailed in duplicate to: Federal Aviation Administration, Regional Counsel, ACE-7, Attention: Rules Docket Clerk, Docket No. CE200, Room 506, 901 Locust, Kansas City, Missouri 64106. All comments must be marked: Docket No. CE200. Comments may be inspected in the Rules Docket weekdays, except Federal holidays, between 7:30 a.m. and 4 p.m.

**FOR FURTHER INFORMATION CONTACT:** Wes Ryan, Aerospace Engineer, Standards Office (ACE-110), Small Airplane Directorate, Aircraft Certification Service, Federal Aviation Administration, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone (816) 329-4123.

**SUPPLEMENTARY INFORMATION:** The FAA has determined that notice and opportunity for prior public comment hereon are impracticable because these procedures would significantly delay issuance of the approval design and thus delivery of the affected aircraft. In addition, the substance of these special conditions has been subject to the public comment process in several prior instances with no substantive comments received. The FAA, therefore, finds that good cause exists for making these special conditions effective upon issuance.

#### Comments Invited

Interested persons are invited to submit such written data, views, or arguments, as they may desire. Communications should identify the regulatory docket or notice number and be submitted in duplicate to the address

acceptable and unacceptable purpose descriptions to be reported by authorized committees, when itemizing certain disbursements for which reimbursements are required, to provide a brief explanation of the activity for which reimbursement is required. These provisions have been in Title 11 of the Code of Federal Regulations since 1980 and 1995, respectively, and were not affected by the recent statutory changes to the election cycle reporting requirements.

**Need for Correction**

As published, the final rules inadvertently omit two paragraphs describing information to be reported by authorized committees of Federal candidates.

All committees must report the purpose of itemized disbursements (i.e., those disbursements aggregating in excess of \$200). Omitted paragraph (A) contains examples of suitably specific purpose descriptions as well as examples of those descriptions that are unacceptably vague. This paragraph is inconsistent with the reporting of rules for unauthorized committees (committees other than candidate committees) in 11 CFR 104.3(b)(3).

Omitted paragraph (B) is used in administering the "personal use" rules in 11 CFR 113.1. Federal candidates are barred from using campaign funds for personal benefit. Paragraph (B) requires authorized committees of Federal candidates itemizing disbursements for which partial or total reimbursement is required under 11 CFR 113.1(g)(1)(iii)(C) or (D) to provide a brief explanation of the activity for which the reimbursement is made.

Section 801 of Title 5 of the United States Code requires Federal agencies to submit regulations to Congress. These regulations were submitted to the Speaker of the House of Representatives and the President of the Senate on November 26, 2001.

**Certification of No Effect Pursuant to 5 U.S.C. § 605(b) [Regulatory Flexibility Act]**

This correction will not have significant economic impact on a substantial number of small entities. The basis of this certification is that this correction only requires political committees to once again add information to the reports they are required to file. These regulations were in 11 CFR since 1980 and 1995, respectively, before being inadvertently omitted in 2000.

**List of Subjects in 11 CFR Part 104**

Campaign funds, Political committees and parties, Reporting and recordkeeping requirements.

Accordingly, 11 CFR part 104 is corrected by making the following correcting amendment:

**PART 104—REPORTS BY POLITICAL COMMITTEES**

1. The authority citation for part 104 continues to read as follows:

**Authority:** 2 U.S.C. 431(1), 431(8), 431(9), 432(i), 434, 438(a)(8), 438(b), 439a.

**§ 104.3 Contents of reports (2 U.S.C. 434(b), 439a).**

\* \* \* \* \*

2. In § 104.3 add the following paragraphs (b)(4)(i)(A) and (B):

- (b) \* \* \*
- (4) \* \* \*
- (i) \* \* \*

(A) As used in this paragraph, *purpose* means a brief statement or description of why the disbursement was made. Examples of statements or descriptions which meet the requirements of this paragraph include the following: dinner expenses, media, salary, polling, travel, party fees, phone banks, travel expenses, travel expense reimbursement, and catering costs. However, statements or descriptions such as *advance, election day expenses, other expenses, expenses, expense reimbursement, miscellaneous, outside services, get-out-the-vote and voter registration* would not meet the requirements of this paragraph for reporting the purpose of an expenditure.

(B) In addition to reporting the purpose described in paragraph (b)(4)(i)(A) of this section, whenever an authorized committee itemizes a disbursement that is partially or entirely a personal use for which reimbursement is required under 11 CFR 113.1(g)(1)(ii)(C) or (D), it shall provide a brief explanation of the activity for which reimbursement is required.

\* \* \* \* \*

Dated: November 26, 2001.  
**Danny L. McDonald,**  
*Chairman, Federal Election Commission.*  
[FR Doc. 01-29679 Filed 11-29-01; 8:45 am]  
**BILLING CODE 6715-01-P**

**FEDERAL ELECTION COMMISSION**

**11 CFR Part 111**

**[Notice 2001-18]**

**Extension to Administrative Fines**

**AGENCY:** Federal Election Commission.

**ACTION:** Final rule; revision of the sunset date.

**SUMMARY:** The Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the expiration date in which the Federal Election Commission (hereinafter "the Commission") may assess civil money penalties for violations of the reporting requirements of section 434(a) of the Federal Election Campaign Act (hereinafter "the Act" or "FECA").

**DATES:** Effective on December 31, 2001.

**FOR FURTHER INFORMATION CONTACT:** Ms. Rosemary C. Smith, Assistant General Counsel, or Ms. Mai T. Dinh, Attorney, 999 E Street, NW., Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

**SUPPLEMENTARY INFORMATION:**

**Explanation and Justification**

Section 640 of the Treasury and General Government Appropriations Act, 2000, Pub. L. No. 106-58, 106th Cong., 113 Stat. 430, 476-77 (1999), amended § 309(a)(4) of the FECA, 2 U.S.C. 437g(a)(4), to provide for a modified enforcement process for violations of reporting requirements. Under § 437g(a)(4)(C) of the FECA, the Commission may assess a civil money penalty for violations of the reporting requirements of 2 U.S.C. 434(a). This authority, however, was to sunset on December 31, 2001. Pub. L. No. 106-58, 106th Cong., § 640(c). Recently, § 642 of the Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the sunset date to include all reports that cover activity between January 1, 2000, to December 31, 2003.

The Commission published final rules on May 19, 2000, to implement the amendment contained in the Treasury and General Government Appropriations Act, 2000. Section 111.30 of the regulations reflects the sunset provision of Pub. L. No. 106-58, 106th Cong., § 640(c). Therefore, the Commission is issuing this final rule to amend section 111.30 to extend the application of the administrative fine regulations, 11 CFR part 111, subpart B, to include all violations relating to reports that cover the period between January 1, 2000, to December 31, 2003.

The Commission is promulgating this final rule without notice or opportunity for comment because it falls under the "good cause" exemption of the Administrative Procedures Act, 5 U.S.C. 553(b)(B). The exemption allows



# Rules and Regulations

Federal Register

Vol. 68, No. 230

Monday, December 1, 2003

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

## FEDERAL ELECTION COMMISSION

### 11 CFR Parts 100 and 102

[Notice 2003–22]

#### Leadership PACs

**AGENCY:** Federal Election Commission.

**ACTION:** Final rules and transmittal of regulations to Congress.

**SUMMARY:** The Federal Election Commission is revising portions of its regulations to address the relationship between the authorized committee of a Federal candidate or officeholder and entities that are not authorized committees but are associated with the Federal candidate or officeholder. The final rules state that authorized committees and entities that are not authorized committees shall not be deemed to be affiliated. Thus, certain disbursements by those unaffiliated entities will be treated as in-kind contributions to the candidates. Further information is contained in the Supplementary Information that follows.

**EFFECTIVE DATE:** December 31, 2003.

**FOR FURTHER INFORMATION CONTACT:** Ms. Mai T. Dinh, Acting Assistant General Counsel, Mr. J. Duane Pugh Jr., Senior Attorney, or Mr. Anthony T. Buckley, Attorney, 999 E Street, NW., Washington, DC 20463, (202) 694–1650 or (800) 424–9530.

**SUPPLEMENTARY INFORMATION:** The Commission is adopting final rules at 11 CFR 100.5(g)(5) to address the relationship between authorized committees and unauthorized committees that are associated with a Federal candidate or officeholder, more commonly known as “leadership PACs,” as well as other entities that are not Federal political committees, but are established, financed, maintained, or controlled by, or acting on behalf of, a Federal candidate or officeholder

(collectively “leadership PACs”). Previously, the Commission has examined this relationship on a case-by-case basis to determine whether transactions between an authorized committee and a leadership PAC constituted in-kind contributions or resulted in affiliation under 11 CFR 100.5(g). In promulgating rules of general applicability, the Commission is changing its case-by-case approach and is deciding to analyze these transactions as in-kind contributions exclusively and not to engage in an affiliation analysis in examining the relationship between an authorized committee and a leadership PAC. As such, under the new rules, an authorized committee and a leadership PAC will not be deemed to be affiliated. Additionally, the adoption of these rules requires a change in the Commission’s regulations at 11 CFR 102.2(b)(1)(i), which, in part, governs the disclosure of the names of all unauthorized committees affiliated with an authorized committee.

The Commission published a Notice of Proposed Rulemaking on December 26, 2002, 67 FR 78753 (“NPRM”). Written comments were due by January 31, 2003. Comments were received from: the Campaign and Media Legal Center; the Center for Responsive Politics and Common Cause and Democracy 21 (joint comment); Cleta Mitchell, Esq.; Paul E. Sullivan, Esq.; Republicans Members of the U.S. House of Representatives Tom DeLay, Roy Blunt, Deborah Pryce, David Dreier, John Doolittle, Jack Kingston, Tom Reynolds, Bob Ney, Tom Davis, Phil English, Greg Walden, Buck McKeon, Hal Rogers, and Pete Sessions, and the American Liberty PAC, American Success PAC, Federal Victory Fund, Help America’s Leaders PAC, Pacific Northwest Leadership Fund, People for Enterprise, Trade, and Economic Growth, Together for Our Majority PAC, and the 21st Century Fund (joint comment); the Rely on Your Beliefs Fund; and Lyn Utrecht, Esq., Eric Kleinfeld, Esq., Jim Lamb, Esq., and Pat Fiori, Esq. (joint comment). The comments are available at <http://www.fec.gov/register.htm> under “Leadership PACs.” The Commission held a public hearing on February 26, 2003, at which it heard testimony from seven witnesses: Donald McGahn, Esq.; Cleta Mitchell, Esq.; Paul E. Sullivan, Esq.; Lawrence M. Noble, Esq.; Paul

Sanford, Esq.; Glen Shor, Esq.; and Donald Simon, Esq. Transcripts of the hearing are available at the website identified above. Please note that, for purposes of this document, “comment” and “commenter” apply to both written comments and oral testimony at the public hearing.

Under the Administrative Procedures Act, 5 U.S.C. 553(d), and the Congressional Review of Agency Rulemaking Act, 5 U.S.C. 801(a)(1), agencies must submit final rules to the Speaker of the House of Representatives and the President of the Senate, and publish them in the **Federal Register** at least 30 calendar days before they take effect. The final rules that follow were transmitted to Congress on November 24, 2003.

#### Explanation and Justification

##### 11 CFR 100.5 Political Committee

###### I. Background

The Federal Election Campaign Act of 1971, as amended (“FECA”), 2 U.S.C. 431 *et seq.*, defines “authorized committee” as “the principal campaign committee or any other political committee authorized by a candidate under section 432(e)(1) of this title to receive contributions or make expenditures on behalf of such candidate.” 2 U.S.C. § 431(6); *see also* 11 CFR 100.5(f)(1). “Unauthorized committee” is defined in the Commission’s regulations as “a political committee which has not been authorized in writing by a candidate to solicit or receive contributions or make expenditures on behalf of such candidate, or which has been disavowed pursuant to 11 CFR 100.3(a)(3).” 11 CFR 100.5(f)(2) (emphasis added). An unauthorized committee may accept contributions in greater amounts than those allowed to be accepted by an authorized committee, *compare* 2 U.S.C. 441a(a)(1)(C) *with* 2 U.S.C. 441a(a)(1)(A), and, if it attains multicandidate committee status,<sup>1</sup> may contribute greater amounts to Federal candidates than those allowed to be contributed by an authorized

<sup>1</sup> A committee achieves multicandidate status when it has been registered under 2 U.S.C. 433 for not less than six months, has received contributions from more than 50 persons, and except for a State political party organization, has made contributions to five or more candidates for Federal office. 2 U.S.C. 441a(a)(4); 11 CFR 100.5(c)(3).

committee. Compare 2 U.S.C. 441a(a)(2)(A) with 2 U.S.C. 441a(a)(1)(A).

The term "leadership PAC" lacks a formal definition. Generally, such PACs "are formed by individuals who are Federal officeholders and/or Federal candidates. The monies these committees receive are given to other Federal candidates to gain support when the officeholder seeks a leadership position in Congress, or are used to subsidize the officeholder's travel when campaigning for other Federal candidates. The monies may also be used to make contributions to party committees, including State party committees in key states, or donated to candidates for State and local office." *Notice of Proposed Rulemaking on Leadership PACs*, 67 FR 78753, 78754 (Dec. 26, 2002) (citations omitted).

Pursuant to 2 U.S.C. 441a(a)(5), "all contributions made by political committees established or financed or maintained or controlled by any corporation, labor organization, or any other person, including any parent, subsidiary, branch, division, department, or local unit of such corporation, labor organization, or any other person, or by any group of such persons, shall be considered to have been made by a single political committee."

Under the Commission's regulations, committees that are affiliated, that is, committees that are established, financed, maintained, or controlled by the same corporation, labor organization, person or group of persons, *et al.*, share a single limitation on the amount they can accept from any one contributor. 11 CFR 100.5(g), 110.3(a)(1), 110.3(a)(3)(ii). Typically, under FECA and the Commission's regulations, the Commission has treated "leadership PACs" as unauthorized political committees, and usually has not found them to be affiliated with authorized committees sharing contribution limits of affiliated committees.

In 1986 the Commission began a rulemaking to address affiliation in general, including leadership PACs. The Commission determined in 1989, however, to maintain its existing approach, noting that "the Commission has concluded that this complex area is better addressed on a case-by-case basis." *Affiliated Committees, Transfers, Prohibited Contributions, Annual Contribution Limitations and Earmarked Contributions; Final Rule*, 54 FR 34098, 34101 (Aug. 17, 1989). The Commission embarked on this rulemaking in 2002, in part, to clarify its historic approach in examining the

relationship and transactions between a candidate's authorized committee and a leadership PAC associated with that candidate. NPRM at 78755.

## II. Alternatives in the NPRM

The NPRM set forth three different ways of addressing the question of affiliation between an authorized committee and a leadership PAC. The first two proposals (Alternatives A and B) would have established factors for finding affiliation, with all of the consequences of affiliation applying as a result. The third proposal (Alternative C) sought to codify the Commission's existing practice.

Alternative A set out individual factors in proposed section 100.5(g)(5)(i), the presence of any one of which would result in affiliation. The factors were: (1) The candidate or officeholder, or their agent has signature authority on the unauthorized committee's checks; (2) funds contributed or disbursed by the unauthorized committee are authorized or approved by the candidate or officeholder or their agent; (3) the candidate or officeholder is clearly identified as described in 11 CFR 100.17 on either the stationery or letterhead of the unauthorized committee; (4) the candidate, officeholder or his campaign staff, office staff, or immediate family members, or any other agent, has the authority to approve, alter or veto the unauthorized committee's solicitations, contributions, donations, disbursements or contracts to make disbursements; and (5) the unauthorized committee pays for travel by the candidate, his campaign staff or office staff in excess of \$10,000 per calendar year. The second factor would have been satisfied even if the officeholder or candidate or agent authorized or approved only some and not all of the disbursements.

Alternative B described two separate tests under which affiliation would have been found. Under proposed section 100.5(g)(5)(i)(A), affiliation would have existed if any one of the following factors were present: (1) The candidate or officeholder has signature authority on the entity's checks; (2) the candidate or officeholder must authorize or approve disbursements over a certain minimum amount; (3) the candidate or officeholder signs solicitation letters and other correspondence on behalf of the entity; (4) the candidate or officeholder has the authority to approve, alter or veto the entity's solicitations; (5) the candidate or officeholder has the authority to approve, alter, or veto the entity's contributions, donations, or disbursements; or (6) the candidate or

officeholder has the authority to approve the entity's contracts. Under this alternative, the authorized committee and the leadership PAC would have been considered affiliated because the candidate or officeholder exercised sufficient influence to conclude that the candidate or officeholder established, financed, maintained, or controlled the leadership PAC.

If none of the above factors were present, affiliation could still be found under Alternative B of proposed section 100.5(g)(5)(i)(B) if any three of the following factors were present: (1) The campaign staff or immediate family members of the candidate or officeholder have the authority to approve, alter or veto the entity's solicitations; (2) the campaign staff or immediate family members of the candidate or officeholder have the authority to approve, alter, or veto the entity's contributions, donations, or disbursements; (3) the campaign staff or immediate family members of the candidate or officeholder have the authority to approve the entity's contracts; (4) the entity and the candidate or officeholder's authorized committees share, exchange, or sell contributor lists, voter lists, or other mailing lists directly to one another, or indirectly through the candidate or officeholder to one another; (5) the entity pays for the candidate or officeholder's travel anywhere except to or from the candidate or officeholder's home State or district; (6) the entity and the candidate or officeholder's authorized committees share office space, staff, a post office box, or equipment; (7) the candidate or officeholder's authorized committee(s) and the entity share common vendors; and (8) the name or nickname of the candidate or the officeholder, or other unambiguous reference to the candidate or officeholder appears on either the entity's stationery or letterhead.

Alternative C would have largely continued the Commission's current treatment of leadership PACs by treating a leadership PAC as affiliated with a candidate or officeholder's authorized committees unless the leadership PAC undertook activities that would indicate its primary purpose is not to influence the nomination or election of the candidate or officeholder involved. These activities are: (1) Only making disbursements to raise funds for party committees or to influence the nomination or election of persons other than the candidate or officeholder involved; (2) avoiding references to the candidacy or potential candidacy of the sponsoring candidate or officeholder in

any solicitations, communications or other materials of the unauthorized committee; (3) requiring that the candidate or officeholder make no reference to his or her candidacy or potential candidacy during his or her speeches or appearances on behalf of the leadership PAC; and (4) requiring that specified expenses would have to be reimbursed by a presidential campaign committee if the candidate or officeholder becomes a presidential candidate. If the leadership PAC did not conform its activities to these limitations, under Alternative C, it would be deemed to be an authorized committee.

### III. Comments

#### 1. Question of Affiliation

One commenter thought that Alternative A was contrary to FECA and not mandated by the Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155, 116 Stat. 81(2002) ("BCRA"). Another commenter believed that this alternative would defeat the purpose of leadership PACs, and that it was sufficiently onerous that Federal officeholders could not and would not establish them. A third commenter agreed with this latter point, arguing that its terms went beyond what the authors of BCRA envisioned. One commenter disagreed with Alternative A's general structure, arguing that no one single factor is sufficient to prove affiliation absent express authorization by the candidate.

