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FEDERAL ELECTION COMMISSION
Washington, DC 20463

AGENDA ITEM

For Meeting of 1-20-11

SUBMITTED LATE

MEMORANDUM

TO: The Commission

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SUBJECT: Draft Notice of Proposed Rulemaking on Independent Expenditures and Electioneering Communications by Corporations and Labor Organizations (Draft A)

Attached is a draft Notice of Proposed Rulemaking to implement the decision in Citizens United v. Federal Election Commission, 558 U.S. ___, 130 S. Ct. 876 (2010).

We have been asked to place this draft on the agenda for January 20, 2011.

Attachment

Draft Notice of Proposed Rulemaking on Independent Expenditures and Electioneering Communications by Corporations and Labor Organizations
Draft A

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1 **FEDERAL ELECTION COMMISSION**

2 **11 CFR Parts 104, 109, 110, and 114**

3 **[Notice 2011 – XX]**

4 **Independent Expenditures and Electioneering Communications**

5 **by Corporations and Labor Organizations**

6 **AGENCY:** Federal Election Commission.

7 **ACTION:** Notice of Proposed Rulemaking.

8 **SUMMARY:** The Federal Election Commission seeks comment on
9 proposed changes to its rules regarding corporate and labor
10 organization funding and reporting of expenditures,
11 independent expenditures and electioneering
12 communications. These and other proposed changes are in
13 response to the decision of the Supreme Court in Citizens
14 United v. FEC. The Commission has made no final
15 decision on the issues presented in this rulemaking.

16 **DATES:** Comments must be received on or before March 21, 2011.
17 Reply comments must be limited to the issues raised in the
18 initial comments and must be received on or before April
19 11, 2011. The Commission will hold a hearing on these
20 proposed rules and any modifications or amendments
21 thereto that may be proposed, and will announce the date of
22 the hearing at a later date. Anyone wishing to testify at the

hearing must file written comments by the due date and must include a request to testify in the written comments.

ADDRESSES: All comments must be in writing, must be addressed to Robert M. Knop, Assistant General Counsel, and must be submitted in e-mail, facsimile, or paper copy form. Commenters are encouraged to submit comments by e-mail to ensure timely receipt and consideration. E-mail comments must be sent to citizensunited@fec.gov. If e-mail comments include an attachment, the attachment must be in Adobe Acrobat (.pdf) or Microsoft Word (.doc) format. Faxed comments must be sent to (202) 219-3923, with paper copy mailed to the Commission concurrently with the transmitted facsimile. Paper comments and paper copy follow-up of faxed comments must be sent to the Federal Election Commission, Attn.: Robert M. Knop, Assistant General Counsel, 999 E Street, NW., Washington, DC 20463. All comments must include the full name and postal service address of a commenter, and of each commenter if filed jointly, or they will not be considered. The Commission will post comments on its Web site at the conclusion of the comment period. The hearing will be held in the Commission's ninth floor hearing room, 999 E Street, NW., Washington, DC 20463.

1

2 **FOR FURTHER**
3 **INFORMATION**
4 **CONTACT:** Mr. Robert M. Knop, Assistant General Counsel, or
5 Attorneys Ms. Esther D. Heiden, Ms. Cheryl A.F. Hemsley,
6 Mr. Phillip A. Olaya or Ms. Joanna S. Waldstreicher, 999 E
7 Street, NW., Washington, DC 20463, (202) 694-1650 or
8 (800) 424-9530.

9
10 **SUPPLEMENTARY**
11 **INFORMATION:**

12 The Federal Election Campaign Act of 1971,[1] as amended by the Bipartisan
13 Campaign Reform Act of 2002[2] ("the Act"), prohibits corporations and labor
14 organizations from using general treasury funds to make expenditures in connection with
15 Federal elections. 2 U.S.C. 441b. Although the prohibition on expenditures by
16 corporations and labor organizations has been part of the Act since the Act was first
17 enacted in 1971, the prohibition dates at least to 1947 when Congress passed the Taft-
18 Hartley Act, 80 ch. 120 § 304, 61 Stat. 136, as amended, 18 U.S.C. 610 (1970).[3] The
19 prohibition at 18 U.S.C. 610 was included in the 1971 Act, and was moved to 2 U.S.C.
20 441b in 1976. See FEC v. Massachusetts Citizens For Life, Inc., 479 U.S. 238, 246-47
21 (1986).

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[1] Pub. L. No. 92-225, 86 Stat. 3 (1971); 2 U.S.C. 431 et seq.
[2] Pub. L. No. 107-155, 116 Stat. 81 (2002).
[3] The Tillman Act of 1907, ch. 420, 34 Stat. 864-65, expressly prohibited corporate contributions in connection with a Federal election. At the time of the Taft-Hartley Act's enactment, the Senate report indicated that the Tillman Act's prohibition was intended to include a ban on corporate expenditures. See S. Rep. No. 80-1, at 38-39 (1947) (referring to the "loophole whereby corporations, national banks, and labor organizations are enabled to avoid the obviously intended restrictive policy of the statute by garbing their financial assistance in the form of an 'expenditure'").

1 "Expenditure" is defined as "(i) any purchase, payment, distribution, loan,
2 advance, deposit, or gift of money or anything of value, made by any person for the
3 purpose of influencing any election for Federal office; and (ii) a written contract,
4 promise, or agreement to make an expenditure." 2 U.S.C. 431(9)(A); see also 11 CFR
5 100.111. The prohibition on expenditures by corporations and labor organizations
6 includes a subset of "expenditures" known as "independent expenditures," which are
7 expenditures expressly advocating the election or defeat of a clearly identified candidate
8 that are not made in concert or cooperation with, or at the request or suggestion of, a
9 clearly identified candidate, the candidate's authorized political committee, or their
10 agents, or a political party committee and its agents. 2 U.S.C. 431(17); 11 CFR
11 100.16(a). The Bipartisan Campaign Reform Act of 2002 ("BCRA") amended the Act in
12 part to also prohibit corporations and labor organizations from using general treasury
13 funds to make electioneering communications, even when this spending would not
14 qualify as an independent expenditure. 2 U.S.C. 441b(b)(2). "Electioneering
15 communications" are broadcast, cable, or satellite communications that refer to a clearly
16 identified candidate for Federal office, are publicly distributed within sixty days before a
17 general election or thirty days before a primary election, and are targeted to the relevant
18 electorate. 2 U.S.C. 434(f)(3)(A); 11 CFR 100.29(a). The Commission's regulations
19 implementing the statutory prohibitions against independent expenditures and
20 electioneering communication made by corporations and labor organizations are found at
21 11 CFR part 114. The Act and Commission regulations require the reporting of both
22 independent expenditures and electioneering communications. 2 U.S.C. 434(c), 434(f);
23 11 CFR 104.20, 109.10. Finally, the Act and Commission regulations require

1 communications expressly advocating the election or defeat of a clearly identified
2 candidate, as well as electioneering communications, to include statements disclosing
3 who paid for the communication, and whether the communication was authorized by a
4 Federal candidate or a Federal candidate's authorized political committee or its agents
5 and, if so, the identity of that candidate. 2 U.S.C. 441d(a); 11 CFR 110.11.

6 In Citizens United v. FEC, the Supreme Court held that the two statutory
7 provisions prohibiting corporations from making independent expenditures and
8 electioneering communications violate the First Amendment.
9 558 U.S. __, 130 S. Ct. 876 (2010). At the same time, the Supreme Court affirmed the
10 validity of the Act's reporting and disclaimer requirements for independent expenditures
11 and electioneering communications at 2 U.S.C. 434(f), 441d(a)(3) and 441d(d)(2).
12 Citizens United, 130 S. Ct. at 913-16.

13 The Commission seeks comment on whether or not it should modify its
14 regulations by: (1) eliminating the prohibitions in 11 CFR 114.2 and 114.14 on the use of
15 corporate and labor organization general treasury funds to finance expenditures,
16 independent expenditures and electioneering communications; (2) eliminating 11 CFR
17 114.15, which permits corporations and labor organizations to make electioneering
18 communications that are not the functional equivalent of express advocacy; (3)
19 eliminating the prohibitions in 11 CFR 114.3 and 114.4 regarding express advocacy in
20 communications to the general public and revising the standards for voter registration and
21 get-out-the-vote ("GOTV") drives; (4) revising the Commission's corporate facilitation
22 rules in 114.2(f) and related conduit rule in 110.6(b)(2)(ii); (5) revising certain reporting
23 requirements in 11 CFR 104.20 and 109.10 pertaining to independent expenditures and

electioneering communications, in order to provide more comprehensive reporting of such spending; and (6) revising the regulations governing financial participation by foreign nationals in the U.S. electoral process.

Although Citizens United did not directly address whether labor organizations also have a First Amendment right to use their general treasury funds for independent expenditures and electioneering communications, the Act and Commission regulations treat labor organizations in a similar manner to corporations. Because the Court's Citizens United decision, when addressing corporations, often referred to labor organizations, and provided no basis for treating labor organization communications differently than corporate communications under the First Amendment, the Commission proposes to make the same regulatory changes in this Notice of Proposed Rulemaking for both corporations and labor organizations.

I. Background

In Citizens United, the Supreme Court held that the Act's prohibitions on financing independent expenditures or electioneering communications with corporate general treasury funds violate the First Amendment. In doing so, the Supreme Court overruled Austin v. Michigan State Chamber of Commerce, 494 U.S. 652 (1990) ("Austin"), which had upheld a comparable State law prohibiting independent expenditures by corporations using their treasury funds. Citizens United also overruled the part of the Court's decision in McConnell v. FEC, 540 U.S. 93, 204-06 (2003) ("McConnell") that upheld BCRA section 203's prohibition on corporate electioneering communications.

1
2 A. Before BCRA

3 The Act and Commission regulations prohibit corporations and labor
4 organizations from using general treasury funds to make expenditures, including
5 independent expenditures. 2 U.S.C. 441b(a) and (b)(2); 11 CFR 114.2(b)(2).
6 Notwithstanding these prohibitions, the Act and Commission regulations permit
7 corporations and labor organizations to establish and administer separate segregated
8 funds ("SSFs"). 2 U.S.C. 441b(b)(2)(C); 11 CFR 114.5. The funds for a corporation's or
9 labor organization's SSF may only be solicited from those within the corporation or labor
10 organization's restricted class (i.e., a corporation's executive and administrative
11 personnel, stockholders, and the families of these groups, or a labor organization's
12 members, executive or administrative personnel, and the families of both groups). Even
13 though the solicitation authority is limited, an SSF may receive and accept unsolicited
14 funds from persons outside the SSF's restricted class. 11 CFR 114.5(g); see also 11 CFR
15 114.5(f) (establishing that SSFs are subject to the contribution limits for political
16 committees). SSF funds can be contributed directly to candidates for Federal office
17 subject to the amount limitations of the Act. SSF funds may also be used to pay for
18 independent expenditures to communicate to the general public.

19 In 1986, in FEC v. Massachusetts Citizens For Life, Inc. ("MCFL"), the Supreme
20 Court held that incorporated advocacy organizations possessing certain characteristics
21 could not constitutionally be barred from using corporate funds to make independent
22 expenditures but let stand the prohibition as to corporations that did not possess the same
23 characteristics. 479 U.S. 238 (1986). Specifically, the MCFL Court held
24 unconstitutional the Act's financing restrictions on corporate independent expenditures as

1 applied to non-profit corporations that (a) were formed for the sole purpose of promoting
2 political ideas, (b) did not engage in business activities, and (c) did not accept
3 contributions from for-profit corporations or labor organizations. Id. at 263-64.
4 In 1990, in Austin, the Supreme Court upheld a State law that prohibited
5 corporate independent expenditures supporting or opposing any candidate for State
6 office. 494 U.S. at 659. The Supreme Court based this holding on the compelling
7 governmental interest in preventing "the corrosive and distorting effects of immense
8 aggregations of wealth that are accumulated with the help of the corporate form and that
9 have little or no correlation to the public's support for the corporation's political ideas."
10 Id.
11 B. Impact of BCRA
12 In enacting section 203 of BCRA, Congress extended the Act's prohibitions on
13 the use of general treasury funds for corporate and labor organization expenditures
14 (including independent expenditures) under 2 U.S.C. 441b to include, for the first time,
15 electioneering communications. 2 U.S.C. 441b(b)(2); see also 2 U.S.C. 434(f)(3). The
16 Commission implemented the electioneering communications provisions of BCRA by
17 modifying sections 104.3, 114.2 and 114.10, and promulgating new regulations at
18 11 CFR 100.29 and 114.14. See Explanation and Justification for Final Rules on
19 Electioneering Communications, 67 FR 65190 (Oct. 23, 2002), available at
20 http://www.fec.gov/pdf/nprm/electioneering_comm/fr67n205p65189.pdf.
21 In response to a facial challenge to the corporate-funding restrictions, reporting
22 obligations, and disclaimer requirements applicable to electioneering communications,
23 the Supreme Court upheld BCRA's electioneering communication provisions at 2 U.S.C.

1 434(f), 441b, and 441d. See McConnell, 540 U.S. at 194, 201-02, 207-08. Specifically,
2 the Supreme Court held that the prohibition on the use of general treasury funds by
3 corporations and labor organizations to pay for electioneering communications in
4 2 U.S.C. 441b(b)(2) was not facially overbroad, because the "vast majority" of
5 communications that met the definition of electioneering communications were "intended
6 to influence [ ] voters' decision" and were "the functional equivalent of express
7 advocacy." Id. at 206.

8 Subsequently, in Wisconsin Right to Life, Inc. v. FEC, 551 U.S. 449 (2007)
9 ("WRTL"), the Supreme Court considered an as-applied challenge brought by a non-
10 profit corporation. The plaintiff sought to use its own general treasury funds, including
11 donations it had received from other corporations, to pay for broadcast advertisements
12 referring to Senator Feingold and Senator Kohl during the electioneering communications
13 window before the 2004 general election in which Senator Feingold, but not Senator
14 Kohl, was on the ballot. The plaintiff argued that these communications were genuine
15 issue ads run as part of a grassroots lobbying campaign on the issue of Senate filibusters
16 of judicial nominations. Id. at 457-61. The Court held that a communication is the
17 "functional equivalent of express advocacy" only if it is "susceptible of no reasonable
18 interpretation other than as an appeal to vote for or against a specific candidate." Id. at
19 469. Applying that standard, the Supreme Court held that section 441b(b)(2) was
20 unconstitutional as applied to the plaintiff's advertisements because the advertisements
21 were not the "functional equivalent of express advocacy." Id. at 476, 480-81. The
22 Commission adopted the regulation at 11 CFR 114.15 in response to the Supreme Court's
23 ruling in WRTL. Explanation and Justification for Final Rules on Electioneering

1 Communications, 72 FR 72899, 72902 (Dec. 26, 2007), available at
2 http://www.fec.gov/law/cfr/ej_compilation/2007/notice_2007-26.pdf.

3 C. Citizens United

4 In January 2008, Citizens United, a non-profit corporation, released a film in
5 theaters and on DVD about then-Senator Hillary Clinton, who was a candidate in the
6 Democratic Party's 2008 Presidential primary elections. Citizens United wanted to pay
7 cable companies to make the film available to digital cable subscribers for free through
8 video-on-demand, which allows subscribers to view programming, including movies.
9 Citizens United planned to make the film available within thirty days of the 2008 primary
10 elections.

11 Citizens United filed suit seeking a preliminary injunction, arguing (a) that the
12 ban on corporate electioneering communications at 2 U.S.C. 441b(b)(2) was
13 unconstitutional as applied to payments to make the film available through video-on-
14 demand and (b) that the reporting and disclaimer requirements at 2 U.S.C. 434(f) and
15 441d were unconstitutional as applied to payments for the film and for three planned
16 advertisements for the movie. The District Court denied Citizens United a preliminary
17 injunction and granted the Commission's motion for summary judgment. See Citizens
18 United v. FEC, 530 F. Supp. 2d 274 (D.D.C. 2008).

19 On appeal, the Supreme Court invalidated section 441b's restrictions on corporate
20 independent expenditures and electioneering communications.[4] 130 S. Ct. at 913. The
21 Supreme Court determined that the prohibition on corporate independent expenditures

[4] Based on this decision, on January 26, 2010, the Commission received a Petition for Rulemaking, available at http://www.fec.gov/law/law_rulemakings.shtml, requesting that the Commission adopt conforming regulations and repeal 11 CFR 114.2 and 114.14, which implement the ban on the use of general treasury funds by corporations and labor organizations to make independent expenditures and electioneering communications.

1 and electioneering communications is a ban on speech and concluded that section 441b
2 was therefore "subject to strict scrutiny." Id. at 898. The Supreme Court reached this
3 conclusion "notwithstanding the fact that [an SSF] created by a corporation can still
4 speak," which the Court determined did not provide an adequate alternative mechanism
5 for corporate speech. Id at 897.

6 In striking down the ban on corporate independent expenditures and
7 electioneering communications, the Court overruled Austin. The Court concluded that
8 "[p]olitical speech is 'indispensable to decisionmaking in a democracy, and this is no less
9 true because the speech comes from a corporation rather than an individual.'" Id. at 904
10 (quoting First National Bank of Boston v. Bellotti, 435 U.S. 765, 777 (1978)).

11 The Supreme Court further held that, while the government has a compelling
12 interest in preventing corruption or the appearance of corruption, "independent
13 expenditures, including those made by corporations, do not give rise to corruption or the
14 appearance of corruption." Id. at 909. The Supreme Court also disagreed that corporate
15 independent expenditures can be limited because of an interest in protecting dissenting
16 shareholders from being compelled to fund corporate political speech and held that such
17 disagreements may be corrected by shareholders through the procedures of corporate
18 democracy. Id. at 911. The Supreme Court found no compelling government interest to
19 support the limits on corporations' independent political speech and, thus, invalidated
20 441b's restrictions with respect to corporate independent expenditures and electioneering
21 communications. Id. at 913.

22 Citizens United also challenged the Act's disclaimer and reporting provisions at
23 434(f) and 441d as applied to Citizens United's film and three advertisements for the

1 film. Under the Act, electioneering communications must include a statement identifying
2 the person responsible for payment for the advertisement. 2 U.S.C. 441d(a). Also, any
3 person who spends more than $10,000 on electioneering communications within a
4 calendar year must file a reporting statement with the Commission identifying the person
5 making the electioneering communication, the election to which the communication
6 pertains, and information about certain contributors. 2 U.S.C. 434(f)(2). The Supreme
7 Court rejected that challenge, upholding the reporting provisions because "transparency
8 enables the electorate to make informed decisions and give proper weight to different
9 speakers and messages." Citizens United, 130 S. Ct. at 916. The Court found that
10 disclaimer and reporting requirements impose no ceiling on campaign-related spending,
11 do not prevent anyone from speaking, and advance the public's "interest in knowing who
12 is speaking about a candidate shortly before an election." Id at 914-15. The Court also
13 concluded that "prompt disclosure of expenditures can provide shareholders and citizens
14 with the information needed to hold corporations and elected officials accountable for
15 their positions and supporters." Id. at 916.

16 II. Overview of Changes to Part 114 Corporate and Labor Organization Activity

17 Commission regulations implementing the statutory provisions invalidated by
18 Citizens United are no longer valid.[5] These regulations include portions of current
19 11 CFR part 114, which concern corporate and labor organization activity. Accordingly,
20 in this rulemaking, the Commission proposes (1) to amend 11 CFR 114.2, 114.3, and
21 114.4, (2) to remove 11 CFR 114.10, 114.14, and 114.15, and (3) to add a new 11 CFR
22 114.16. The Commission also seeks comment on whether to revise 11 CFR 114.2(f).

[5] See FEC Statement on the Supreme Court's Decision in Citizens United v. FEC, Feb. 5, 2010, available at http://www.fec.gov/press/press2010/20100205CitizensUnited.shtml.

1 The Commission's proposed changes to 11 CFR part 114 seek to comply with the
2 Court's holding in Citizens United by (1) modifying specific language within sections of
3 part 114 that prohibit corporations and labor organizations from using general treasury
4 funds to finance independent expenditures and electioneering communications and (2)
5 repealing language that appears superfluous given the permissible uses of general
6 treasury funds under Citizens United. Because the Court's holding in Citizens United left
7 intact the prohibition on corporate and labor organization contributions under 2 U.S.C.
8 441b, the Commission does not propose to change the provisions in 11 CFR part 114 that
9 implement this contribution ban. However, the Commission seeks comment on the
10 possibility of revising its rules prohibiting the facilitation of contributions by corporations
11 and labor organizations, to the degree that facilitation activity is conducted independently
12 of candidates.

13 Among the Commission's proposals to comply with Citizens United are
14 alternatives for modifying current 11 CFR 114.2(b)(2)(i), which prohibits corporations
15 and labor organizations from making expenditures, including independent expenditures.
16 The Commission proposes to modify 11 CFR 114.2(b)(2)(i) in one of two ways: (1)
17 narrow the prohibition to allow all expenditures except those that are coordinated with a
18 candidate or a political party committee or (2) narrow the prohibition to allow only
19 communications that are not coordinated with a candidate or a political party committee,
20 while continuing to prohibit non-communicative expenditures. These alternative
21 approaches would also apply to the expenditure prohibition for voter registration and
22 GOTV drives, as discussed below in the proposed changes to section 114.3 (with respect
23 to the restricted class) and section 114.4 (with respect to the general public).

