MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrken
Staff Director

FROM: Lawrence H. Norton
General Counsel
Rosemary C. Smith
Associate General Counsel
Brad C. Deutsch
Assistant General Counsel
Ron B. Katwan
Attorney

SUBJECT: Final Rules on Coordinated and Independent Expenditures by Party Committees (11 CFR 109.35)


Recommendation:

The Office of the General Counsel recommends that the Commission approve the attached Final Rules and Explanation and Justification for publication in the Federal Register and transmittal to Congress.

Attachment
FEDERAL ELECTION COMMISSION

11 CFR Parts 102, 106, and 109

[Notice 2004 - >]

Coordinated and Independent Expenditures by Party Committees

AGENCY: Federal Election Commission.

ACTION: Final Rules.

SUMMARY: The Federal Election Commission is removing its rules restricting the ability of political party committees to make both independent expenditures and coordinated party expenditures with respect to the same candidate’s general election campaign for Federal office. The Commission is also repealing its rules prohibiting political party committees that make coordinated party expenditures with respect to a candidate from transferring funds to, or assigning authority to make coordinated party expenditures to, or receiving a transfer of funds from, a political party committee that has made or intends to make an independent expenditure with respect to that candidate. These rules were originally promulgated to implement section 213 of the Bipartisan Campaign Reform Act of 2002. However, in McConnell v. FEC, the U.S. Supreme Court held that section 213 is unconstitutional. Therefore, the Commission is now removing the rules implementing section 213. Further information is provided in the supplementary information that follows.
EFFECTIVE DATE:

[Insert date thirty days after date of publication in the FEDERAL REGISTER]

FOR FURTHER INFORMATION CONTACT:

Mr. Brad C. Deutsch, Assistant General Counsel, or Mr. Ron B. Katwan, Attorney, 999 E Street N.W., Washington, D.C. 20463,

(202) 694-1650 or (800) 424-9530.

SUPPLEMENTARY INFORMATION:

The Notice of Proposed Rulemaking ("NPRM"), on which these final rules are based, was published in the Federal Register on June 30, 2004. 69 Fed. Register 39,373 (June 30, 2004). The comment period closed on July 30, 2004. The Commission received three written comments on the proposed rules. These Final Rules are identical to the rules proposed in the NPRM.

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 3004.

Explanation and Justification

To conform its regulations to the Supreme Court’s invalidation of section 213 of the Bipartisan Campaign Reform Act of 2002 (Pub. L. 107-155 (Mar. 27, 2002)) ("BCRA") in McConnell v. FEC, 540 U.S. 93, 199-205 (2003), the Commission is removing its
regulations at 11 CFR 109.35 and deleting any cross-references to that section in other
regulations.

I. 11 CFR 102.6—Transfer of funds; collecting agents.

The Commission is revising section 102.6 by deleting the cross-reference to section
109.35, which is being removed.

II. 11 CFR 106.8—Allocation of expenses for political party committee phone banks
that refer to clearly identified Federal candidate.

The Commission is revising section 106.8 by deleting the cross-reference to section
109.35, which is being removed.

III. 11 CFR 109.30—How are political party committees treated for purposes of
coordinated and independent expenditures?

The Commission is revising section 109.30 by deleting the cross-references to
section 109.35, which is being removed.

IV. 11 CFR 109.33—May a political party committee assign its coordinated party
expenditure authority to another political party committee?

The Commission is revising section 109.33 by deleting the cross-reference to
section 109.35, which is being removed.

V. 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?

Under the Federal Election Campaign Act of 1971 (the “Act”), as amended, 2
U.S.C. 431 et seq., a national committee, State committee, or a subordinate committee of a
State committee of a political party may make expenditures in coordination with a Federal
candidate for that candidate’s general election campaign\(^1\) up to prescribed limits without
develop these expenditures counting against the party committee’s contribution limits. 2 U.S.C.
441a(d)(1)-(3); 11 CFR 109.32. While the Act limits coordinated expenditures, the
Supreme Court has determined that political party committees may make unlimited
"independent expenditures,"\(^2\) which are not coordinated with a candidate or a candidate’s
authorized committees or agents. See Colorado Republican Federal Campaign Committee
v. FEC, 518 U.S. 604 (1996) ("Colorado I").\(^3\)

BCRA section 213 amended 2 U.S.C. 441a(d), by prohibiting 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).

\(^1\) See 2 U.S.C. 441a(a)(7)(B)(i)-(ii) for a definition of coordinated party expenditures. See
also 11 CFR 109.20(b).

\(^2\) "Independent expenditure" is defined in 2 U.S.C. 431(17). See also 11 CFR 100.16.

\(^3\) The holding of Colorado I is limited to independent expenditures in connection with
Congressional campaigns. The opinion in Colorado I did not address the issue of whether
regulation of independent expenditures is constitutionally permissible in connection with
Presidential campaigns. ("Since this case involves only the provision concerning
congressional races, we do not address issues that might grow out of the public funding of
presidential campaigns.") 518 U.S. at 612. Thus, the opinion in Colorado I did not reach
the issue of whether former 11 CFR 110.7(a)(5) which prohibited independent expenditures
by the national committee of a political party in connection with a Presidential campaign
was constitutional. Subsequently, however, BCRA effectively repealed section 110.7(a)(5)
and the Commission replaced the section with 11 CFR 109.36, which prohibits a national
committee of a political party from making independent expenditures in connection with a
presidential campaign only in certain circumstances in which the national committee of a
political party serves as the principal campaign committee or authorized committee of its
Presidential candidate. See Coordinated and Independent Expenditures; Final Rules, 68

Subsequently, in *McConnell v. FEC*, the Supreme Court found BCRA section 213 unconstitutional. The Court held that by requiring political parties to choose between coordinated and independent expenditures during the post-nomination, pre-election period, BCRA section 213 placed an unconstitutional burden on the parties’ right to make unlimited independent expenditures. 540 U.S. at 199-205. Accordingly, the NPRM proposed removing the regulations at 11 CFR 109.35, which implemented BCRA section 213.