Other commenters disapproved of Alternative A because it did not allow for sufficient opportunities to find affiliation. One commenter stated that the alternative contained only a *per se* list and thus ignored numerous factors that indicated a relationship existed between two committees. Another commenter argued that Alternative A was insufficiently comprehensive to encompass all relationships covered by the statutory term "established, financed, maintained, or controlled." Similarly, one commenter supported many of the factors of Alternative A, but believed it did not include enough factors and was not sufficiently flexible.

With respect to Alternative B, one commenter argued that it also was contrary to FECA and not mandated by BCRA. Another commenter felt that it essentially defeated the purpose of leadership PACs and was sufficiently onerous that the only conclusion to be drawn is that Federal officeholders could not and would not establish them. A third commenter agreed with this latter point, stating that Alternative B

was a more burdensome version of Alternative A.

The commenter who disagreed with the general structure of Alternative A concurred that most of the eight factors listed should be considered in determining affiliation, but thought setting a specific number to be met could present problems. Of the three commenters who thought Alternative A was not sufficiently comprehensive, all three supported the structure of Alternative B, but did not feel it included enough factors. Each of these commenters proposed variations on Alternative B that included additional factors. Two of these commenters added a third option for finding affiliation, based on a "totality of the circumstances." The commenter who did not include such an option argued that the rule should only apply to political committees under FECA and political organizations organized under 26 U.S.C. 527.

One commenter stated that Alternative C was a useful starting point for addressing the issue of the status of leadership PACs in the related candidate's own election. Another commenter thought that Alternative C provided a basis for a reasonable set of criteria defining and governing leadership PACs. This commenter suggested that certain amendments to Alternative C would be appropriate: (1) Specifically authorizing leadership PACs to contribute to State and local candidates and political parties within the limits and pursuant to State laws; (2) eliminating provisions that prohibit references to the related Federal candidate in solicitations or public appearances; and (3) requiring candidates and officeholders who become candidates for President and qualify for primary or general election financing to repay to the presidential campaign committee any expenses paid by the leadership PAC for travel, polling, staff, or other expenses made on behalf of the presidential campaign effort. Another commenter stated that Alternative C's proposed conditions are cumbersome and do not significantly improve the Commission's regulatory framework. This commenter suggested that the Commission should presume a leadership PAC is unaffiliated unless its activities are for the purpose of influencing the election of the connected Federal candidate.

Another commenter argued that Alternative C continues a current system that fails to properly consider affiliation, and that the mere absence of a leadership PAC attempt to influence the specific officeholder's election should not be conclusive evidence that

the committees are not affiliated. This commenter argued that such a standard ignores the "established, financed, maintained, or controlled by" test in FECA. Two other commenters disapproved of Alternative C because it maintains the status quo.

#### 2. Impact of BCRA

The Commission also sought comment as to how BCRA impacted a potential rule governing leadership PACs. Five commenters took issue with a suggestion in the NPRM that BCRA might require a finding of affiliation between an authorized committee and a leadership PAC. One commenter noted that one of BCRA's sponsors, Senator John McCain, had stated that, under BCRA's terms, "[a] Federal officeholder or candidate is prohibited from soliciting contributions for a Leadership PAC that do not comply with Federal hard money source and amount limitations. Thus, the Federal officeholder or candidate could solicit up to \$5,000 per year from an individual or PAC for the Federal account of the Leadership PAC and an additional \$5,000 from an individual or PAC for the non-Federal account of the Leadership PAC." 148 Cong. Rec. S2140 (Mar. 20, 2002). Thus, this commenter argued that BCRA does not contemplate the automatic affiliation of leadership PACs with authorized committees.

This same commenter noted that a number of leaders of the House of Representatives, all of whom voted in favor of BCRA, have leadership PACs. One commenter argued that BCRA does not require or even suggest that the Commission change its approach with respect to leadership PACs and the proper focus is on whether the activities at issue are "for the purpose of influencing the election of the individual who is connected with the PAC." In contrast, other commenters argued for an interpretation that BCRA prohibits Federal candidates and officeholders from maintaining soft money leadership PACs.

The Commission determined in the Soft Money rulemaking that BCRA does not allow a Federal candidate or officeholder to raise up to \$5,000 separately for the Federal and non-Federal accounts of leadership PACs directly or indirectly established, financed, maintained, or controlled by that Federal candidate or officeholder. Rather, for their leadership PACs, they are limited to raising a total of \$5,000 from any one source, per election cycle. *See Final Rules on Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money*, 67 FR 49064, 49107 (July 29, 2002) ("Although

candidate PACs and Leadership PACs are not specifically mentioned, the legislative history indicates that 2 U.S.C. 441i(e)(1) is intended to prohibit Federal officeholders and candidates from soliciting any funds for these committees that do not comply with FECA's source and amount limitations.") Therefore Federal candidates will not violate BCRA merely by establishing and raising money for their leadership PACs within the amount limitations and source prohibitions of FECA and BCRA.

### 3. Other Concerns

Two commenters, a leadership PAC and a joint comment from leadership PACs and Members of the House of Representatives, stated that their support of challengers helped those candidates who are often at a fundraising disadvantage when compared to incumbents.<sup>2</sup> One commenter argued that leadership PAC support for open seat candidates is sometimes critical to the viability of these candidates. Another commenter urged that the rule should be clear to "encourage and validate" the important role of these committees. This same commenter argued that leadership PACs should be encouraged as an avenue for Federal officeholders to support local and State parties and candidates in a manner that is disclosed to the Commission. This commenter also noted the importance of leadership PACs in their role of replacing the loss of non-Federal funds due to BCRA.

In response to the commenters arguing that BCRA precludes the result of the final rule issued today, the Commission concludes that BCRA's structure and wording answer these concerns. BCRA contemplates Federal candidate control of unauthorized committees. Otherwise, there would be no need to apply "hard money" limits. 2 U.S.C. 441i(e)(1). Thus, BCRA cannot be read generally to prohibit leadership PACs or to require that they be affiliated with a candidate's authorized committee. To the contrary, had Congress believed it was mandating a *per se* rule of affiliation between the two types of committees, BCRA would have gone further to require that contributions to those committees be aggregated with contributions to the candidate's authorized committee. BCRA requires no such aggregation.

<sup>2</sup> One commenter cited the Commission recent approval of campaign payment of candidate's salaries under certain circumstances as recognition of the importance of challengers receiving adequate funds.

## IV. Final Rule

In previous advisory opinions and compliance matters, the Commission has examined leadership PACs whose activities were significantly intertwined with the activities of a Federal candidate's authorized committee. In such circumstances, the Commission had two competing, but equally valid, theories it could pursue. The Commission could consider whether the leadership PAC's actions made it affiliated with the authorized committee, or the Commission could consider the committees unaffiliated and determine whether the leadership PAC made in-kind contributions to the authorized committee. The Commission has declined in several instances to find that a leadership PAC was affiliated with a candidate's authorized committee, even where it was apparent that the committees were controlled by the same person. *See* affiliation factors at 11 CFR 100.5(g). Instead, the Commission exercised its discretion to determine that a leadership PAC made in-kind contributions to the related Federal candidate's campaign. Nonetheless, the Commission maintained its discretion to pursue either of the two competing approaches. In making these findings, the Commission typically found that committees formed by a candidate to further his or her campaign were affiliated; those formed for other purposes were not.

New § 100.5(g)(5) clarifies the relationship between an authorized committee and a leadership PAC by removing the possibility that a candidate's authorized committee can be affiliated with an entity that is not an authorized committee, even if the candidate established, financed, maintained, or controlled that entity.

In promulgating this final rule, the Commission has considered the 25-year history of Commission enforcement and policy precedent (*see, e.g.*, Advisory Opinions 1978–12, 1984–46, 2003–12; MURs 1870, 2897 and 3740) and the comments received in response to the NPRM. Alternatives A and B, with *per se* affiliation factors, would have been too rigid and overbroad. They would have created a basis for affiliation in situations where interaction between an authorized committee and a leadership PAC would not merit such designations if those interactions were undertaken by committees where neither committee was authorized in writing by the candidate. Although Alternative C reflects the Commission's historic approach to leadership PACs, it suggests that the Commission would examine

them on a case-by-case basis. While the Commission has discretion to pursue either an affiliation or in-kind contributions analysis under FECA on a case-by-case basis when considering the circumstances surrounding leadership PACs, the Commission has decided, as a matter of policy, to adopt the in-kind contribution analysis as a rule of general applicability as they pertain to leadership PACs. *See Michigan v. EPA*, 268 F.3d 1075, 1087 (D.C. Cir. 2001) (discussing agency's discretion to choose rulemaking or case-by-case adjudicative procedure, *citing SEC v. Chenery*, 332 U.S. 174, 203 (1947) and *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 543 (1978)).

This decision does not affect affiliation between an authorized committee and any joint fundraising committee under 2 U.S.C. 432(e)(3)(ii) and 11 CFR 102.13(c)(1). Nor does it affect the ability of a national committee of a political party to be designated as the principal campaign committee of that party's presidential candidate under 2 U.S.C. 432(e)(3)(i) and 11 CFR 102.13(c)(2). Nor does this rule allow a leadership PAC to provide support to the Federal candidate or officeholder with whom it is associated in amounts different than those available to other similar political committees. Rather, a leadership PAC's provision of funds, goods, or services to any authorized committee will be treated as a contribution as defined in 2 U.S.C. 431(8), and thus limited to the amount at either 2 U.S.C. 441a(a)(1)(A) or 441a(a)(2)(A) per election, depending on whether the leadership PAC has attained multicandidate committee status, unless the activity falls within an exception to the definition of "contribution" or "expenditure," or is a fair market value exchange of goods or services for the usual and normal charge. *See also* 2 U.S.C. 431(8).

The Commission considered the issue of whether its treatment of leadership PACs comports with the purpose of the affiliation rule: the protection of contribution limitations. In adopting new § 100.5(g)(5), the Commission is applying the affiliation rule separately to distinct types of political committees to enforce different contribution limits. Typically, committees that become affiliated already operate under similar limitations on the amounts of contributions that they can make and accept. The fact of affiliation simply means that they now share one common limitation. One of the complications in affiliating authorized committees with leadership PACs is that these types of committees are subject to different

amount limitations for making and receiving contributions. Requiring them to abide by a single contribution limit means choosing a limitation that is not intended for one of those committees.<sup>3</sup> Consequently, it is logical to view an authorized committee and a leadership PAC as separate committees, and transactions between them that benefit the authorized committee as contributions and not as a basis to find them affiliated.

Further, the consequences of new 11 CFR 100.5(g)(5) with respect to leadership PAC contribution limits are no different after the promulgation of this rule than before. Leadership PACs operating as unauthorized political committees—that is, political committees whose purpose is to support more than one Federal candidate—may receive up to \$5000 per year from individuals, other persons, and multicandidate committees, and once they qualify as multicandidate committees, may contribute up to \$5000 per candidate per election. See 2 U.S.C. 432(e)(3), 441a(a)(1)(C) and 441a(a)(2)(A); 11 CFR 110.1(d) and 110.2(b). Although such leadership PACs are not exposed to the consequences of affiliation with authorized committees, leadership PACs may still be deemed affiliated with other unauthorized committees. See 11 CFR 100.5(g)(2), (3), and (4); see also Advisory Opinion 1990–16 (where the Commission found that a committee organized under State law and devoted to supporting candidates for election to State and local office, that had previously been the campaign committee of the State's then-governor, was affiliated with a Federal political committee that had been organized by the governor and that had as its purpose supporting candidates for Federal office). Thus, the rule in new 11 CFR 100.5(g)(5) provides no new avenue for circumventing the separate contribution limitations applicable to authorized and unauthorized committees.

The Commission concludes that since its first examination of leadership PACs, these committees cannot be assumed to be acting as authorized committees. Rather, these PACs are worthy of the same treatment as other unauthorized committees that operate without

presumptions as to their status. To the extent that leadership PACs are used to pay for costs that could and should otherwise be paid for by a candidate's authorized committee, such payments are in-kind contributions, subject to the Act's contribution limits and reporting requirements.

The Commission also concludes that in instances when leadership PAC activity results in an in-kind contribution to a candidate, Commission regulations adequately regulate such activity. 11 CFR 100.52(a) and (d), 109.20, 109.21, 109.23, 109.37; see MUR 5376 (Campaign America/Quayle); Report of the Audit Division on Bauer for President 2000, Inc., FEC Agenda Doc. No. 02–37, dated May 8, 2002 (considered in the Open Sessions on May 16, 2002 and May 23, 2002) (recommendations with respect to Campaign for Working Families PAC); MUR 3367 (Committee for America/Haig). These regulations, which define “contribution” and which address coordinated activities, will serve to ensure that leadership PACs are not used improperly to support the “associated” candidate's campaign.

The final rule at 11 CFR 100.5(g)(5) properly places the enforcement focus on the activity at issue. To support the proposition that rules governing in-kind contributions properly capture this activity, the Commission need look no further than its recently-issued final rule “to treat certain expenses incurred by multicandidate committees as in-kind contributions benefiting publicly funded Presidential candidates.” *Final Rules on Public Financing of Presidential Candidates and Nominating Conventions*, 68 FR 47386, 47407 (Aug. 8, 2003); 11 CFR 9034.10; 11 CFR 110.2(l). Although that rule was aimed at a somewhat different range of activity, the explanation and justification stated, “For other situations not addressed [in the new regulations governing pre-candidacy activity with a nexus to a Presidential campaign], including when expenditures are paid for by multicandidate committees after candidacy, the general provisions describing in-kind contributions at 11 CFR 100.52(a) and (d), 109.20, 109.21, 109.23, and 109.37 would apply.” *Final Rules on Public Financing of Presidential Candidates and Nominating Conventions*, 68 FR at 47407. The Commission intends symmetry between its regulations with respect to leadership PACs and its new rules applicable to certain pre-candidacy activity benefiting Presidential candidates by multicandidate committees.

The Commission also noted that the final rules in the *Public Financing of Presidential Candidates and Nominating Conventions*, 68 FR at 47408, “in no way address situations where the Commission determines that the multicandidate political committee and the candidate's principal campaign committee are affiliated under 11 CFR 100.5(g)(4).” With the new rule, the Commission has decided to examine these situations with a contribution analysis, instead of an affiliation analysis.

By its terms, new 11 CFR 100.5(g)(5) also applies to entities that are not political committees. Recently, the Commission examined the situation of a State ballot initiative committee that had been established by a Federal candidate and officeholder, but was not a registered Federal committee. AO 2003–12. The Commission found that the relationship between the ballot initiative committee and the Federal candidate and officeholder was sufficiently similar to the relationship between a traditional leadership PAC and its connected Federal candidate to warrant treating the Federal candidate and officeholder and the ballot initiative committee in the same manner as the Commission had historically treated leadership PACs for affiliation purposes. Therefore, under new 11 CFR 100.5(g)(5), the Commission would not examine the transactions between the Federal candidate and officeholder and the ballot initiative committee to determine whether the ballot initiative committee is affiliated with the Federal candidate and officeholder's authorized committee. Rather, the Commission would analyze the facts to determine whether the ballot initiative committee made an in-kind contribution to the Federal candidate and officeholder. Furthermore, the Commission will continue to use the affiliation factors in 11 CFR 300.2(c) to determine whether the Federal candidate and officeholder or his agent directly or indirectly established or finance or maintained or controlled the ballot initiative committee for purposes of the restrictions on the solicitation, receipt, transfer or disbursement of non-Federal funds in 2 U.S.C. 441i(e).

## V. Effect on Previous Advisory Opinions

As the Commission noted earlier, these new rules merely codify the discretion the Commission has exercised when the question of affiliation between an authorized committee and an unauthorized committee has come before it in the past. Thus, the final rules supersede

<sup>3</sup> Indeed, the NPRM sought comment on which of the two separate contribution limitations applicable to authorized and unauthorized committees should obtain in the event the Commission determined such committees would be affiliated. The one commenter who addressed this question believed that the FECA allowed the Commission no discretion in this matter, and that the lower contribution limits applicable to the authorized committee would have to be applied to the leadership PAC.

Advisory Opinions 1978–12, 1984–46, 1987–12, 1990–7, 1991–12, and 1993–22, only to the extent these advisory opinions suggest that an authorized committee can be affiliated with an unauthorized committee.

11 CFR 102.2 Statement of Organization: Forms and Committee Identification Number

The Commission’s previous reporting regulations at 11 CFR 102.2(b)(1)(i) provided, in part, for the eventuality of an authorized committee being affiliated with an unauthorized committee, and mandated that a principal campaign committee disclose on its statement of organization the names and addresses of all unauthorized committees with which it is affiliated. Because the new rule in 11 CFR 100.5(g)(5) eliminates the possibility of a principal campaign committee, i.e. an authorized committee, being affiliated with an unauthorized committee, the provisions of § 102.2(b)(1)(i) addressing such a possibility are no longer valid. Accordingly, the Commission is revising § 102.2(b)(1)(i) to eliminate these provisions. Pursuant to the revised § 102.2(b)(1)(i), a principal campaign committee will still be required to disclose the names and addresses of all other authorized committees that have been authorized by its candidate. While this revision was not addressed in the NPRM, it is a logical and technical change necessitated by the new 11 CFR 100.5(g)(5).

Certification of No Effect Pursuant to 5 U.S.C. 605(b) (Regulatory Flexibility Act)

The Commission certifies that the final rules do not have a significant economic impact on a substantial number of small entities. The basis of this certification is that these rules only codify current Commission practice with respect to whether certain entities established, financed, maintained, controlled by, or acting on behalf of, Federal candidates, are affiliated with authorized committees of Federal candidates. Accordingly, these rules do not impose any additional costs on the contributors or the committees. Further, the primary purpose of the proposed revisions is to clarify the Commission’s rules regarding affiliation and limits on contributions. This does not impose a significant economic burden because entities affected are already required to comply with the Act’s requirements in these areas.

List of Subjects

11 CFR Part 100

Elections.

11 CFR Part 102

Registration, organization, and recordkeeping by political committees.

■ For the reasons set out in the preamble, the Federal Election Commission amends subchapter A of Chapter I of Title 11 of the Code of Federal Regulations as follows:

PART 100—SCOPE AND DEFINITIONS

■ 1. The authority citation for part 100 continues to read as follows:

Authority: 2 U.S.C. 431, 434, 438(a)(8).

■ 2. In § 100.5, paragraph (g)(5) is added to read as follows:

§ 100.5 Political committee (2 U.S.C. 431(4), (5), (6)).

\* \* \* \* \*

(g) \* \* \*

(5) Notwithstanding paragraphs (g)(2) through (g)(4) of this section, no authorized committee shall be deemed affiliated with any entity that is not an authorized committee.

PART 102—REGISTRATION, ORGANIZATION, AND RECORDKEEPING BY POLITICAL COMMITTEES

■ 3. The authority citation for part 102 continues to read as follows:

Authority: 2 U.S.C. 432, 433, 434(a)(11), 438(a)(8), 441d.

■ 4. In § 102.2, paragraph (b)(1)(i) is revised to read as follows:

§ 102.2 Statement of organization: Forms and committee identification number (2 U.S.C. 433(b), (c)).

\* \* \* \* \*

(b) \* \* \*

(1) \* \* \*

(i) A principal campaign committee is required to disclose the names and addresses of all other authorized committees that have been authorized by its candidate. Authorized committees need only disclose the name of their principal campaign committee.

\* \* \* \* \*

Dated: November 24, 2003.