1 While the Commission proposes to retain the reporting requirements currently in
2 11 CFR 114.3(b), which require corporations and labor organizations to report
3 disbursements for communications containing express advocacy made to the restricted
4 class, it recognizes that a communication containing express advocacy may now be made
5 both to the general public and the restricted class, thereby triggering different thresholds
6 for reporting obligations. With respect to 11 CFR 114.4, the Commission proposes to
7 remove the prohibition on making express advocacy communications to those outside the
8 restricted class, but maintain the restrictions on coordinating with candidates and political
9 parties when making communications to those outside the restricted class. Additionally,
10 the Commission proposes to adopt a new 11 CFR 114.16 that incorporates certain
11 provisions of current 11 CFR 114.10. These provisions would affirmatively recognize
12 the right of corporations and labor organizations to make independent expenditures and
13 electioneering communications. These provisions would reference other Commission
14 regulations that now apply to corporations and labor organizations that make such
15 independent expenditures or electioneering communications, including references to the
16 reporting requirements for independent expenditures and electioneering communications
17 under 11 CFR 104.4(a), 109.10(b), and 104.20(b), and the disclaimer provisions of
18 11 CFR 110.11. Finally, the Commission proposes to remove 11 CFR 114.10, 114.14,
19 and 114.15, which implement exceptions to the general prohibition against corporate and
20 labor organization funding of independent expenditures and electioneering
21 communications, since, given the holding in Citizens United, the exceptions no longer
22 appear to be necessary.
23

1 III. Proposed 11 CFR 114.2(b) – Prohibitions on certain expenditures

2 The Commission regulation at 11 CFR 114.2(b) implements 2 U.S.C. 441b(a) by
3 prohibiting corporations and labor organizations from making expenditures, including
4 independent expenditures[6] (i.e., expenditures for express advocacy[7] communications to
5 those outside their restricted classes). This rule also prohibits corporations and labor
6 organizations from making payments for electioneering communications to those outside
7 their restricted classes unless certain criteria are met. The Supreme Court's decision in
8 Citizens United invalidated the prohibitions on corporate and labor organization
9 independent expenditures and electioneering communications in 2 U.S.C. 441b(a).[8]
10 Accordingly, certain portions of 11 CFR 114.2(b) are no longer valid. Thus, the
11 Commission proposes to revise this regulation to repeal the prohibitions on independent
12 expenditures and electioneering communications.

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[6] An "independent expenditure" is statutorily defined as "an expenditure by a person— (A) expressly advocating the election or defeat of a clearly identified candidate; and (B) that is not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate's authorized political committee, or their agents, or a political party committee or its agents." 2 U.S.C. 431(17). Similarly, the Commission's regulations define an "independent expenditure" as "an expenditure by a person for a communication expressly advocating the election or defeat of a clearly identified candidate . . ." 11 CFR 100.16(a).

[7] Express advocacy is defined in 11 CFR 100.22 as "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), "reject the incumbent," or communications of campaign slogan(s) or individual word(s), which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s), such as posters, bumper stickers, advertisements, etc. which say "Nixon's the One," "Carter '76," "Reagan/Bush" or "Mondale!"; or (b) When taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because– (1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and (2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action."

[8] See discussion above regarding the applicability of the Citizens United holding to labor organizations.

1 A. 11 CFR 114.2(b)(2)(i) – Prohibition on Corporate and Labor Organization
2 Expenditures

3 Current 11 CFR 114.2(b)(2)(i) generally prohibits corporations and labor
4 organizations from making "expenditures," as defined in 11 CFR part 100, subpart D.
5 With certain exceptions, this prohibition applies to all expenditures whether they are
6 independent, coordinated, or any other form of expenditure, including in-kind
7 contributions.[9] It also applies whether expenditures are for communications or are for
8 non-expressive activity.

9 The Commission is considering two alternatives for revising 11 CFR
10 114.2(b)(2)(i). Both alternatives would permit corporations and labor organizations to
11 make independent expenditures from their general treasury funds for communications
12 that are not coordinated with a candidate or political party, and both alternatives would
13 maintain the prohibition on corporate and labor organization expenditures for all
14 activities that are coordinated with a candidate or political party as defined in 11 CFR
15 109.20 or 109.21. The alternatives differ in that Alternative A would permit corporate
16 and labor organizations to make all types of expenditures from their general treasuries for
17 any non-coordinated activities, whether or not they are communications, while
18 Alternative B would maintain the existing prohibition on non-expressive expenditures by
19 corporations and labor organizations regardless of whether they are coordinated with a
20 candidate or political party. The Commission invites comment on which, if either, of the
21 two proposals would better implement Citizens United and why.

[9] An example of an in-kind contribution is "the provision of any goods or services without charge or at a charge that is less than the usual and normal charge for the goods or services." 11 CFR 100.111(e)(1). All corporate and labor organization contributions, including in-kind contributions, continue to be prohibited under Citizens United. Coordinated communications and coordinated expenditures continue to be prohibited because they are a form of in-kind contribution. 11 CFR 109.20(b), 109.21(b).

1 As discussed in more detail below, Alternative A proposes treating all
2 expenditures the same on the ground that Citizens United did not distinguish among
3 different types of expenditures so long as they are made independently of any campaign
4 or political party. By contrast, Alternative B suggests distinguishing between
5 expenditures for communications and other types of expenditures, on the specific ground
6 that the Court's holding in Citizens United struck down only prohibitions on political
7 speech as inconsistent with the First Amendment, but did not address conduct more
8 generally. Under the statute and the Commission's historical understanding,
9 "independent expenditures" are limited only to communications. The Commission seeks
10 comment on whether it has the legal authority to interpret the Court's holding in Citizens
11 United to reach beyond political speech in the form of independent expenditures to non-
12 communicative expenditures in the face of existing statutory provisions that prohibit non-
13 communicative expenditures by corporations and labor organizations and have not been
14 declared unconstitutional. Does the Commission have jurisdiction to effectively repeal
15 (through non-enforcement) a statute and the implementing regulations that are valid and
16 have not been subject to constitutional challenge? The Commission invites comment on
17 which, if either, of the two approaches reflects the appropriate response to Citizens
18 United and why.

19 Alternative A – Permit Corporations and Labor Organizations to Make
20 Expenditures Except for Coordinated Expenditures and Coordinated
21 Communications

22 The Court in Citizens United stated that "[b]y definition, an independent
23 expenditure is political speech presented to the electorate that is not coordinated with a

1 candidate." Citizens United, 130 S. Ct. at 910. Alternative A would therefore comply
2 with the Court's holding by repealing the existing broad prohibition on corporate and
3 labor organization expenditures from general treasury funds, and replace it with a
4 regulation specifically prohibiting only expenditures that are coordinated with a candidate
5 or a political party committee, and coordinated communications.

6 The Commission seeks comment on whether Alternative A would comply with
7 the Citizens United holding. Does the proposal eliminate too much or too little of the
8 prohibition on corporate and labor organization expenditures? Does the proposed
9 alternative provide sufficiently clear guidance as to the types of expenditures
10 corporations and labor organizations may constitutionally make in accordance with
11 Citizens United?

12 The Commission also seeks comment on whether Alternative A should
13 distinguish between expenditures for communications (i.e., political speech) and other
14 types of non-coordinated expenditures. Expenditures for all political speech by
15 corporations and labor organizations would be permitted under Alternative A so long as
16 they are not coordinated with candidates or political parties. Expenditures that are not for
17 communications would also be permitted under Alternative A as long as these
18 expenditures are not coordinated with candidates or political parties. Examples would
19 include but not be limited to (a) payment for transportation of volunteers to campaign
20 events, (b) payment for expenses of voter registration drives, (c) the provision of food to
21 campaign volunteers, or (d) providing babysitting services to enable voters supporting a
22 particular candidate to vote. Should such non-communicative expenditures by
23 corporations and labor organizations continue to be prohibited on the ground that the

1 Citizens United decision did not reach the question and therefore the statutory prohibition
2 still applies? Alternatively, should they be permitted on the ground that the holding of
3 Citizens United may be interpreted to reach beyond communications and permits any
4 corporate or labor organization expenditure that is not coordinated with a candidate?
5 For example, how should the Commission treat corporate or labor organization
6 expenditures for transporting voters to polling places as part of a GOTV campaign
7 supporting or opposing a specific candidate, when not coordinated with any candidate or
8 political party? Such expenses might include the driver's salary, vehicle rental, and fuel,
9 and, if workers were brought in from another geographical area to assist in the efforts, the
10 corporation or labor organization might also be paying for their travel, lodging, and food
11 costs. These payments would be permitted in unlimited amounts under Alternative A.
12 The Commission seeks comment on this approach. Does the Commission have the legal
13 authority to interpret the Court's holding in Citizens United to reach beyond independent
14 expenditures to other types of non-communicative expenditures in the face of conflicting
15 statutory provisions that have not been declared unconstitutional? Must any further
16 expansion of the holding in Citizens United come through as-applied legal challenges?
17 Alternative B - Permit Corporations and Labor Organizations to Make
18 Independent Expenditures but not Coordinated Communications or Non-
19 Communicative Expenditures
20 Alternative B implements Citizens United by amending the prohibition on
21 corporate and labor organization expenditures to permit those entities to make
22 independent expenditures from their general treasury funds for non-coordinated

1 communications, but continues to prohibit non-communicative expenditures and in-kind
2 contributions, including coordinated communications.

3 Alternative B distinguishes expenditures for communications from other types of
4 expenditures. As noted above, the Court in Citizens United stated that "[b]y definition,
5 an independent expenditure is political speech presented to the electorate that is not
6 coordinated with a candidate." Citizens United, 130 S. Ct. at 910. This language
7 suggests that the rationale of Citizens United applies to corporate and labor organization
8 political speech only and does not apply to non-communicative activity. Indeed, the
9 definition of expenditure, which includes "any purchase, payment, distribution, loan,
10 advance, deposit, or gift of money or anything of value, made by any person for the
11 purpose of influencing any election for Federal office," 2 U.S.C. 431(9)(A), covers non-
12 communicative activity. The Commission is therefore proposing Alternative B to clearly
13 distinguish between permissible independent expenditures for political speech on the one
14 hand, and types of non-speech and coordinated expenditures by corporations and labor
15 organizations that would continue to be prohibited, on the other. Alternative B would
16 apply the Court's reasoning to communications generally, but would not apply it to other
17 types of expenditures because Citizens United addressed only, in the words of the Court,
18 "political speech," 130 S. Ct. at 916, in the form of independent expenditures and
19 electioneering communications.

20 There is a line of judicial decisions, and several Commission actions, that provide
21 authority for drawing a distinction between independent expenditures for independent
22 political speech and non-speech expenditures in this rulemaking. In Buckley v. Valeo,
23 424 U.S. 1 (1976), the Court distinguished between contribution limits, which it upheld,

1 and expenditure limits, which it invalidated. The Court explained that "[t]he expenditure
2 limitations contained in the Act represent substantial rather than merely theoretical
3 restraints on the quantity and diversity of political speech." 424 U.S. at 19. By contrast,
4 the Court concluded contributions involve only a limited degree of protected speech
5 because they represent a "symbolic expression of support" such that the limitation "does
6 not in any way infringe the contributor's freedom to discuss candidates and issues." Id. at
7 21. See MCFL, 479 U.S. at 259-60 ("We have consistently held that restrictions on
8 contributions require less compelling justification than restrictions on independent
9 spending."). Moreover, in Buckley, the Court also recognized that certain expenditures –
10 namely those that are made in coordination with candidates – are nothing more than
11 "disguised contributions" and receive only the lesser protections afforded to contributions
12 by the constitution. 424 U.S. at 46-47. Finally, although the Buckley Court stated that
13 "the dependence of a communication on the expenditure of money" does not "itself
14 introduce a non speech element," the Court did acknowledge that the "giving and
15 spending of money" may ultimately involve primarily conduct, rather than speech. Id. at
16 16.

17 The Supreme Court has long distinguished between government restrictions on
18 pure speech and government restrictions on conduct, including expressive conduct. See,
19 e.g., Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991) (upholding State statute despite its
20 incidental limitations on some expressive activity); Spence v. Washington, 418 U.S. 405
21 (1974) (striking down State statute that infringed protected expression); United States v.
22 O'Brien, 391 U.S. 367 (1968) (upholding Federal statute due to non-communicative
23 impact of conduct). While restrictions on pure speech are subject to strict scrutiny by the

1 courts, a "sufficiently important governmental interest in regulating the nonspeech
2 element can justify incidental limits on First Amendment freedoms." Barnes, 501 U.S. at
3 567 (quoting O'Brien, 391 U.S. at 376).

4 One Federal court has explicitly recognized and applied the distinction between
5 speech and conduct to the expenditure rules administered by the Commission. In FEC v.
6 Christian Coalition, the court considered regulations regarding the coordination of
7 expenditures with campaigns. 52 F. Supp. 2d 45 (D.D.C. 1999). The court stated that
8 "the First Amendment requires different treatment for 'expressive,' 'communicative' or
9 'speech-laden' coordinated expenditures, which feature the speech of the spender, from
10 coordinated expenditures on non-communicative materials, such as hamburgers or travel
11 expenses for campaign staff." Id. at 85 n.45. The court limited its analysis to "expressive
12 coordinated expenditures" because "[t]he interest-balancing process may well yield
13 different results for non-expressive coordinated expenditures." Id. at 91. The
14 Commission's rules on coordination also distinguish between communications and
15 "expenditures that are not made for communications." Explanation and Justification for
16 Final Rules on Coordinated and Independent Expenditures, 68 FR 421, 425 (Jan. 3,
17 2003), available at
18 http://www.fec.gov/pdf/nprm/electioneering_comm/fr67n205p65189.pdf; see Statement
19 of Reasons of Vice Chairman David M. Mason and Commissioner Hans A. von
20 Spakovsky, MUR 5564, Alaska Democratic Party, at 7 (acknowledging that the
21 Explanation and Justification for 11 CFR 109.20 "does limit Section 109.20 to

1 expenditures that are not communications"), available at
2 http://eqs.sdrdc.com/eqsdocsMUR/28044191265.pdf.[10]
3 "Independent expenditure" is a term that is defined in the Act and the
4 Commission's regulations. Congress crafted the statutory definition of "independent
5 expenditure" to reflect the Court's decision in Buckley. See H.R. DOC. NO. 94-917, at 5
6 (1976). In Buckley, the Court construed the provision "expenditures . . . relative to a
7 clearly identified candidate" as "expenditures for communications that in express terms
8 advocate the election or defeat of a clearly identified candidate for federal office."[11] 424
9 U.S. at 44 (emphasis added); see also id. at 80.
10 Indeed, the Citizens United Court, in the language quoted above, explicitly
11 referred to the "definition" of "independent expenditure." The statute defines
12 "independent expenditure" as "an expenditure by a person . . . expressly advocating the
13 election or defeat of a clearly identified candidate." 2 U.S.C. 431(17). The statute's use
14 of the phrase "expressly advocating" underscores that the definition of independent
15 expenditure is limited to communications. In short, although other activities may indicate
16 support for a candidate, only communications can "expressly advocate."
17 Furthermore, the Commission has, as a historical matter, consistently understood
18 the statutory definition of "independent expenditure" to apply only to communications.
19 The Commission's current regulation defines "independent expenditure" as "an
20 expenditure by a person for a communication expressly advocating the election or defeat
21 of a clearly identified candidate." 11 CFR 100.16(a) (emphasis added). See also 11 CFR

[10] Compare 11 CFR 109.20 (concerning a coordinated expenditure that is "not made for a coordinated communication") with 11 CFR 109.21 (concerning a "communication [that] is coordinated with a candidate, an authorized committee, a political party committee, or an agent of any of the foregoing").
[11] In this context, the Court was not discussing the definition of expenditure at 2 U.S.C. 431(9), but rather a pre-Buckley provision that was limited by its terms to communicative activity.

1 100.22 ("Expressly advocating means any communication that . . . .") (emphasis added).
2 The Commission included this language in the original regulation implementing the Act.
3 41 FR 35947 (Aug. 25, 1976). The Explanation and Justification for this regulation
4 explained that the definition parallels the statute "with additional language from Buckley
5 requiring that the expenditure be communicative in nature." Explanation and
6 Justification for Final Rules on Part 114, H.R. DOC. NO. 95-44, at 54 (1977) ("1977
7 E&J").

8 Under proposed Alternative B, corporations and labor organizations would be
9 permitted to make expenditures from general treasury funds solely for the type of activity
10 described by the Supreme Court: "political speech presented to the electorate that is not
11 coordinated with a candidate." Citizens United, 130 S. Ct. at 910. Under this proposed
12 alternative, coordinated communications as well as all non-communicative expenditures
13 would continue to be prohibited, on the ground that the holding in Citizens United did not
14 extend to non-speech expenditures, which were not before the Court.

15 The Commission seeks comment on Alternative B. As noted above, Citizens
16 United referred only to "political speech" in the form of independent expenditures and
17 electioneering communications. The Court did not address conduct. Accordingly, the
18 Commission seeks comment as to whether the decision in Citizens United should be read
19 to apply to non-communicative activities. Does the proposal eliminate too much or too
20 little of the statutory prohibition on corporate and labor organization expenditures? Is
21 Alternative B specific enough as to the types of expenditures corporations and labor
22 organizations may constitutionally make, according to Citizens United? Does the Act
23 contemplate the proposed distinction between political speech and non-expressive

1 political activities? Does Citizens United or other Supreme Court precedent permit or
2 require this distinction? The Commission also seeks comment on whether Alternative B
3 should be modified to preserve more of the existing prohibitions, and if so, which ones
4 should be preserved and why?

5 B. 11 CFR 114.2(b)(2)(ii) and (b)(3) – Prohibition on Corporate and Labor
6 Organization Express Advocacy Communications and Electioneering Communications to
7 Those Outside the Restricted Class

8 Currently, 11 CFR 114.2(b)(2)(ii) prohibits corporations and labor organizations
9 from "making expenditures with respect to a Federal election . . . for communications to
10 those outside the restricted class that expressly advocate the election or defeat of one or
11 more clearly identified candidate(s) or the candidates of a clearly identified political
12 party." Because the Supreme Court held in Citizens United that corporations and labor
13 organizations have a constitutional right to make expenditures for communications
14 containing express advocacy to those not in their restricted classes, the Commission
15 proposes to remove paragraph (b)(2)(ii).

16 Currently, 11 CFR 114.2(b)(3) prohibits corporations and labor organizations
17 from making payments for electioneering communications to those outside their
18 restricted classes unless permissible under 11 CFR 114.10 or 114.15. This provision does
19 not apply to State party committees and State candidate committees that incorporate
20 under 26 U.S.C. 527(e)(1), provided that (1) the committee is not a political committee as
21 defined in 11 CFR 100.5; (2) the committee incorporated for liability purposes only;
22 (3) the committee does not use any funds donated by corporations or labor organizations

1 to make electioneering communications; and (4) the committee complies with the
2 reporting requirements for electioneering communications at 11 CFR part 104.
3 Because the Supreme Court held in Citizens United that all corporations may
4 make electioneering communications to audiences outside their restricted classes, the
5 Commission proposes to remove paragraph (b)(3) of section 114.2.
6 C. 11 CFR 114.2(f) – Facilitating the making of contributions
7 The Act and Commission regulations prohibit corporations and labor
8 organizations from making contributions to candidates or political committees in
9 connection with a Federal election. 2 U.S.C. 441b(a); 11 CFR 114.2(b)(1). Corporations
10 and labor organizations are also generally prohibited from facilitating the making of
11 contributions to candidates or political committees. 11 CFR 114.2(f)(1). Facilitating the
12 making of contributions means "using corporate or labor organization resources or
13 facilities to engage in fundraising activities in connection with any Federal election." Id.
14 Examples of facilitation include (a) ordering or directing subordinates to plan, organize,
15 or carry out a fundraising project as part of their work responsibilities, using corporate or
16 labor organization resources, (b) providing materials for the purpose of transmitting or
17 delivering contributions, such as stamps and envelopes, and (c) using coercion to urge
18 individuals to make contributions. 11 CFR 114.2(f)(2). See Explanation and
19 Justification for Final Rules on Corporate and Labor Organization Activity, 60 FR 64620,
20 64624 (Dec. 14, 1995), available at
21 http://www.fec.gov/law/cfr/ej_compilation/1995/1995-
22 23_Express_Advocacy_Indep_Exp_and_Coordination.pdf. Additionally, corporations

1 and labor organizations are prohibited from acting as conduits for contributions
2 earmarked to candidates or their authorized committees. 11 CFR 110.6(b)(2)(ii).
3 In light of the holding in Citizens United, the Commission is seeking comment on
4 whether -- and if so, to what extent and how -- its regulations on corporate and labor
5 organization facilitation of contributions should be revised. As discussed above, the
6 Citizens United decision invalidated restrictions on corporate independent expenditures
7 and electioneering communications. However, the Court noted that "Citizens United has
8 not made direct contributions to candidates, and it has not suggested that the Court should
9 reconsider whether contribution limits should be subjected to rigorous First Amendment
10 scrutiny." 130 S. Ct. at 909. See also Buckley, 424 U.S. at 28-29 ("Significantly, the
11 Act's contribution limitations in themselves do not undermine to any material degree the
12 potential for robust and effective discussion of candidates and campaign issues by
13 individual citizens, associations, the institutional press, candidates, and political
14 parties."). Absent coordination with a candidate, is facilitating the making of
15 contributions by the corporate and labor organization activities still prohibited by these
16 prohibitions on contributions?
17 Given that Citizens United left the prohibition on contributions by corporations
18 and labor organizations entirely undisturbed, is there any need for the Commission to
19 revise its facilitation regulations? Alternatively, do the Commission's regulations on
20 facilitating contributions impermissibly restrict activities that are constitutionally
21 protected, when the activities are conducted independent of a candidate or political party
22 committee? Does the Commission have the legal authority to extend the Court's holding

1 in Citizens United beyond the Act's identification of the line between activity that is
2 permissible and that which is not?

3 In a related context, should the Commission revise 11 CFR 110.6(b)(2)(ii), which
4 provides that any person who is prohibited from making contributions or expenditures in
5 connection with an election for Federal office is prohibited from acting as a conduit for
6 contributions earmarked to candidates or their authorized committees? While removing
7 the prohibitions on corporate and labor organization independent expenditures and
8 electioneering communications as required by Citizens United, should the Commission
9 also revise this provision of the Commission's regulations? If the basis for this regulation
10 is the Act's prohibition on corporate and labor organization contributions, given that
11 Citizens United left undisturbed this statutory prohibition, does the Commission have the
12 legal authority to extend the Court's holding in Citizens United to revise the conduit
13 restrictions contained in 11 CFR 110.6(b)(2)?

14 IV. Proposed 11 CFR 114.3 – Disbursements for communications to the restricted
15 class by corporations and labor organizations in connection with a Federal election

16 Current 11 CFR 114.3 implements certain statutory exceptions to the general ban
17 on contributions and expenditures by corporations and labor organizations. Before
18 Citizens United was decided, corporations and labor organizations could make
19 communications containing express advocacy only to their restricted class. 2 U.S.C.
20 441b(a) and (b)(2)(A). Section 114.3 implements these provisions of the Act, and sets
21 out the requirements and restrictions on those communications to the restricted class,
22 including publications, candidate and party appearances, phone banks, and voter
23 registration and GOTV drives.