The Commission received three comments on this rulemaking. The Internal Revenue Service submitted a comment informing the Commission that it had no comments. A second comment, while urging the Commission to remove the regulations implementing BCRA section 213 on the grounds that it was unconstitutional, primarily addressed issues beyond the scope of this rulemaking. A third brief comment concerned issues also not within the scope of this rulemaking. The Commission received no comments opposing the removal of its regulations at 11 CFR 109.35 as proposed in the NPRM. Accordingly, the Commission is removing and reserving section 109.35 because the statutory foundation for this section, 2 U.S.C. 441a(d)(4), has been invalidated by the Supreme Court in *McConnell v. FEC*.

VI. 11 CFR 109.36—Are there circumstances under which a political party committee is prohibited from making independent expenditures?
The Commission is revising section 109.36 by deleting the word "additional" in the heading of section 109.36, because, as a result of the removal of section 109.35, the circumstances described in section 109.36 are the only circumstances under which a political party committee is prohibited from making independent expenditures.

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 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.

To the extent that political party committees may fall within the definition of "small entities," their number is not substantial. In addition, the rules do not add but remove restrictions applicable to political party committees.

List of Subjects

11 CFR Part 102

Political committees and parties, reporting and recordkeeping requirements.

11 CFR Part 106

Political candidates, campaign funds, political committees and parties.

11 CFR Part 109
Coordinated expenditures, independent expenditures, political committees and parties.
For the reasons set out in the preamble, the Federal Election Commission is
amending Subchapter A of Chapter I 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 102.6 is amended by revising paragraph (a)(1)(ii) to read as follows:

§ 102.6 Transfers of funds; collecting agents.

(a) * * *

(1) * * *

(ii) Subject to the restrictions set forth at 11 CFR 409.35(e), 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.

PART 106 – ALLOCATIONS OF CANDIDATE AND COMMITTEE ACTIVITIES

3. The authority citation for Part 106 continues to read as follows:

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

4. Section 106.8 is amended by revising paragraph (b)(2)(ii) to read as follows:
§ 106.8 Allocation of expenses for political party committee phone banks that refer to a clearly identified Federal candidate.

(b) *(2) * *(ii) A coordinated expenditure or an independent expenditure, subject to the limitations, restrictions, and requirements of 11 CFR 109.10, 109.32, and 109.33 and 109.35; or *

PART 109 – COORDINATED AND INDEPENDENT EXPENDITURES (2 U.S.C. 431(17), 441a(a) and (d), AND PUB. L. 107-155 SEC. 214(c))

5. The authority citation for Part 109 continues to read as follows:

Authority: 2 U.S.C. 431(17), 434(c), 438(a)(8), 441a, 441d; Sec. 214(c) of Pub. L. 107-155, 116 Stat. 81.

6. Section 109.30 is amended by revising the section to read as follows:

§ 109.30 How are political party committees treated for purposes of coordinated and independent expenditures?

Political party committees may make independent expenditures subject to the provisions in this subpart. See 11 CFR 109.34 through 109.36. Political party committees may also make coordinated party expenditures in connection with the general election campaign of a candidate, subject to the limits and other provisions in this subpart. See 11 CFR 109.32 through 109.34.
7. Section 109.33 is amended by revising paragraph (a) to read as follows:

§ 109.33 May a political party committee assign its coordinated party expenditure authority to another political party committee?

(a) Assignment. Except as provided in 11 CFR 109.35(e), The national committee of a political party and a State committee of a political party, including any subordinate committee of a State committee, may assign its authority to make coordinated party expenditures authorized by 11 CFR 109.32 to another political party committee. Such an assignment must be made in writing, must state the amount of the authority assigned, and must be received by the assignee committee before any coordinated party expenditure is made pursuant to the assignment.

* * * * *

8. Section 109.35 is removed and reserved.

§ 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?

(a) Applicability. For the purposes of this section, 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.

(b) Restrictions on certain coordinated and independent expenditures. On or after the date on which a political party nominates a candidate for election to Federal office, no committee of the political party may make:
(1) Any coordinated-party expenditure under 11 CFR 109.32 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
cy cle: or
(2) Any independent expenditure with respect to the candidate during the
election cycle at any time after it makes any coordinated expenditure under
11 CFR 109.32 with respect to the candidate during the election cycle.
(e) Restrictions on certain transfers and assignments. A committee of a political party
that makes coordinated expenditures under 11 CFR 109.32 with respect to a candidate shall
not, during the election cycle, transfer any funds to, assign authority to make coordinated
expenditures under 11 CFR 109.32 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.
§ 109.35 [Removed and reserved]
9. Section 109.36 is amended by revising the heading to read as follows:
§ 109.36 Are there additional circumstances under which a political party committee
is prohibited from making independent expenditures?

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Bradley A. Smith
Chairman
Federal Election Commission

DATED
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