Bradley A. Smith, Vice Chairman, Federal Election Commission. [FR Doc. 03–29752 Filed 11–28–03; 8:45 am] BILLING CODE 6715–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2001–SW–07–AD; Amendment 39–13371; AD 2003–24–02]

RIN 2120–AA64

Airworthiness Directives; Eurocopter France Model AS332C, L, L1, and L2 Helicopters

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD) for the specified Eurocopter France (Eurocopter) model helicopters that requires inspecting the cockpit pedal unit (pedal unit) adjustment lever (lever) for a crack at specified time intervals by a dye-penetrant inspection and replacing any cracked lever with an airworthy lever before further flight. Modifying the pedal unit is also required and is a terminating action for the requirements of this AD. This amendment is prompted by cracks detected in the lever that creates an unsafe condition. The actions specified by this AD are intended to prevent failure of the lever, loss of access to the brake pedals on the ground or loss of yaw control in flight, and subsequent loss of control of the helicopter.

DATES: Effective January 5, 2004.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of January 5, 2004.

ADDRESSES: The service information referenced in this AD may be obtained from American Eurocopter Corporation, 2701 Forum Drive, Grand Prairie, Texas 75053–4005, telephone (972) 641–3460, fax (972) 641–3527. This information may be examined at the FAA, Office of the Regional Counsel, Southwest Region, 2601 Meacham Blvd., Room 663, Fort Worth, Texas; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Gary Roach, Aviation Safety Engineer, FAA, Rotorcraft Directorate, Regulations and Guidance Group, Fort Worth, Texas 76193–0110, telephone (817) 222–5130, fax (817) 222–5961.

SUPPLEMENTARY INFORMATION: A proposal to amend 14 CFR part 39 to add an AD for Eurocopter France Model AS332C, L, L1, and L2 helicopters was published as an NPRM in the Federal

acceptable and unacceptable purpose descriptions to be reported by authorized committees, when itemizing certain disbursements for which reimbursements are required, to provide a brief explanation of the activity for which reimbursement is required. These provisions have been in Title 11 of the Code of Federal Regulations since 1980 and 1995, respectively, and were not affected by the recent statutory changes to the election cycle reporting requirements.

**Need for Correction**

As published, the final rules inadvertently omit two paragraphs describing information to be reported by authorized committees of Federal candidates.

All committees must report the purpose of itemized disbursements (i.e., those disbursements aggregating in excess of \$200). Omitted paragraph (A) contains examples of suitably specific purpose descriptions as well as examples of those descriptions that are unacceptably vague. This paragraph is inconsistent with the reporting of rules for unauthorized committees (committees other than candidate committees) in 11 CFR 104.3(b)(3).

Omitted paragraph (B) is used in administering the "personal use" rules in 11 CFR 113.1. Federal candidates are barred from using campaign funds for personal benefit. Paragraph (B) requires authorized committees of Federal candidates itemizing disbursements for which partial or total reimbursement is required under 11 CFR 113.1(g)(1)(iii)(C) or (D) to provide a brief explanation of the activity for which the reimbursement is made.

Section 801 of Title 5 of the United States Code requires Federal agencies to submit regulations to Congress. These regulations were submitted to the Speaker of the House of Representatives and the President of the Senate on November 26, 2001.

**Certification of No Effect Pursuant to 5 U.S.C. § 605(b) [Regulatory Flexibility Act]**

This correction will not have significant economic impact on a substantial number of small entities. The basis of this certification is that this correction only requires political committees to once again add information to the reports they are required to file. These regulations were in 11 CFR since 1980 and 1995, respectively, before being inadvertently omitted in 2000.

**List of Subjects in 11 CFR Part 104**

Campaign funds, Political committees and parties, Reporting and recordkeeping requirements.

Accordingly, 11 CFR part 104 is corrected by making the following correcting amendment:

**PART 104—REPORTS BY POLITICAL COMMITTEES**

1. The authority citation for part 104 continues to read as follows:

**Authority:** 2 U.S.C. 431(1), 431(8), 431(9), 432(i), 434, 438(a)(8), 438(b), 439a.

**§ 104.3 Contents of reports (2 U.S.C. 434(b), 439a).**

\* \* \* \* \*

2. In § 104.3 add the following paragraphs (b)(4)(i)(A) and (B):

- (b) \* \* \*
- (4) \* \* \*
- (i) \* \* \*

(A) As used in this paragraph, *purpose* means a brief statement or description of why the disbursement was made. Examples of statements or descriptions which meet the requirements of this paragraph include the following: dinner expenses, media, salary, polling, travel, party fees, phone banks, travel expenses, travel expense reimbursement, and catering costs. However, statements or descriptions such as *advance, election day expenses, other expenses, expenses, expense reimbursement, miscellaneous, outside services, get-out-the-vote and voter registration* would not meet the requirements of this paragraph for reporting the purpose of an expenditure.

(B) In addition to reporting the purpose described in paragraph (b)(4)(i)(A) of this section, whenever an authorized committee itemizes a disbursement that is partially or entirely a personal use for which reimbursement is required under 11 CFR 113.1(g)(1)(ii)(C) or (D), it shall provide a brief explanation of the activity for which reimbursement is required.

\* \* \* \* \*

Dated: November 26, 2001.  
**Danny L. McDonald,**  
*Chairman, Federal Election Commission.*  
[FR Doc. 01-29679 Filed 11-29-01; 8:45 am]  
**BILLING CODE 6715-01-P**

**FEDERAL ELECTION COMMISSION**

**11 CFR Part 111**

**[Notice 2001-18]**

**Extension to Administrative Fines**

**AGENCY:** Federal Election Commission.

**ACTION:** Final rule; revision of the sunset date.

**SUMMARY:** The Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the expiration date in which the Federal Election Commission (hereinafter "the Commission") may assess civil money penalties for violations of the reporting requirements of section 434(a) of the Federal Election Campaign Act (hereinafter "the Act" or "FECA").

**DATES:** Effective on December 31, 2001.

**FOR FURTHER INFORMATION CONTACT:** Ms. Rosemary C. Smith, Assistant General Counsel, or Ms. Mai T. Dinh, Attorney, 999 E Street, NW., Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

**SUPPLEMENTARY INFORMATION:**

**Explanation and Justification**

Section 640 of the Treasury and General Government Appropriations Act, 2000, Pub. L. No. 106-58, 106th Cong., 113 Stat. 430, 476-77 (1999), amended § 309(a)(4) of the FECA, 2 U.S.C. 437g(a)(4), to provide for a modified enforcement process for violations of reporting requirements. Under § 437g(a)(4)(C) of the FECA, the Commission may assess a civil money penalty for violations of the reporting requirements of 2 U.S.C. 434(a). This authority, however, was to sunset on December 31, 2001. Pub. L. No. 106-58, 106th Cong., § 640(c). Recently, § 642 of the Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the sunset date to include all reports that cover activity between January 1, 2000, to December 31, 2003.

The Commission published final rules on May 19, 2000, to implement the amendment contained in the Treasury and General Government Appropriations Act, 2000. Section 111.30 of the regulations reflects the sunset provision of Pub. L. No. 106-58, 106th Cong., § 640(c). Therefore, the Commission is issuing this final rule to amend section 111.30 to extend the application of the administrative fine regulations, 11 CFR part 111, subpart B, to include all violations relating to reports that cover the period between January 1, 2000, to December 31, 2003.

The Commission is promulgating this final rule without notice or opportunity for comment because it falls under the "good cause" exemption of the Administrative Procedures Act, 5 U.S.C. 553(b)(B). The exemption allows



# Rules and Regulations

Federal Register

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Monday, December 15, 2003

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

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## FEDERAL ELECTION COMMISSION

### 11 CFR Parts 100, 106, 114, 9004, and 9034

[Notice 2003–24]

#### Travel on Behalf of Candidates and Political Committees

**AGENCY:** Federal Election Commission.

**ACTION:** Final rules and transmittal of regulations to Congress.

**SUMMARY:** The Federal Election Commission is promulgating new and revised rules regarding the proper rates and timing for payment for travel on behalf of political committees and candidates on means of transportation that are not offered for commercial passenger service, including government conveyances. The final rules provide more comprehensive guidance than the previous regulations by establishing a single, uniform valuation scheme for campaign travel that does not depend on whether the service provider is a corporation, labor organization, individual, partnership, limited liability company or other entity. The final rules apply to all Federal candidates, including publicly funded presidential candidates as well as other individuals traveling on behalf of candidates, party committees, and other political committees where the travel is in connection with Federal elections. Further information is provided in the supplementary information that follows.

**EFFECTIVE DATE:** The effective date for the revisions to 11 CFR parts 100, 106, 114 and 9034 is January 14, 2004. Further action on revisions to 11 CFR part 9004, including the publication of a document in the **Federal Register** announcing an effective date, will be taken after these regulations have been before Congress for 30 legislative days pursuant to 26 U.S.C. 9009(c).

**FOR FURTHER INFORMATION CONTACT:** Mr. John C. Vergelli, Acting Assistant General Counsel, or Mr. Richard T. Ewell, Attorney, 999 E Street NW., Washington, DC 20463, (202) 694–1650 or (800) 424–9530.

**SUPPLEMENTARY INFORMATION:** The Commission is implementing several changes to its rules governing travel in connection with a Federal election. These final rules establish a simple, uniform payment scheme covering all Federal election travel on either government or private aircraft and other conveyances. The previous regulation at 11 CFR 114.9(e) established the amount and timing for reimbursement by a candidate to a corporation or labor organization for the use of a private airplane or other means of transportation, but did not address means of travel furnished by individuals, partnerships, and other entities. The previous rules in section 114.9(e) also were not fully consistent with the Commission's treatment of similar travel by presidential and vice-presidential candidates using government-provided transportation under 11 CFR 9004.7 and 9034.7. Nor did the previous rules in 11 CFR 114.9(e) establish specific guidance for those traveling on behalf of party committees or other unauthorized committees.

The Notice of Proposed Rulemaking ("NPRM") on which these final rules are based was published in the **Federal Register** on August 21, 2003. 68 FR 50,481 (August 21, 2003). The comment period was originally set to close on September 19, 2003, but the Commission extended the comment period until September 29, 2003. The Commission received nine comments from ten commenters,<sup>1</sup> and held a public hearing on this and two other rulemakings on October 1, 2003. Seven witnesses testified during the hearing. Transcripts of the hearing are available at <http://www.fec.gov/register.htm>. Please note that, for purposes of this document, the terms "commenter" and "comment" apply to both written

<sup>1</sup> The Commission received written comments from: Perkins, Coie LLP; The Campaign Legal Center; FEC Watch; the Center for Responsive Politics; National Republican Senatorial Committee; National Republican Congressional Committee; National Business Aviation Association, Inc.; Nancy J. Lally; attorneys Lyn Utrecht, Eric Kleinfeld, Pat Fiori, and James Lamb of Ryan, Phillips, Utrecht & MacKinnon; and the Internal Revenue Service.

comments and oral testimony at the public hearing.

Under the Administrative Procedures Act, 5 U.S.C. 553(d), and the Congressional Review of Agency Rulemaking Act, 5 U.S.C. 801(a)(1), agencies must submit final rules to the Speaker of the House of Representatives and the President of the Senate, and publish them in the **Federal Register** at least 30 calendar days before they take effect. In addition, 26 U.S.C. 9009(c) requires that any rules or regulations prescribed by the Commission to carry out the provisions of the Presidential Election Campaign Fund Act be transmitted to the Speaker of the House of Representatives and the President of the Senate 30 legislative days before they are finally promulgated. The final rules that follow were transmitted to Congress on December 10, 2003.

#### Explanation and Justification

##### I. 11 CFR 100.93 Travel by Airplane or Other Means of Transportation

###### A. Introduction

The Commission's previous candidate travel rules in 11 CFR 114.9(e) focused only on means of travel owned or leased by corporations or labor organizations. In the NPRM, the Commission proposed broadening the rules to include airplanes and other means of travel owned by other persons. The NPRM proposed the addition of new section 11 CFR 100.93, based on the previous 11 CFR 114.9(e) with the organizational and substantive changes described in the NPRM and below. New § 100.93 is one of the enumerated exceptions to the definition of "contribution" in 11 CFR part 100, subpart C, and identifies circumstances in which the use of a private means of transportation not owned or leased by candidates, their authorized committees, or other political committees would *not* be contributions.

###### B. 11 CFR 100.93(a) Scope and Definitions

1. Paragraph (a)(1) Means of Transportation Within the Scope of 11 CFR 100.93

(i) Paragraph (a)(1)(i)—Airplanes not licensed by the FAA to operate for compensation or hire under 14 CFR parts 121, 129, or 135.

Previous 11 CFR 114.9(e)(1) focused on the use of airplanes owned by

corporations or labor organizations not "licensed to offer commercial services for travel in connection with a Federal election." Thus, the previous rule distinguished between the use of airplanes owned or leased by a corporation or labor organization licensed to offer commercial services for travel, and airplanes owned by other corporations or labor organizations not normally engaged in commercial air passenger service. This distinction required an examination of the plane's ownership or lease structure to determine the proper reimbursement timing and amount.

One district court found the wording "licensed to offer commercial services for travel in connection with a Federal election" to be ambiguous. See *Federal Election Commission v. Arlen Specter '96*, 150 F. Supp. 2d 797, 804 and 808 (E.D. Pa. 2001). In that case, a presidential candidate claimed that 11 CFR 114.9(e) applied to all travel on airplanes except airplanes owned or leased by a corporation or labor organization possessing a license for travel in connection with a Federal election. The final rules are intended, in part, to remedy this ambiguity. The Court noted that no such license existed and ultimately deferred to the Commission's longstanding position that 11 CFR 114.9(e) applied only to airplanes owned by corporations or labor organizations not engaged in the business of providing commercial air service generally, without regard to providing service specifically in connection with a Federal election. *Id.* at 812.

In the NPRM, the Commission proposed the normal use of the airplane as the criterion for the applicability of section 100.93. Specifically, if the plane was normally operated for passenger service for a fee, 11 CFR 100.52 would apply, and if it was not, then section 100.93 would apply. Under section 100.52, "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" is an "in-kind contribution." 11 CFR 100.52(d). Thus, a candidate or other campaign traveler receives an in-kind contribution when he or she is provided commercial transportation without charge or at a charge that is less than the usual and normal charge for that transportation.

The Commission received four comments addressing the scope of section 100.93. Three of the commenters supported the elimination of 11 CFR 114.9(e). Two commenters expressed support for the proposed distinction based on whether the airplane is

"normally operated for commercial passenger service." A different commenter, however, recommended that the rule focus on whether the person providing the service normally provides the service as a commercial service, rather than whether a particular airplane is normally operated for commercial passenger service. This commenter asserted that "when a commercial provider of transportation services leases an airplane specifically for the purpose of providing services to a campaign, the Commission should treat the commercial provider the same as if it owned the airplane. The fact that the airplane had never previously been used as a commercial aircraft would be irrelevant."

Likewise, another commenter urged the Commission to "focus on the provider of the air transportation and the primary business of that provider rather than the 'normal use' of a particular aircraft." This commenter asserted that it would be too difficult to determine the "normal use" of an aircraft in light of the varied ownership structures and shared users and uses of a single plane. The commenter argued that a rule focusing on the "normal use" of an aircraft would require significant clarification, including an explanation of whether the "normal use" pertained only to use by the usual operator or whether it would also apply to use by other persons leasing the aircraft for particular flights or for a longer period of time. This commenter recommended basing the distinction instead on the "FAA's long established primary business test." Under that test, the commenter stated, any aircraft offered to a candidate or other campaign traveler would be covered by 11 CFR 100.93 so long as air transportation is not the primary business of the provider. This approach is similar to an alternative proposed in the NPRM, which would delineate the airplanes covered by this new section based on whether the service provider is a "commercial vendor," as defined in 11 CFR 116.1(c), of air transportation services.

These comments raise a number of concerns about the difficulties inherent in basing a rule on "normal use" of an airplane. The approaches suggested by the commenters would be, to the extent they require a determination of the ownership structure or consideration of the prior use of the airplane, subject to manipulation and would perpetuate the difficulties presented by the previous rule. The Commission rejects the "commercial vendor" standard and the commenter's suggested "primary business test," because each would require analysis of the service provider's

structure and business practices. One impetus for this rulemaking is to avoid an ownership-dependent analysis in establishing the proper valuation of election-related travel where the value of that travel is not readily ascertainable from a normal and usual charge. The purpose of new § 100.93 is to provide clear guidance to campaign travelers, not to describe the business practices of service providers.

The Commission concludes that the legal operating authority for the airplane, rather than the ownership or leasing arrangement, is the relevant determinant because it indicates the applicability of 11 CFR 100.52(d) or new § 100.93. The service provider's business practice is relevant only to the extent that it discloses the operating authority of the airplane. Because the commenters are correct that a determination of the "normal use" of an airplane could be complex, the final rule relies on the classifications already established by the Federal Aviation Administration ("FAA").

The new rules in § 100.93 apply to all airplanes not licensed by the FAA to operate for compensation or hire under 14 CFR parts 121, 129, or 135.<sup>2</sup> 11 CFR 100.93(a)(1). This phrase eliminates any potential ambiguity in the current language at 11 CFR 114.9(e) and provides a readily discernible bright line based on existing FAA regulations. Paragraph (a) further clarifies that new section 100.93 also applies to airplanes operated by a Federal, State or local government in the United States.

The NPRM indicated that the proposed regulations in 11 CFR 100.93

<sup>2</sup> The FAA requires airplane operators who hold their service out to the public as willing to transport persons or property to be certificated under 14 CFR part 119 to conduct operations in accordance with 14 CFR part 121 or part 135, as applicable, depending primarily on the size of the aircraft used. Operators must notify the FAA of the specific aircraft they intend on using in the part 121 or 135 operation. Foreign aircraft held out to the public within the United States must comply with the requirements of 14 CFR part 129. Operators conducting operations for compensation or hire that are not common carriage, or operators that are private carriage in large aircraft must be certificated by the FAA to operate under part 125. See 14 CFR 125.1(a) (applies to aircraft with a seating capacity of 20 or more persons, but only where common carriage is not involved). Operators conducting flights in small private aircraft not for compensation or hire are regulated by the FAA under 14 CFR part 91. Although aircraft operating under 14 CFR part 91 certification are not usually permitted to accept any form of payment or reimbursement from passengers, a special FAA exception permits Federal candidates to reimburse the owners of such aircraft for the use of planes pursuant to the Commission's regulations. See 14 CFR 91.321. Aircraft operating under 14 CFR part 125 certification are similarly prohibited from operating as common carriers, but there is no similar general prohibition on the acceptance of payment from passengers to warrant an identical exception.

were intended to apply only to airplanes not authorized by the FAA to conduct operations in air transportation as a common carrier, while the current regulations at 11 CFR 100.52 would apply to all airplanes operated pursuant to other certifications that do permit carriage of passengers for compensation. The final rules in § 100.93(a)(1)(i) differ from the proposed rules by including a specific reference to the operating authority for the planes. Most operators offering passenger service for compensation or hire, such as air carriers or commercial operators, must receive special certification under 14 CFR parts 121, 129, or 135 in order to hold out the use of the airplane to the general public. A usual and normal charge will ordinarily be apparent for the use of these airplanes, so there is no need to apply new § 100.93 to the use of these airplanes. Rather, section 100.93 applies to private jets and other airplanes that are not normally held out to the public, such as airplanes operated exclusively under 14 CFR parts 91 or 125.<sup>3</sup> The pilot of an airplane is usually aware of the operating authority in order to comply with the safety requirements and other duties required for that each different type of operating certification. The status of the airplane can be quickly determined by reference to the operations specifications for that airplane, which will identify the rule part that governs the operator.