1 The Commission's current regulations at 11 CFR 114.4 set out the restrictions and
2 prohibitions for communications by corporations and labor organizations beyond the
3 restricted class and to the general public. Citizens United held that, under the First
4 Amendment, corporations and labor organizations may make independent expenditures
5 beyond the restricted class to the general public. However, the Act exempts
6 disbursements for communications made by corporations and labor organizations to their
7 restricted class from the definition of expenditure altogether, whether or not the
8 communications contain express advocacy, and, as discussed in greater detail below,
9 establishes different reporting requirements for these communications in 2 U.S.C.
10 431(9)(B)(iii). Because of this statutory distinction between disbursements for express
11 advocacy communications made to the restricted class, which are not expenditures, and
12 disbursements for express advocacy communications made beyond the restricted class,
13 which are expenditures, the Commission proposes to maintain the current structure in
14 which 11 CFR 114.3 addresses disbursements for communications containing express
15 advocacy made to the restricted class, and 11 CFR 114.4 addresses disbursements for
16 communications containing express advocacy made to those outside the restricted class,
17 with certain proposed changes discussed below. The Commission requests comment on
18 this proposal to maintain the current structure. Instead, would combining 11 CFR 114.3
19 and 114.4 be more readily understandable to the public now that corporations and labor
20 organizations can make express advocacy communications beyond the restricted class?
21 Should the Commission maintain the separate regulations as they are now, or separate
22 them in a different way?

1 A. 11 CFR 114.3(a) – General provisions on communications to the restricted class
2 in connection with a Federal election

3 Section 114.3(a) of the Commission's rules states that corporations and labor
4 organizations may communicate on any subject with their restricted class, including
5 communications containing express advocacy. Section 114.3(a) also states that
6 corporations and labor organizations may coordinate their activities under section 114.3
7 with candidates and political committees, but only to the extent permitted by section
8 114.3. For example, under paragraph (c)(2), corporations and labor organizations may
9 coordinate with a candidate in planning a candidate appearance before members of the
10 restricted class. Paragraph (c)(4), however, prohibits corporations and labor
11 organizations from coordinating voter registration and GOTV drives with candidates,
12 candidates' committees, or political parties. The Commission does not propose any
13 changes to 11 CFR 114.3(a), but seeks comment on this approach.

14 B. 11 CFR 114.3(b) – Reporting of disbursements for express advocacy
15 communications

16 1. Reporting of disbursements for express advocacy communications solely to the
17 restricted class under current 11 CFR 114.3(b)

18 The proposed rules do not change the requirement, currently at 11 CFR 114.3(b),
19 that corporations and labor organizations report disbursements for communications
20 containing express advocacy made to the restricted class in accordance with 11 CFR
21 100.134 and 104.6. The Act exempts express advocacy communications made by
22 corporations and labor organizations to their restricted class from the definition of
23 "expenditure." 2 U.S.C. 431(9)(B)(iii). However, the Act requires that corporations and

1 labor organizations that make disbursements for express advocacy communications to the
2 restricted class in excess of $2,000 for any election file quarterly reports in an election
3 year and pre-election reports for any general election. 2 U.S.C. 431(9)(B)(iii);
4 434(a)(4)(A)(i) and (ii). This statutory requirement is implemented in the Commission
5 regulations at current 11 CFR 100.134(a), 104.6(a), and 114.3(b).

6 2. Reporting of disbursements for express advocacy communications beyond the
7 restricted class

8 As discussed in Section VI.B below, proposed 11 CFR 114.16(b) requires
9 corporations and labor organizations that choose to make independent expenditures for
10 communications to persons beyond the restricted class to report these independent
11 expenditures under 2 U.S.C. 434(c). This provision requires that "every person (other
12 than a political committee) who makes independent expenditures in an aggregate amount
13 or value in excess of $250 during a calendar year" report such expenditures to the
14 Commission. Thus, under 2 U.S.C. 434(c), corporations and labor organizations that
15 make such independent expenditures must now file a report in the first reporting period in
16 which the corporation or labor organization's independent expenditures exceed the $250
17 reporting threshold and in any succeeding reporting period during the same calendar year
18 during which the corporation or labor organization makes additional independent
19 expenditures of any amount. These reports must disclose the identity of any person who
20 received any disbursement during the reporting period in an aggregate amount greater
21 than $200 during the calendar year in connection with an independent expenditure made
22 by the corporation or labor organization. The reports must also disclose, among other
23 things, contributions received by the person making the independent expenditure, the

1 date, amount, and purpose of the independent expenditure, a statement indicating whether
2 the independent expenditure is in support of, or in opposition to the relevant candidate,
3 and a certification that the independent expenditure is not made in cooperation,
4 consultation, or concert with, or at the request of, any candidate, or any authorized
5 committee or agent of such committee. 2 U.S.C. 434(c). Therefore, subsequent to
6 Citizens United, corporations and labor organizations must report all independent
7 expenditures for communications made beyond the restricted class once the $250 per year
8 threshold is met, and must report disbursements for express advocacy communications to
9 the restricted class once the $2,000 per election threshold is met. Additional
10 requirements for the reporting of funds given by others to corporations or labor
11 organizations to make independent expenditures or electioneering communications are
12 discussed below, in Sections VIII and IX.

13 The Commission does not propose to change the language of the reporting
14 requirements at current 11 CFR 114.3(b) because Citizens United did not affect the
15 provision of the Act at 2 U.S.C. 431(9)(B)(iii) that exempts disbursements for express
16 advocacy communications to the restricted class from the definition of "expenditure" and
17 establishes the reporting requirement for such communications. The Commission seeks
18 comment on this approach.

19 3. Reporting of express advocacy communications both to the restricted class and
20 outside the restricted class

21 The Commission seeks comment on how spending for communications by a
22 corporation or labor organization directed to both the restricted class and outside the
23 restricted class should be reported. If a corporation or labor organization makes a single

1 disbursement for a communication containing express advocacy that is made both to the
2 general public, which is an independent expenditure, and the restricted class, which is
3 exempt from the definition of expenditure, should the corporation or labor organization
4 allocate the expense between the cost of the communication made to the restricted class
5 and the cost of the communication made beyond the restricted class and report the
6 allocated expenses separately under the two reporting regimes? How would costs be
7 allocated for a broadcast communication, such as a television advertisement, that is not
8 specifically directed at identifiable members of the restricted class? Alternatively, would
9 the fact that the communication went beyond the restricted class result in the entire
10 disbursement being treated as an independent expenditure, which therefore must be
11 reported only under the independent expenditure reporting regime? For items like
12 bumper stickers and T-shirts, when a corporation or labor organization pays for the items
13 and distributes them to members of the restricted class, does the fact that they can be seen
14 beyond the restricted class transform their classification? Given that the statutory
15 provision has not changed, is there a way to reconcile the two reporting regimes for
16 disbursements for communications containing express advocacy made to the restricted
17 class and independent expenditures for communications made to those outside the
18 restricted class?

19 C. 11 CFR 114.3(c)(1) and (2) – Publications and candidate appearances

20 Section 114.3(c) governs several of the types of communications that may be
21 made to the restricted class: publications; candidate and party appearances; phone banks;
22 and voter registration and GOTV drives, and sets forth certain requirements and
23 restrictions that apply to each. Paragraph 114.3(c)(1) states that a corporation or labor

1 organization may distribute printed materials expressly advocating the election or defeat
2 of a clearly identified candidate or candidates of a political party to its restricted class,
3 provided that certain requirements and restrictions are met. The provision requires that
4 the material be produced at the expense of the corporation or labor organization, reflect
5 the views of the corporation or the labor organization, and may not be a republication or
6 reproduction of campaign materials prepared by the candidate, candidate's committee, or
7 candidate's authorized agents.

8 Paragraph 114.3(c)(2) provides that corporations and labor organizations may
9 invite a candidate, a candidate's representative, or a party representative to address the
10 restricted class at meetings, conventions, and other functions of the corporation or labor
11 organization. Paragraph 114.3(c)(2) currently provides that the candidate, the candidate's
12 representative, or the party representative may ask for and accept contributions to his or
13 her campaign or party, and may ask that contributions to the corporation or labor
14 organization's SSF be designated for the candidate's campaign or party. Paragraph
15 114.3(c)(2) prohibits officers, directors, or other representatives of the corporation or
16 labor organization from collecting contributions on behalf of the candidate or party
17 committee. Finally, the provision addresses news media coverage of these appearances.

18 The Commission does not propose to change the provisions of 11 CFR
19 114.3(c)(1) and (2). The Commission seeks comment on this approach.

20 D. 11 CFR 114.3(c)(3) – Phone banks

21 Section 114.3(c)(3) specifically provides that corporations and labor organizations
22 may establish and operate phone banks to urge members of their restricted class to
23 register and/or vote for a particular candidate or candidates, or to register with a

1 particular political party. Because corporations and labor organizations may continue to
2 establish and operate such phone banks, the Commission does not propose to change this
3 provision. However, because Citizens United struck down the prohibition on express
4 advocacy communications by corporations and labor organizations beyond the restricted
5 class, the Commission seeks comment on whether a separate provision expressly
6 permitting corporations and labor organizations to use phone banks to urge members of
7 the restricted class to register or vote for a particular candidate or candidates is still
8 necessary. Would retaining the separate provision create an impression that corporations
9 and labor organizations are prohibited from establishing and operating a phone bank
10 aimed at persons beyond the restricted class? Are there any costs associated with a phone
11 bank such as payment for provision of transportation and food to phone bank volunteers,
12 as discussed in Section III.A above, that lack a sufficient nexus to the communicative
13 activity such that they should continue to be prohibited as non-communicative
14 expenditures? The Commission seeks comment on whether to remove or modify
15 paragraph (c)(3) of section 114.3.

16 E. Proposed 11 CFR 114.3(c)(4) – Voter registration and get-out-the-vote drives

17 Current 11 CFR 114.3(c)(4) provides that a corporation or a labor organization
18 may conduct nonpartisan voter registration and GOTV drives "aimed at its restricted
19 class." Section 114.3(c)(4) states that voter registration and GOTV drives include
20 providing transportation to the place of registration and to the polls. The current
21 provision further permits such drives to include communications containing express
22 advocacy, "such as urging individuals to register with a particular political party or to
23 vote for a particular candidate or candidates." 11 CFR 114.3(c)(4). However, the current

1 provision prohibits corporations and labor organizations from withholding or refusing to
2 give information and other assistance regarding registering or voting "on the basis of
3 support for or opposition to particular candidates, or a particular political party." Id.
4 The Commission is proposing two alternatives to revise paragraph (c)(4). Both
5 alternatives would make a technical change to remove the language stating that urging
6 individuals to register with a given party constitutes express advocacy because such
7 activity may, but does not necessarily, involve expressly advocating the election or defeat
8 of one or more clearly identified candidates. Alternative A also repeals the existing
9 requirement that corporations or labor organizations not withhold or refuse to give
10 information or other assistance on the basis of support for, or opposition to, particular
11 candidates or a particular political party, but maintain the exemption from the definition
12 of "contribution or expenditure" under 2 U.S.C. 441b(b)(2)(B) for voter registration and
13 GOTV drives that adhere fully to the statutory requirement. Alternative B does not make
14 any changes to current 11 CFR 114.3(c)(4), except the technical change, and therefore
15 retains the current prohibition on withholding or refusing to give information and other
16 assistance regarding registering or voting "on the basis of support for or opposition to
17 particular candidates, or a particular political party." The Commission invites comment
18 on which, if either, of the two proposals better adheres to the existing statutory structure
19 and complies with Citizens United and why.
20

1 Alternative A – Repeal requirement that corporations and labor organizations not
2 withhold or refuse to provide assistance on the basis of support for, or opposition
3 to, particular candidates or a particular party

4 This alternative would repeal the prohibition on withholding or refusing to
5 provide information or other assistance regarding registering or voting based on support
6 for or opposition to particular candidates, or a particular party. Instead, Alternative A
7 only prohibits corporations and labor organizations from conducting voter registration or
8 GOTV drives if the activity is coordinated with a candidate or a political party. As
9 discussed in Section III.A above, one approach to revising the Commission's regulations
10 to comply with the decision in Citizens United would be to eliminate the existing broad
11 prohibition on corporate and labor organization expenditures, and instead prohibit only
12 those expenditures that are coordinated with a candidate or a political party. Similarly,
13 Alternative A provides that corporations and labor organizations may conduct voter
14 registration and GOTV drives, so long as they were not coordinated with a candidate or
15 political party.

16 Alternative A, however, maintains the statutory exception to the definition of
17 "contribution or expenditure" for voter registration and GOTV drives. See 2 U.S.C.
18 441b(b)(2)(B). Under existing rules, corporations and labor organizations do not have to
19 report to the Commission disbursements for voter registration and GOTV drives that
20 meet the conditions of the statutory exception, since such disbursements are neither
21 contributions nor expenditures. While voter registration and GOTV drives are
22 permissible under Alternative A regardless of whether the drives meet the conditions of
23 the statutory exception, corporations or labor organizations conducting drives that do

1 meet those conditions are not required to report disbursements for those drives. Thus,
2 Alternative A states that disbursements for voter registration and GOTV drives are not
3 contributions or expenditures if the drive is conducted in such a manner that the
4 corporation or labor organization does not withhold or refuse to provide information or
5 other assistance regarding registering or voting on the basis of support for or opposition
6 to particular candidates or a particular political party, consistent with the statutory
7 exception in 2 U.S.C. 441b(b)(2)(B).

8 The Commission also notes the significance of this reporting regime for the
9 Commission's choice of alternatives for amending section 114.4. Corporations and labor
10 organizations are not required to report disbursements associated with qualifying voter
11 registration or GOTV drives, such as driver salaries and the cost of fuel, while persons
12 who file reports with the Commission must report all expenditures for communications
13 (both independent expenditures and electioneering communications). The statute thus
14 implicitly distinguishes between communications and voter registration and GOTV
15 drives.

16 The Commission requests comment on this approach. Does Alternative A comply
17 with Citizens United? Does the proposal eliminate too much or too little in implementing
18 the remaining prohibitions on corporate and labor organization expenditures? Is
19 Alternative A's uniform treatment of all expenditures consistent with the statutory
20 distinction, described above, between the treatment of communications and other
21 activities?
22

1 Alternative B – Retain existing regulation at 11 CFR 114.3(c)(4)

2 Alternative B makes no changes to the existing regulation at 11 CFR 114.3(c)(4)
3 other than the technical change discussed above. As discussed in Section III.A above,
4 one alternative for revising the Commission's regulations to comply with the decision in
5 Citizens United would be to specifically exclude expenditures for communications (i.e.,
6 "independent expenditures") from the broader prohibition on expenditures, with the result
7 being that certain corporate and labor organization expenditures that do not involve
8 communications would remain prohibited. Like proposed Alternative B for 11 CFR
9 114.2(b)(2)(i) discussed above, Alternative B for 11 CFR 114.3(c)(4) also distinguishes
10 between speech and non-speech activity.

11 In promulgating the current regulation at 11 CFR 114.3(c)(4), the Commission
12 distinguished between the "'pure speech' aspects of the drives [that] may be partisan,"
13 and the non-speech activity aspects of the drives, which "must be conducted in a
14 nonpartisan manner." 1977 E&J at 105. The Commission's implementation of the
15 nonpartisan requirement of 2 U.S.C. 441b(b)(2)(B) reflects this distinction between "pure
16 speech" and non-speech elements of voter registration and GOTV drives. In Alternative
17 B, the Commission would continue to regulate the nonspeech aspects of voter registration
18 and GOTV drives in order to implement 2 U.S.C. 441b because Citizens United did not
19 address the prohibition on corporate and labor organization disbursements that do not
20 involve political speech in the form of independent expenditures and electioneering
21 communications. Alternative B reflects the principle that, as the Supreme Court has
22 stated, "It is possible to find some kernel of expression in almost every activity a person
23 undertakes . . . but such a kernel is not sufficient to bring the activity within the

1 protection of the First Amendment." Dallas v. Stanglin, 490 U.S. 19, 25 (1989). These
2 expenses might include but not be limited to the driver's salary, vehicle rental and fuel,
3 and travel, lodging, and food costs in instances where volunteers or workers were
4 required to travel in order to participate in the voter registration or GOTV drive. These
5 expenses might also include office leasing and other general office costs, as well as child
6 care costs for voter registration and GOTV workers and for voters.

7 In Alternative B, as in Alternative A, a corporation or labor organization
8 continues to be able to make voter registration or GOTV communications, including
9 express advocacy, to its restricted class under 11 CFR 114.3(c)(4). Furthermore, as in
10 Alternative A, in Alternative B voter registration and GOTV drives conducted in
11 accordance with 11 CFR 114.3(c)(4) remain exempt from the definition of "contribution
12 or expenditure" under 2 U.S.C. 441b(b)(2)(B). However, under Alternative B,
13 corporations and labor organizations remain prohibited from engaging in non-
14 communicative activities related to voter registration and GOTV drives other than those
15 conducted in accordance with 11 CFR 114.3(c)(4).

16 The Commission requests comment on this approach. Is Alternative B consistent
17 with the holdings in Citizens United? Is it appropriate to interpret these holdings as
18 relating only to political speech and therefore not reaching non-communicative conduct?

19 V. Proposed 11 CFR 114.4 – Disbursements for communications by corporations
20 and labor organizations beyond the restricted class in connection with a Federal election

21 Current 11 CFR 114.4 sets out a number of exceptions to the prohibitions on
22 corporations and labor organizations making expenditures. The regulation permits
23 certain communications and activities directed beyond the restricted class, both to

1 employees outside the restricted class and the general public. This section also permits
2 certain communications made to those outside the restricted class to be coordinated, to a
3 limited extent, with candidates. Specifically, section 114.4(b) covers candidate and party
4 appearances on corporate or labor organization premises or at a meeting, convention, or
5 other function that are attended by employees beyond the restricted class.
6 Notwithstanding that prior to Citizens United, corporations and labor organizations were
7 prohibited from making independent expenditures and electioneering communications,
8 current section 114.4(c) identifies seven types of communications that even then
9 corporations and labor organizations could make to the general public, namely: (1) voter
10 registration and voting communications; (2) official registration and voting information;
11 (3) voting records; (4) voter guides; (5) endorsements; (6) candidate appearances on
12 educational institution premises; and (7) electioneering communications, and the relevant
13 requirements and restrictions that apply to each. The proposed changes to 11 CFR 114.4
14 eliminate the prohibition on express advocacy communications made beyond the
15 restricted class, but maintain the restrictions on coordination with candidates and political
16 parties in communications beyond the restricted class.
17 A. Proposed 11 CFR 114.4(a) – General
18 Current 11 CFR 114.4(a) states that any communications that a corporation or
19 labor organization may make to the general public may also be made to the restricted
20 class and to employees outside the restricted class. Paragraph (a) also sets out the
21 structure of the rest of section 114.4. Finally, paragraph (a) provides that
22 communications described in section 114.4 may be coordinated with candidates and
23 political committees only to the extent permitted in section 114.4. The Commission is

1 proposing minor changes to the wording of paragraph (a) to clarify the meaning of the
2 provisions.

3 B. Proposed 11 CFR 114.4(b) – Communications by a corporation or labor
4 organization involving candidate and party appearances to employees beyond its
5 restricted class

6 Current 11 CFR 114.4(b)(1) sets forth the circumstances under which a
7 corporation may coordinate with a candidate or political party to make communications
8 to employees beyond the restricted class by providing that candidates, candidates'
9 representatives, or representatives of political parties may appear on corporate premises
10 or at meetings, conventions, or other corporate functions. Current 11 CFR 114.4(b)(2)
11 applies these regulations and restrictions to labor organizations. The Commission
12 proposes to reorganize current 11 CFR 114.4(b)(1) and (b)(2) by consolidating the
13 provisions into proposed 11 CFR 114.4(b). The proposed reorganization moves the
14 language regarding labor organizations currently located in paragraph (b)(2) to paragraph
15 (b)(1), which is redesignated at 11 CFR 114.4(b). Current paragraphs (b)(1)(i) through
16 (b)(1)(viii) are redesignated as paragraphs (b)(1) through (b)(8), and would apply to both
17 corporations and labor organizations. The Commission does not propose to make any
18 other changes to the language of 11 CFR 114.4(b), other than this reorganization.

19 Current 11 CFR 114.4(b)(1)(v) and (b)(2)(ii) prohibit corporations and labor
20 organizations from expressly advocating the election or defeat of a clearly identified
21 candidate or candidate of a clearly identified political party "in conjunction with" a
22 candidate, candidate representative, or party representative appearance described under
23 current paragraph (b) of section 114.4. Because the activities governed by paragraph (b)

1 involve contact and discussion with candidates and political parties, they do not involve
2 the independent political speech addressed by Citizens United. Expenditures for
3 appearances coordinated with candidates and political parties would therefore constitute
4 in-kind contributions by a corporation or labor organization. 2 U.S.C. 441a(a)(7)(B)(i)
5 and (ii); see also 11 CFR 109.20.

6 Because section 114.4(b) implements the Act's contribution ban, which was left
7 undisturbed by Citizens United, the Commission does not propose any substantive
8 changes to this provision but seeks comment on this proposal. The Commission also
9 notes that the rule at section 114.4(b) applies to appearances attended by the "restricted
10 class and other employees of the corporation, and their families," while 114.4(c) applies
11 to communications to the general public. Though not reflected in the statute, this
12 distinction follows Congressional intent to allow some corporate and labor activity
13 beyond the restricted class that would otherwise be a prohibited in-kind contribution. See
14 1977 E&J at 105 ("This provision is based on traditional types of 'good government'
15 programs established by corporations for all employees and the traditional practice of
16 candidates touring the facilities to shake hands with employees. In the conference
17 debates, Congressman Wiggins and Hays agreed that the bill would allow such activities
18 to continue if the programs were conducted on an equitable and non-partisan basis.").
19 The proposed rule retains this distinction. Are the implications of this distinction clear
20 subsequent to Citizens United? Although Citizens United permits express advocacy
21 communications to the general public, in-kind contributions remain prohibited. Should
22 the Commission modify the rule to make it clear that the use of corporate facilities for
23 events attended by the general public is still prohibited?