New section 100.93 applies to airplanes owned by any “person,” as defined at 11 CFR 100.10, as well as airplanes owned by the Federal government or a State or local government. This is intended to remedy whatever confusion might have previously resulted from the fact that previous 11 CFR 114.9(e) covered only corporate and labor organization aircraft.

*(ii) Paragraph (a)(1)(ii)—Other means of transportation.*

Because most conveyances other than airplanes are not operated subject to FAA authority, new § 100.93 applies to “other means of transportation not operated for commercial passenger service.” 11 CFR 100.93(a)(1). The Commission believes that a determination of the normal use of a car, bus, or similar conveyances, while requiring some examination of its normal operation, does not raise the unique complexities presented by the ownership structures, expenses, and uses of airplanes. Without any external regulatory structure to parallel the FAA

regulations of airplanes, the Commission concludes that this approach provides the most accurate means of identifying when the usual and normal charge for a conveyance can be readily ascertained for compliance with 11 CFR 100.52(d), and when it cannot.

*(iii) Paragraph (a)(1)(iii)—Government conveyances.*

Because the scope of the final rules is tied to FAA certification, the Commission is adding new paragraph (a)(1)(iii) to clarify that election-related travel aboard a Federal, State, or local government conveyance is within the scope of new 11 CFR 100.93.

**2. Paragraph (a)(2) Means of Transportation Outside the Scope of 11 CFR 100.93**

New paragraph (a)(2) of section 100.93 provides that 11 CFR 100.52(a) and (d) continue to apply to travel by means of transportation operated for commercial passenger service. However, for campaign travelers using means of transportation not operated for commercial passenger service where the normal and usual charge may not be obvious, as opposed to commercial airlines or charter or taxi services normally offered for a fee, § 100.93 establishes a substitute for the normal and usual rate for that means of travel.

**3. Paragraph (a)(3) Definitions**

*(i) Paragraph (a)(3)(i)—Campaign traveler.*

Paragraph (a)(3) defines several terms used in new section 100.93. In the NPRM, the Commission proposed defining the term “campaign traveler” to provide a succinct term covering the candidate, candidate’s agent, or other individual traveling on behalf of a candidate or a candidate’s authorized committee. One commenter suggested that 11 CFR 100.93 be expanded to include payment for travel by persons traveling on behalf of political parties and other political committees, essentially inviting the Commission to expand the definition of “campaign traveler” to these other travelers. The Commission is implementing the suggestion to provide guidance to these other travelers who, if not permitted to rely on this valuation of travel as set forth in this new section, would be left without specific guidance as to the proper rate of reimbursement. By establishing a single rate for travel reimbursement, the new rules will promote greater uniformity among all individuals traveling in connection with a Federal election on behalf of a political committee.

The final rules at 11 CFR 100.93(a)(3)(i)(A) define a new term, “campaign traveler,” to include any individual traveling in connection with a Federal election on behalf of a candidate, a political party committee, or any other political committee. In addition, because the news media sometimes accompany Federal candidates on government conveyances and other means of transportation at the candidate’s discretion, the final rules address the proper amount of payment for their travel. Section 100.93(a)(3)(i)(B) specifies that members of the news media are included in the definition of “campaign traveler” when traveling with a candidate. This definition applies whether or not such candidates are running for President or Vice President or are receiving public funding. It is consistent with the provisions in former 11 CFR 9004.7(b)(5)(i)(C) and 9034.7(b)(5)(i)(C) that required the inclusion of members of the media in calculating the cost of comparable transportation. Once a service provider makes an airplane or other conveyance available for the use of a candidate and the accompanying news media, the service provider must be reimbursed for the value of that travel in order to avoid a contribution from the service provider to the candidate’s campaign. Therefore, either the candidate’s authorized committee, other political committee responsible for payment of travel expenses for the candidate, or the media travelers, must pay the travel costs, at the same rate, for the members of the media who accompany the candidate(s). See 11 CFR 100.93(b), discussed below. The news media may elect to pay the service provider directly, or to reimburse the political committee in accordance with this section and 11 CFR 9004.6 and 9034.6.

*(ii) Paragraph (a)(3)(ii)—Service provider.*

Given the complex ownership and leasing arrangements often associated with airplanes and other means of transportation, a person providing transportation to a campaign traveler may be either the owner of the conveyance, or may be a different person who is leasing the conveyance from the owner and making it available for the campaign traveler’s use. The NPRM proposed to define “service provider” as the owner or lessee of an airplane or other conveyance who uses the airplane or other conveyance to provide transportation to a campaign traveler. One commenter expressed concern that this definition would not allow sufficient flexibility for aircraft owners and lessees to provide

<sup>3</sup> Aircraft operating pursuant to 14 CFR parts 91 or 125 are not permitted to operate as common carriers.

alternative transportation when their aircraft becomes unavailable and they are forced to charter different aircraft in order to fulfill their transportation commitments. Presumably, the commenter is concerned that in such instances the service provider would be the owner of the substitute aircraft. A different commenter recommended that the Commission address similar situations in which the owner or lessor of an airplane makes the airplane available to a major client, independent contractor, or other person outside the corporation or labor organization. This commenter urged that in such situations the service provider should be the "person who has been given the right to use the aircraft," rather than the owner or lessor. Likewise, one commenter suggested that the Commission specifically address situations where multiple persons or entities share access to an airplane, such as through a joint ownership or time-sharing agreement. This commenter stated that in such instances the service provider should be the person who makes the airplane available to the candidate.

The final rules at 11 CFR 100.93(a)(3)(ii) clarify that the "service provider" is the person making the airplane or other conveyance available to the campaign traveler or otherwise providing the transportation to the campaign traveler. Thus, a service provider may be the owner, a person leasing the airplane or other conveyance from the owner, or another person with a legal right to offer the use of the airplane or other conveyance to the campaign traveler.

(iii) Paragraph (a)(3)(iii)—*Unreimbursed value.*

The proposed rules at paragraph (a)(2) sought to define the term "unreimbursed value" as the portion of the value provided to the campaign traveler, calculated according to the rules in this section, that is not reimbursed by the candidate's authorized committee. The proposed definition specified that a late payment would not qualify as a reimbursement under this section, meaning that the value of the service provided would be an in-kind contribution to the candidate. By contrast, a service provider would not make an in-kind contribution if the candidate's authorized committee provides payment within the time specified in paragraphs (c) or (d).

One commenter argued that the rule would unfairly penalize "absentminded campaign schedulers or late reimbursers" by treating late payments as contributions, suggesting that the rule as proposed in the NPRM would remove

the incentive for *sua sponte* payments outside the permitted time frames. The timing requirements in 11 CFR 100.93 are integral components of the regulatory scheme. The definition of "unreimbursed value" in the final rule, which is located in paragraph (a)(3)(iii), is therefore substantially the same as proposed in the NPRM. The Commission does not agree that the definition of "unreimbursed value" will discourage *sua sponte* payments after the deadlines because it does not believe those acting in good faith would be deterred from taking corrective, mitigating actions.

C. 11 CFR 100.93(b) General Rule

Section 100.93(b) sets forth the general rule for when the providing of travel does not constitute a contribution to a candidate or political committee, as well as when and to what extent the unreimbursed value of such travel is an in-kind contribution. Under paragraph (b)(1), as proposed in the NPRM, a candidate's authorized committee would not receive or accept a contribution if the authorized committee pays the service provider the full value of the transportation within the specified time. One commenter stated that the proposed rule was "sound and consistent" with the Act and Commission's treatment of in-kind contributions.

The Commission is implementing the final rule as proposed in the NPRM, with additional clarifications described below and the conforming changes needed to account for payment by members of the news media and for persons traveling on behalf of political party committees and other political committees. Paragraph (b)(1) sets out the rule for most campaign travelers, generally requiring that the candidate's authorized committee, in order to avoid receiving or accepting a contribution, pay the service provider for campaign travelers traveling on behalf of that candidate. Likewise, other political committees (*i.e.*, other than authorized committees) must pay the service provider for other campaign travelers who are traveling on behalf of such committees. For example, if a Federal candidate attending a fundraiser for her own campaign flies on the same private airplane with a government official traveling to appear on behalf of a non-connected political committee in connection with a Federal election, the candidate's authorized committee would pay for the candidate's travel and the non-connected political committee would pay for the government official's travel.

While the authorized committee or other political committee will generally make the reimbursement payment, paragraph (b)(1)(ii) permits a campaign traveler to pay the service provider directly for his or her own travel. However, such payment constitutes an in-kind contribution by the campaign traveler to the candidate or political committee to the extent that it does not qualify for the transportation expense exception set forth in 11 CFR 100.79.<sup>4</sup> In the example above, an individual working for a Federal candidate could choose to pay up to \$1,000 from her own pocket for campaign travel without the payment constituting an in-kind contribution, assuming that she had not already made other payments for travel with respect to that election.

Paragraph (b)(1)(iii) similarly specifies that a member of the news media traveling with a candidate may choose to reimburse the service provider directly at the rate not less than the amount set forth in paragraphs (c) or (d) of section 100.93. If a member of the news media elects to have the candidate's authorized committee pay for the media's travel rather than paying the service provider directly, he or she may do so and the candidate's authorized committee is permitted to seek reimbursement from the media. Ultimately it is the candidate's responsibility to ensure that the service provider is reimbursed for the value of the transportation provided to all persons traveling with the candidate.

In light of the fact that the previous rules at 11 CFR 114.9(e) were limited to airplanes owned by corporations or labor organizations, payment was required because the unpaid use of such airplanes is a contribution in violation of 2 U.S.C. 441b. In contrast, the new rule also encompasses airplanes owned or leased by individuals, partnerships, and certain other persons who are permitted to make in-kind contributions to candidates up to the amounts set forth in 2 U.S.C. 441a. Thus, under the new rules, a candidate or political committee may elect to receive an in-kind contribution from the service provider rather than reimbursing that

<sup>4</sup> 11 CFR 100.79(a) permits an individual traveling on behalf of any candidate or political party committee to incur up to \$1,000 in transportation expenses with respect to a single election, and up to \$2,000 on behalf of all political committees of each political party within a calendar year, without reimbursement and without making a contribution to a candidate or political party committee. Under 11 CFR 100.79(b), volunteers may use personal funds for usual and normal subsistence expenses incidental to volunteer activity. A substantively identical exception to the definition of "expenditure" is provided at 11 CFR 100.139.

service provider, so long as the service provider is permitted to make an in-kind contribution and the amount of the contribution does not exceed the limitations of the Act. New 11 CFR 100.93(b)(2) addresses this situation by stating when a service provider makes an in-kind contribution. A candidate's authorized committee or other political committee paying for the travel must comply with the payment conditions in 11 CFR 100.93 to avoid receiving a contribution in the amount of the unreimbursed value. If these conditions are not met, then the provision of the value of the travel would be a prohibited in-kind contribution if the service provider is a corporation or labor organization, or an excessive in-kind contribution if the value of the service would, when added to other contributions to the same candidate or political committee by the service provider, exceed that service provider's contribution limit. See 11 CFR 100.93(b)(2). The value of the in-kind contribution is determined in the same manner as the amount of the reimbursement would normally be determined under paragraphs (c), (d) or (e) of new section 100.93.

The Commission recognizes that this approach may, in some cases, require the same type of ownership analysis that is discussed above. This analysis, however, is not a necessary step in every circumstance because it must be employed only where the service's provider elects not to seek full or partial reimbursement from the political committee, or when the political committee fails to pay the service provider. The Commission sought comments on whether reimbursement should always be required, regardless of the ownership, or whether the possibility of an in-kind contribution from a permissible source should be addressed in some other fashion. One commenter stated that it is not important for the Commission to preserve the option of making an in-kind contribution because the value of the transportation will often exceed the contribution limits. While the commenter makes a valid point, there are still some circumstances in which an in-kind contribution is otherwise permissible under the Act. The Commission is therefore preserving the option of an in-kind contribution as described above.

#### *D. 11 CFR 100.93(c) Travel by Airplane*

Under the previous rules at 11 CFR 114.9(e)(1), when a candidate or other campaign passenger used an airplane owned by corporation or labor organization not in the business of

providing commercial air travel, the rate of reimbursement was either the first-class airfare or the normal charter rate, depending on whether the destination city was served by regularly scheduled commercial air service. The charter rate, which in many cases is considerably higher than first-class airfare to a city in the same area, better represents the actual cost that a political committee would incur, but for the use of the corporate or labor organization airplane, to reach a particular destination by air when that destination is not served by commercial air service. Nevertheless, the NPRM recognized that candidates who campaign in major metropolitan areas that have regularly scheduled commercial airline service will generally be able to use a private plane and reimburse only the equivalent of a first-class airfare, whereas candidates who campaign in more rural areas that have little, if any, commercial air service would be required to reimburse the equivalent charter rate. Consequently, the NPRM expressed concern that the reimbursement scheme in 11 CFR 114.9(e)(1) may have been unnecessarily complex and unfairly affected campaigning in rural areas.

#### 1. Three Alternatives in NPRM

To address these concerns, the NPRM sought comments on three alternative reimbursement rules in proposed 11 CFR 100.93(c), as well as any other appropriate payment systems. The Commission also sought comments on whether and how it should further simplify the rules and address other inequities, if any, arising from the previous application of 11 CFR 114.9(e) or the changes proposed for section 100.93.

Alternative A proposed setting the payment rate at the amount of the lowest unrestricted and non-discounted first-class airfare to the closest airport that has such service. For an airport served by regularly scheduled coach airline service but not regularly scheduled first-class airline service, Alternative A proposed setting the payment at the lowest unrestricted and non-discounted commercial coach rate to that destination.

Alternative B proposed two different payment rates, following closely the travel valuation rules set forth in the ethics rules for the House of Representatives and the United States Senate.<sup>5</sup> The first rate, the normal cost

of first-class airfare between the cities, would have applied to previously scheduled flights, as opposed to flights specifically scheduled for a campaign traveler, between cities with regularly scheduled air service. Like Alternative A, Alternative B would also have permitted payment at the unrestricted and non-discounted commercial coach rate where coach service is regularly scheduled on the same route in cases where only coach service is available. The second rate under Alternative B, the normal charter rate for a similar airplane, would have applied to flights specifically scheduled for a campaign traveler and flights where the origin or destination city is not served by regularly scheduled commercial air service.

Alternative C would have established a uniform rule by requiring the payment amount to be the normal and usual cost of chartering a plane of sufficient size to accommodate all campaign travelers plus the news media and security personnel where applicable. This payment rate would depend on the rate for chartering the entire plane, rather than a per-passenger cost, and would not vary based on whether the destination airport is served by regularly scheduled commercial air service of any particular class.

#### 2. Comments on Proposed Alternatives A, B, and C

The Commission received eight comments regarding proposed alternatives A, B, and C, reflecting a lack of consensus. One commenter submitted general recommendations encouraging the Commission to adopt a "clear, uniform format."

Two of the comments criticized the previous rules at 11 CFR 114.9(e) for undervaluing the travel service provided by permitting, in some instances, candidates to pay for charter services at the lower first-class airfare rates. This undervaluation of travel services, these commenters asserted, constitutes a prohibited contribution where the service is provided by a corporation or labor organization. These commenters urged the Commission to adopt Alternative C as the most accurate reflection of the actual cost of the travel service provided, as well as the easiest of the alternatives to administer. These commenters opposed Alternative A as permitting an even greater amount of in-kind contributions than allowed under the previous 11 CFR 114.9(e). Furthermore, they stated Alternative B

<sup>5</sup> See Select Committee on Ethics, U.S. Senate, Senate Ethics Manual, S. Pub. No. 108-1 (2003), "Private Air Travel" at p. 60; Committee on Standards of Official Conduct, U.S. House of Representatives, Rules of the U.S. House of Representatives on Gifts and Travel (2001), "Use of

Private Aircraft for Travel" available at [http://www.house.gov/ethics/Gifts\\_and\\_Travel\\_Chapter.htm#\\_Toc476623633](http://www.house.gov/ethics/Gifts_and_Travel_Chapter.htm#_Toc476623633).

would be preferable to Alternative A because it would mandate the charter rate in some cases. These commenters, however, were skeptical that a standard dependent upon whether a flight was "scheduled specifically for the use of a campaign traveler" could be enforced effectively. A different commenter, however, urged the Commission to adopt Alternative B as an effective compromise between the approaches in A and C.

In contrast, the other five commenters specifically advocated the implementation of Alternative A. These commenters stressed the simplicity of the rate structure and some expressed support for the reasons in the NPRM for Alternative A. 68 FR at 50,484. One commenter stated that Alternative A would eliminate an "arbitrary focus on the destination city" and the need to refer to the FAA's classification of whether an airport offers "commercial air service." The same commenter criticized the previous rule at 11 CFR 114.9(e) for failing to address geographic realities and benefiting "well-entrenched incumbents to the detriment of candidates running in either an open seat or challenging a well-entrenched incumbent" because the higher cost of travel would impair the ability of challengers to attract a "high ranking leader" and "other luminaries" to events in their State or district. Three of these five commenters criticized Alternatives B and C as furthering the inequities of the previous rule and causing campaign travel to be more complicated and expensive. Several commenters specifically advocated the replacement of the advance payment requirement with the seven-day post-travel repayment period.

### 3. Selection of a Combination of First-Class Airfare, Coach Airfare, and Charter Rates in the Final Rules

After considering the written comments and hearing testimony, the Commission concludes that a combination of first-class airfare, coach airfare, and charter rates presents the most workable and accurate approach to the valuation of campaign travel. Accordingly, new 11 CFR 100.93(c) reflects the basic structure of the previous 11 CFR 114.9(e)(1), with the addition of several clarifications described below.

The new rules continue to focus on travel between cities, rather than between particular airports, to account for the various geographic considerations discussed in Advisory

Opinion ("AO") 1999-13,<sup>6</sup> which remains in effect. One commenter recommended a supplementary approach incorporating the standard metropolitan statistical areas ("SMSAs"), a unit of population measurement administered by the Office of Management and Budget. While the Commission views the SMSA approach as overly complicated and unnecessary, it offers the following explanation of the new valuation rule for clarification.

New 11 CFR 100.93(c) provides three valuation methods that apply in different situations: (1) The lowest unrestricted and non-discounted *first-class* airfare available for the dates traveled or within seven calendar days thereof; (2) the lowest unrestricted and non-discounted *coach* airfare available for the dates traveled or within seven calendar days thereof; or (3) the charter rate for a comparable commercial airplane of sufficient size to accommodate all of the campaign travelers, including members of the news media, and security personnel, if applicable.

*(i) Paragraph (c)(1)—Travel between cities served by regularly scheduled first-class commercial airline service.*

New 11 CFR 100.93(c)(1) requires payment of at least the lowest unrestricted and non-discounted first-class rate for travel between two cities with regularly scheduled first-class airline service. As qualified by new paragraph 100.93(f), discussed below, the rate must be available to the general public for the dates traveled or within seven calendar days thereof. For travel between two cities that each have regularly scheduled first-class airline service, but no regularly scheduled direct flight between the two cities, the required rate is the lowest unrestricted and non-discounted first-class rate for an indirect flight with the same departure city and final destination city.

*(ii) Paragraph (c)(2)—Travel between cities served by regularly scheduled coach, but not first-class, commercial airline service.*

<sup>6</sup> In AO 1999-13, the Commission recognized that particular destination cities might be served by several airports in the surrounding region. In that advisory opinion, the Commission determined that an airport need not be within the corporate limits of a city in order for that city to be considered "served by regularly scheduled commercial air service." The Commission further agreed that it was reasonable for the requestor to determine whether a city is served by a particular airport through reference to published sources such as an FAA directory or a corporate directory regarded at the time as the charter industry's standard reference for airports. To the extent that the advisory opinion contemplates advance payment for air travel and does not recognize that commercial coach rates may be appropriate in other situations, the opinion is superseded.

The final rules also provide a limited allowance for commercial coach service rates to reflect airline industry trends. Paragraph (c)(2) permits the use of the lower coach rate for travel between cities served by regularly scheduled coach airline service but not regularly scheduled first-class airline service. 11 CFR 100.93(c)(2). This rate is based on the previous rules governing publicly-funded presidential candidates' payments for the use of government aircraft. *See* former 11 CFR 9004.7(b)(5)(i)(B) and former 9034.7(b)(5)(i)(B). Paragraph (c)(2) also permits the use of the coach rate where the travel is between one city served by coach commercial airline service, but not first-class commercial airline service, and a second city served by coach commercial airline service, regardless of whether or not the second city is also served by first-class commercial airline service.

*(iii) Paragraph (c)(3)—Travel to or from a city not served by regularly scheduled commercial airline service.*

Paragraph (c)(3), like paragraph (e)(1) of current section 114.9, requires payment at the normal and usual charter rate for all other flights except certain flights on government planes (*see* discussion of paragraph (e), below.) Thus, the charter rate must be used for travel between two cities not served by regularly scheduled first-class or coach airline service, or between such a city and a different city with regularly scheduled first-class or coach commercial airline service. The charter rate must be calculated at the rate for a charter flight between the same departure and destination cities used for the actual travel. 11 CFR 100.93(c)(3). This rate must also be equivalent to the publicly available rate for a comparable commercial airplane capable of accommodating the same number of campaign travelers, including members of the news media, plus the Secret Service and other security personnel accompanying a candidate. *Id.* This rate is consistent with the previous rules governing publicly funded presidential candidates' payments for the use of government aircraft. *See* 11 CFR 9004.7(b)(5)(i)(B) and 9034.7(b)(5)(i)(B). To the extent that the candidate in Advisory Opinion 1984-48 was not required to include security personnel or news media in the calculation of the sufficient size of the comparable aircraft, that advisory opinion is hereby superseded to promote uniformity in the treatment of all candidate travel.

A "comparable commercial airplane" means an airplane of similar make and model as the airplane that actually makes the trip, and with the same

amenities as that airplane. For example, in Advisory Opinion 1984-48, the Commission interpreted a comparable airplane as being "of the same type (e.g., jet aircraft versus prop plane) and services offered (e.g., plane with dining service or lavatory versus one without)" as the plane actually used. The Commission further explained that when a candidate used a twin engine prop jet, a single engine, prop aircraft would not be a comparable aircraft. The term "comparable commercial airplane" is intended to require these distinctions as well as other differences such as when a plane is chartered with a crew or without, or with or without fuel.

#### 4. Multi-Stop Travel

One commenter asked the Commission to address multi-stop travel. In response, the Commission is adding the following clarification to 11 CFR 100.93(c) in the final rule. For the purposes of § 100.93 only, the payment for campaign travel must be calculated for each leg of travel. For example: a candidate traveling entirely for the purposes of her own election (and not for a mixed-purpose trip addressed in 11 CFR 106.3) departs from a city in Maryland without any regularly scheduled commercial air service and flies to a city in Illinois that is also without any commercial airline service. After several hours at a campaign rally in the Illinois city, the candidate travels from Illinois to New York City for a campaign fundraising event before returning to Washington, DC. Because there is first class commercial airline service between New York City and Washington, DC, the proper payment for the entire trip would be the amount of the lowest unrestricted and non-discounted first-class airfare from one of the airports serving New York City to one of the airports serving Washington, DC, plus the equivalent charter rate for the flights from the city in Maryland to the city in Illinois, and from Illinois to New York City.

In addition, the Commission is adding language to paragraph (c) in the final rule to clarify payment for travel where several candidates and their entourages travel together aboard the same airplane not operated for commercial passenger service. In such cases, each campaign committee is expected to pay the same first-class rate for each of its campaign travelers or to pay its pro-rata share of the equivalent rate for chartering a comparable airplane of sufficient size to accommodate all campaign travelers, including members of the news media traveling with its candidate, and security personnel, if applicable. One candidate's committee is not permitted

to pay more or less than the other campaign committees with respect to each traveler on the same flight because the value each campaign traveler derives from the provision of the travel service is identical. But for the provision of the private airplane, it would presumably have been necessary for each campaign traveler to pay for a first-class or coach ticket or arrange for a charter flight to reach the same location on the same date.

#### 5. Advance Payment Not Required

The NPRM sought comment on whether campaign travelers should be required to pay the service provider in advance for the value of travel, as they were required to do under previous 11 CFR 114.9(e)(1). Alternatives A and B proposed eliminating the previous advance payment requirement in 11 CFR 114.9(e)(1). In its place, there would be a fixed period of seven calendar days for payment after travel has begun. Under Alternative C, the Commission would have continued to require advance payment for the use of all airplanes not normally used for commercial passenger service.

The Commission recognized that the removal of the advance payment rule could be perceived as a departure from the previous approach under which corporations are prohibited from extending credit outside the ordinary course of their business. See 11 CFR part 116. The Commission sought comments on the potential consequences of the rule as proposed, particularly with respect to the use of an airplane owned by a corporation or labor organization where payment does not occur in advance. Several commenters argued for the inclusion of the seven-day rule as a necessary accommodation to the unavoidable constraints of campaign scheduling and last-minute changes in travel plans. One commenter insisted that the advance-payment requirement in the previous rule should be retained, asserting a potential inconsistency with 11 CFR part 116 and arguing that it would be more difficult for the campaign traveler to calculate the necessary amounts as much as the seven days after the departure date.

The Commission disagrees with this latter commenter and is permitting the seven-day post-travel window for payment because of the unique nature of campaign travel cited by the other commenters. The Commission also notes that the previous rule at 11 CFR 114.9(e)(2) had permitted payment for travel other than by airplane within a "commercially reasonable time," thereby allowing for some post-travel

payments. Other provisions in 11 CFR 114.9 also contemplate after-the-fact reimbursement for certain goods or services provided by corporations. For example, certain uses of a corporation's or labor organization's facilities under section 114.9(a) through (d) are permissible if reimbursed within a commercially reasonable time.

New 11 CFR 100.93(c) does not require a campaign traveler to pay in advance of travel, but it does establish a strict deadline of payment within seven calendar days of the departure of the flight. For multi-stop travel over a period of more than one day, a campaign traveler may elect to pay for separate flights at different times by calculating the separate seven-day periods for each flight departing on a different day.

The seven-day airplane travel repayment period permitted in paragraph (c) of section 100.93 is shorter than the thirty/sixty day period used for other forms of transportation (see discussion of 11 CFR 100.93(d), below) because the political committee has complete control over the timing of the reimbursement as all the necessary passenger information and costs will be determinable at the time the airplane departs. Thus, it will be possible for the candidate's authorized committee, or another political committee, to calculate the proper reimbursement rate for airplane travel without a billing or invoice process to cause delay. In addition, each leg of travel by airplane is very unlikely to last more than one day and can usually be calculated separately, whereas the charter or rental rate for travel on a bus tour or by other means of travel may be based on the total miles traveled or otherwise calculable only at the completion of travel, which may not conclude until several days or weeks after it begins.

#### 6. "Deadhead Miles" Not Considered Separately

The NPRM requested comment regarding how, if at all, to account for the expenses associated with the positioning of the airplane, known as "deadhead miles." Two commenters asserted that these costs are normally incorporated into the rates offered for commercial service, so there is no need for the Commission to address them separately. One of these commenters argued that those costs are beyond the control of the traveler. The Commission generally agrees with this reasoning and is not requiring any additional payment for these costs when campaign travelers use private airplanes. To promote uniformity between the treatment of publicly funded candidates and all



other candidates, the Commission is removing 11 CFR 9004.7(b)(5)(ii) and 9034.7(b)(5)(ii).

*E. 11 CFR 100.93(d) Other Means of Transportation*

For other means of travel, such as limousines, other automobiles, trains, helicopters, and buses, a political committee must pay the service provider an amount equivalent to the normal and usual fare or rental charge for a comparable commercial conveyance that is capable of accommodating the same number of campaign travelers, including members of the news media, plus security personnel, if applicable. 11 CFR 100.93(d). This rate is consistent with the previous rules governing publicly funded presidential candidates' payments for the use of government conveyances other than airplanes. See 11 CFR 9004.7(b)(5)(iii) and 9034.7(b)(5)(iii). A "comparable commercial conveyance" is one that approximates the same class and type of the conveyance actually used, with similar features and amenities. For example, when a campaign traveler uses a private bus, a "comparable commercial conveyance" would be a similar type of motor vehicle with similar amenities and features. As with payment for travel by airplane, the rate must be available to the general public for the dates traveled or within seven calendar days thereof. See new 11 CFR 100.93(f).

Just as the Commission is no longer requiring advance payment for travel by airplane, the Commission is also setting a post-travel period of time for payment for travel by means other than by airplane: thirty calendar days from the receipt of the invoice, but no more than sixty calendar days following the date the travel commenced. See 11 CFR 100.93(d). One commenter urged the Commission to fix the sixty-day time period from the date the travel ends, rather than when the travel commenced, to accommodate longer trips, invoice delays, and the resolution of any disputes between the campaign traveler and the service provider. The same commenter further cautioned against finding that a contribution occurs where a political committee fails to pay within the required time period if it has made a good faith effort to obtain or reasonably disputes an invoice. The Commission is cognizant of the potential tension between this thirty/sixty-day allowance and the general prohibitions on extension of credit outside the ordinary course of business. See 11 CFR part 116, discussed above. The Commission is permitting the

limited thirty/sixty-day provision with the expectation that the invoice will be sent within the ordinary course of business and payment will be made promptly. It therefore does not agree with the commenter's suggestion that the time period should be extended indefinitely so long as the campaign traveler continues to travel. The Commission notes that a political committee need not wait until the end of the travel to submit payment for the travel service. A political committee faced with an invoice delay or involved in a payment dispute with a service provider may, in the rare instance where the matter cannot be resolved within the sixty-day period, pay an approximate amount and seek reimbursement from the service provider. A political committee also may treat the matter as a disputed debt under 11 CFR 116.10.

This fixed deadline in new 11 CFR 100.93(d) adds greater clarity and certainty than the reference in the previous 11 CFR 114.9(e)(2) to a "commercially reasonable" period while retaining the flexibility necessary to account for costs that cannot be calculated until the completion of travel or shortly thereafter. The sixty-day cutoff will help to ensure that the invoice will be rendered to the political committee promptly. Any extensions of credit resulting from payments not being made within the sixty-day period are considered in-kind contributions to the candidate or other political committee responsible for payment of the travel, and thus violate the Act and Commission regulations where such contributions are prohibited or excessive. As set forth in new paragraph (f), the payment rate is set at the usual and normal fare or rental charge available to the general public for the dates traveled or within seven calendar days thereof.

*F. 11 CFR 100.93(e) Government Conveyances*

Paragraph (e) of 11 CFR 100.93 provides the required amount of payment for travel using any means of transportation, including an airplane, that is owned or leased by the Federal government or any State or local government. The required amount of payment for travel by a campaign traveler on government airplanes is the amount of payment set forth in paragraph (c) of § 100.93: A political committee must pay the first-class, coach, or charter rate in accordance with 11 CFR 100.93(c) and (f). 11 CFR 100.93(e)(1)(ii).

Under paragraph (c), however, Air Force One and many other military airplanes would be required to use a

comparable charter rate in some instances because their travel would be between military bases and not between cities served by regularly scheduled first-class commercial airline service. Because it would be difficult to find a charter airplane comparable to Air Force One and other military airplanes, new paragraph (e)(1)(i) provides a special rule for government airplanes traveling to or from a military base. When such travel occurs, the political committee may pay the lowest unrestricted and non-discounted first-class airfare to or from the city with regularly scheduled first-class service that is geographically closest to the military base actually used.

The required amount of payment for use of other means of travel owned or leased by a Federal, State, or local government is the amount of payment set forth in paragraph (d): The usual fare or rental charge available to the general public on the same travel date for a comparable vehicle that is capable of accommodating the same number of campaign travelers, including members of the news media, plus the Secret Service and other security personnel accompanying a candidate. A political committee paying for the use of government travel by airplane or other conveyance must also comply with the time limitations in paragraphs (c) and (d), respectively.

Note that paragraph (e), like all of section 100.93, is limited to travel in connection with a Federal election. Individuals traveling on official government business are not required to reimburse the service provider under this section. A significant portion of travel on government conveyances is paid for using funds authorized and appropriated by the Federal Government. The use of Federal funds is governed by general appropriations law and is subject to Congressional oversight. The prohibitions and limitations of the Act apply to a contribution or expenditure by a "person," as defined in 2 U.S.C. 431(11) and 11 CFR 100.10. See FEC Interpretation of Allocation of Candidate Travel Expenses, 67 FR 5,445 (Feb. 6, 2002). The statutory definition of the term "person" expressly excludes the Federal Government and any authority thereof.<sup>7</sup> The Commission has previously concluded that the travel allocation and reporting regulations at 11 CFR 106.3(b) are not applicable to

<sup>7</sup> 2 U.S.C. 431(11) provides: "The term 'person' includes an individual, partnership, committee, association, corporation, labor organization, or any other organization or group of persons, but such term does not include the Federal Government or any authority of the Federal Government."

the extent that a candidate pays for travel expenses using funds authorized and appropriated by the Federal Government. 67 FR 5,445.

*G. 11 CFR 100.93(f) Date and Public Availability of Payment Rate*

Because airfares vary based on the date and time of travel, the Commission sought comments on how precisely the payment rate should correspond to the actual date of travel. For example, some airlines or charter companies may set a base rate for tickets purchased over a month in advance of the travel date that is different than the price of the same ticket when purchased on the date of travel. One commenter urged the Commission to permit the normal advance ticket price when calculating the comparable rate as required in proposed section 100.93. Another commenter indicated that a search for first-class rates with a travel agency should be sufficient, but asserted that Internet fares were "too volatile" to use in determining the proper rate. A different commenter argued that the phrase "lowest unrestricted and non-discounted first-class airfare available for time traveled" is adequately specific, so there is no need to specify "some mandated artificial purchase time-frame, such as within seven days of the travel date."

The final rules in section 100.93 include a new paragraph (f), which specifies that the payment amount must be an unrestricted non-discounted rate available to the general public for the dates traveled or within seven calendar days thereof.<sup>8</sup> New paragraph (f) applies to all of the payment rates set forth in paragraphs (c), (d) and (e) of 11 CFR 100.93. The Commission agrees that special discounted fares are inappropriate for the purposes of this rule and is therefore foreclosing reliance on "e-savers" and other special fares, such as non-refundable fares or fares dependent on advance purchase, that do not approximate the normal and usual "walk-up" charge for the travel route. Paragraph (f) specifies that the rate must be available to the general public. Candidates and other campaign travelers may not, for example, use a "government rate" or membership discount to establish the proper amount of payment. The rate must approximate the amount that a campaign traveler would have to pay if he or she actually scheduled an equivalent flight at an unrestricted non-discounted fare aboard

<sup>8</sup> The seven-day period is permitted to account for cities that may have commercial airline service on certain days of the week, but no commercial service on other days.

a commercial airplane or, for non-airplane travel, the unrestricted non-discounted rental charge or fare for an equivalent trip aboard a comparable commercial conveyance.

In light of the comments and additional clarifications, the Commission is not prescribing a set period of time during which comparable rates must be ascertained, except that the rate must be determined by the time the payment is due.

*H. 11 CFR 100.93(g) Preemption*

The rates required by section 100.93 generally establish a floor, rather than a ceiling, on the amount of reimbursement payment required to avoid a contribution. With the exception of payment for campaign travel by publicly funded presidential and vice-presidential candidates and individuals traveling on their behalf, candidates and other campaign travelers may pay a higher amount than called for by section 100.93, such as when the service provider seeks a higher rate of payment for the use of the conveyance.

In some cases, there may be State or local laws governing the use of State or local government conveyances. In other cases, State or local laws may require certain officeholders or public employees to pay a higher rate for travel. State or local laws may also require payment in advance, or within a shorter period than the seven-day window permitted by 11 CFR 100.93(c) or the thirty-day window permitted under 11 CFR 100.93(d). A new paragraph (g) in the final rules therefore clarifies that applicable State or local laws are preempted to the extent that they purport to supplant the rates or timing requirements of 11 CFR 100.93. State or local officeholders may choose to comply with State or local laws requiring higher payment rates or more stringent requirements on the time of payment, but they cannot be *required* to comply with those laws.

*I. 11 CFR 100.93(h) Reporting*

The NPRM proposed requiring political committees to report the value of unreimbursed travel by campaign travelers as well as the actual date of travel. Two commenters opposed the proposed reporting requirements, arguing that they would impose unnecessary burdens and questioning whether significant violations could be exposed using the additional information reported. One of these commenters asserted that "[s]omeone intent on violating the law simply would not report the travel." Another commenter argued that the proposed reporting requirements would go further

than existing requirements, and would exceed the scope of 2 U.S.C. 434(b)(5) if it required specific dates of travel. This commenter stated that there is currently no requirement that an authorized committee must disclose the date of a fundraiser, the range of dates that a poll was taken, or the date of a mailing. Another commenter expressed a concern that the report of campaign travel payment might disclose sensitive campaign information. In contrast, a different commenter supported the proposed approach, stating that "candidate committees always are, or ought to be, aware of receiving transportation from third parties."

The Commission disagrees with the commenters who characterize the reporting requirements as overly burdensome and of minimal value. No reports other than regularly scheduled committee disclosure reports are required. Moreover, the disbursement by the political committee for the travel payment must already be reported, along with its purpose, like all other disbursements, under 11 CFR 104.1 and 104.3(b)(3) or (4). The Commission views the reporting of the date of travel to be entirely consistent with the disclosure purposes of the Act. It seems unlikely that reporting the date of travel would force the disclosure of sensitive campaign information, particularly in light of the fact that the payment and reporting of such payment will occur after the travel has been completed in most cases and in light of the fact that many campaign events are covered by the news media. For these reasons, the Commission is adopting the final rules on reporting that generally follow the proposed rules.

Paragraph (h)(1) of 11 CFR 100.93 refers the reader to the existing reporting requirements for the receipt of an in-kind contribution. Under 11 CFR 104.13, a candidate's authorized committee and other political committees must report the amount of unreimbursed value for travel services as both the receipt of a contribution from the service provider and an expenditure by the political committee.

In addition, the political committee on whose behalf the travel was undertaken must report the travel dates on the report disclosing the reimbursement for the travel service. Under new paragraph (h)(2) of section 100.93, the political committee must report the actual date of travel in the "purpose of disbursement" field corresponding to the disbursement.