1 C. Proposed 11 CFR 114.4(c) – Communications by a corporation or labor
2 organization to the general public

3 Current 11 CFR 114.4(c) addresses communications by corporations and labor
4 organizations to the general public, and currently includes specific provisions on seven
5 types of communications, listed above, that corporations and labor organizations may
6 make to the general public. Each of the provisions within paragraph (c) prohibits
7 coordinating the communication with a candidate or a candidate's committee or agent,
8 with the exception of paragraph (c)(7) addressing candidate appearances on incorporated
9 non-profit educational institution premises and paragraph (c)(8) regarding electioneering
10 communications. The Commission proposes to restructure paragraph (c) by adding a
11 general prohibition to paragraph (c)(1) stating that a corporation or labor organization
12 must not act in cooperation, consultation, or concert with or at the request or suggestion
13 of a candidate, a candidate's committee or agent, or a political party committee or its
14 agent regarding the preparation, contents, and distribution of any of the specific types of
15 communications described at proposed 11 CFR 114.4(c)(2) through (c)(6). This
16 language would replace the repetition of the prohibitions on coordination contained in
17 each of the specific paragraphs at current 11 CFR 114.4(c)(2) through (c)(6). The
18 Commission seeks comment on this approach.

19 1. Repeal of express advocacy prohibition

20 Proposed 11 CFR 114.4(c)(1) removes the current language specifically
21 recognizing the right of "qualified nonprofit corporations" ("QNCs") under 11 CFR
22 114.10(c) to include express advocacy in any communication made to the general public.
23 See Section VI below. After Citizens United, all corporations and labor organizations

1 may include express advocacy in any communication made to the general public so long
2 as the communication is not coordinated with candidates or political parties. Hence, this
3 language is now superfluous.

4 Current 11 CFR 114.4(c)(2) through (c)(6) govern several types of
5 communications that corporations and labor organizations may make to the general
6 public and set out the conditions under which corporations and labor organizations may
7 make them. These communications are: voter registration and GOTV communications;
8 official voter registration and voting information; voting records; voter guides; and
9 endorsements. Proposed 11 CFR 114(c)(1) includes a reference to 11 CFR 114.16 to
10 make clear that corporations and labor organizations are no longer limited to the specific
11 types of communications in these paragraphs. Nonetheless, the Commission proposes to
12 retain these paragraphs to provide specific information about election-related
13 communications that corporations and labor organizations may make. Furthermore, all
14 five of these paragraphs currently prohibit corporations or labor organizations from
15 expressly advocating the election or defeat of clearly identified candidates in these
16 communications. Proposed 11 CFR 114.4(c)(2) through (6) eliminates the prohibition on
17 express advocacy contained in each of the current paragraphs when these
18 communications are not coordinated with any candidate or political party. The
19 Commission requests comment on these proposed deletions.

20 2. Proposed 11 CFR 114.4(c)(2) – Voter registration and GOTV
21 communications

22 Current 11 CFR 114.4(c)(2) contains a list of media through which corporations
23 and labor organizations may make registration and voting communications to the general

1 public. The list currently includes: posters; billboards; broadcasting media; newspapers;
2 newsletters; brochures; and "similar means of communication with the general public."
3 11 CFR 114.4(c)(2). The Commission proposes to add mail, Internet communications,
4 emails, text messages, and telephone calls to the list. These changes are intended to
5 reflect additional common means of political communication. The Commission requests
6 comment on these proposed additions. Are there any other methods of communications
7 that should be specifically included in the list? Alternatively, is a list of media through
8 which corporations and labor organizations may make registration and voting
9 communications to the general public necessary at all? Instead, should the Commission
10 modify the regulation to simply state generically that such communications to the general
11 public are permissible?

12 3. Proposed 11 CFR 114.4(c)(5) – Voter guides

13 Current 11 CFR 114.4(c)(5) sets forth certain requirements for and restrictions on
14 the preparation and distribution of voter guides by corporations and labor organizations to
15 the general public. This provision currently requires that voter guides present the
16 positions of two or more candidates on campaign issues. It further requires that all
17 candidates for a particular seat or office be given an equal opportunity to respond, and
18 prohibits a corporation or labor organization from giving greater prominence to any one
19 candidate or substantially more space for a candidate's responses, and from including an
20 electioneering message in the voter guide or accompanying materials. Paragraph (c)(5)
21 would be revised by repealing the requirement that the voter guide contain the positions
22 of two or more candidates, or that all candidates for a particular office or seat be
23 permitted to respond. The prohibitions on giving one candidate more prominence or

1 space on electioneering communications would also be removed. The Commission
2 proposes these deletions to conform its voter guide rules to the holding in Citizens United
3 that corporations and labor organizations may expressly advocate the election or defeat of
4 candidates in communications to the general public that are not coordinated with
5 candidates. The Commission requests comment on these proposed changes.

6 4. Proposed 11 CFR 114.4(c)(6) – Endorsements

7 Current 11 CFR 114.4(c)(6) permits corporations and labor organization to
8 endorse candidates, and sets out certain requirements and restrictions on such
9 endorsements. Current 11 CFR 114.4(c)(6) permits a corporation or labor organization to
10 communicate the endorsement only to its restricted class through specific types of
11 publications, and prohibits these publications from being distributed to the general public
12 over a de minimis amount. Current 11 CFR 114.4(c)(6) then sets out the circumstances
13 under which a corporation and labor organization may announce the endorsement to the
14 general public. The Commission proposes to remove these restrictions on the manner of
15 announcing a corporation or labor organization's endorsement of a candidate in proposed
16 11 CFR 114.4(c)(6) to comply with the decision in Citizens United. The Commission
17 requests comment on these proposed deletions.

18 5. Proposed 11 CFR 114.4(c)(7) – Candidate appearances on education institution
19 premises

20 The Commission does not propose any changes to the text of current 11 CFR
21 114.4(c)(7). This paragraph permits candidate appearances on the premises of
22 incorporated nonprofit educational institutions at no charge or a less than the usual or
23 normal charge. Current 11 CFR 114.4(c)(7)(ii) prohibits incorporated educational

1 institutions from expressly advocating the election or defeat of candidates in conjunction
2 with candidate or political committee appearances for which the educational institution
3 provided access to the premises at no charge or at less than the usual and normal
4 charge.[12] Paragraph (c)(7)(ii) also prohibits incorporated educational institutions from
5 favoring any one candidate or political party in allowing appearances on the educational
6 institutions premises at no charge or a less than the usual or normal charge. Corporations
7 are generally prohibited from making contributions to, or giving anything of value to, a
8 Federal candidate, which includes free or below usual and normal charge use of facilities.
9 2 U.S.C. 441b(a) and (b)(2); see also 11 CFR 100.52(d) and 114.2(a). Because
10 incorporated educational institutions' ability to permit candidate appearances on their
11 premises for no charge or at less than usual and normal charge is an exception to the
12 general prohibition on corporate in-kind contributions, which was not affected by
13 Citizens United, the Commission does not propose any changes to this provision. The
14 Commission requests comment on this approach.

15 6. Proposed 11 CFR 114.4(c)(8) – Electioneering communications

16 Current 11 CFR 114.4(c)(8) permits corporations and labor organizations to make
17 electioneering communications to the general public only to the extent permitted under
18 current 11 CFR 114.15. Section 114.15 was promulgated in response to the Court's
19 decision in Wisconsin Right to Life. Section 114.15 permits corporations and labor
20 organizations to make electioneering communications, unless the communication is
21 susceptible of no reasonable interpretation other than as an appeal to vote for or against a
22 clearly identified Federal candidate.

[12] A corresponding provision governing candidate appearances on the premises of unincorporated public nonprofit education institutions is located at 11 CFR 110.12.

1 Current 11 CFR 114.4(c)(8) further permits QNCs to make electioneering
2 communications in accordance with current 11 CFR 114.10. Section 114.10(d)(2), in
3 turn, permits QNCs to make any electioneering communication. Because Citizens United
4 struck down the prohibition on corporations and labor organizations making
5 electioneering communications, the exception to the prohibition on electioneering
6 communications at 11 CFR 114.4(c)(8) is superfluous. Therefore, the Commission
7 proposes to eliminate current 11 CFR 114.4(c)(8) in its entirety to comply with the
8 Supreme Court's decision in Citizens United. The Commission seeks comment on this
9 approach.

10 D. Proposed 11 CFR 114.4(d) – Voter registration and GOTV drives

11 Current 11 CFR 114.4(d) permits corporations and labor organizations to conduct
12 voter registration and GOTV drives aimed at the general public. It states that registration
13 and GOTV drives include providing transportation to the place of registration and to the
14 polls. The current provision prohibits such drives from including communications
15 containing express advocacy and states that the drives may not be coordinated with any
16 candidate or political party. The current provision prohibits corporations or labor
17 organizations from withholding or refusing to give information and other assistance
18 regarding registering or voting on the basis of support for, or opposition to, particular
19 candidates or a particular political party; from directing the drives primarily at individuals
20 based on registration with a particular party; and from paying individuals conducting
21 such drives on the basis of number of individuals registered or transported to the polls
22 who support a particular candidate or candidates or political party. In light of Citizens
23 United, the Commission is proposing two alternatives to revise the provision currently

1 located at 11 CFR 114.4(d). Both Alternatives A and B repeal the prohibition on
2 communications expressly advocating the election or defeat of candidates or political
3 parties made in connection with a voter registration or GOTV drive. Alternative A,
4 however, as discussed in more detail below, also repeals all of the existing requirements
5 and prohibitions regarding voter registration and GOTV drives, with the exception of the
6 prohibition on coordination with candidates or political parties. Alternative A maintains
7 the exemption from the definition of "expenditure" under 2 U.S.C. 431(9)(B)(ii) and
8 11 CFR 100.133 for voter registration and GOTV drives that meet the existing
9 requirements and prohibitions. In contrast, as discussed in more detail below, Alternative
10 B retains current 11 CFR 114.4(d), except that it removes the prohibition on express
11 advocacy currently at 11 CFR 114.4(d)(1). The Commission invites comment on which,
12 if either, of the two proposals better implements Citizens United and why.

13 Alternative A – Repeal all restrictions on voter registration and GOTV drives
14 except for the prohibition on coordinating with candidates and political parties

15 This alternative removes all the requirements for and restrictions on voter
16 registration and GOTV drives at current 11 CFR 114.4(d)(3) through (6), with the
17 exception of the prohibition on coordinating drives with candidates or political parties,
18 currently at 11 CFR 114.4(d)(2). As discussed in Sections III.A and IV.E above, one
19 approach to revising the Commission's regulations to comply with the decision in
20 Citizens United would be to eliminate the existing prohibition on corporate and labor
21 organization expenditures, and instead prohibit only those expenditures that are
22 coordinated with a candidate or a political party committee or are in-kind contributions.
23 Similarly, under Alternative A, corporations and labor organizations may conduct voter

1 registration and GOTV drives, as long as they are not coordinated with a candidate or
2 political party.

3 Alternative A, however, maintains the statutory exemption from the definition of
4 "expenditure" at 2 U.S.C. 431(9)(B)(ii) for voter registration and GOTV drives. Under
5 the Commission's existing rules, corporations and labor organizations do not have to
6 report to the Commission disbursements for voter registration and GOTV drives that
7 meet the conditions of the statutory exception, since such disbursements are neither
8 contributions nor expenditures. While voter registration and GOTV drives are
9 permissible under Alternative A regardless of whether the drives meet the conditions of
10 the statutory exception, corporations or labor organizations conducting drives that do
11 meet those conditions are not required to report disbursements for those drives. Proposed
12 Alternative A thus states that disbursements for voter registration and GOTV drives are
13 not expenditures if the drives meet the requirements for, and restrictions on, voter
14 registration and GOTV drives that are currently stated in 11 CFR 114.4(d)(1) and (3)-(6).
15 These requirements include the prohibition on express advocacy, as well as the
16 prohibition on withholding or refusing to provide information or other assistance
17 regarding registration or voting on the basis of support for, or opposition to, particular
18 candidates or a particular political party.

19 Alternative B – Retain existing regulation at 11 CFR 114.4(d) except for the
20 prohibition on express advocacy

21 Alternative B makes no changes to the existing regulation at 11 CFR 114.4(d),
22 except to remove the prohibition on corporations and labor organizations making
23 communications expressly advocating the election or defeat of clearly identified

1 candidates currently at 11 CFR 114.4(d)(1). As discussed in Sections III.A and IV.E
2 above, Alternative B excludes expenditures for communications from the prohibition on
3 expenditures, while still prohibiting other corporate and labor organization expenditures
4 that are not for communications, as well as other expenditures such as in-kind
5 contributions and coordinated expenditures.

6 After Citizens United, corporations and labor organizations are no longer
7 prohibited from making independent communications. Because Citizens United did not
8 affect the Act's prohibition on corporate and labor organization expenditures that do not
9 involve communications, Alternative B implements the Act's restrictions on the
10 nonspeech aspects of voter registration and GOTV drives, such as the costs associated
11 with driving voters to registration sites or the polls or "providing babysitting services to
12 enable voters to go to the polls." 1977 E&J at 106. Therefore, under Alternative B, three
13 current prohibitions remain in effect: (1) directing voter drives at individuals based on
14 party affiliation; (2) withholding or refusing to provide information or other assistance
15 regarding registration or voting on the basis of support for, or opposition to, particular
16 candidates or a particular political party; and (3) paying individuals conducting voter
17 drives based on the number of individuals registered or transported who support a
18 particular candidate or political party. Voter registration and GOTV drives conducted in
19 accordance with proposed Alternative B remain exempt from the definition of
20 "expenditure" under 2 U.S.C. 431(9)(B)(ii).

21 The current rule at 11 CFR 114.4, like the rule at 114.3, recognizes the difference
22 between expenditures for communications and for non-communicative activities. Current
23 114.4(c)(2) specifically allows for voter registration or GOTV communications to the

1 general public, provided that the communications do not contain express advocacy, while
2 current 114.4(d), following 2 U.S.C. 441b(b)(2)(B), exempts voter registration and
3 GOTV drives conducted in a nonpartisan manner from the definition of expenditure.
4 Alternative B, as with Alternative A, provides that a corporation or labor organization
5 may make voter registration or GOTV communications, including express advocacy, to
6 the general public under proposed 11 CFR 114.4(c)(2). Furthermore, as in Alternative A,
7 in Alternative B voter registration and GOTV drives conducted in accordance with
8 proposed 11 CFR 114.4(d) remain exempt from the definition of "expenditure" under
9 2 U.S.C. 441b(b)(2)(B). However, under Alternative B, corporations and labor
10 organizations remain prohibited from engaging in non-communicative activities related
11 to voter registration and GOTV drives other than those conducted in accordance with
12 proposed 11 CFR 114.4(d).
13 The Commission requests comment on these proposals. Which of the proposed
14 alternatives better reflects the Court's reasoning in Citizens United? Does either proposal
15 eliminate too much or too little in implementing the remaining prohibitions on corporate
16 and labor organization expenditures?
17 E. Unchanged provisions of current 11 CFR 114.4
18 The Commission is not proposing any changes to current 11 CFR 114.4(e) or (f).
19 Current 11 CFR 114.4(e) states that incorporated membership organizations, incorporated
20 trade associations, incorporated cooperatives, and corporations without capital stock may
21 permit candidate and party representative appearances before members and employees
22 and their families on the organization's premises, or at a meeting, convention, or other

1 function of the organization, in accordance with 11 CFR 114.4(c)(1) through (c)(8). The
2 Commission requests comment on this approach.
3 Current 11 CFR 114.4(f) addresses candidate debates staged or funded by non-
4 profit organizations described in 11 CFR 110.13 using funding from corporations and
5 labor organizations. The Commission is not proposing any changes to this provision, but
6 invites comment as to whether any revisions are needed to comply with the Citizens
7 United opinion.
8 VI. Proposed repeal of 11 CFR 114.10 – Nonprofit corporations exempt from the
9 prohibitions on making independent expenditures and electioneering
10 communications; and proposed 11 CFR 114.16 – Independent expenditures and
11 electioneering communications made by corporations and labor organizations
12 The Commission promulgated 11 CFR 114.10 in response to the Supreme Court's
13 decision in MCFL and, in part, to the Supreme Court's decision in Austin. In MCFL, the
14 Court considered the application of the independent expenditure prohibition in 2 U.S.C.
15 441b to a nonprofit corporation organized to promote specific ideological beliefs. The
16 Court concluded that, because the plaintiff nonprofit corporation in MCFL did not have
17 the potential to corrupt the electoral process, it did not implicate the concerns that
18 prompted regulation of corporations by Congress with respect to campaign finance. See
19 MCFL, 479 U.S. at 259. In response to MCFL, the Commission adopted 11 CFR 114.10,
20 creating a regulatory exception to the independent expenditure ban in section 441b for
21 organizations with the same characteristics as MCFL, referred to as "qualified nonprofit
22 corporations" or "QNCs." After Congress enacted BCRA's electioneering
23 communications provisions in 2002, the Commission created an exception in 11 CFR

1 114.10 for QNCs making electioneering communications. Because Citizens United
2 struck down the statutory bans on independent expenditures and electioneering
3 communications for all corporations and labor organizations, the regulatory exceptions
4 for QNCs are now superfluous. Therefore, the Commission proposes to remove 11 CFR
5 114.10 in its entirety. The Commission seeks comment on this approach.

6 The Commission further proposes to adopt a new regulation at 11 CFR 114.16
7 that would explicitly recognize the right of all corporations and labor organizations to
8 make independent expenditures and electioneering communications. As discussed
9 below, proposed 11 CFR 114.16 is modeled on parts of current 11 CFR 114.10 and
10 addresses the following issues: (1) the reporting requirements for QNCs making
11 independent expenditures or electioneering communications at 11 CFR 114.10(e); (2) the
12 solicitation disclaimer requirement at 11 CFR 114.10(f); (3) the non-authorization
13 disclaimer requirement at 11 CFR 114.10(g); (4) the provision in 11 CFR 114.10(h)
14 permitting QNCs to establish segregated bank accounts for disbursements for
15 electioneering communications; and (5) 11 CFR 114.10(i), which states that nothing in
16 section 114.10 authorizes any organization exempt from taxation under 26 U.S.C. 501(a)
17 to carry out any activity that it is prohibited from undertaking by the Internal Revenue
18 Code. The Commission seeks comment on this approach.

19 A. Independent expenditures and electioneering communications by corporations and
20 labor organizations

21 Current 11 CFR 114.10(d) specifically permits QNCs to make independent
22 expenditures and electioneering communications. Because Citizens United made
23 independent expenditures and electioneering communications permissible for all

1 corporations and labor organizations, proposed 11 CFR 114.16(a) expands current
2 11 CFR 114.10(d) to cover all corporations and labor organizations. As discussed above,
3 the Commission seeks comment on whether it would it be helpful for corporations and
4 labor organizations to have a regulation explicitly permitting them to make independent
5 expenditures and electioneering communications. Should the regulation instead more
6 broadly state that corporations and labor organizations may make any communication in
7 connection with an election so long as it is not a coordinated communication under
8 11 CFR 109.21? Alternatively, would it be more appropriate to simply remove the
9 current prohibitions in 11 CFR 114.2(b)(2) and (b)(3) on corporations and labor
10 organizations making disbursements for independent expenditures and electioneering
11 communications from general treasury funds?

12 B. Reporting independent expenditures and electioneering communications

13 Current 11 CFR 114.10(e)(2) sets forth the reporting requirements for QNCs
14 making independent expenditures and electioneering communications. Proposed 11 CFR
15 114.16(b) modifies the language of current 11 CFR 114.10(e)(2) to include independent
16 expenditures and electioneering communications made by all corporations and labor
17 organizations. Proposed 11 CFR 114.16(b)(1) states that corporations and labor
18 organizations that make independent expenditures aggregating in excess of $250 with
19 respect to a given election in a calendar year must file reports according to 11 CFR part
20 104. Section 104.4(a) requires that "every person that is not a political committee must
21 report independent expenditures in accordance with paragraphs (e) and (f) of this section
22 and 11 CFR 109.10" (emphasis added). Proposed 11 CFR 114.16(b)(2) states that
23 corporations or labor organizations that make electioneering communications aggregating

1 in excess of $10,000 in a calendar year must file statements as required by 11 CFR
2 104.20(b). Section 104.20(b), in turn, requires that "every person who has made an
3 electioneering communication . . . aggregating in excess of $10,000 during any calendar
4 year" file a statement on FEC Form 9, disclosing information set out in paragraph (c) of
5 that section (emphasis added). Given that the definition of "person" already covers
6 corporations and labor organizations, is it necessary to have an additional regulation that
7 states that corporations and labor organizations are subject to these requirements? See
8 2 U.S.C. 431(11); 11 CFR 100.10.

9 C. Solicitation; disclosure of use of contributions for political purposes

10 Current 11 CFR 114.10(f) requires that solicitations for donations by QNCs
11 disclose to potential donors that their donations may be used for political purposes, such
12 as supporting or opposing candidates. Similarly, proposed 11 CFR 114.16(c) retains this
13 requirement, but expands it to cover any corporation or labor organization. The
14 requirement at current section 114.10(f) derives from the Supreme Court's decision in
15 MCFL. Explanation and Justification for Final Rules on Express Advocacy; Independent
16 Expenditures; Corporate and Labor Organization Expenditures, 60 FR 35292, 35303
17 (July 6, 1995), available at http://www.fec.gov/law/cfr/ej_compilation/1995/1995-
18 10_Express_Advocacy_Indep_Exp_MCFL_Corps.pdf. In holding the prohibition on
19 independent expenditures unconstitutional as applied to QNCs, the Supreme Court said
20 "[t]he rationale for regulation is not compelling with respect to independent expenditures
21 by [MCFL]" because "[i]ndividuals who contribute to appellee are fully aware of its
22 political purposes, and in fact contribute precisely because they support those purposes."
23 MCFL, 479 U.S. at 260-61. "Given a contributor's awareness of the political activity of

1 [MCFL], as well as the readily available remedy of refusing further donations, the
2 interest [of] protecting contributors is simply insufficient to support § 441b's restriction
3 on the independent spending of MCFL." Id. at 262 (emphasis added).
4 In Citizens United, the Court upheld the disclaimer requirements of 2 U.S.C.
5 441d(d)(2) and the reporting requirements of 2 U.S.C. 434(f). In analyzing the
6 disclaimer requirements, the Court stated that "[t]he disclaimers required by [BCRA]
7 § 311 'provide the electorate with information,' McConnell, 540 U.S. at 196, and 'insure
8 that the voters are fully informed' about the person or group who is speaking, Buckley,
9 424 U.S. at 76." Citizens United, 130 S. Ct. at 915 (additional citation omitted).
10 Regarding reporting requirements, the Court cited its previous explanation that
11 "disclosure is a less restrictive alternative to more comprehensive regulations of speech."
12 Id. The Court further stated that "[t]he First Amendment protects political speech; and
13 disclosure permits citizens and shareholders to react to the speech of corporate entities in
14 a proper way. This transparency enables the electorate to make informed decisions and
15 give proper weight to different speakers and messages." Id. at 916.
16 The Supreme Court's decision in Citizens United striking down the independent
17 expenditure and electioneering communications ban in section 441b has rendered the
18 QNC exception unnecessary. Nevertheless, is the solicitation disclosure requirement in
19 MCFL still important in ensuring that those solicited have the necessary information to
20 make informed decisions about how their donations may be used? Does the Court's
21 opinion in Citizens United regarding disclosure and disclaimers mean that the
22 Commission may and should continue to have a specific requirement for QNCs that they
23 provide disclosure to potential donors and contributors? If so, should the rules at 11 CFR

1 114.10(c) defining "QNC" be retained? The Commission also seeks comment on
2 whether to extend the solicitation disclosure requirements currently applicable to QNCs
3 to all corporations and labor organizations. Should the Commission require corporations
4 and labor organizations to disclose that the funds received may be used specifically for
5 independent expenditures or electioneering communications, as opposed to "political
6 purposes" generally?