*J. 11 CFR 100.93(i) Recordkeeping*

Presidential and vice-presidential candidates receiving public funds have

been required to maintain records documenting the rates used in calculating their travel reimbursements. See former 11 CFR 9004.7(b)(5)(v) and former 9034.7(b)(5)(v). To standardize the treatment of campaign travel, the Commission in the NPRM proposed extending these recordkeeping requirements to all candidates and moving them to new 11 CFR 100.93(i). Of the two commenters addressing this subject, one opposed it as a burden unwarranted by evidence of widespread abuse. The other commenter expressed support for the proposed recordkeeping requirements.

The final rules implement the recordkeeping requirements proposed in the NPRM and incorporate several other documentation requirements from 11 CFR 9004.7(b)(5)(v) and 9034.7(b)(5)(v) to standardize recordkeeping for candidate travel, to ensure accuracy in reporting, and to enhance the disclosure of disbursements for travel. These recordkeeping provisions have worked well, in practice, for presidential committees. Most of this information must be acquired regardless of any recordkeeping duty so that the campaign traveler can ensure that the political committee is paying the appropriate amount to the service provider. In addition, the final rules require that the political committee document the tail number of the airplane actually used. For military airplanes without tail numbers, some other unique identifier for that airplane will suffice. This documentation is needed to ensure accurate reporting and disclosure in light of the broadened scope of the new rules and the importance of the operating license of each aircraft.

The recordkeeping requirements for airplanes in the final rules vary slightly depending on whether the rate of payment is based on 11 CFR 100.93(c)(1) or (2) (*i.e.*, whether the actual travel was between two cities served by regularly scheduled first-class commercial airline service or not.) For travel paid for under paragraph (c)(1) or (c)(2), the political committee must maintain a record of the name of the service provider, the tail number of the airplane used, an itinerary for the trip that lists the total numbers of passengers and specifies the campaign travelers, and the information on which the first-class payment is based. 11 CFR 100.93(i)(1). For travel on a government aircraft to or from a military base (see 11 CFR 100.93(e)(1)(i)), the payment rate is also tied to the first-class rate between two cities served by regularly scheduled first-class commercial airline service so the recordkeeping requirements are the

same as for travel paid for under paragraph (c)(1). 11 CFR 100.93(i)(1).

For all other travel by airplane, payment is based on a charter or rental rate for a comparable charter airplane, so a record of the size, model, and make of the airplane used must be maintained in addition to the other information described above. 11 CFR 100.93(i)(2)(i). The itinerary for the trip must list the total numbers of passengers and specify the number of security personnel as well as campaign travelers. 11 CFR 100.93(i)(2)(ii). The political committee must document the rate for a comparable charter airplane by listing the name of the company offering that service to the public and the dates of the comparison rates. 11 CFR 100.93(i)(2)(iii). For travel other than by airplane, payment is based on a charter or rental rate for a comparable conveyance, so a record of the size, model, and make of the conveyance used must be maintained in addition to the other itinerary and service provider information described above. 11 CFR 100.93(i)(3).

#### **II. 11 CFR 106.3 Allocation of Expenses Between Campaign and Non-Campaign Related Travel**

The final rules make only one change to 11 CFR 106.3. Candidates who use government conveyance or accommodations for campaign-related travel are currently required to report an expenditure in the amount equivalent to the "rate for comparable commercial conveyance or accommodation." 11 CFR 106.3(e). To eliminate disparities between campaign-related travel on private planes and travel on government planes, the Commission is revising 11 CFR 106.3 by replacing the reference to the "rate of comparable commercial conveyance" with a reference to the applicable rates for travel reimbursement set forth in 11 CFR 100.93(c),(d) and (e). Both the reimbursement rates and the payment due dates in 11 CFR 100.93 would be applicable to travel by airplane and other means of travel, whether owned by an individual, corporation, labor organization, partnership, the Federal government, a State government, or any other person. The Commission sought comment on this approach in the NPRM, but received none.

#### **III. 11 CFR 114.9 Use of Corporate or Labor Organization Facilities**

Previously, paragraph (e) of section 114.9 established the proper reimbursement rate for a candidate's use of a means of travel owned or leased by corporations or labor organizations. The Commission recognized in the NPRM

that in most cases the means of travel used for campaign trips is likely to be owned or leased by a corporation or labor organization, but not in all cases. Individuals or partnerships own some airplanes and other means of travel. To accommodate more uniform and comprehensive travel reimbursement rules, the Commission proposed replacing 11 CFR 114.9(e) with new section 11 CFR 100.93. Both of the commenters who addressed this issue expressed support for the broadened scope and new location of the rule.

For the reasons explained above, the Commission is removing and reserving paragraph (e) of section 114.9. The subject matter previously addressed in 11 CFR 114.9(e) is addressed in new 11 CFR 100.93. In addition, the heading of section 114.9, previously "Use of corporate and labor organization facilities and means of transportation," is revised to remove the reference to means of transportation because the rules governing corporate and labor organization means of transportation are now located in 11 CFR 100.93.

#### **IV. 11 CFR 9004.6 Expenditures for Transportation and Services Made Available to Media Personnel; Reimbursements**

As described below, the Commission is replacing the separate reimbursement rates for general election campaign travel by presidential and vice-presidential candidates with a reference to the rates required by new 11 CFR 100.93. A technical revision to 11 CFR 9004.6(b)(2) is necessary to conform the previous reference to paragraph (C) of 9004.7(b)(5)(i), which is removed.

#### **V. 11 CFR 9004.7 Allocation of Travel Expenditures**

The regulations at 11 CFR 9004.7(b) govern travel on government conveyances by general election presidential and vice-presidential candidates receiving federal funding. This rule requires the presidential or vice-presidential candidate to pay the appropriate government entity at one of several specified rates. These rates are established in largely the same manner as the reimbursement rates set forth in the previous 11 CFR 114.9(e).

In the NPRM, the Commission proposed revising 11 CFR 9004.7(b)(5)(i) and (b)(8) to replace the parallel rate determinations in this rule with a reference to the reimbursement rates set forth in 11 CFR 100.93. The Commission did not receive any comments on this proposal.

In the final rules, § 9004.7(b)(5)(i) provides that the reimbursement rates in 11 CFR 100.93 serve as the applicable

valuation of travel by presidential and vice-presidential candidates aboard government conveyances. The final rules therefore do not include previous paragraphs (A), (B), and (C) of 11 CFR 9004.7(b)(5)(i), which had set out the proper valuation rates for the use of a government airplane for campaign-related travel. For the reasons stated in the above discussion of "deadhead miles" in the Explanation and Justification for 11 CFR 100.93, the Commission is also removing and reserving 9004.7(b)(5)(ii). The final rules also include a technical revision to 11 CFR 9004.7(b)(5)(iii) to replace the specified rate for use of a government conveyance with a reference to the rate in 11 CFR 100.93(d). In addition, the recordkeeping provisions of former 11 CFR 9004.7(b)(5)(v) are being moved to new 11 CFR 100.93(i) and cross references to the latter section are being added in paragraph (b)(5)(v) of section 9004.7.

The NPRM proposed minor changes to the wording in paragraphs (b)(5)(i) through (iv) in sections 9004.7 and 9034.7 to set the required reimbursement rate as a floor, not a ceiling on how much the candidate may reimburse, in order to permit a candidate to pay at a higher rate. Such a ceiling is necessary, however, to ensure the conservation of public funds. The final rules therefore do not include these proposed changes. However, the cross reference to new 11 CFR 100.93 in 11 CFR 9004.7(b)(8) does include a revision specifying that section 100.93 governs airplanes not licensed by the FAA to operate for compensation or hire under 14 CFR part 121, 129, or 135, and government conveyances, thereby mirroring the revision to the scope of section 100.93.

#### **VI. 11 CFR 9034.6 Expenditures for Transportation and Services Made Available to Media Personnel; Reimbursements**

As with the changes to 11 CFR 9004.7, the Commission is replacing in 11 CFR 9034.7 the separate reimbursement rates for primary election campaign travel by presidential candidates with a reference to the rates required by new 11 CFR 100.93. A conforming revision to 11 CFR 9034.6(b)(2) is therefore necessary to replace the previous reference to paragraph (C) of section 9034.7(b)(5)(i), which is removed.

#### **VII. 11 CFR 9034.7 Allocation of Travel Expenditures**

The regulations at 11 CFR 9034.7(b) are substantively identical to the regulations at 11 CFR 9007.4(b), except that section 9034.7 governs travel on

government conveyance by *primary* election presidential candidates receiving public funds. The changes being made to 11 CFR 9034.7(b) follow the changes made to 11 CFR 9004.7(b) for the reasons stated above in the explanation and justification for that section.

#### **Certification of No Effect Pursuant to 5 U.S.C. 605(b) [Regulatory Flexibility Act]**

The Commission certifies that the attached rules will not have a significant economic impact on a substantial number of small entities. The basis for this certification is that few, if any, small entities would be affected by these final rules, which impose obligations only on Federal candidates, their campaign committees, other individuals traveling in connection with a Federal election, and the political committees on whose behalf this travel is conducted. Federal candidates, their campaign committees, and most other political party committees and other political committees entitled to rely on these rules are not small entities. These rules generally relieve existing restrictions on the timing of reimbursement for certain travel and are largely intended to simplify the process of determining reimbursement rates. The rules do not impose compliance costs on any service providers (as defined in the rules) that are small entities so as to cause a significant economic impact. With respect to the determination of the amount of reimbursement for travel, the new rules merely reflect an extension of existing similar rules. To the extent that operators of air-taxi services or on-demand air charter services are small entities indirectly impacted by these rules, any economic effects would result from the travel choices of individual candidates or other travelers rather than Commission requirements and, in any event, are likely to be less than \$100,000,000 per year.

#### **List of Subjects**

##### *11 CFR Part 100*

Elections.

##### *11 CFR Part 106*

Campaign funds, political committees and parties, political candidates.

##### *11 CFR Part 114*

Business and industry, elections, labor.

##### *11 CFR Part 9004*

Campaign funds.

#### *11 CFR Part 9034*

Campaign funds, reporting and recordkeeping requirements.

■ For the reasons set out in the preamble, the Federal Election Commission is amending subchapters A, E, and F of chapter 1 of title 11 of the *Code of Federal Regulations* as follows:

#### **PART 100—SCOPE AND DEFINITIONS (2 U.S.C. 431)**

■ 1. The authority citation for part 100 continues to read as follows:

**Authority:** 2 U.S.C. 431, 434, and 438(a)(8).

■ 2. Section 100.93 is added to subpart C of part 100 to read as follows:

#### **§ 100.93 Travel by airplane or other means of transportation.**

(a) *Scope and definitions.*

(1) This section applies to all campaign travelers who use:

(i) An airplane not licensed by the Federal Aviation Administration to operate for compensation or hire under 14 CFR part 121, 129, or 135;

(ii) Other means of transportation not operated for commercial passenger service; or

(iii) An airplane or other means of transportation operated by a Federal, State, or local government.

(2) Campaign travelers who use an airplane that is licensed by the Federal Aviation Administration to operate for compensation or hire under 14 CFR part 121, 129, or 135, or other means of transportation that is operated for commercial passenger service, such as a commercial airline flight, charter flight, taxi, or an automobile provided by a rental company, are governed by 11 CFR 100.52(a) and (d), not this section.

(3) For the purposes of this section:

(i) *Campaign traveler* means

(A) Any individual traveling in connection with an election for Federal office on behalf of a candidate or political committee; or

(B) Any member of the news media traveling with a candidate.

(ii) *Service provider* means the owner of an airplane or other conveyance, or a person who leases an airplane or other conveyance from the owner or otherwise obtains a legal right to the use of an airplane or other conveyance, and who uses the airplane or other conveyance to provide transportation to a campaign traveler. For a jointly owned or leased airplane or other conveyance, the service provider is the person who makes the airplane or other conveyance available to the campaign traveler.

(iii) *Unreimbursed value* means the difference between the value of the transportation service provided, as set

acceptable and unacceptable purpose descriptions to be reported by au APPENDIX CURRENT REGULATIONS WITH PREVIOUSLY DIFFERENT CITATIONS requires authorized committees, when itemizing certain disbursements for which reimbursements are required, to provide a brief explanation of the activity for which reimbursement is required. These provisions have been in Title 11 of the Code of Federal Regulations since 1980 and 1995, respectively, and were not affected by the recent statutory changes to the election cycle reporting requirements.

**Need for Correction**

As published, the final rules inadvertently omit two paragraphs describing information to be reported by authorized committees of Federal candidates.

All committees must report the purpose of itemized disbursements (i.e., those disbursements aggregating in excess of \$200). Omitted paragraph (A) contains examples of suitably specific purpose descriptions as well as examples of those descriptions that are unacceptably vague. This paragraph is inconsistent with the reporting of rules for unauthorized committees (committees other than candidate committees) in 11 CFR 104.3(b)(3).

Omitted paragraph (B) is used in administering the "personal use" rules in 11 CFR 113.1. Federal candidates are barred from using campaign funds for personal benefit. Paragraph (B) requires authorized committees of Federal candidates itemizing disbursements for which partial or total reimbursement is required under 11 CFR 113.1(g)(1)(iii)(C) or (D) to provide a brief explanation of the activity for which the reimbursement is made.

Section 801 of Title 5 of the United States Code requires Federal agencies to submit regulations to Congress. These regulations were submitted to the Speaker of the House of Representatives and the President of the Senate on November 26, 2001.

**Certification of No Effect Pursuant to 5 U.S.C. § 605(b) [Regulatory Flexibility Act]**

This correction will not have significant economic impact on a substantial number of small entities. The basis of this certification is that this correction only requires political committees to once again add information to the reports they are required to file. These regulations were in 11 CFR since 1980 and 1995, respectively, before being inadvertently omitted in 2000.

**List of Subjects in 11 CFR Part 104**

Campaign funds, Political committees and parties, Reporting and recordkeeping requirements.

Accordingly, 11 CFR part 104 is corrected by making the following correcting amendment:

**PART 104—REPORTS BY POLITICAL COMMITTEES**

1. The authority citation for part 104 continues to read as follows:

**Authority:** 2 U.S.C. 431(1), 431(8), 431(9), 432(i), 434, 438(a)(8), 438(b), 439a.

**§ 104.3 Contents of reports (2 U.S.C. 434(b), 439a).**

\* \* \* \* \*

2. In § 104.3 add the following paragraphs (b)(4)(i)(A) and (B):

- (b) \* \* \*
- (4) \* \* \*
- (i) \* \* \*

(A) As used in this paragraph, *purpose* means a brief statement or description of why the disbursement was made. Examples of statements or descriptions which meet the requirements of this paragraph include the following: dinner expenses, media, salary, polling, travel, party fees, phone banks, travel expenses, travel expense reimbursement, and catering costs. However, statements or descriptions such as *advance, election day expenses, other expenses, expenses, expense reimbursement, miscellaneous, outside services, get-out-the-vote and voter registration* would not meet the requirements of this paragraph for reporting the purpose of an expenditure.

(B) In addition to reporting the purpose described in paragraph (b)(4)(i)(A) of this section, whenever an authorized committee itemizes a disbursement that is partially or entirely a personal use for which reimbursement is required under 11 CFR 113.1(g)(1)(ii)(C) or (D), it shall provide a brief explanation of the activity for which reimbursement is required.

\* \* \* \* \*

Dated: November 26, 2001.  
**Danny L. McDonald,**  
*Chairman, Federal Election Commission.*  
[FR Doc. 01-29679 Filed 11-29-01; 8:45 am]  
**BILLING CODE 6715-01-P**

**FEDERAL ELECTION COMMISSION**

**11 CFR Part 111**

**[Notice 2001-18]**

**Extension to Administrative Fines**

**AGENCY:** Federal Election Commission.

**ACTION:** Final rule; revision of the sunset date.

Authorized committees. Paragraph (B) SUMMARY: The Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the expiration date in which the Federal Election Commission (hereinafter "the Commission") may assess civil money penalties for violations of the reporting requirements of section 434(a) of the Federal Election Campaign Act (hereinafter "the Act" or "FECA").

**DATES:** Effective on December 31, 2001.

**FOR FURTHER INFORMATION CONTACT:** Ms. Rosemary C. Smith, Assistant General Counsel, or Ms. Mai T. Dinh, Attorney, 999 E Street, NW., Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

**SUPPLEMENTARY INFORMATION:**

**Explanation and Justification**

Section 640 of the Treasury and General Government Appropriations Act, 2000, Pub. L. No. 106-58, 106th Cong., 113 Stat. 430, 476-77 (1999), amended § 309(a)(4) of the FECA, 2 U.S.C. 437g(a)(4), to provide for a modified enforcement process for violations of reporting requirements. Under § 437g(a)(4)(C) of the FECA, the Commission may assess a civil money penalty for violations of the reporting requirements of 2 U.S.C. 434(a). This authority, however, was to sunset on December 31, 2001. Pub. L. No. 106-58, 106th Cong., § 640(c). Recently, § 642 of the Treasury and General Government Appropriations Act, 2002, amended the Treasury and General Government Appropriations Act, 2000, by extending the sunset date to include all reports that cover activity between January 1, 2000, to December 31, 2003.

The Commission published final rules on May 19, 2000, to implement the amendment contained in the Treasury and General Government Appropriations Act, 2000. Section 111.30 of the regulations reflects the sunset provision of Pub. L. No. 106-58, 106th Cong., § 640(c). Therefore, the Commission is issuing this final rule to amend section 111.30 to extend the application of the administrative fine regulations, 11 CFR part 111, subpart B, to include all violations relating to reports that cover the period between January 1, 2000, to December 31, 2003.

The Commission is promulgating this final rule without notice or opportunity for comment because it falls under the "good cause" exemption of the Administrative Procedures Act, 5 U.S.C. 553(b)(B). The exemption allows

# Rules and Regulations

Federal Register

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## FEDERAL ELECTION COMMISSION

### 11 CFR Part 111

[Notice 2004-5]

#### Extension of Administrative Fines Program

**AGENCY:** Federal Election Commission.

**ACTION:** Final rule and transmittal of regulations to Congress.

**SUMMARY:** Section 639 of the Fiscal 2004 Omnibus Consolidated Appropriations Act ("2004 Appropriations Act") amended the Treasury and General Government Appropriations Act, 2000, by extending the expiration date in which the Federal Election Commission ("Commission") may assess civil monetary penalties for violations of the reporting requirements of section 434(a) of the Federal Election Campaign Act ("Act" or "FECA"). Accordingly, the Commission is extending the applicability of its rules and penalty schedules in implementing the administrative fines program ("AFP"). Further information is provided in the **SUPPLEMENTARY INFORMATION** that follows.

**EFFECTIVE DATE:** February 11, 2004.

**FOR FURTHER INFORMATION CONTACT:** Ms. Mai T. Dinh, Acting Assistant General Counsel, or Mr. Daniel E. Pollner, Attorney, 999 E Street, NW., Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

#### **SUPPLEMENTARY INFORMATION:**

#### **Explanation and Justification for 11 CFR 111.30**

Section 640 of the Treasury and General Government Appropriations Act, 2000, Pub. L. No. 106-58, 106th Cong., 113 Stat. 430, 476-77 (1999), amended 2 U.S.C. 437g(a)(4) to provide for a modified enforcement process for violations of certain reporting requirements. Under 2 U.S.C.

437g(a)(4)(C), the Commission may assess a civil monetary penalty for violations of the reporting requirements of 2 U.S.C. 434(a). This authority, however, terminated on December 31, 2003. See Pub. L. No. 107-67, 107th Cong., 640(c). Recently, section 639 of the 2004 Appropriations Act amended the Treasury and General Government Appropriations Act, 2000, by extending the sunset date to include all reports that cover activity between July 14, 2000 and December 31, 2005. Accordingly, the Commission is issuing this final rule to amend section 11 CFR 111.30 to renew the applicability of the administrative fines regulations, 11 CFR part 111, subpart B, to include all violations relating to reports that cover the period between July 14, 2000 and December 31, 2003 and the period between the date that this final rule is published in the **Federal Register** and December 31, 2005.

Until the 2004 Appropriations Act was enacted, the Commission did not have the authority to extend the AFP beyond December 31, 2003. Consequently, there is a gap in the applicability of the AFP from January 1, 2004 to February 10, 2004. All reports covering reporting periods that began and ended during this gap and that are due before February 11, 2004, the effective date of this final rule, are not subject to the AFP. This includes certain 48-hour reports and pre-election reports. These reports are, however, subject to the Commission's enforcement procedures set forth at 11 CFR subpart A. See 11 CFR 111.31(a).

The Commission notes that Congress, in extending the Commission's AFP authority, provided for continuous applicability of the AFP through December 31, 2005. Moreover, the AFP is procedural; the underlying substantive reporting requirements have remained continuously in effect. Consequently, it is appropriate to apply the AFP to reports that are due after February 10, 2004 even though those reports may relate to reporting periods that include the gap.

The Commission is promulgating this final rule without notice or an opportunity for comment because it falls under the "good cause" exemption of the Administrative Procedures Act, 5 U.S.C. 553(b)(3)(B). This exemption allows agencies to dispense with notice and comment if the procedures are

"impracticable, unnecessary, or contrary to public interest." *Id.* This final rule satisfies the "good cause" exemption because a notice and comment period is impracticable in that it would prevent this final rule from taking effect without an even larger gap in the applicability of the AFP. See *Administrative Procedures Act: Legislative History*, S. Doc. No. 248 200 (1946) ("'Impracticable' means a situation in which the due and required execution of the agency functions would be unavoidably prevented by its undertaking public rule-making proceedings"). In addition, this final rule merely extends the applicability of the AFP and does not change the substantive regulations themselves. Those regulations were already subject to notice and comment when they were proposed in March 2000, 65 FR 16534, and adopted in May 2000, 65 FR 31787, and again when substantive revisions to the AFP were proposed in April 2002, 67 FR 20461, and adopted in March 2003, 68 FR 12572. Thus, it is appropriate and necessary for the Commission to publish this final rule without providing a notice and comment period.

The Commission is making this final rule effective immediately upon publication in the **Federal Register** because it falls within the "good cause" exception to the thirty-day delayed effective date requirement set forth at section 553(d)(3) of the Administrative Procedures Act. See 5 U.S.C. 553(d)(3). The same reasons that justify the promulgation of this final rule without a notice and comment period, which are set forth above, also justify making this final rule effective without the thirty-day delay. Moreover, making this final rule effective immediately upon publication in the **Federal Register** is justified because a thirty-day delay of the effective date would increase the gap in the AFP.

The Commission is submitting this final rule to the Speaker of the House of Representatives and the President of the Senate pursuant to the Congressional Review of Agency Regulations Act, 5 U.S.C. 801(a)(1)(A), on February 6, 2004. Since this is a non-major rule, it is not subject to the delayed effective date provisions of 5 U.S.C. 801(a)(3).

### Certification of No Effect Pursuant to 5 U.S.C. 605(b) (Regulatory Flexibility Act)

The attached final rule will not have a significant impact on a substantial number of small entities. The basis for this certification is that this final rule merely extends the applicability of existing regulations for two more years. The existing regulations have already been certified as not having a significant economic impact on a substantial number of small entities. 65 FR 31793 (2000). Therefore, the extension of these existing regulations will not have a significant economic impact on a substantial number of small entities.

#### List of Subjects in 11 CFR Part 111

Administrative practice and procedures, Elections, Law enforcement.

■ For the reasons set out in the preamble, subchapter A, chapter I of title 11 of the Code of Federal Regulations is amended as follows:

#### PART 111—COMPLIANCE PROCEDURES (2 U.S.C. 437g, 437d(a))

■ 1. The authority for part 111 continues to read as follows:

**Authority:** 2 U.S.C. 437g, 437d(a), 438(a)(8); 28 U.S.C. 2461 nt.

■ 2. 11 CFR 111.30 is revised to read as follows:

##### § 111.30 When will subpart B apply?

Subpart B applies to violations of the reporting requirements of 2 U.S.C. 434(a) committed by political committees and their treasurers that relate to the reporting periods that begin on or after July 14, 2000 and end on or before December 31, 2005. This subpart, however, does not apply to reports that are due between January 1, 2004 and February 10, 2004 and that relate to reporting periods that begin and end between January 1, 2004 and February 10, 2004.

Dated: February 5, 2004.

**Bradley A. Smith,**

*Chairman, Federal Election Commission.*

[FR Doc. 04-2845 Filed 2-10-04; 8:45 am]

BILLING CODE 6715-01-P

### FEDERAL RESERVE SYSTEM

#### 12 CFR Part 222

### FEDERAL TRADE COMMISSION

#### 16 CFR Part 602

[Regulation V; Docket Nos. R-1172 and R-1175; and Project No. PO44804]

RIN 3084-AA94

#### Effective Dates for the Fair and Accurate Credit Transactions Act of 2003

**AGENCIES:** Board of Governors of the Federal Reserve System (Board) and Federal Trade Commission (FTC).

**ACTION:** Joint final rules.

**SUMMARY:** The recently enacted Fair and Accurate Credit Transactions Act of 2003 (FACT Act or the Act) requires the Board and the FTC (the Agencies) jointly to adopt rules establishing the effective dates for provisions of the Act that do not contain specific effective dates. The Agencies are adopting joint final rules that establish a schedule of effective dates for many of the provisions of the FACT Act for which the Act itself does not specifically provide an effective date. The Agencies also are jointly making final rules that previously were adopted on an interim basis. Those rules establish December 31, 2003, as the effective date for provisions of the Act that determine the relationship between the Fair Credit Reporting Act (FCRA) and state laws and provisions that authorize rulemakings and other implementing action by various agencies.

**EFFECTIVE DATE:** Effective on March 12, 2004.

#### FOR FURTHER INFORMATION CONTACT:

*Board:* Thomas E. Scanlon, Counsel, Legal Division, (202) 452-3594; David A. Stein, Counsel, Minh-Duc T. Le, Ky Tran-Trong, Senior Attorneys, Krista P. DeLargy, Attorney, Division of Consumer and Community Affairs, (202) 452-3667 or (202) 452-2412; for users of Telecommunications Device for the Deaf ("TDD") only, contact (202) 263-4869.

*FTC:* Christopher Keller or Katherine Armstrong, Attorneys, Division of Financial Practices, (202) 326-3224.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

The FACT Act became law on December 4, 2003. Pub. L. 108-159, 117 Stat. 1952. In general, the Act amends the FCRA to enhance the ability of consumers to combat identity theft, to increase the accuracy of consumer reports, and to allow consumers to

exercise greater control regarding the type and amount of marketing solicitations they receive. The FACT Act also restricts the use and disclosure of sensitive medical information. To bolster efforts to improve financial literacy among consumers, title V of the Act (entitled the "Financial Literacy and Education Improvement Act") creates a new Financial Literacy and Education Commission empowered to take appropriate actions to improve the financial literacy and education programs, grants, and materials of the Federal government. Lastly, to promote increasingly efficient national credit markets, the FACT Act establishes uniform national standards in key areas of regulation.

The Act includes effective dates for many of its sections that vary to take account of the need for rulemaking, implementation efforts by industry, and other policy concerns. Section 3 of the FACT Act requires the Agencies to prescribe joint regulations establishing an effective date for each provision of the Act "[e]xcept as otherwise specifically provided in this Act and the amendments made by this Act." The FACT Act requires that the Agencies jointly adopt final rules establishing the effective dates within two months of the date of the enactment of the Act. Thus, by law, the Agencies must complete these rulemaking efforts by February 4, 2004. The Act also provides that each of the effective dates set by the Agencies must be "as early as possible, while allowing a reasonable time for the implementation" of that provision, but in no case later than ten months after the date of issuance of the Agencies' joint final rules establishing the effective dates for the Act. 117 Stat. 1953.

In mid-December of 2003, the Agencies took two related actions to comply with the requirement to establish effective dates for the Act. In the first action, the Agencies implemented joint interim final rules that establish December 31, 2003, as the effective date for sections 151(a)(2), 212(e), 214(c), 311(b), and 711 of the FACT Act, each of which determines the relationship of State laws to areas governed by the FCRA. See 68 FR 74467 (Dec. 24, 2003). In the second action, the Agencies proposed joint rules that would establish a schedule of effective dates for certain other provisions of the FACT Act for which the Act itself does not specifically provide an effective date. See 68 FR 74529 (Dec. 24, 2003). The Agencies sought comment on both of these related actions.



## **CITATION INDEX FOR EXPLANATIONS AND JUSTIFICATIONS**

This index lists chronologically and numerically all regulations which have a written Explanation and Justification (E&J). It is organized in seven sections:

1. Parts 1-8;
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3. Administrative, Parts 200-201;
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For each regulation listed, the index indicates the subject, the year of effective date, and the page number for the E&J. The reader should be aware that a citation may cover different subjects over the years. A conversion table included at the end of the book should help to trace the regulations. There is also an appendix which lists previous citations for any current regulation that has been renumbered. Readers are referred to the appendix by an asterisk next to the subject category in this index. If the E&J simply explains an amendment to the regulation, but not a change in Commission policy or citation, only the year and the page are given for the E&J.

To locate a particular E&J for a regulation, simply look up the citation, then match up the subject and year, and refer to the page number listed.

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**PART 9035: EXPENDITURE LIMITATIONS**

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Suppose you wanted to identify the previous citations for 11 CFR 100.2. You would first glance at the left column to locate 100.2. Then, following the line to the right column, you would find the previous citation of 100.6. To learn the year of this previous citation, as well as the location of the E&J for 100.6, you would turn to the Citation Index. At 100.6 in the Citation Index, you would find that the definition of election (now located at 100.2) was previously given at 100.6 in 1975 and again in 1977. You would also see that the page numbers given for those citations were 25 and 42. Thus, to review the previous E&J for the term “election,” you would refer to the 19 75 E&J for 100.6 at page 24 and to the 1977 E&J at page 42.

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| (1)        | 100.7(a)(1)(i)(A)   |
| (2)        | 100.7(a)(1)(i)(B)   |
| (3)        | 100.7(a)(1)(i)(C)   |
| (4)        | 100.7(a)(1)(i)(D)   |
| (5)        | 100.7(a)(1)(i)(E)   |
| (c)        | 100.7(a)(1)(ii)     |
| (d) (1)    | 100.7(a)(1)(iii)(A) |
| (2)        | 100.7(a)(1)(iii)(B) |
| 100.53     | 100.7(a)(2)         |
| 100.54     | 100.7(a)(3)         |
| (a)        | 100.7(a)(3)(i)      |
| (b)        | 100.7(a)(3)(ii)     |
| (c)        | 100.7(a)(3)(iii)    |
| 100.55     | 100.7(a)(4)         |

**PART 100: SCOPE AND DEFINITIONS**  
**SUBPART C: EXCEPTIONS TO CONTRIBUTIONS**

|            |                    |
|------------|--------------------|
| 100.71 (a) | 100.7(b)           |
| (b)        | 100.7(c)           |
| 100.72 (a) | 100.7(b)(1)(i)     |
| (b)        | 100.7(b)(1)(ii)    |
| (1)        | 100.7(b)(1)(ii)(A) |
| (2)        | 100.7(b)(1)(ii)(B) |
| (3)        | 100.7(b)(1)(ii)(C) |
| (4)        | 100.7(b)(1)(ii)(D) |
| (5)        | 100.7(b)(1)(ii)(E) |
| 100.73     | 100.7(b)(2)        |
| 100.74     | 100.7(b)(3)        |
| 100.75     | 100.7(b)(4)        |

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**PART 100: SCOPE AND DEFINITIONS**  
**SUBPART C: EXCEPTIONS TO CONTRIBUTIONS**

|                |                       |
|----------------|-----------------------|
| 100.76         | 100.7(b)(5)           |
| 100.77         | 100.7(b)(6)           |
| 100.78         | 100.7(b)(7)           |
| 100.79         | 100.7(b)(8)           |
| 100.80         | 100.7(b)(9)           |
| 100.81         | 100.7(b)(10)          |
| 100.82 (a)-(d) | 100.7(b)(11)          |
| (e)            | 100.7(b)(11)(i)       |
| (1) (i)        | 100.7(b)(11)(i)(A)(1) |
| (ii)           | 100.7(b)(11)(i)(A)(2) |
| (2)            | 100.7(b)(11)(i)(B)    |
| (i)            | 100.7(b)(11)(i)(B)(1) |
| (ii)           | 100.7(b)(11)(i)(B)(2) |
| (iii)          | 100.7(b)(11)(i)(B)(3) |
| (iv)           | 100.7(b)(11)(i)(B)(4) |
| (v)            | 100.7(b)(11)(i)(B)(5) |
| (3)            | 100.7(b)(11)(ii)      |
| 100.83         | 100.7(b)(22)          |
| 100.84         | 100.7(b)(12)          |
| 100.85         | 100.7(b)(13)          |
| 100.86         | 100.7(b)(14)          |
| 100.87         | 100.7(b)(15)          |
| (a)            | 100.7(b)(15)(i)       |
| (b)            | 100.7(b)(15)(ii)      |
| (c)            | 100.7(b)(15)(iii)     |
| (d)            | 100.7(b)(15)(iv)      |
| (e)            | 100.7(b)(15)(v)       |
| (f)            | 100.7(b)(15)(vi)      |
| (g)            | 100.7(b)(15)(vii)     |
| 100.88 (a)-(b) | 100.7(b)(16)          |
| 100.89         | 100.7(b)(17)          |
| (a)            | 100.7(b)(17)(i)       |
| (b)            | 100.7(b)(17)(ii)      |
| (c)            | 100.7(b)(17)(iii)     |



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**PART 100: SCOPE AND DEFINITIONS**  
**SUBPART C: EXCEPTIONS TO CONTRIBUTIONS, *continued***

|            |                   |
|------------|-------------------|
| 100.89 (d) | 100.7(b)(17)(iv)  |
| (e)        | 100.7(b)(17)(v)   |
| (f)        | 100.7(b)(17)(vi)  |
| (g)        | 100.7(b)(17)(vii) |
| 100.90     | 100.7(b)(18)      |
| 100.91     | 100.7(b)(20)      |
| 100.92     | 100.7(b)(21)      |

**PART 100: SCOPE AND DEFINITIONS**  
**SUBPART D: DEFINITION OF EXPENDITURE**

|             |                    |
|-------------|--------------------|
| 100.110 (a) | 100.8(a)           |
| (b)         | 100.8(c)           |
| 100.111 (a) | 100.8(a)(1)        |
| (b)         | 100.8(a)(1)(i)     |
| (c)         | 100.8(a)(1)(ii)    |
| (d)         | 100.8(a)(1)(iii)   |
| (e) (1)     | 100.8(a)(1)(iv)(A) |
| (2)         | 100.8(a)(1)(iv)(B) |
| 100.112     | 100.8(a)(2)        |
| 100.113     | 100.8(a)(3)        |

**PART 100: SCOPE AND DEFINITIONS**  
**SUBPART E: EXCEPTIONS TO EXPENDITURE**

|             |                    |
|-------------|--------------------|
| 100.130 (a) | 100.8(b)           |
| (b)         | 100.8(c)           |
| 100.131 (a) | 100.8(b)(1)(i)     |
| (b)         | 100.8(b)(1)(ii)    |
| (1)         | 100.8(b)(1)(ii)(A) |
| (2)         | 100.8(b)(1)(ii)(B) |
| (3)         | 100.8(b)(1)(ii)(C) |
| (4)         | 100.8(b)(1)(ii)(D) |
| (5)         | 100.8(b)(1)(ii)(E) |

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**PART 100: SCOPE AND DEFINITIONS**  
**SUBPART E: EXCEPTIONS TO EXPENDITURE, *continued***

|                     |                        |
|---------------------|------------------------|
| 100.132             | 100.8(b)(2)            |
| (a)-(b)             | 100.8(b)(2)(i)-(ii)    |
| 100.133             | 100.8(b)(3)            |
| 100.134 (a)         | 100.8(b)(4)            |
| (b)                 | 100.8(b)(4)(i)         |
| (c)                 | 100.8(b)(4)(ii)        |
| (d)                 | 100.8(b)(4)(iii)       |
| 100.134 (d) (1) (i) | 100.8(b)(4)(iii)(A)(1) |
| (ii)                | 100.8(b)(4)(iii)(A)(2) |
| (2) (i)             | 100.8(b)(4)(iii)(B)(1) |
| (ii)                | 100.8(b)(4)(iii)(B)(2) |
| (iii)               | 100.8(b)(4)(iii)(B)(3) |
| (iv)                | 100.8(b)(4)(iii)(B)(4) |
| (3)                 | 100.8(b)(4)(iii)(C)    |
| (4)                 | 100.8(b)(4)(iii)(D)    |
| (e)                 | 100.8(b)(4)(iv)(A)     |
| (1)                 | 100.8(b)(4)(iv)(A)(1)  |
| (2)                 | 100.8(b)(4)(iv)(A)(2)  |
| (3)                 | 100.8(b)(4)(iv)(A)(3)  |
| (4)                 | 100.8(b)(4)(iv)(A)(4)  |
| (5)                 | 100.8(b)(4)(iv)(A)(5)  |
| (6)                 | 100.8(b)(4)(iv)(A)(6)  |
| (f)                 | 100.8(b)(4)(iv)(B)     |
| (1)                 | 100.8(b)(4)(iv)(B)(1)  |
| (2)                 | 100.8(b)(4)(iv)(B)(2)  |
| (3)                 | 100.8(b)(4)(iv)(B)(3)  |
| (g)                 | 100.8(b)(4)(iv)(C)     |
| (h)                 | 100.8(b)(4)(iv)(D)     |
| (i)                 | 100.8(b)(4)(iv)(E)     |
| (j)                 | 100.8(b)(4)(iv)(F)     |
| (k)                 | 100.8(b)(4)(v)         |
| (l)                 | 100.8(b)(4)(vi)        |
| (m)                 | 100.8(b)(4)(vii)       |
| 100.135             | 100.8(b)(5)            |
| 100.136             | 100.8(b)(6)            |