7 Alternatively, because Citizens United struck down the statutory bans on
8 independent expenditures and electioneering communications for all corporations and
9 labor organizations, is the solicitation disclaimer requirement for QNC's now
10 superfluous? Should the Commission instead remove 11 CFR 114.10 in its entirety and
11 not incorporate the solicitation disclaimer requirement into proposed section 114.16, and
12 if so, why?

13 D. Non-authorization notice

14 Current 11 CFR 114.10(g) requires that QNCs comply with the disclaimer
15 requirements of 11 CFR 110.11. As discussed in Section IV.C above, the Court in
16 Citizens United upheld the disclaimer provisions of 2 U.S.C. 441d. 130 S. Ct. at 914-16.
17 Section 441d(a) requires that certain communications include statements identifying the
18 person who paid for the communication and whether the communication is authorized by
19 any candidate or candidate's committee, and sets out the requirements for such
20 statements. These communications include all public communications by any person that
21 expressly advocate the election or defeat of a clearly identified candidate, and all
22 electioneering communications by any person. 2 U.S.C. 441d(a). The Act defines
23 "person" to include corporations and labor organizations. 2 U.S.C. 431(11).

1 Section 110.11 implements the requirements of 2 U.S.C. 441d. Because the
2 requirements of 2 U.S.C. 441d and 11 CFR 110.11 apply to public communications
3 containing express advocacy and electioneering communications made by any person, the
4 provision now applies automatically to public communications containing express
5 advocacy and electioneering communications by corporations and labor organizations.
6 Therefore, if a corporation or labor organization makes an independent expenditure or
7 electioneering communication as permitted after Citizens United, the communication
8 must include a statement identifying, among other things, the name and address of the
9 corporation or labor organization that paid for the communication. Proposed 11 CFR
10 114.16(d) would follow current 11 CFR 114.10(g), but would modify it to require that all
11 corporations and labor organizations comply with 11 CFR 110.11. Although the
12 requirements at 2 U.S.C. 441d and 11 CFR 110.11 already apply to corporations and
13 labor organizations, should proposed section 114.16 explicitly state that all corporations
14 and labor organizations must comply with the requirements of 11 CFR 110.11?

15 E. Segregated bank account

16 The Commission proposes a regulation to affirmatively state that a corporation or
17 labor organization may establish a segregated bank account for funds to be used for the
18 making of electioneering communications. This regulation would not affect other
19 restrictions and limitations applicable to those that make electioneering communications.
20 Instead, it would clarify that corporations and labor organizations that may make
21 electioneering communications may do so using a segregated bank account. Current
22 11 CFR 114.10(h) states that a QNC may, but is not required to, establish a segregated
23 bank account into which it deposits only funds donated or otherwise provided by

1 individuals, as described in 11 CFR part 104, from which it makes disbursements for
2 electioneering communications. Proposed 11 CFR 114.16(e) adopts this language and
3 expands it to state that any corporation or labor organization may establish such an
4 account.[13] The current regulation at 11 CFR 114.10(h) implements 2 U.S.C. 434(f)(2)(E)
5 and (F), which sets out the reporting requirements for every person making
6 disbursements for electioneering communications paid out of segregated bank accounts.
7 Aside from this reporting requirement, however, the Act does not otherwise affirmatively
8 state that a person may set up such segregated bank account. Furthermore, 11 CFR
9 114.10(h) is the only place in the current regulations that affirmatively states that a
10 person may, but is not required to, set up such a segregated bank account, and this
11 regulation is limited to QNCs.
12 The Commission requests comment on the proposed regulation affirmatively
13 stating that any corporation or labor organization may, but is not required to, set up a
14 segregated bank account for the purpose of making electioneering communications, as
15 described in 2 U.S.C. 434(f)(2)(E). Is such a regulation necessary, given that the
16 reporting requirements in the Act already contemplate the existence of such a segregated
17 bank account? Should the Commission adopt a broader regulation that would permit, but
18 not require, any person (other than a political committee) to set up such an account?
19 Alternatively, should the Commission require corporations and labor organizations that
20 make independent expenditures and electioneering communications to use a segregated
21 bank account?

[13] This provision applies to corporation and labor organizations but not to political committees, because such spending by political committees is reported as an expenditure and therefore is not an electioneering communication. 2 U.S.C. 434(f)(3); 11 CFR 104.20(b).

1 individuals, as described in 11 CFR part 104, from which it makes disbursements for
2 electioneering communications. Proposed 11 CFR 114.16(e) adopts this language and
3 expands it to state that any corporation or labor organization may establish such an
4 account.[13] The current regulation at 11 CFR 114.10(h) implements 2 U.S.C. 434(f)(2)(E)
5 and (F), which sets out the reporting requirements for every person making
6 disbursements for electioneering communications paid out of segregated bank accounts.
7 Aside from this reporting requirement, however, the Act does not otherwise affirmatively
8 state that a person may set up such segregated bank account. Furthermore, 11 CFR
9 114.10(h) is the only place in the current regulations that affirmatively states that a
10 person may, but is not required to, set up such a segregated bank account, and this
11 regulation is limited to QNCs.
12 The Commission requests comment on the proposed regulation affirmatively
13 stating that any corporation or labor organization may, but is not required to, set up a
14 segregated bank account for the purpose of making electioneering communications, as
15 described in 2 U.S.C. 434(f)(2)(E). Is such a regulation necessary, given that the
16 reporting requirements in the Act already contemplate the existence of such a segregated
17 bank account? Should the Commission adopt a broader regulation that would permit, but
18 not require, any person (other than a political committee) to set up such an account?
19 Alternatively, should the Commission require corporations and labor organizations that
20 make independent expenditures and electioneering communications to use a segregated
21 bank account?

[13] This provision applies to corporation and labor organizations but not to political committees, because such spending by political committees is reported as an expenditure and therefore is not an electioneering communication. 2 U.S.C. 434(f)(3); 11 CFR 104.20(b).

1 Finally, as discussed further in Section IX below, the Commission requests
2 comment on whether it would be advisable and appropriate to promulgate a regulation
3 allowing all persons other than political committees to set up and use segregated bank
4 accounts for funds used to make independent expenditures. If persons using segregated
5 bank accounts were only required to disclose information about those who donated to
6 such a segregated bank account, would such a proposal provide sufficient reporting?
7 Section 434(c) requires that every person (other than a political committee) that makes
8 independent expenditures totaling more than $250 during a calendar year file a report
9 disclosing the identification of each person who has made a contribution during the
10 reporting period, whose contribution or contributions aggregate in excess of $200 during
11 the calendar year. Section 434(f)(2)(E), which establishes the reporting requirements for
12 disbursements for electioneering communications made from the segregated bank
13 accounts, requires the reporting entity to report only the names and addresses of
14 contributors whose contributions to that segregated bank account aggregated $1,000 or
15 more within a certain timeframe. If the Commission were to adopt a regulation allowing
16 similar segregated bank accounts for making independent expenditures parallel to the
17 bank accounts used for electioneering communications, how would the reporting
18 requirements of 2 U.S.C. 434(c) and 434(f)(2)(E) operate together? Should reporting be
19 required beginning from the time that an individual contributor satisfies either of these
20 two reporting requirements, irrespective of which requirement is reached first?
21 F. Activities prohibited by the Internal Revenue Code
22 Current 11 CFR 114.10(i) states that nothing in section 114.10 shall be construed
23 to authorize any organization exempt from taxation under 26 U.S.C. 501(a) to carry out

1 any activity that it is prohibited from undertaking by the Internal Revenue Code. The
2 Commission proposes to move this provision to new section 114.16(f). The language
3 referring specifically to QNCs would be removed, for the reasons discussed above. The
4 Commission requests comment on this proposed change.

5 VII. Proposed repeal of 11 CFR 114.14 and 114.15

6 The Commission proposes to repeal existing 11 CFR 114.14 and 114.15 in their
7 entirety. Together, these sections prohibit corporations and labor organizations from
8 providing general treasury funds to other persons to make electioneering communications
9 that are the functional equivalent of express advocacy.

10 Prior to WRTL and Citizens United, corporations and labor organizations were
11 prohibited from making electioneering communications outside the restricted class, either
12 directly, or by providing funds to other persons for the purpose of making electioneering
13 communications. 2 U.S.C. 441b(b)(2); 11 CFR 114.14 (2003). In promulgating 11 CFR
14 114.14, the Commission explained that the purpose of the rule was to prevent "any
15 instance of a corporation or labor organization providing funds out of their general
16 treasury funds to pay for an electioneering communication, including through a non-
17 Federal account." Explanation and Justification for Final Rules on Electioneering
18 Communications, 67 FR 65190, 65207 (Oct. 23, 2002) ("2002 EC E&J"), available at
19 http://www.fec.gov/pdf/nprm/electioneering_comm/fr67n205p65189.pdf. In WRTL, the
20 Court held that the statutory prohibition on corporations and labor organizations making
21 electioneering communications outside the restricted class was unconstitutional as
22 applied to electioneering communications that were not the "functional equivalent" of
23 express advocacy. 551 U.S. 449, 456-57 (2007). The Court further defined the

1 "functional equivalent" of express advocacy to mean that the communication is
2 "susceptible of no reasonable interpretation other than as an appeal to vote for or against
3 a specific candidate." Id. at 469-70.
4 In response to the Court's decision in WRTL, the Commission promulgated
5 11 CFR 114.15. Explanation and Justification for Final Rules on Electioneering
6 Communications, 72 FR 72899, 72902 (Dec. 26, 2007) ("2007 EC E&J"), available at
7 http://www.fec.gov/law/cfr/ej_compilation/2007/notice_2007-26.pdf. Current section
8 114.15 permits corporations and labor organizations to make electioneering
9 communications outside the restricted class, unless the communication is susceptible of
10 no reasonable interpretation other than as an appeal to vote for or against a clearly
11 identified Federal candidate. The regulation also contains a safe harbor for when an
12 electioneering communication is permissible, and sets out criteria to use in considering
13 whether an electioneering communication that does not meet the safe harbor is
14 nonetheless permissible. The regulation also requires corporations and labor
15 organizations that make electioneering communications aggregating in excess of $10,000
16 in a calendar year to report them in accordance with 11 CFR 104.20.
17 To comply with the Court's decision in WRTL, the Commission also made
18 changes to 11 CFR 114.14, limiting the prohibition to providing funds for those
19 electioneering communications that were impermissible under 11 CFR 114.15. 2007 EC
20 E&J, 72 FR at 72912. Because corporations and labor organizations were still prohibited
21 from using general treasury funds to make electioneering communications that were the
22 functional equivalent of express advocacy, however, the Commission maintained the

1 prophylactic prohibition on corporations and labor organizations providing funds to other
2 persons for such impermissible electioneering communications. 11 CFR 114.14.
3 The Court held in Citizens United that corporations may make all electioneering
4 communications, including those that are the functional equivalent of express advocacy.
5 Because 11 CFR 114.14 is a prophylactic regulation designed to prohibit corporations
6 and labor organizations from doing through other persons what the corporation or labor
7 organization could not do directly, the decision in Citizens United could be interpreted to
8 have rendered the prohibition in 11 CFR 114.14 unnecessary. The Commission therefore
9 seeks comment on removing the prohibition in this section altogether.
10 On the other hand, the Commission also seeks comment on whether 11 CFR
11 114.14 should be retained to better fulfill the Court's support for disclosure of spending
12 on political speech which "enables the electorate to make informed decisions and give
13 proper weight to different speakers and messages," Citizens United, 130 S. Ct. at 916. In
14 considering this issue, the Commission notes that section 434(f) of the Act requires
15 entities that make electioneering communications to report certain information to the
16 Commission, including the identification of persons who have provided funds to
17 segregated bank accounts for the purpose of making electioneering communications.
18 2 U.S.C. 434(f). The Commission promulgated 11 CFR 104.20(c)(7) to implement this
19 statutory requirement. Explanation and Justification for Final Rules on Bipartisan
20 Campaign Reform Act of 2002 Reporting, 68 FR 404, 413 (Jan. 3, 2003), available at
21 http://www.fec.gov/pdf/nprm/consolidated_reporting/fr68n002p00403.pdf. In doing so,
22 the Commission interpreted the statute to treat funds provided for the purpose of making
23 electioneering communications as "donations," rather than as "contributions" under the

1 Act. Id. Should this same reading of section 434(f) apply to corporate and labor
2 organizations funds provided to other persons for the purpose of making electioneering
3 communications? If such funds are donations, they would not violate the prohibition on
4 corporate and labor organization contributions in section 441b(a) of the Act. The
5 Commission seeks comment on the relationship between the treatment of funds provided
6 by individuals to other persons for electioneering communications as donations in
7 11 CFR 104.20(c)(7) and the treatment of funds provided by corporations and labor
8 organizations to other persons for electioneering communications as contributions in
9 2 U.S.C. 441b(b)(2).

10 Current section 114.14 prohibits corporations and labor organizations from
11 providing funds to other persons for the purpose of making electioneering
12 communications, unless the electioneering communication is permissible under section
13 114.15. If the prohibition in 11 CFR 114.14 is removed as proposed, the exception to the
14 section 114.14 prohibition at 11 CFR 114.15 would be superfluous. Thus, the
15 Commission proposes to remove section 114.15 as well. The Commission seeks
16 comment on whether any portion of 11 CFR 114.15 should be retained. Is the exception,
17 the safe harbor, or the rules of interpretation at 11 CFR 114.15 relevant to any remaining
18 valid Commission regulations, such that they should not be removed?

19 VIII. Proposed 11 CFR 104.20 – Reporting electioneering communications

20 BCRA established reporting requirements for those making electioneering
21 communications. See 2 U.S.C. 434(f). Any person that has made electioneering
22 communications aggregating in excess of $10,000 in a calendar year must file a reporting
23 statement. 2 U.S.C. 434(f)(1). Generally, these statements must include, among other

1 things: (1) the identification of the person (among other things, name and address)
2 making the disbursement for the electioneering communication, as well as the
3 identification of any person sharing or exercising direction or control over the activities
4 of such person, (2) the amount of each disbursement over $200 for the electioneering
5 communication, (3) all clearly identified candidates referred to in the electioneering
6 communication, (4) the election in which those candidates are running for office, and (5)
7 the names and addresses of those who donated $1,000 or more to the person making the
8 disbursement for the electioneering communication "during the period beginning on the
9 first day of the preceding calendar year and ending on the disclosure date." 2 U.S.C.
10 434(f)(2).

11 The Commission originally promulgated 11 CFR 104.20 to implement BCRA in
12 2002. In WRTL, the Supreme Court exempted from that prohibition electioneering
13 communications that do not include the functional equivalent of express advocacy. In
14 response to that decision, the Commission revised the reporting provision at 11 CFR
15 104.20 to explicitly require that corporations and labor organizations report their
16 disbursements for permissible electioneering communications, as well as information
17 about persons who made donations to a corporation or labor organization for the purpose
18 of furthering electioneering communications. See Explanation and Justification for Final
19 Rules on Electioneering Communications, 72 FR 72899 (Dec. 26, 2007), available at
20 http://www.fec.gov/law/cfr/ej_compilation/2007/notice_2007-26.pdf.

21 In Citizens United, the Court invalidated the statutory prohibition on the making
22 of electioneering communications by corporations and labor organizations in its entirety.
23 Accordingly, corporations and labor organizations making electioneering

1 communications are no longer subject to the restrictions in 11 CFR 114.15, which appear
2 to have been rendered superfluous. For this reason, as discussed in Section VII, the
3 Commission is proposing to remove that regulation. Because 11 CFR 114.15 itself is no
4 longer enforceable, the Commission also intends to eliminate certain references to that
5 provision in 11 CFR 104.20.

6 Although the Court in Citizens United invalidated the ban on electioneering
7 communications made by corporations and labor organizations, it also upheld the
8 reporting requirements for electioneering communications contained in sections 434(f)
9 and 441d of the Act. The Court reasoned that "disclosure permits citizens and
10 shareholders to react to the speech of corporate entities in a proper way. This
11 transparency enables the electorate to make informed decisions and give proper weight to
12 different speakers and messages." Citizens United, 130 S. Ct. at 916.

13 In light of the Supreme Court's statement regarding the importance of providing
14 meaningful disclosure to the electorate, the Commission is proposing additional changes
15 to its regulation at 11 CFR 104.20 to promote transparency. Alternatively, the
16 Commission seeks comment as to whether the current electioneering communications
17 regime set forth in 11 CFR 104.20 should be maintained. The Commission notes that in
18 the 2004 election cycle, 95.8 percent of organizations making electioneering
19 communications reported their sources of funding to the Commission, while 87.1 percent
20 of organizations making electioneering communications in the 2006 election cycle
21 reported their sources of funding. In the 2008 election cycle, subsequent to the revision
22 of 11 CFR 104.20 in response to WRTL, only 46.3 percent of groups making
23 electioneering communications reported their sources of funding. In the 2010 cycle, only

1 41.1 percent of groups making electioneering communications reported their sources of
2 funding.[14] Does this experience with reporting entities' response to the regulation argue
3 for a revision to the regulation?

4 A. 11 CFR 104.20(a)(3) – Persons sharing or exercising direction or control

5 The Commission's regulation at 11 CFR 104.20(c)(2) implements the statutory
6 requirement to report the identification of any "person sharing or exercising direction or
7 control" over the activities of the person who made any disbursements or who executed
8 any contracts to make disbursements for an electioneering communication. See 2 U.S.C.
9 434(f)(2)(A). Although the term "persons sharing or exercising direction or control" is
10 not defined in the Act, the regulations at 11 CFR 104.20(a)(3) currently define the term
11 as "officers, directors, executive directors or their equivalent, partners, and in the case of
12 unincorporated organizations, owners, of the entity or person making the disbursement
13 for the electioneering communication." The Commission proposes to revise this
14 regulation to provide additional categories of persons who may share or exercise
15 direction or control in making electioneering communications. Proposed 11 CFR
16 104.20(a)(3)(i) states that, in the case of corporations, such persons would be the
17 corporation's officers, directors, executive directors, chief financial officers or their
18 equivalent, majority or controlling shareholders, and majority donors, and would also
19 include any person delegated the responsibility or authority to make electioneering
20 communications. For example, an incorporated membership organization may have
21 different levels of membership, and some members may pay more, or even the majority,
22 of the membership dues. For partnerships, those who share or exercise direction or

[14] See also Public Citizen, Disclosure Eclipse: Nearly Half of Outside Groups Kept Donors Secret in 2010; Top 10 Groups Revealed Sources of Only One in Four Dollars Spent (Nov. 18, 2010), available at http://www.citizen.org/documents/Eclipsed-Disclosure11182010.pdf.

1 control in making electioneering communications would be the partners, and the
2 partnership's officers, directors, and executive directors or their equivalent, and would
3 also include any person delegated the responsibility or authority to make electioneering
4 communications. See proposed 11 CFR 104.20(a)(3)(ii). For unincorporated
5 organizations, those who share or exercise direction or control in making electioneering
6 communications would be the organization's owners, and would also include any person
7 delegated the responsibility or authority to make electioneering communications. See
8 proposed 11 CFR 104.20(a)(3)(iii). In the case of labor organizations, those who share or
9 exercise direction or control would be the officers, directors, and executive directors, or
10 their equivalent, and would also include any person delegated the responsibility or
11 authority to make electioneering communications. This may include, for example, the
12 head of a local chapter or affiliate of a national labor organization. See proposed 11 CFR
13 104.20(a)(3)(iv). The definition of "persons sharing or exercising direction or control"
14 would also include a catchall provision for any other person with responsibility or
15 authority for sharing or exercising direction or control over the entity or person making
16 the disbursement for the electioneering communication. See proposed 11 CFR
17 104.20(a)(3)(v).
18 The Commission seeks comment on the proposed revisions to the definition of
19 "persons sharing or exercising direction or control" in 11 CFR 104.20(a)(3). Does the
20 proposed definition provide sufficient reporting in FEC reports as to who is actually
21 responsible for making, or who has authority to make or delegate the making of, an
22 electioneering communication? Is the proposed definition underinclusive or
23 overinclusive? If the proposed definition is either underinclusive or overinclusive, what

1 additional categories of persons should the Commission add to, or remove from, the
2 proposed definition? Does the Commission's current regulation at 11 CFR 104.20(a)(3)
3 provide for sufficient reporting of those who may share or exercise direction or control
4 over the making of electioneering communications?

5 B. Proposed 11 CFR 104.20(c) – Contents of electioneering communication
6 disclosure statements

7 Current section 104.20(c) specifies the contents of reports filed by all persons
8 when they make electioneering communications.[15] The information that must be reported
9 depends on who is making disbursements for electioneering communications and how
10 that person pays for them. See 11 CFR 104.20 (c)(7)-(9).[16]

11 Under current paragraph (c)(7)(i), if a person pays for electioneering
12 communications exclusively from a segregated bank account that accepts funds only
13 from individuals who are United States citizens, or who are lawfully admitted for
14 permanent residence under 8 U.S.C. 1101(a)(20), then the electioneering communications
15 may contain the functional equivalent of express advocacy, and the person paying for the
16 electioneering communication must report the name and address of each person whose
17 donations aggregated $1,000 or more to that segregated bank account since the first day
18 of the preceding calendar year. Similarly, current paragraph (c)(7)(ii) provides that if a
19 person paying for electioneering communications does so solely from a segregated bank
20 account established to pay for electioneering communications that do not contain the

[15] Political committees do not file these reports because such spending by political committees is reported as an expenditure. 2 U.S.C. 434(f)(3); see also 11 CFR 104.20(b).

[16] Paragraphs (c)(7)(i) and (c)(8) were part of the implementation of the electioneering communication provisions of BCRA. After the Court's decision in WRTL, the Commission added paragraphs (c)(7)(ii) and (c)(9), and slightly revised paragraphs (c)(7)(i) and (c)(8), to implement the Court's decision.

1 functional equivalent of express advocacy, then the person paying for the electioneering
2 communication must report the name and address of each donor to that segregated
3 account whose donations aggregated $1,000 or more since the first day of the preceding
4 calendar year. Current paragraph (c)(7)(ii) differs from current paragraph (c)(7)(i) in that
5 the segregated bank account is not limited to donations solely from individuals.
6 Current paragraph (c)(8) requires the reporting of the name and address of each
7 person who donated an amount aggregating $1,000 or more within a certain time frame to
8 the person making the electioneering communication if (1) the electioneering
9 communication was not funded exclusively by one of these segregated bank accounts
10 described in paragraph (c)(7), and (2) was not made by a corporation or labor
11 organization pursuant to 11 CFR 114.15.
12 For electioneering communications made by corporations and labor organizations,
13 the rules at 11 CFR 104.20(c)(9) currently specify that information about donors must be
14 reported only if the donation aggregating to $1,000 or more "was made for the purpose of
15 furthering electioneering communications." 11 CFR 104.20(c)(9). This requirement was
16 intended to provide the "public with information about those persons who actually
17 support the message conveyed by the [electioneering communications] without imposing
18 on corporations and labor organizations the significant burden of disclosing the identities
19 of the vast numbers of customers, investors, or members, who have provided funds for
20 purposes entirely unrelated to the making of [electioneering communications]." 2007 EC
21 E&J, 72 FR at 72911.
22

1 C. Proposed Alternatives for Electioneering Communications Reporting

2 The Commission seeks comment on alternative approaches for implementing the
3 reporting requirements for corporations and labor organizations following the Citizens
4 United decision. Both alternatives preserve the Commission's existing rules regarding
5 segregated bank accounts. As explained above, those making electioneering
6 communications may pay for such communications from a segregated bank account, with
7 reporting of information about donors of a certain threshold to the account. Alternative A
8 also retains the existing rule that those corporations and labor organizations making
9 electioneering communications without the use of a segregated account must report
10 information about donors to the Commission only if the donation "was made for the
11 purpose of furthering electioneering communications." Alternative B, in contrast,
12 requires any corporation or labor organization that makes an electioneering
13 communication with funds from an account other than a segregated bank account to
14 report information (name and address) about all sources of funding to the organization
15 over a certain amount, rather than only funding "for the purpose of furthering
16 electioneering communications." Thus, Alternative B would require those making
17 electioneering communications to choose either to make electioneering communications
18 from a segregated bank account, with reporting of that account's funding, or to report all
19 funds received by the corporation or labor organization generally.

20 Proposed Alternative A for 11 CFR 104.20(c)

21 To comply with the Court's decision in Citizens United, the Commission is
22 proposing in Alternative A for 11 CFR 104.20(c) to revise its reporting regulations by
23 removing all references to the content restrictions in current 11 CFR 114.15. Removing

1 these references would allow persons other than corporations or labor organizations to
2 accept corporate and labor funding for electioneering communications, which would be
3 deposited in their segregated bank account under paragraph (c)(7)(ii). Removing these
4 references would also revise the Commission's regulations to reflect that corporations
5 and labor organizations may now make electioneering communications that contain
6 express advocacy or its functional equivalent under paragraph (c)(9). This change would
7 be consistent with the Commission's proposal to remove 11 CFR 114.15 itself from the
8 regulations.

9 Under Alternative A, the Commission proposes rearranging the paragraph for
10 clarity and improved readability. Under Alternative A, proposed paragraph (c)(9)
11 continues to require disclosure of only those donations made "for the purpose of
12 furthering electioneering communications." The Commission requests comment on the
13 approach taken in Alternative A for proposed paragraphs (c)(7), (c)(8), and (c)(9).
14 Would the proposed revisions provide the public with sufficient reporting regarding the
15 individuals or entities providing funds for electioneering communications? Would the
16 proposed rules provide the information Congress intended to make public as to the
17 individuals or entities funding electioneering communications? Are the proposed rules
18 consistent with the reporting requirements of the Act located at 2 U.S.C. 434(f)?

19 <u>Proposed Alternative B for 11 CFR 104.20(c)</u>

20 Proposed Alternative B allows any person, including corporations and labor
21 organizations but not political committees, to use segregated bank accounts, as described
22 in paragraph (c)(7), to make electioneering communications. In Alternative B, proposed
23 paragraph (c)(8) requires any person that does not use a segregated bank account

1 described in paragraph (c)(7) to report to the Commission all donors from whom the
2 person making the electioneering communication receives $1000 or more within the
3 relevant time frame, regardless of whether the donor intended the funds to be used for
4 making electioneering communications. Proposed Alternative B also, in accordance with
5 Citizens United, removes all references to 11 CFR 114.15 throughout proposed
6 104.20(c).

7 Accordingly, under Alternative B, both proposed paragraph (c)(7)(i) and (c)(7)(ii)
8 clarify that the paragraphs apply to any person who makes an electioneering
9 communication using a segregated bank account. Note that these two paragraphs would
10 differ in that the segregated bank account in paragraph (c)(7)(ii) is not limited to
11 donations solely from individuals. Thus, the segregated bank account in paragraph
12 (c)(7)(ii) may contain donations from corporations and labor organizations, consistent
13 with the holding in Citizens United.

14 Under Alternative B, proposed paragraph (c)(8) requires any person who makes
15 an electioneering communication but does not pay for it from a segregated bank account
16 described in paragraph (c)(7) to report all donors from whom the person making the
17 electioneering communication receives $1000 or more within the relevant time frame,
18 regardless of whether the donor intended the funds to be used for making electioneering
19 communications.

20 In Alternative B, paragraph (c)(9) would be removed as superfluous because
21 corporations or labor organizations, like any other person making electioneering
22 communications, may either use the segregated bank accounts described in paragraph
23 (c)(7) and thereby only report donors whose funds were donated for the purpose of

1 making electioneering communications, or, if the funds are not placed in a segregated
2 bank account, report all donors from whom they receive $1,000 or more within the
3 relevant time frame. By giving corporations and labor organizations this choice, any
4 burden of disclosing the identities of the sizeable numbers of persons who have provided
5 funds for purposes entirely unrelated to the making of electioneering communications
6 may simply be avoided by setting up the segregated bank accounts described in
7 paragraph (c)(7).

8 The Commission requests comment on proposed Alternative B and whether it
9 would provide sufficient reporting as to those who are making, or are funding those who
10 are making, electioneering communications. The Commission recognizes that proposed
11 Alternatives A and B would require considerably different amounts of information to be
12 disclosed.

13 The Commission is also seeking comment on whether there is some other
14 alternative that would ensure meaningful and sufficient disclosure so that the public may
15 be informed as to who makes and funds electioneering communications. Specifically,
16 should the Commission require corporations and labor organizations to report something
17 more than funds received specifically "for the purpose of furthering electioneering
18 communications" (as proposed in Alternative A), but still less than disclosing any person
19 who provides funds aggregating to $1,000 or more since the first day of the preceding
20 calendar year (as proposed in Alternative B)? For example, should the rules specify that
21 corporations and labor organizations must inform potential donors that their donations
22 may be used "for political purposes, such as supporting or opposing candidates" (see
23 discussion in Section VI.C, above), while also requiring the reporting of funds received

1 from those donors who were so informed (at least for those donors giving more than
2 $1,000 per calendar year)?

3 Alternatively, should this rule require corporations and labor organizations to
4 disclose to potential donors that their donations may be used specifically for independent
5 expenditures or electioneering communications, as opposed to disclosing, as a general
6 matter, that donations may be used for "political purposes, such as supporting or
7 opposing a candidate"? In addition, should the Commission require the reporting of the
8 identity of donors who were so informed, or who indicated that this is how they wished
9 their money to be used, when their donations aggregate to $1,000 or more within the
10 relevant timeframe? This requirement would be consistent with the solicitation
11 disclaimer requirement in proposed 11 CFR 114.16(c), above. This standard for the
12 solicitation disclaimer would be adapted from the Supreme Court's decision in MCFL
13 and would be expanded to include solicitations by corporations and labor organizations.
14 Should the Commission employ this same standard for the disclosure of donations to all
15 corporations or labor organizations that make electioneering communications?

16 Would repealing 11 CFR 104.20(c)(9), without more, provide for adequate
17 disclosure of the source of funds used to make an electioneering communication? In light
18 of the Commission's recent disagreement as to the scope of the regulation in MUR 6002
19 (Freedom's Watch),[17] does the regulation require clarification or revision?

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[17] See Statement of Reasons of Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn in MUR 6002 at 5, available at http://eqs.nictusa.com/eqsdocsMUR/10044274536.pdf (concluding that "a donation must be itemized on a non-political committee's independent expenditure report only if such a donation is made for the purpose of paying for the communication that is the subject of the report." (emphasis in original)); Statement of Reasons of Vice Chair Cynthia L. Bauerly and Commissioner Ellen L. Weintraub in MUR 6002 at 4-6, http://eqs.nictusa.com/eqsdocsMUR/10044280805.pdf (concluding that disclosure is required for any donation made for the purpose of further electioneering communications whether or not the donation was made to fund the specific communication that is the subject of the report).

1 Alternatively, should the Commission adopt a rule to require reporting of the
2 original source of funds used to make an electioneering communication regardless of
3 whether it is passed through one or more intermediaries? Would this approach
4 effectively implement the reporting requirements in 2 U.S.C. 434(f) and, as articulated in
5 Citizen United, support the public's "interest in knowing who is speaking about a
6 candidate shortly before an election"? Citizens United, 130 S. Ct. at 915. Is there
7 another standard the Commission should adopt that would represent a middle ground
8 between Alternatives A and B and, if so, what should it be, and why?
9 Lastly, the Commission is not proposing any modifications to the existing
10 requirements for disclaimers on independent expenditures and electioneering
11 communications. See 2 U.S.C. 441d; 11 CFR 110.11. Nonetheless, the Commission
12 notes that FECA requires disclaimers on all such communications to state who "paid for
13 the communication." 2 U.S.C. 441d(a)(3); see also 2 U.S.C. 441d(d)(2) (requiring
14 identification of the "person paying for communication" for all communications
15 transmitted by radio or television).
16 The Commission seeks comment on the implication for this requirement in
17 situations in which a corporation or labor organization uses funds donated by another
18 person to make electioneering communications. Should the Commission modify its
19 existing rules to require disclaimers to identify the original source of funds used to pay
20 for electioneering communications? How would the Commission implement this
21 requirement, given that funding may be received from many sources and disclaimers are
22 relatively brief?
23

1 IX. Proposed 11 CFR 109.10 – Reporting independent expenditures

2 The Commission's regulation at 11 CFR 109.10 sets forth the reporting
3 requirements for persons, other than political committees, that make independent
4 expenditures. Because corporations and labor organizations are "persons" under the Act,
5 2 U.S.C. 431(11), subsequent to Citizens United, this section also applies to corporations
6 and labor organizations that make independent expenditures. To implement Citizens
7 United, the Commission is considering two possible alternatives, although only the
8 second alternative is set out in the proposed rules.

9 The first alternative would be to make no changes to 11 CFR 109.10 since it
10 automatically applies to all "persons" other than political committees, which would
11 automatically require corporations and labor organizations to report independent
12 expenditures.[18] The second alternative, recognizing the broader application of this
13 regulation after Citizens United, would require the reporting of a broader range of
14 persons who contribute to organizations making independent expenditures. The second
15 alternative would give effect to the Supreme Court's statements from Buckley through
16 Citizens United about the importance of disclosure.

17 The Act at 2 U.S.C. 434(c)(1) requires persons who make independent
18 expenditures exceeding $250 per calendar year to report the identification of each person
19 who makes a contribution to the person making the independent expenditure during the
20 reporting period if the contributor's total contributions exceed $200 in a calendar year.
21 See 2 U.S.C. 434(b)(3)(A). Section 434(c)(2)(C) further requires that a person who
22 makes independent expenditures must also report the identification of any person who

[18] The definition of the term "person" in section 431(11) of the Act includes corporations and labor organizations. See also 11 CFR 100.10.

1 makes a contribution in excess of $200 "for the purpose of furthering an independent
2 expenditure."
3 Currently, 11 CFR 109.10(e)(1)(vi) requires persons who make independent
4 expenditures to report the identification of each person who made a contribution in
5 excess of $200 to the person filing the report, "which contribution was made for the
6 purpose of furthering the reported independent expenditure." The current regulation does
7 not reference the general reporting requirement at 2 U.S.C. 434(c)(1). It also does not
8 specifically state that those persons who make the independent expenditures must
9 disclose the identification of any person from whom he or she receives funds in excess of
10 $200 that qualify as a "contribution" under the Act. See 2 U.S.C. 431(8)(A) and
11 434(b)(3)(A).
12 The proposed rule makes three changes to this language regarding the reporting
13 requirements for persons making independent expenditures. First, the proposed rule
14 requires the reporting of, among other things, the name and address of all persons who
15 made contributions in excess of $200 to the person making the independent expenditure,
16 regardless of the purpose of the contribution, rather than only reporting those who
17 contribute above the $200 threshold during the reporting period specifically to further
18 independent expenditures. Second, the proposed rule modifies the current requirement to
19 report those who contribute specifically "for the purpose of furthering the reported
20 independent expenditure." [emphasis added] Instead, the proposed reporting requirement
21 would apply more broadly to contributions made "for the purpose of furthering an
22 independent expenditure." [emphasis added] Third, the proposed rule modifies the
23 regulatory language to mirror the statutory language that requires identification of each

1 person "whose contributions have an aggregate amount or value in excess of $200 within
2 the calendar year." [emphasis added]
3 The Commission requests comment on whether the statute contemplates more
4 extensive reporting than the current rules require, and, if so, whether the Commission
5 should revise its regulation at 11 CFR 109.10(e)(1)(vi) to adhere to the statutory language
6 more closely. In addition, would the proposed rule for 11 CFR 109.10 be more in
7 keeping with the emphasis the Court placed on transparency and disclosure in its Citizens
8 United ruling? Should the Commission adopt a rule to require reporting of the original
9 source of funds used to make an independent expenditure regardless of whether it is
10 passed through an intermediary? Would this approach effectively implement the
11 reporting requirements in 434(f) and, as articulated in Citizen United, also support the
12 public's "interest in knowing who is speaking about a candidate shortly before an
13 election"? Citizens United, 130 S. Ct. at 915. Is there another standard the Commission
14 should adopt that would represent a middle ground between the alternatives? If so, what
15 should it be and why?
16 The Commission also requests comment on whether it would be appropriate and
17 advisable to add a requirement to 11 CFR 109.10 to track the proposals for reporting of
18 electioneering communications at 11 CFR 104.20(c)(2) to require the reporting of those
19 who share or exercise control over the independent expenditures and over those persons
20 making the independent expenditures. If so, the Commission requests comment on
21 whether and why the definition of those persons who share or exercise direction or
22 control should be the same as that in proposed 11 CFR 104.20(a)(3), or whether the list
23 should be different for independent expenditures. Finally, the Commission requests

1 comment on whether it would be advisable and appropriate for the independent
2 expenditure rule to be amended to provide that all persons other than political committees
3 may set up and use segregated bank accounts for making independent expenditures.
4 Would such a proposal provide sufficient reporting? Would it be consistent with the
5 statutory reporting requirements of 2 U.S.C. 434(c) that are silent with respect to the
6 creation of segregated bank accounts for independent expenditures?

7 As with electioneering communications discussed above, the Commission is not
8 proposing any modifications to the existing requirements for disclaimers on independent
9 expenditures. See 2 U.S.C. 441d; 11 CFR 110.11. Nonetheless, because FECA requires
10 disclaimers on all such communications, the Commission seeks comment on the
11 implication for this requirement in situations in which a person uses funds contributed by
12 another person to make independent expenditures. Should the Commission modify its
13 existing rules to require disclaimers to provide the identity of the original source of funds
14 used to pay for independent expenditures?

15 X. 11 CFR 110.20 – Foreign nationals

16 The Commission also seeks comment on whether, or to what extent, Citizens
17 United has any implications for the prohibition on contributions, expenditures, and other
18 activities by foreign nationals at 11 CFR 110.20, and on three proposed alternative
19 amendments to this regulation.

20 A. Background

21 In Citizens United, the Supreme Court did not "reach the question whether the
22 Government has a compelling interest in preventing foreign individuals or associations
23 from influencing our Nation's political process." Citizens United, 130 S. Ct. at 911. The

1 Court thus did not specifically address the current statutory provision regarding
2 "corporations or associations that were created in foreign countries or funded
3 predominately by foreign shareholders." Id. While acknowledging that 2 U.S.C. 441e
4 provides an independent basis for prohibiting contributions, expenditures, and
5 independent expenditures by foreign nationals, the Court limited its analysis to 2 U.S.C.
6 441b. Section 441e prohibits foreign nationals from making "a contribution or donation
7 of money . . . in connection with a Federal, State or local election," or "an expenditure,
8 independent expenditure, or disbursement for an electioneering communication."
9 2 U.S.C. 441e(a)(1). This prohibition applies whether the contribution, donation,
10 expenditure, independent expenditure or disbursement is made "directly or indirectly."
11 Id.

12 A domestic corporation that is owned or controlled by a foreign national is not
13 itself a "foreign national" under 2 U.S.C. 441e so long as the domestic corporation is
14 "organized under or created by the laws of the United States or of any State or other place
15 subject to the jurisdiction of the United States and has its principal place of business
16 within the United States" ("U.S. subsidiary" or "U.S. corporation").[19] However, because
17 the foreign national parent of a U.S. subsidiary is prohibited by 2 U.S.C. 441e(a)(1)(C)
18 from directly or indirectly making expenditures, independent expenditures, and
19 disbursements for electioneering communications, the prohibitions in 2 U.S.C. 441e
20 could apply to actions by a U.S. subsidiary that is owned or controlled by a foreign
21 national. The Commission's regulations do not specifically address whether or when
22 U.S. subsidiaries of foreign parent corporations are subject to the prohibitions on foreign
23 national expenditures and disbursements for electioneering communications, because,

[19] See 2 U.S.C. 441e(b)(1); 22 U.S.C. 611(b)(2).

1 before Citizens United, all corporations, foreign and domestic, were prohibited from
2 making these types of disbursements. Because U.S. corporations, as a result of the
3 Citizens United holding, may use their own treasury funds to make independent
4 expenditures and disbursements for electioneering communications, the Commission
5 must now examine for the first time the restrictions in 2 U.S.C. 441e and their potential
6 application to political activities paid for by U.S. subsidiaries of foreign nationals or
7 corporations.

8 Section 441e of the Act and current 11 CFR 110.20 provide in relevant part that
9 foreign nationals may not, "directly or indirectly," make expenditures or independent
10 expenditures, or disbursements for electioneering communications. 2 U.S.C.
11 441e(a)(1)(C); 11 CFR 110.20(e) and (f). The regulation also follows the statute in
12 defining a "foreign national," in part, by reference to 22 U.S.C. 611(b), a provision of the
13 Foreign Agents Registration Act ("FARA"), which in turn provides that the term "foreign
14 principal" includes "a partnership, association, corporation, organization, or other
15 combination of persons organized under the laws of or having its principal place of
16 business in a foreign country." See 2 U.S.C. 441e(b)(1); 11 CFR 110.20(a)(3)(i).[20]

17 Current 11 CFR 110.20(e) and (f) prohibit foreign corporations from making
18 independent expenditures and disbursements for electioneering communications. Current
19 11 CFR 110.20(i), in turn, prohibits foreign nationals from directing, dictating,
20 controlling, or directly or indirectly participating in the decision-making process of any
21 person, including a corporation or labor organization, with regard to such person's
22 Federal or non-Federal election-related activities. These regulations implement the

[20] FARA is a disclosure statute requiring those acting as agents of foreign principals in a political or related representational capacity (such as a public relations counsel or publicity agent) to make public disclosure of their relationship with the foreign principal, as well as financial activity in support of those activities.

1 specific ban on expenditures, independent expenditures, and disbursements for
2 electioneering communications by foreign nationals at 2 U.S.C. 441e; they do not relate
3 to the ban on corporate-funded expenditures, independent expenditures and
4 disbursements for electioneering communications in 2 U.S.C. 441b that was at issue in
5 Citizens United.

6 Current 11 CFR 110.20 was promulgated in 2002 as a part of the Commission's
7 regulations implementing BCRA, in which Congress expanded and strengthened the
8 then-existing ban on foreign contributions and expenditures in connection with Federal
9 elections, and added a prohibition on soliciting, accepting, or receiving contributions and
10 donations from foreign nationals. In the 2002 rulemaking, the Commission proposed a
11 definition of "foreign national" that generally followed the previous definition at former
12 11 CFR 110.4(a)(4) and incorporated the definition at 22 U.S.C. 611(b). The
13 Commission did not receive any comments on this proposal, and it adopted the proposed
14 definition as the final rule. See Explanation and Justification for Final Rules on
15 Contribution Limitations and Prohibitions ("Contribution E&J"), 67 FR 69928, 69940
16 (Nov. 19, 2002), available at
17 http://www.fec.gov/pdf/nprm/contribution_lim_pro/fr67n223p69927.pdf.

18 BCRA also amended the ban on foreign contributions and expenditures to
19 prohibit them from being made "directly or indirectly." See 2 U.S.C. 441e. During the
20 2002 rulemaking, the Commission solicited comment as to whether BCRA's statutory
21 language prohibited a foreign-controlled U.S. corporation, including a U.S. subsidiary of
22 a foreign corporation, from making corporate donations in States where they are
23 permitted to do so under State law, or from making contributions in connection with a

1 Federal election from an SSF, or both. In the Contribution E&J, the Commission stated
2 that the absence of express Congressional intent to restrict such spending meant that these
3 U.S. subsidiaries should not be prohibited from making donations in non-Federal
4 elections, and their SSFs should not be barred from making Federal contributions.
5 Contribution E&J at 69943.

6 The Commission also amended 11 CFR 110.20(i) in the 2002 rulemaking,
7 expanding its reach slightly but retaining the existing prohibition on direct or indirect
8 foreign national participation in decisions about expenditures and disbursements made in
9 support of, or in opposition to, Federal, State, or local candidates, political committees, or
10 political organizations, or about the management of political committees, among other
11 things. Id. at 69946.