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**PART 100: SCOPE AND DEFINITIONS**  
**SUBPART E: EXCEPTIONS TO EXPENDITURE, *continued***

|                 |                        |
|-----------------|------------------------|
| 100.137         | 100.8(b)(7)            |
| 100.138         | 100.8(b)(8)            |
| 100.139         | 100.8(b)(9)            |
| 100.140         | 100.8(b)(10)           |
| 100.141         | 100.8(b)(11)           |
| 100.142 (a)-(d) | 100.8(b)(12)           |
| (e)             | 100.8(b)(12)(i)        |
| (1) (i)         | 100.8(b)(12)(i)(A)(i)  |
| (ii)            | 100.8(b)(12)(i)(A)(ii) |
| (2)             | 100.8(b)(12)(i)(B)     |
| (i)             | 100.8(b)(12)(i)(B)(1)  |
| (ii)            | 100.8(b)(12)(i)(B)(2)  |
| (iii)           | 100.8(b)(12)(i)(B)(3)  |
| (iv)            | 100.8(b)(12)(i)(B)(4)  |
| (v)             | 100.8(b)(12)(i)(B)(5)  |
| (3)             | 100.8(b)(12)(ii)       |
| 100.143         | 100.8(b)(24)           |
| 100.144         | 100.8(b)(13)           |
| 100.145         | 100.8(b)(14)           |
| 100.146         | 100.8(b)(15)           |
| 100.147         | 100.8(b)(16)           |
| (a)             | 100.8(b)(16)(i)        |
| (b)             | 100.8(b)(16)(ii)       |
| (c)             | 100.8(b)(16)(iii)      |
| (d)             | 100.8(b)(16)(iv)       |
| (e)             | 100.8(b)(16)(v)        |
| (f)             | 100.8(b)(16)(vi)       |
| (g)             | 100.8(b)(16)(vii)      |
| 100.148         | 100.8(b)(17)           |
| 100.149         | 100.8(b)(18)           |
| (a)             | 100.8(b)(18)(i)        |
| (b)             | 100.8(b)(18)(ii)       |
| (c)             | 100.8(b)(18)(iii)      |
| (d)             | 100.8(b)(18)(iv)       |
| (e)             | 100.8(b)(18)(v)        |
| (f)             | 100.8(b)(18)(vi)       |
| (g)             | 100.8(b)(18)(vii)      |

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**PART 100: SCOPE AND DEFINITIONS**  
**SUBPART E: EXCEPTIONS TO EXPENDITURE, *continued***

|             |                      |
|-------------|----------------------|
| 100.150     | 100.8(b)(19)         |
| 100.151     | 100.8(b)(20)         |
| 100.152 (a) | 100.8(b)(21)(i)      |
| (b)         | 100.8(b)(21)(ii)     |
| (c)         | 100.8(b)(21)(iii)    |
| (1)         | 100.8(b)(21)(iii)(A) |
| (2)         | 100.8(b)(21)(iii)(B) |
| 100.153     | 100.8(b)(22)         |
| 100.154     | 100.8(b)(23)         |

**PART 102: REGISTRATION, ORGANIZATION AND RECORDKEEPING BY POLITICAL COMMITTEES**

|                        |                                   |
|------------------------|-----------------------------------|
| 102.2 (a) (2)          | 102.3                             |
| (b) (1) (ii) (C)       | 102.5                             |
| 102.3                  | 102.4                             |
| (b)                    | 102.4(b)--see E&J for 102.4       |
| 102.5 (a)              | 102.6                             |
| 102.6 (c) (4) (ii) (A) | 102.6(b)(1)--see E&J for 102.6(b) |
| (C)                    | 102.6(b)(3)--"" ""                |
| (D)                    | 102.6(b)(2)--"" ""                |
| (5)                    | 102.6(b)(3)--"" ""                |
| 102.7 (b)&(c)          | 102.7(d)--see E&J for 102.7       |
| 102.9                  | 103.3                             |
| (e)                    | 101.2(d)--see E&J for 101.2       |
| 102.12 (b)             | 102.11(b)--see E&J for 102.11     |
| 102.13                 | 102.12                            |
| (a)&(b)                | 102.12(a)&(b)--see E&J for 102.12 |

**PART 103: CAMPAIGN DEPOSITORIES**

|               |                                    |
|---------------|------------------------------------|
| 103.3 (b) (5) | 103.3(b)(1)&(2)--see E&J for 103.3 |
|---------------|------------------------------------|

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**PART 104: REPORTS BY POLITICAL COMMITTEES**

|               |                             |
|---------------|-----------------------------|
| 104.3 (a) (1) | 104.2(b)(1)                 |
| (4) (i)       | 104.2(b)(3)(ii)             |
| 104.4         | 109.2(a)                    |
| (e)           | 104.4(c)                    |
| 104.5         | 105.4*; 104.4               |
| (f)           | 104.4(e)                    |
| (g) (2)       | 104.5(g)                    |
| 104.8 (c)     | 104.5(c)--see E&J for 104.5 |
| (d)           | 104.5(e)--"" ""             |
| 104.11        | 104.8                       |
| 104.12        | 104.10                      |
| 104.13        | 104.3                       |
| 104.14        | 104.12                      |
| 104.15        | 104.13                      |
| 104.18 (b)    | 104.18(a)                   |
| (d)           | 104.18(b)                   |
| (e)           | 104.18(c)                   |
| (f)           | 104.18(d)                   |
| (g)           | 104.18(e)                   |
| (h)           | 104.18(f)                   |
| (i)           | 104.18(g)                   |

**PART 105: DOCUMENT FILING**

|       |                                |
|-------|--------------------------------|
| 105.1 | 105.4(a)(1)--see E&J for 105.4 |
| 105.2 | 105.4(a)(2)--"" ""             |
| 105.4 | 105.4(b)-- "" ""               |

NOTE: The previous citation of 105.4 was proposed by the FEC to Congress in 1975, but was never prescribed.

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| <b>Current Regulation</b> | <b>Previously Cited At</b> |
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**PART 106: ALLOCATIONS OF CANDIDATE AND COMMITTEE ACTIVITIES**

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|                   |                 |
|-------------------|-----------------|
| 106.2 (b) (2) (v) | 106.2(b)(2)(vi) |
| (c)               | 106.2(d)        |
| 106.7             | 106.5(e)        |

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**PART 107: PRESIDENTIAL NOMINATING CONVENTION REGISTRATION AND REPORTS**

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|       |       |
|-------|-------|
| 107.1 | 107.2 |
| 107.2 | 107.1 |

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NOTE: The previous citations listed for this part were proposed by the FEC to Congress in 1975, but were never prescribed.

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**PART 108: FILING COPIES OF REPORTS AND STATEMENTS WITH STATE OFFICERS**

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|       |       |
|-------|-------|
| 108.2 | 111.2 |
| 108.3 | 111.3 |
| 108.4 | 111.3 |
| 108.5 | 111.5 |
| 108.6 | 111.6 |
| 108.7 | 111.7 |

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NOTE: The previous citations listed for this part were proposed by the FEC to Congress in 1975, but were never prescribed.

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**PART 109: COORDINATED AND INDEPENDENT EXPENDITURES**

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|            |                     |
|------------|---------------------|
| 109.3      | 109.1(b)(5)         |
| 109.10 (b) | 109.2(a)            |
| (d)        | 109.2(b)            |
| (e)        | 109.2(a)(1) and (c) |
| 109.11     | 109.3               |
| 109.20     | 109.1(c)            |
| 109.23     | 109.1(d)            |

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**PART 109: COORDINATED AND INDEPENDENT EXPENDITURES, *continued***

|            |   |
|------------|---|
| 109.32 (a) | 110.7(a) (except paragraphs (a)(4)-(5)) |
| (b)        | 110.7(b)                                |
| 109.33     | 110.7(a)(4) and (c)                     |
| 109.34     | 110.7(d)                                |
| 109.36     | 110.7(a)(5)                             |

**PART 110: CONTRIBUTION AND EXPENDITURE LIMITATIONS AND PROHIBITIONS**

|                        |  |
|------------------------|--|
| 110.1 (b) (1)          | 110.1(a)(1)--see E&J for 110.1         |
| (2)                    | 110.1(a)(2)-- "" ""                    |
| (4)                    | 110.1(a)(2)(ii)-- "" ""                |
| (c)                    | 110.1(b)-- "" ""                       |
| (d)                    | 110.1(c)&(d)-- "" ""                   |
| (k) (2)                | 104.8(d)                               |
| (n)                    | 110.1(d)(2)                            |
| 110.2 (b) (1)          | 110.2(a)(1)--see E&J for 110.2         |
| (c)                    | 110.2(a)(2)-- "" ""                    |
| (d)                    | 110.2(a)(3)-- "" ""                    |
| (e)                    | 110.2(c)-- "" ""                       |
| (f)                    | 110.1(f)--see E&J for 110.1            |
| (g)                    | 110.1(g)-- "" ""                       |
| (h)                    | 110.1(h)-- "" ""                       |
| (i)                    | 110.2(d)--see E&J for 110.2            |
| (k)                    | 110.2(d)(2)                            |
| 110.3 (a) (3) (ii) (B) | 110.3(a)(1)(iii)(B)--see E&J for 110.3 |
| (b) (3)                | 110.3(b)(2)(ii)-- see E&J for 110.3    |
| (c) (1)                | 110.3(c)-- "" ""                       |
| 110.4 (b) (1) (iv)     | 110.4(b)(1)(iii)--see E&J for 110.4(b) |
| 110.6 (b) (1)          | 110.6(b)--see E&J for 110.6; 100.5**   |
| 110.7                  | 146.1                                  |
| 110.8 (a)              | 110.8(a)(1)(i)                         |
| (b)                    | 110.8(a)(1)(ii)                        |

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**PART 110: CONTRIBUTION AND EXPENDITURE LIMITATIONS AND PROHIBITIONS, *continued***

|                |                                     |
|----------------|-------------------------------------|
| 110.11 (a) (6) | 110.11(a)(2)                        |
| (7)            | 110.11(a)(1)(iv)(B)                 |
| (b) (1)        | 110.11(a)(1)(i)                     |
| (2)            | 110.11(a)(1)(ii)                    |
| (3)            | 110.11(a)(1)(iii)                   |
| (c)            | 110.11(a)(5)                        |
| (d)            | 110.11(a)(2)                        |
| (e)            | 110.11(a)(4)                        |
| (f)            | 110.11(a)(6)                        |
| (g)            | 110.11(b)                           |
| 110.14 (c) (2) | 110.14(f)--see E&J for 110.14       |
| (d)            | 110.14(c)                           |
| (e)            | 110.14(d)                           |
| (f) (1)        | 110.14(d)(2)(i)--see E&J for 110.14 |
| (2)            | 110.14(d)(2)(ii)--"" ""             |
| (4)            | 110.14(d)(2)(ii)(D)--"" ""          |
| (g)            | 110.14(d)                           |
| 110.16         | 110.9(b)                            |
| 110.17         | 110.9(c)                            |
| 110.18         | 110.9(d)                            |
| 110.19         | 110.1(i)(2)                         |
| 110.20         | 110.4(a)                            |

**PART 112: ADVISORY OPINIONS**

|           |                             |
|-----------|-----------------------------|
| 112.1 (f) | 112.1(d)--see E&J for 112.1 |
|-----------|-----------------------------|

**PART 113: EXCESS CAMPAIGN FUNDS AND CONTRIBUTIONS TO SUPPORT FEDERAL OFFICEHOLDER ACTIVITIES**

|       |       |
|-------|-------|
| 113.4 | 113.5 |
|-------|-------|



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**PART 114: CORPORATE AND LABOR ORGANIZATION ACTIVITY**

|           |                             |
|-----------|-----------------------------|
| 114.2 (d) | 114.2(c)--see E&J for 114.2 |
| (e)       | 114.2(d)--"" ""             |
| 114.4 (e) | 114.4(d)                    |
| (f)       | 114.4(e)                    |

**PART 116: DEBTS OWED BY CANDIDATES AND POLITICAL COMMITTEES**

|               |                  |
|---------------|------------------|
| 116.5 (b) (2) | 106.2(b)(2)(iii) |
|---------------|------------------|

**ADMINISTRATIVE REGULATIONS**

**PART 201: EX PARTE COMMUNICATIONS**

|                   |                                   |
|-------------------|-----------------------------------|
| 201.3 (b) (2) (i) | 201.3(b)(1)--see E&J for part 201 |
| (ii)              | 201.3(b)(2)--"" ""                |

**PRESIDENTIAL ELECTION CAMPAIGN FUND:  
PRESIDENTIAL GENERAL ELECTION FUNDING**

**PART 9002: DEFINITIONS**

|        |          |
|--------|----------|
| 9002.6 | 140.2(b) |
| 9002.7 | 140.2(b) |

**PART 9003: ELIGIBILITY FOR PAYMENTS**

|                |                                |
|----------------|--------------------------------|
| 9003.2 (c) (1) | 141.2(c)(1)--see E&J for 141.2 |
| (2)            | 141.2(c)(3)--"" ""             |
| (d)            | 141.2(d)-- "" ""               |
| 9003.3 (b) (5) | 9003.3(b)(4)                   |
| (c)            | 9003.3(b)                      |

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**PART 9004: ENTITLEMENT OF ELIGIBLE CANDIDATES TO PAYMENTS;  
USE OF PAYMENTS**

|                |                             |
|----------------|-----------------------------|
| 9004.2 (a)     | 142.2(a)--see E&J for 142.2 |
| (b)            | 142.2(b)--"" ""             |
| 9004.3 (a)     | 142.3(a)--see E&J for 142.3 |
| (b)            | 142.3(b)--"" ""             |
| (c)            | 9004.3(b)                   |
| 9004.4 (a) (5) | 9004.4 (a)(ii)              |
| 9004.9 (f)     | 9004.9(e)                   |

**PART 9005: CERTIFICATION BY COMMISSION**

|            |                               |
|------------|-------------------------------|
| 9005.1 (d) | 9005.1(b)--see E&J for 9005.1 |
| 9005.2     | 9005.3                        |

**PART 9007: EXAMINATIONS AND AUDITS; REPAYMENTS**

|                |                                     |
|----------------|-------------------------------------|
| 9007.1 (a) (1) | 9007.1                              |
| (d) (2)        | 9007.1(e)(2)--see E&J for 9007.1    |
| (3)            | 9007.1(e)(4)--see E&J for 9007.1    |
| 9007.2 (a) (4) | 9004.4(c)                           |
| (c) (2) (i)    | 9007.2(c)(2)--see E&J for 9007.2(c) |
| (ii)           | 9007.2(c)(3)--see E&J for 9007.2(c) |
| (3)            | 9007.2(c)(4)--see E&J for 9007.2(c) |

**PART 9008: FEDERAL FINANCING OF PRESIDENTIAL NOMINATING  
CONVENTIONS  
SUBPART A: EXPENDITURES BY NATIONAL COMMITTEES  
AND CONVENTION COMMITTEES**

|               |                  |
|---------------|------------------|
| 9008.3 (a)    | 9008.8(b)        |
| (b)           | 9008.12(b)       |
| (b) (1) (iii) | 9008.3(b)(1)(ii) |
| 9008.4 (a)    | 9008.3(a)        |
| (b)           | 9008.3(b)        |
| (c)           | 9008.5           |

| <b>Current Regulation</b> | <b>Previously Cited At</b> |
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**PART 9008: FEDERAL FINANCING OF PRESIDENTIAL NOMINATING CONVENTIONS**  
**SUBPART A: EXPENDITURES BY NATIONAL COMMITTEES AND CONVENTION COMMITTEES, *continued***

|             |                                     |
|-------------|-------------------------------------|
| 9008.5      | 9008.4                              |
| 9008.6      | 9008.8                              |
| (a)         | 9008.8(a)                           |
| 9008.7      | 9008.6                              |
| (a)         | 9008.7(a)                           |
| (b)         | 9008.6(b)                           |
| (3)         | 9008.6(b)(3)                        |
| 9008.8 (a)  | 9008.7(a)                           |
| (b) (1)     | 9008.7(d)(4)--see E&J for 9008.7(d) |
| (2)         | 9008.7(d)(4)--"" "" ""              |
| 9008.10 (e) | 9008.8(b)(4)(v)                     |
| 9008.11     | 9008.9                              |
| 9008.12     | 9008.10                             |

**PART 9008: FEDERAL FINANCING OF PRESIDENTIAL NOMINATING CONVENTIONS**  
**SUBPART B: HOST COMMITTEES REPRESENTING A CONVENTION CITY; CONVENTION EXPENDITURES BY GOVERNMENT AGENCIES AND MUNICIPAL CORPORATIONS**

|             |              |
|-------------|--------------|
| 9008.50 (b) | 9005.52(a)   |
| 9008.51 (a) | 9008.12(a)   |
| (b)         | 9008.12(a)   |
| 9008.52 (a) | 9008.52(b)   |
|             | 9008.7(d)(1) |
| (b)         | 9008.52(c)   |
| 9008.54     | 9008.9       |

| <b>Current Regulation</b> | <b>Previously Cited At</b> |
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**PRESIDENTIAL ELECTION CAMPAIGN FUND:  
PRESIDENTIAL PRIMARY MATCHING FUND**

**PART 9032: DEFINITIONS**

|            |                               |
|------------|-------------------------------|
| 9032.1 (b) | 9032.1(a)--see E&J for 9032.1 |
| (d)        | 9032.1(b)--"" ""              |
| 9032.4     | 130.8; 130.9                  |
| 9032.8     | 130.2                         |
| 9032.9 (b) | 110.8(g)                      |
| 9032.11    | 9032.10                       |

**PART 9033: ELIGIBILITY FOR PAYMENTS**

|                |                                     |
|----------------|-------------------------------------|
| 9033.1 (a) (1) | 9033.1(a)&(b)--see E&J for 9033.1   |
| (b) (1) & (3)  | 9033.1(a)&(b)--"" ""                |
| 9033.2 (a) (1) | 9033.2                              |
| (b) (3)        | 9033.2(c)(1)--see E&J for 9033.2(c) |
| 9033.4 (b)     | 9033.4(c)                           |
| 9033.8 (b)&(c) | 9033.9(b)-(d)--see E&J for 9033.9   |
| 9033.11        | 9033.1(b)(2)                        |

**PART 9034: ENTITLEMENTS**

|                |                                     |
|----------------|-------------------------------------|
| 9034.2 (c) (6) | 9034.3(i)                           |
| 9034.5 (a)     | 9034.5(a)&(b)--see E&J for 9034.5   |
| (e)            | 9034.5(c)--see E&J for 9034.5       |
| (f) (3)        | 9034.5(f)(2)--see E&J for 9034.5(f) |
| (g)            | 9034.5(e)                           |

**PART 9035: EXPENDITURE LIMITATIONS**

|                |  |
|----------------|--|
| 9035.1 (c) (1) | 9034.4(a)(3)(iii) --see E&J for 9035(c)(1) |
| 9035.1 (d)     | 9035.1(b)--see E&J for 9035.1              |

**Current Regulation** **Previously Cited At**

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**PART 9036: REVIEW OF SUBMISSION AND CERTIFICATION OF PAYMENTS  
BY COMMISSION**

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|            |                               |
|------------|-------------------------------|
| 9036.1 (a) | 9033.2(e)--see E&J for 9033.2 |
| (b) (8)    | 9036.1(b)(7)                  |
| (9)        | 9036.1(b)(8)                  |
| (c) (1)    | 9036.1(a)--see E&J for 9036.1 |
| (2)&(3)    | 9036.1(c)--"" ""              |

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**PART 9038: EXAMINATIONS AND AUDITS**

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|                |                               |
|----------------|-------------------------------|
| 9038.1 (a) (1) | 9038.1(a)--see E&J for 9038.1 |
| (2)            | 9038.1(b)--"" ""              |
| (4)            | 9034.4(c)                     |

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