12 Consistent with Section 441e(b)(1) of the Act, the Commission has previously
13 concluded that domestic corporations whose principal places of business are located in
14 the United States are not foreign nationals even if they are wholly or partially owned by
15 foreign entities. It also concluded that such domestic corporations may establish,
16 administer, and control SSFs so long as the individuals who exercise decision-making
17 authority over the activities of those funds are U.S. citizens or legal residents, and
18 decisions made by those persons are not dictated or directed by any foreign nationals.
19 Finally, the Commission has concluded that no foreign parent corporation may contribute
20 to its domestic subsidiary's SSF, directly or through subsidies to the subsidiary. See
21 Advisory Opinions 1978-21 (Budd Citizenship Committee), 1980-100 (Revere Sugar),
22 1981-36 (Japan Business Association of Southern California), 1989-20 (Kuilima), 1989-
23 29 (GEM), 1990-08 (CIT), 1992-16 (Nansay Hawaii), 1995-15 (Allison Engine PAC),

1999-28 (Bacardi-Martini), 2000-17 (Extendicare), 2006-15 (TransCanada), and 2009-14 (Mercedes-Benz USA/Sterling). Because U.S. subsidiaries were already prohibited from making expenditures, independent expenditures or electioneering communications by 2 U.S.C. 441b, the Commission has never formally addressed or determined whether 2 U.S.C. 441e separately prohibits such activity by corporations that are owned or controlled by foreign nationals.

The Commission seeks comment on three alternatives. Alternative A proposes treating domestic subsidiaries as foreign nationals if (1) at least 20 percent of the domestic corporation's shares are owned or controlled by foreign nationals; (2) if a third or more of the corporation's board of directors are foreign nationals; or (3) if one or more foreign nationals has the power to direct, dictate, or control the corporation's decision-making process. Under Alternative A, domestic subsidiaries of foreign nationals are treated just like foreign corporations. Thus, under Alternative A, domestic subsidiaries are prohibited from making contributions or expenditures in Federal, state and local elections and from establishing and operating SSFs.

In contrast to Alternative A, Alternative B provides that domestic subsidiaries are controlled or owned by foreign nationals if (1) more than 50 percent of the corporation's shares are owned by foreign nationals; (2) a majority of the corporation's board of directors are foreign nationals; or (3) as in Alternative A, one or more foreign nationals has the power to direct, dictate, or control the corporation's decision-making process. Furthermore, Alternative B does not revise the definition of "foreign national," but instead prohibits domestic subsidiaries of foreign corporations from using treasury funds for independent expenditures or electioneering communications beyond the restricted

1 class. Alternative B would therefore not prohibit domestic subsidiaries from establishing
2 and operating SSFs.
3 Alternative C seeks to apply the Commission's prior approach with respect to
4 domestic subsidiaries of foreign corporations to the new issue of independent
5 expenditures and electioneering communications. Alternative C permits U.S. subsidiaries
6 owned or controlled by foreign nationals to establish SSFs and fund independent
7 expenditures and electioneering communications if they meet certain standards.
8 B. General Questions
9 Before the discussion of these alternatives in greater detail below, the
10 Commission seeks comment on general questions that may influence its approach. Do
11 the existing Commission regulations sufficiently define "foreign national"? Does the
12 Commission have statutory authority to revise the definition of foreign national at
13 11 CFR 110.20(a)(3), given that the Act defines "foreign national" by reference to
14 22 U.S.C. 611(b)? Alternatively, are revisions to 11 CFR 110.20 appropriate in light of
15 the Supreme Court's decision in Citizens United, which substantially changed the law
16 concerning the participation of corporations in U.S. elections? Additionally, should the
17 Commission provide guidance as to what factors should be considered in making a
18 determination as to where a corporation has its "principal place of business"?
19 Are there material distinctions between the making of independent expenditures
20 or disbursements for electioneering communications and the establishment or
21 administration of an SSF (such as the source of funds used) that would support the
22 adoption of any one of the three proposed alternatives? In this context, the Commission
23 notes that under current law only U.S. citizens may contribute to an SSF established,

1 administered and controlled by a domestic corporation owned or controlled by a foreign
2 corporation. See, e.g. Advisory Opinion 1978-21 (Budd Citizenship Committee). Thus,
3 the pool of money available to such an SSF consists of funds voluntarily provided by
4 U.S. citizens, with full knowledge that the funds are to be used for political purposes.
5 See Pipefitters Local Union No. 562 v. United States, 407 U.S. 385, 414-15 (1972). Does
6 this voluntariness requirement suggest that an SSF advances the speech interests of the
7 individuals in an organization's restricted class who have contributed to the SSF and
8 without whose contributions the SSF could not make a contribution or expenditure? Or
9 do SSFs speak on behalf of the connected organizations that administer, maintain and
10 control them?

11 Are the general treasury funds of a domestic subsidiary that is owned or
12 controlled by a foreign corporation subject to the ultimate control, or at least the indirect
13 control, of the parent foreign corporation? If the profits generated by a domestic
14 subsidiary flow to the parent, does the subsidiary's decision to spend corporate money on
15 political activity have direct financial or other implications for the parent's interests?

16 The foreign corporation may delegate authority to U.S. nationals to oversee
17 domestic political activities, including the making of independent expenditures and
18 electioneering communications. Are such U.S. nationals agents of the foreign
19 corporation, and, if so, are they obligated by their fiduciary duties to their employer to act
20 in a manner consistent with the foreign employer's interests? Can U.S. national
21 employees be expected to make decisions independently, without regard to the interests
22 of their employer? Do they have authority to do so? Does the relationship between
23 foreign principals and their U.S. national employees support any of the three alternative

1 approaches proposed by the Commission? Do the Commission's existing regulations
2 prohibiting expenditures and disbursements for electioneering communications by
3 foreign nationals adequately implement the prohibition on foreign nationals making
4 contributions or donations in connection with Federal, State or local elections, 2 U.S.C.
5 441e(a)(1)(A), in light of the holding in Citizens United?
6 The Commission also seeks comment on how its regulations should address
7 different corporate structures, and specifically how different forms of stock ownership
8 may result in control over a decision to use corporate treasury funds to make an
9 independent expenditure or electioneering communication. Similarly, the Commission
10 seeks comment on how corporate officers, directors, and executives may exercise control
11 over a decision to use corporate treasury funds for political speech.
12 For instance, with respect to stock ownership, should the Commission's analysis
13 of corporate control be limited to ownership of voting stock or are there instances in
14 which owners of non-voting stock or significant debt-holders may be able to exercise de
15 facto control, such as (1) when the preponderance of a corporation's issued shares are
16 non-voting or (2) when a corporation has sufficient debt such that one or more debt-
17 holders may be in a position to exercise de facto control over the corporation?
18 Regardless of whether the Commission looks only to voting shares, or also
19 considers non-voting shares and debt, at what level of foreign ownership should the
20 Commission conclude that a domestic corporation is "owned or controlled" by a foreign
21 national? Would 5 percent foreign ownership be sufficient for such a determination?
22 Alternatively, is a threshold of 20 percent, or 50 percent, more appropriate? Should
23 different thresholds be applicable for different ownership structures? For instance,

1 should the Commission apply different thresholds to privately held and publicly held
2 corporations? If a corporation is controlled by a single majority shareholder who owns
3 more than 50 percent of the corporation's shares, would it be appropriate for the
4 Commission to disregard all other minority shareholders? How should the Commission
5 analyze ownership interests in a non-stock corporation such as a nonprofit entity or a
6 foundation? In such instances should the Commission look to who has provided funding,
7 or pledged funding, for a non-stock corporation?
8 With respect to corporate officers, directors and executives, should the
9 Commission's analysis of corporate control be limited to members of a corporation's
10 President and board of directors or are there other corporate officers or employees, such
11 as a Chief Executive Officer, Chief Operating Officer, Chief Financial Officer or
12 Executive Director, or members of any committee to which such authority has been
13 delegated, who might be capable of exercising control over decisions to use corporate
14 treasury funds for political speech? Should the Commission's analysis also include
15 consideration of persons who have the legal capacity to select or elect either board
16 members or corporate executives? With respect to the board of directors, is it only a
17 majority of a corporation's board members that is able to exercise control over the
18 corporation or are there instances where the Commission should conclude that something
19 less than a numerical majority is able to exercise de facto control over a corporation?
20 Are there different structures of corporate boards that the Commission should
21 consider in determining who is capable of exercising corporate control, such as board
22 size, composition or decision-making procedures (e.g., whether a simple majority,
23 supermajority, or consensus is needed to make a decision)?

1 Additionally, because corporations, including foreign corporations, often create
2 partnerships or joint ventures through which they operate in the U.S., to what extent
3 should the Commission's regulations address political spending on independent
4 expenditures and disbursements for electioneering communications by such partnerships?
5 In light of the discussion above, and in view of Citizens United, the Commission
6 also seeks comment on the relevance of the Commission's prior advisory opinions
7 concerning the activities of domestic subsidiaries of foreign corporations for the present
8 rulemaking. For example, one advisory opinion allowed a domestic corporation in which
9 the majority of the board of directors was foreign nationals to create an SSF, through the
10 use of a committee comprised only of U.S. citizens or permanent resident aliens residing
11 in the United States. See AO 2000-17 (Extendicare). Additionally, one advisory opinion
12 permitted the board of directors, which included foreign nationals, of a domestic
13 corporation owned by a foreign corporation to set the budget for political donations and
14 disbursements made by the domestic corporation in connection with State and local
15 elections. See AO 2006-15 (TransCanada). Should the Commission explicitly supersede
16 either or both of these advisory opinions? Would this have consequences for any other
17 advisory opinions and, if so, which ones?
18 C. Proposed Alternatives
19 Alternative A
20 Alternative A revises the definition of "foreign national" at 11 CFR 110.20(a)(3)
21 to include domestic subsidiaries that are owned or controlled by foreign parent
22 corporations or foreign nationals. Specifically, Alternative A provides that domestic
23 subsidiaries will be treated as "foreign nationals" if any of the following is present:

1 (a) at least 20 percent of the domestic corporation's outstanding voting or non-
2 voting shares are directly or indirectly owned or controlled by foreign nationals;
3 (b) one third or more of the members of the corporation's board of directors are
4 foreign nationals;
5 (c) one or more foreign nationals has the power, individually or in concert with
6 other foreign nationals, to direct, dictate or control, directly or indirectly, the
7 corporation's decision-making process with respect to its interests in the United States; or
8 (d) one or more foreign nationals has the power, individually or in concert with
9 other foreign nationals, to direct, dictate or control, directly or indirectly, the
10 corporation's decision-making process with respect to the corporation's political
11 activities.
12 This alternative seeks to implement the prohibition on foreign nationals making
13 contributions, expenditures, independent expenditures or disbursements for
14 electioneering communications, directly or indirectly, set forth at 2 U.S.C. 441e.
15 In essence, Alternative A is based on the proposition that when a foreign person[21]
16 owns or controls a substantial block of voting or non-voting shares of a domestic
17 corporation, even if less than a majority, that person may has the power to assert effective
18 control over the decisions made by the entity, and the actions of the domestic corporation
19 may be "indirectly" attributable to the foreign person.[22] Because it would revise the

[21] The Act defines "person" to include corporations and labor organizations. 2 U.S.C. 431(11).
[22] In some states, corporate law provides that ownership of more than 50% of a corporation's voting shares represents literal control over the corporation, while ownership of as little as 20% of the voting shares has been considered to represent effective control over the corporation, especially for publicly held corporations. See Construction and Application of State Antitakeover Statutes, 37 A.L.R. 6th 1 (2008); see also, e.g., Denver & R. G. W. R. Co. v. United States, 387 U.S. 485, 499 (1967) ("[Seller's] proposed issuance of a 20% stock interest to [buyer] undoubtedly raised a serious question whether control of its operations might pass to [buyer]."); 8 Del. C. § 203(c)(4) ("A person who is the owner of 20% or more of the outstanding voting stock of any corporation, partnership, unincorporated association or other entity

1 definition of foreign national, Alternative A would, under 11 CFR 110.20(f) and the
2 Commission's precedents, prohibit a domestic corporation that is controlled by a foreign
3 parent from making contributions or expenditures in Federal, State and local elections,
4 and also from establishing, maintaining or controlling a SSF.

5 Is the proposed definition of "foreign national" in Alternative A consistent with
6 2 U.S.C. 441e, which defines "foreign national," in part, by reference to 22 U.S.C.
7 611(b)? If so, does Alternative A appropriately restrict foreign national participation in
8 the U.S. electoral process? Is Alternative A consistent with the First Amendment rights
9 of domestic subsidiaries controlled by foreign parent corporations or foreign
10 governments? Would Alternative A be justified by the government's "interest in
11 preventing foreign individuals or associations from influencing our Nation's political
12 process"? Citizens United, 130 S. Ct. at 911 (declining to reach the question of whether
13 this interest is "compelling").

14 If the Commission adopts Alternative A, should the Commission also adopt a
15 definition for "owns or controls" or do general principles of corporate law provide
16 adequate guidance for determining who "owns or controls" voting stock? Should the
17 Commission separately address what constitutes "the power to direct, dictate, or control
18 the decision-making process of the corporation with respect to its interests in the United
19 States?" See Proposed Alternative A. If such definitions are preferable, what should
20 those definitions be?

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shall be presumed to have control of such entity[.]"); Ind. Code § 23-1-42-1 (2010) cmt. ("One-fifth (or 20%) is the level of ownership . . . [that] represents a significant level of dominance that, in a public corporation in which other shareholdings are generally dispersed, can amount to effective control for many purposes.").

1 Does Alternative A strike an appropriate balance between permitted and
2 prohibited activity? Is a 20 percent bright line threshold for ownership of voting stock
3 appropriate? Should the threshold be lower or higher? Would it be advisable to establish
4 a bright line threshold for publicly held corporations that is different from the threshold
5 for privately held corporations? Is it appropriate to focus on ownership of voting stock,
6 on board composition, or on some other factor, when evaluating whether a corporation is
7 owned or controlled by foreign nationals? If there are other factors that should be
8 considered, what should they be? Does Alternative A provide adequate guidance as to
9 which domestic corporations are owned or controlled by foreign nationals?
10 Alternative A sets forth four possible conditions, paragraphs (A)-(D), which cause
11 a corporation to be considered a foreign national; do these four conditions adequately
12 capture all of the ways in which a domestic corporation may be directed or controlled by
13 a foreign parent corporation? Are these conditions too narrow or overbroad? Should any
14 of the four paragraphs be omitted? Should any be added?
15 The language of proposed paragraphs (C) and (D) raises several additional
16 questions. They refer to one or more foreign nationals having "the power, individually or
17 in concert with other foreign nationals, to direct, dictate, or control the corporation's
18 decision-making process." Should this include only decision-making power that is set
19 forth in the corporate by-laws, or should it also include de facto control of the
20 corporation's decision-making? Should it explicitly include control that might be
21 achieved through control structures, collateral agreements, indebtedness, market share, or
22 otherwise? Should it include power to control corporate decision-making that is granted
23 by the law of the State under whose laws the corporation is incorporated, even if such

1 control is not formally granted by the corporation's by-laws? Should paragraphs (C) and
2 (D) instead refer to a corporation in which one or more foreign nationals "directs,
3 dictates, or controls the decision-making process of the corporation"?
4 Paragraph (C) also refers to a foreign national's power to control decision-making
5 "with respect to [the corporation's] interests in the United States." Is this necessary to
6 capture all relevant forms of foreign control of political spending? Is it overbroad? What
7 kinds of interests should it include, if any?
8 Alternative B
9 Alternative B prohibits domestic subsidiaries that are owned or controlled by
10 foreign nationals from using treasury funds for independent expenditures or
11 electioneering communications other than communications to the restricted class.
12 Alternative B also sets forth the conditions that constitute ownership or control by a
13 foreign national. Specifically, Alternative B provides that domestic subsidiaries are
14 controlled or owned by foreign nationals if any of the following conditions is present:
15 (a) more than 50 percent of the corporation's outstanding voting shares are
16 directly or indirectly owned by foreign nationals;
17 (b) a majority of members of the corporation's board of directors are foreign
18 nationals;
19 (c) one or more foreign nationals has the power, individually or in concert with
20 other foreign nationals, to direct, dictate or control, directly or indirectly, the
21 corporation's decision-making process with respect to its interests in the United States; or
22 (d) one or more foreign nationals has the power, individually or in concert with
23 other foreign nationals, to direct, dictate or control, directly or indirectly, the

1 corporation's decision-making process with respect to the corporation's political
2 activities.

3 Unlike Alternative A, Alternative B does not propose to amend the definition of
4 the term "foreign national" and therefore would not result in prohibiting a domestic
5 corporation that is controlled by a foreign parent from establishing, maintaining or
6 controlling a SSF. Alternative B also differs from Alternative A in providing that a
7 foreign national owns or controls a domestic corporation when the foreign national owns
8 or controls over 50 percent of the corporation's voting stock, as opposed to the 20 percent
9 in Alternative A. Is a 50 percent bright line for ownership of voting stock appropriate?
10 Should it be lower or higher? Again, would it be more appropriate to have a bright line
11 threshold for publicly held corporations that is different from the threshold for privately
12 held corporations? The different thresholds in Alternative A and B are intended to
13 provide contrasts in approach. There is nothing inherent to Alternative A that would
14 require a threshold of 20 percent, nor is there anything inherent to Alternative B that
15 would require a threshold of 50 percent. Should the Commission adopt Alternative A
16 with a 50 percent threshold or Alternative B with a 20 percent threshold?

17 Likewise, Alternative B differs from Alternative A in providing that a foreign
18 national owns or controls a domestic corporation when a majority of the members of the
19 domestic corporation's board of directors are foreign nationals, as opposed to the one-
20 third of the members threshold in Alternative A. Is a "majority of the members" bright
21 line for the board of directors appropriate? Would it be more appropriate to have a bright
22 line threshold for publicly held corporations that is different from the threshold for

1 privately held corporations? The different thresholds in Alternative A and Alternative B
2 are intended to provide contrasts in approach.
3 Does Alternative B strike an appropriate balance between permitted and
4 prohibited activity? In evaluating whether a corporation is owned by foreign nationals,
5 Alternative A and B focus on ownership of voting stock. Is this appropriate, or should
6 the Commission adopt an approach to ownership that takes into account other financial
7 instruments such as warrants, options, debt, or non-voting stock? Alternatively, should
8 the Commission defer to general principles of corporate law, including State law, to
9 determine when a domestic corporation is owned or controlled by a foreign national and
10 therefore not adopt a bright line threshold at all? Could the Commission develop a rule
11 that provides clear guidance in this area of the law?
12 Alternative B also includes a requirement that whenever a corporation reports
13 disbursements for electioneering communications pursuant to 11 CFR 104.20 or reports
14 disbursements for independent expenditures pursuant to 11 CFR 109.10, the report must
15 include a statement that the corporation is in compliance with the prohibitions on foreign
16 nationals making payments for electioneering communications and independent
17 expenditures. Should corporations be required to certify that they are not owned or
18 controlled by foreign nationals on any reports filed with the Commission and therefore
19 are in compliance with 11 CFR 110.20? If so, should the Commission require
20 corporations to provide an explanation of how they determined their ownership status?
21 Does the Commission have authority to require such certifications?
22

1 Alternative C

2 Alternative C seeks to adapt the Commission's prior approach with respect to
3 domestic corporations owned or controlled by foreign nationals to the new issue of
4 independent expenditures and electioneering communications made by such corporations.
5 First, the proposal provides that a domestic subsidiary of a foreign corporation may
6 establish an SSF if the subsidiary is a separate legal entity whose principal place of
7 business is the United States (and thus, under this alternative, is not considered to be a
8 "foreign national") and if those exercising decision-making authority over the
9 subsidiary's SSF are not foreign nationals. See Advisory Opinions 1980-100 (Revere
10 Sugar), 1980-111 (Portland Cement).

11 Second, Alternative C provides the conditions under which a U.S. subsidiary may
12 make independent expenditures or electioneering communications, so long as no foreign
13 national controls the corporation's decision-making with respect to its election-related
14 activities and the domestic corporation uses only U.S. net earnings, with no
15 replenishment, subsidization, offsets or other financial consequences from its foreign
16 parent. As noted above, the Commission has previously determined that the activities of
17 U.S. subsidiaries are to be governed by 11 CFR 110.20(i), which prohibits the
18 involvement of foreign nationals in the decision-making of SSFs and of corporations.
19 However, the Commission has never had occasion to apply 11 CFR 110.20(i) to the
20 making of independent expenditures and electioneering communications by domestic
21 subsidiaries of foreign nationals, because such activity was independently prohibited by
22 2 U.S.C. 441b.

1 The Commission seeks comment on whether 11 CFR 110.20 should also apply to
2 corporations' electioneering communications and independent expenditures. Would
3 Alternative C, which is based on the Commission's approach to domestic subsidiaries of
4 foreign corporations prior to Citizens United when corporations were prohibited by the
5 Act from making independent expenditures or electioneering communication, define with
6 sufficient clarity and thoroughness when a domestic subsidiary is funded or subsidized by
7 a corporate parent? See Advisory Opinion 1989-20 (Kuilima) (concluding that a
8 domestic subsidiary "funded predominantly by a foreign national corporation" is
9 prohibited by 2 U.S.C. 441e from making State and local contributions). In Advisory
10 Opinion 2006-15 (TransCanada), the Commission concluded that "in order for a domestic
11 subsidiary of a foreign national to make donations or disbursements in connection with a
12 State or local election, the donations or disbursements may not be derived from the
13 foreign national's funds and no foreign national may have any decision-making authority
14 concerning the making of donations or disbursements." Similarly, Alternative C applies
15 these two conditions to domestic subsidiaries of foreign corporations making
16 electioneering communications and independent expenditures, which corporations and
17 labor organizations may now make after Citizens United.
18 Proposed Alternative C incorporates language from Commission advisory
19 opinions addressing the activities of domestic subsidiaries of foreign corporations. The
20 regulation sets forth two conditions on the establishment of an SSF that were first
21 articulated by the Commission in 1980. Advisory Opinion 1980-111 (Portland Cement).
22 The first condition prohibits foreign nationals from participating in decision-making
23 related to the SSF's activities, pursuant to 11 CFR 110.20(i). The second condition

1 prohibits the solicitation of foreign nationals for donations to the SSF, pursuant to
2 11 CFR 110.20(g). See Advisory Opinion 1980-111 (Portland Cement); Advisory
3 Opinion 2004-42 (Pharmavite). Does the proposed regulation satisfactorily implement
4 the policies intended by the Act with respect to the limiting the capacity of foreign
5 nationals to influence the U.S. election process? Given that both of the referenced
6 provisions already exist in the Commission regulations, is this first part of Alternative C
7 necessary? Is it useful to reiterate these two previously separate conditions together in
8 one paragraph to make clear that they apply in tandem to SSFs of domestic subsidiaries
9 owned by foreign nationals? Could proposed paragraph (k) state simply that a domestic
10 subsidiary of a foreign national corporation may establish an SSF provided it complies
11 with 11 CFR 110.20(g) and (i), or that it may establish an SSF provided it complies with
12 all other existing regulations? Should the Commission adopt any additional conditions
13 on the establishment of an SSF by a domestic subsidiary and, if so, what conditions
14 should be considered and why?
15 Next, proposed Alternative C sets forth two conditions on the making of
16 disbursements for electioneering communications and communications containing
17 express advocacy beyond the restricted class. The first condition prohibits foreign
18 nationals from participating in decision-making related to contributions, donations,
19 expenditures, or disbursements in connection with any election, pursuant to 11 CFR
20 110.20(i). See Advisory Opinion 2006-16 (TransCanada). The second condition, which
21 is based on prior Commission advisory opinions on the topic of domestic subsidiaries'
22 donations to State and local candidates, provides that the funds used to finance
23 electioneering communications and express advocacy communications beyond the

1 restricted class must be solely from U.S. net earnings, and must not be subsidized or
2 replenished by the foreign national parent. Id.; see also MUR 4594 (Longevity Int'l
3 Enterprises Corp.) (providing that a domestic subsidiary may not make donations to State
4 and local candidates using funds originating from a foreign parent). The Commission
5 seeks comment on this proposal.

6 Should the Commission define any of the terms used in Alternative C? Should
7 the Commission craft a regulation to govern the full panoply of commonly used corporate
8 arrangements, structures and combinations that may exist between and among
9 subsidiaries and their parent corporations? Does Alternative C cover the full range of
10 possible corporate arrangements? Unlike Alternative A, both Alternatives B and C
11 continue to permit U.S. subsidiaries to maintain SSFs. Would continuing to allow
12 domestic subsidiaries to maintain SSFs avoid constitutional issues that might by
13 presented by Alternative A?

14 Alternative C permits U.S. subsidiaries of foreign nationals, including foreign
15 governments,[23] to pay for communications that expressly advocate the election of Federal
16 candidates. Would allowing these communications be consistent with the prohibition on
17 foreign national participation in U.S. elections in 2 U.S.C. 441e, as long as no foreign
18 national participates in the decision-making process with respect to the activity and the
19 activity is not funded by foreign nationals?

20 Would it be appropriate for the Commission to adopt more restrictive rules for
21 domestic subsidiaries that are owned or controlled by a foreign government or by a
22 foreign corporation that is, in turn, owned or controlled by a foreign government? Are

[23] The term "foreign principal" in Section 611(b) of FARA includes "a government of a foreign country." 22 U.S.C. 611(b)(1).

1 the concerns about foreign involvement in U.S. elections discussed above more
2 significant when a foreign government is involved? If a foreign government acquires
3 direct or indirect ownership or control over a domestic corporation, should that
4 corporation be permitted to spend unlimited amounts on independent expenditures and
5 electioneering communications that are intended to influence U.S. elections? Is it
6 reasonable to expect that a domestic corporation's involvement in U.S. elections will not
7 be influenced by the interests of a foreign government that owns or controls the domestic
8 corporation, directly or indirectly, and that may hire and supervise the corporation's
9 board members, officers and executives?

10 The Commission also seeks comment on the extent to which the Commission's
11 regulations should specifically address different ways that foreign national influence
12 could result in "direct[ing], dictat[ing], control[ling], or directly or indirectly
13 participat[ing] in the decision-making process of" a domestic corporation, as prohibited
14 by 11 CFR 110.20(i), where such corporations are (a) created by one or more foreign
15 nationals, (b) owned by one or more foreign nationals, (c) funded by one or more foreign
16 nationals, irrespective of ownership (including loans), or (d) controlled by one or more
17 foreign nationals, irrespective of ownership or funding. Do Alternatives A, B and C
18 provide adequate guidance as to which domestic corporations are owned or controlled by
19 foreign nationals?

20 If the Commission does not adopt Alternative A, B or C, should the Commission
21 adopt some other regulation specifically addressing the relationships between foreign
22 parent corporations and domestic subsidiaries, or between foreign and domestic partners,
23 limiting how much control or influence the foreign national may exert over its domestic

1 subsidiary or partner before the latter is also subject to the prohibitions on foreign
2 national expenditures and electioneering communications? Put another way, should the
3 Commission adopt a rule other than those proposed in this NPRM setting forth when a
4 foreign parent corporation's control or influence over its domestic subsidiary is so great
5 as to justify a restriction on the subsidiary's speech? If the Commission did adopt such a
6 rule, what information, criteria or factors would be relevant in gauging the level of
7 foreign control or influence? Alternatively, since the making of independent
8 expenditures and electioneering communications is distinct from activities sanctioned
9 under prior Commission precedent, should the Commission instead handle the Court's
10 concern about expenditures by foreign-controlled corporations on a case-by-case basis in
11 enforcement and Advisory Opinions? Would this approach be preferable to adopting a
12 new regulation?

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

14 The Commission certifies that the attached proposed rules, if adopted, would not
15 have a significant economic impact on a substantial number of small entities. There are
16 two bases for this certification. First, there are few small entities that would be affected
17 by these proposed rules. The Commission's proposed revisions may affect some for-
18 profit corporations, labor organizations, individuals, and some non-profit organizations.
19 Individuals and labor organizations are not "small entities" under 5 U.S.C. 601(6). Many
20 non-profit organizations that might use general treasury funds to make independent
21 expenditures or electioneering communications are not "small organizations" under
22 5 U.S.C. 601(4) because they are not financed by a small identifiable group of

1 individuals, but rather rely on contributions from a large number of individuals to fund
2 operations and activities.
3 Second, the proposed rules would not have a significant economic impact on the
4 small entities affected by this rulemaking. Overall, the proposed rules would relieve a
5 funding restriction that the current rules place on some corporations and labor
6 organizations. The proposed rules would allow small entities to engage in activity they
7 were previously prohibited from funding with corporation or labor organization funds.
8 Thus, while one effect of the proposed rule would be to increase substantially the number
9 of corporations and labor organizations that use general treasury funds to make
10 independent expenditures or electioneering communications, these entities will do so
11 voluntarily and not because of any new Federal requirement to do so. Although they
12 would incur some costs in complying with the obligation to report independent
13 expenditures and electioneering communications, these costs would not be very great and
14 thus would not have a significant economic impact on the small entities affected by this
15 rulemaking. In fact, the obligation for corporations and labor organizations to report
16 electioneering communications should not be burdensome because the trigger to report
17 electioneering communications remains high. Further, because qualified non-profit
18 corporations would continue to be able to make independent expenditures and
19 electioneering communications just as they have done before, their reporting obligations
20 will not change or become more burdensome because of this rulemaking. Therefore, the
21 attached rule would not have a significant economic impact on a substantial number of
22 small entities.
23

1 **List of Subjects**

2 11 CFR Part 104

3 Campaign funds, political committees and parties, reporting and recordkeeping

4 requirements.

5 11 CFR Part 109

6 Elections, reporting and recordkeeping requirements.

7 11 CFR Part 110

8 Campaign funds, political committees and parties.

9 11 CFR Part 114

10 Business and industry, elections, labor.

11

1 For the reasons set out in the preamble, the Federal Election Commission is
2 amending Subchapter A of Chapter 1 of Title 11 of the Code of Federal Regulations as
3 follows:

4 **PART 104 – REPORTS BY POLITICAL COMMITTEES AND OTHER**
5 **PERSONS (2 U.S.C. 434)**

6 1. The authority citation for part 104 would continue to read as follows:
7 Authority: 2 U.S.C. 431(1), 431(8), 431(9), 432(i), 434, 438(a)(8) and (b), 439a,
8 441a, and 36 U.S.C. 510.

9 2. In section 104.20, paragraphs (a)(3), (c)(7), (c)(8), and (c)(9) would be revised
10 to read as follows:

11 **§ 104.20 Reporting electioneering communications (2 U.S.C. 434(f)).**

12 (a) * * *

13 (3) Persons sharing or exercising direction or control means
14 (i) In the case of corporations, officers, directors, executive directors,
15 Chief Financial Officers, or their equivalent, majority or
16 controlling shareholders, majority donors;
17 (ii) in the case of partnerships, officers, directors, executive directors
18 or their equivalent, partners;
19 (iii) in the case of unincorporated organizations, owners;
20 (iv) in the case of labor organizations, officers, directors, executive
21 directors or their equivalent; and
22 (v) any other person with the responsibility or authority for exercising
23 or sharing actual direction or control over the ~~in;~~ the entity or

1 person making the disbursement for the electioneering
2 communication.
3 * * * * *
4 (c) Contents of statement. Statements of electioneering communications filed under
5 paragraph (b) of this section shall disclose the following information:
6 * * * * *
7 **ALTERNATIVE A for 104.20(c)(7), (8), and (9)**
8 (7) * * *
9 (i) If the disbursements were paid exclusively from a segregated bank
10 account established to pay for electioneering communications ~~not~~
11 ~~permissible under 11 CFR 114.15~~, consisting of funds provided
12 solely by individuals who are United States citizens, United States
13 nationals, or who are lawfully admitted for permanent residence
14 under 8 U.S.C. 1101(a)(20), the name and address of each donor
15 who donated an amount aggregating $1,000 or more to the
16 segregated bank account, aggregating since the first day of the
17 preceding calendar year; or
18 (ii) If the disbursements were paid exclusively from a segregated bank
19 account established to pay for electioneering communications,
20 consisting of funds provided by any person ~~permissible under 11~~
21 ~~CFR 114.15~~, the name and address of each donor who donated an
22 amount aggregating $1,000 or more to the segregated bank

account, aggregating since the first day of the preceding calendar year.

(8) If ~~the~~ any person other than a corporation or labor organization made disbursements for electioneering communications that were not paid exclusively from a segregated bank account described in paragraph (c)(7) of this section ~~and were not made by a corporation or labor organization pursuant to 11 CFR 114.15~~, the name and address of each donor who donated an amount aggregating $1,000 or more to the person making the disbursement, aggregating since the first day of the preceding calendar year.

(9) If the disbursements were made by a corporation or labor organization ~~pursuant to 11 CFR 114.15~~, the name and address of each person who made a donation aggregating $1,000 or more to the corporation or labor organization, aggregating since the first day of the preceding calendar year, which was made for the purpose of furthering electioneering communications.

* * * * *

ALTERNATIVE B for 104.20(c)(7), (8), and (9)

(7) * * *

~~(i)~~ If ~~the~~ any person made disbursements ~~were~~ paid exclusively from a segregated bank account established to pay for electioneering communications ~~not permissible under 11 CFR 114.15~~, consisting of funds provided solely by individuals who are United States

citizens, United States nationals, or who are lawfully admitted for permanent residence under 8 U.S.C. 1101(a)(20), the name and address of each donor who donated an amount aggregating $1,000 or more to the segregated bank account, aggregating since the first day of the preceding calendar year; or

(ii) If any person made the disbursements ~~were~~ paid exclusively from a segregated bank account established to pay for electioneering communications, consisting of funds provided by any person ~~permissible under 11 CFR 114.15~~, the name and address of each donor who donated an amount aggregating $1,000 or more to the segregated bank account, aggregating since the first day of the preceding calendar year.

(8) If ~~the~~ any person made disbursements for electioneering communications that were not paid exclusively from a segregated bank account described in paragraph (c)(7) of this section ~~and were not made by a corporation or labor organization pursuant to 11 CFR 114.15~~, the name and address of each donor who donated an amount aggregating $1,000 or more to the person making the disbursement, aggregating since the first day of the preceding calendar year.

~~(9) If the disbursements were made by a corporation or labor organization pursuant to 11 CFR 114.15, the name and address of each person who made a donation aggregating $1,000 or more to the corporation or labor organization, aggregating since the first day of the preceding calendar~~

1 ~~year, which was made for the purpose of furthering electioneering~~

2 ~~communications.~~

3 * * * * *

4 **PART 109 – COORDINATED AND INDEPENDENT EXPENDITURES (2 U.S.C.**

5 **431(17), 441a(a) and (d), and Pub. L. 107-155 Sec 215(c)).**

6 3. The authority citation for part 109 would continue to read as follows:

7 Authority: 2 U.S.C. 431(17), 434(c), 438(a)(8), 441a 441d; Sec. 214(c) of Pub. L.

8 107-155, 116 Stat. 81.

9 4. In section 109.10, revise and renumber paragraph (e)(1)(vi) as (e)(1)(vii)

10 and add new paragraph (e)(1)(vi) to read as follows:

11 **§ 109.10 How do political committees and other persons report independent**

12 **expenditures?**

13 * * * * *

14 (e) * * *

15 (1) * * *

16 (vi) The identification of each person who made a contribution during

17 the calendar year to the person filing such report, whose

18 contributions have an aggregate amount or value in excess of $200

19 within the calendar year, or in any lesser amount if the person

20 filing such report should so elect, together with the date and the

21 amount of any such contribution; and

22 (vii) The identification of each person who made a contribution during

23 the reporting period in excess of $200 to the person filing such

1 report, which contribution was made for the purpose of furthering

2 ~~the reported~~ an independent expenditure.

3 * * * * *

4 **PART 110 – CONTRIBUTION AND EXPENDITURE LIMITATIONS AND**

5 **PROHIBITIONS (2 U.S.C 431(8), 431(9), 432(c)(2), 434(i)(3), 438(a)(8), 441a, 441b,**

6 **441d, 441e, 441f, 441g, 441h and 36 U.S.C. 510)**

7 5. The authority citation for part 110 would continue to read as follows:

8 Authority: 2 U.S.C 431(8), 431(9), 432(c)(2), 434(i)(3), 438(a)(8), 441a, 441b,

9 441d, 441e, 441f, 441g, 441h and 36 U.S.C. 510.

10 **ALTERNATIVE A for 110.20**

11 6. In section 110.20, paragraph (a)(3)(iv) would be added to read as follows:

12 **§ 110.20 Prohibition on contributions, donations, expenditures, independent**

13 **expenditures, and disbursements by foreign nationals (2 U.S.C. 441e, 36 U.S.C. 510).**

14 (a) * * *

15 (3) Foreign national means –

16 * * *

17 (iv) Any corporation

18 (A) In which one or more foreign nationals described in paragraph

19 (a)(3)(i) or (ii) of this section directly or indirectly own or

20 control at least twenty percent of the voting or non-voting

21 shares;

1 (B) With respect to which one third or more of the members of the
2 board of directors are foreign nationals described in paragraph
3 (a)(3)(i) or (ii) of this section;
4 (C) Over which one or more foreign nationals described in
5 paragraph (a)(3)(i) or (ii) of this section has the power,
6 individually or in concert with other foreign nationals, to
7 direct, dictate, or control, directly or indirectly, the decision-
8 making process of the corporation with respect to its interests
9 in the United States; or
10 (D) Over which one or more foreign nationals described in
11 paragraph (a)(3)(i) or (ii) of this section has the power,
12 individually or in concert with other foreign nationals, to
13 direct, dictate, or control, directly or indirectly, the decision-
14 making process of the corporation with respect to activities in
15 connection with any Federal, State, or local election, including
16 =
17 (i) The making of a contribution, donation,
18 expenditure, independent expenditure, or
19 disbursement for an electioneering communication;
20 or
21 (ii) The administration of a separate segregated fund
22 established or maintained by the corporation.
23 **ALTERNATIVE B for 110.20**

1 7. In section 110.20, paragraph (k) would be added to read as follows:

2 **§ 110.20 Prohibition on contributions, donations, expenditures, independent**

3 **expenditures, and disbursements by foreign nationals (2 U.S.C. 441e, 36 U.S.C. 510).**

4 * * * * *

5 (k) Domestic corporation owned or controlled by foreign national

6 (1) Notwithstanding any other provision of this title, a domestic corporation

7 that is owned or controlled by a foreign national is prohibited from:

8 (i) Making expenditures in connection with a Federal election (as

9 defined in 11 CFR 114.1(a)), for communications to those outside

10 the restricted class that expressly advocate the election or defeat of

11 one or more clearly identified candidate(s) or the candidates of a

12 clearly identified political party; and

13 (ii) Making payments for an electioneering communication to those

14 outside the restricted class.

15 (2) Domestic corporation that is owned or controlled by a foreign national

16 means any corporation:

17 (i) In which one or more foreign nationals described in paragraph

18 (a)(1) or (2) of this section directly or indirectly own or control

19 more than 50 percent of the voting shares;

20 (ii) With respect to which the majority of the members of the board of

21 directors are foreign nationals described in paragraph (a)(1) or (2)

22 of this section;

1 (iii) Over which one or more foreign nationals described in paragraph
2 (a)(1) or (2) of this section has the power, individually or in
3 concert with other foreign nationals, to direct, dictate or control,
4 directly or indirectly, the decision-making process of the
5 corporation with respect to its interests in the United States; or
6 (iv) Over which one or more foreign nationals described in paragraph
7 (a)(1) or (2) of this section has the power, individually or in
8 concert with other foreign nationals, to direct, dictate or control,
9 directly or indirectly, the decision-making process of the
10 corporation with respect to activities in connection with any
11 Federal, State, or local election, including –
12 (A) The making of a contribution, donation, expenditure,
13 independent expenditure, or disbursement for an
14 electioneering communication; or
15 (B) the administration of a separate segregated fund established
16 or maintained by the corporation.
17 (3) Any corporation that reports disbursements for electioneering
18 communications pursuant to 11 CFR 104.20 or that reports expenditures
19 for independent expenditures pursuant to 11 CFR 109.10 must include in
20 each report a statement that the corporation is in compliance with the
21 prohibitions described in paragraphs (e), (f), and (k) of this section.
22 **ALTERNATIVE C for 110.20**
23 8. In section 110.20, paragraph (k) would be added to read as follows:

1 **§ 110.20 Prohibition on contributions, donations, expenditures, independent**
2 **expenditures, and disbursements by foreign nationals (2 U.S.C. 441e, 36 U.S.C. 510).**
3 * * * * *
4 (k) Domestic corporation owned or controlled by foreign national
5 (1) A domestic corporation owned or controlled by one or more foreign
6 nationals may establish and operate a separate segregated fund provided
7 that:
8 (i) No foreign national shall direct, dictate, control, or directly or
9 indirectly participate in the decision-making process of such a corporation
10 or separate segregated fund, with regard to such corporation or fund's
11 Federal or non-Federal election-related activities, including decisions
12 concerning the making of contributions, donations, expenditures, or
13 disbursements in connection with elections for any Federal, State, or local
14 office or decisions concerning the administration of a political committee
15 pursuant to paragraph (i) of this section; and
16 (ii) No foreign nationals are solicited to contribute to the separate
17 segregated fund pursuant to paragraph (g) of this section.
18 (2) A domestic corporation owned or controlled by one or more foreign
19 nationals may make expenditures in connection with a Federal election for
20 communications to those outside the restricted class that expressly
21 advocate the election or defeat of one or more clearly identified
22 candidate(s) and may make payments for an electioneering
23 communication to those outside the restricted class provided that:

(i) No foreign national shall direct, dictate, control, or directly or indirectly participate in the decision-making process of such as a corporation or separate segregated fund, with regard to such corporation or fund's Federal or non-Federal election-related activities, including decisions concerning the making of contributions, donations, expenditures, or disbursements in connection with elections for any Federal, State, or local office or decisions concerning the administration of a separate segregated fund pursuant to paragraph (i) of this section; and

(ii) The domestic corporation uses only its U.S. net earnings, not subsidized or replenished by the foreign national parent, to fund election-related activity;

(iii) The expenditure or payment is not coordinated with a candidate, an authorized committee, a political party committee, or an agent of any of the foregoing.

* * * * *

PART 114 – CORPORATE AND LABOR ORGANIZATION ACTIVITY (2 U.S.C 431(8), 431(9), 432, 434, 437d(a)(8), 438(a)(8), and 441b)

9. The authority citation for part 114 continues to read as follows:

Authority: 2 U.S.C. 431(8), 431(9), 432, 434, 437d(a)(8), 438(a)(8), 441b.

10. In section 114.2, paragraph (b) would be revised to read as follows:

§114.2 Prohibitions on contributions~~,~~ and expenditures ~~and electioneering communications~~.

1 * * * * *

2 (b) * * *

3 **ALTERNATIVE A for 114.2(b)(2)**

4 (2) ~~Except as provided at 11 CFR 114.10, c~~Corporations and labor

5 organizations are prohibited from~~:~~

6 ~~(i) M~~making coordinated expenditures as defined in 11 CFR ~~part 100,~~

7 ~~subpart D~~ 109.20 and coordinated communications as defined in

8 11 CFR 109.21.~~; or~~

9 ~~(ii) Making expenditures with respect to a Federal election (as defined~~

10 ~~in 11 CFR 114.1(a)), for communications to those outside the~~

11 ~~restricted class that expressly advocate the election or defeat of one~~

12 ~~or more clearly identified candidate(s) or the candidates of a~~

13 ~~clearly identified political party.~~

14 **ALTERNATIVE B for 114.2(b)(2)**

15 (2) ~~Except as provided at 11 CFR 114.10, c~~Corporations and labor

16 organizations are prohibited from~~:~~

17 ~~(i) M~~making expenditures as defined in 11 CFR part 100, subpart D,

18 except for payments for communications that are not coordinated

19 communications as defined in 11 CFR 109.21; or

20 ~~(ii) Making expenditures with respect to a Federal election (as defined~~

21 ~~in 11 CFR 114.1(a)), for communications to those outside the~~

22 ~~restricted class that expressly advocate the election or defeat of one~~

~~or more clearly identified candidate(s) or the candidates of a clearly identified political party.~~

ALTERNATIVES A and B for 114.2(b)(3)

~~(3) Corporations and labor organizations are prohibited from making payments for an electioneering communication to those outside the restricted class unless permissible under 11 CFR 114.10 or 114.15. However, this paragraph (b)(3) shall not apply to State party committees and State candidate committees that incorporate under 26 U.S.C. 527(e)(1), provided that:~~

~~(i) The committee is not a political committee as defined in 11 CFR 100.5;~~

~~(ii) The committee incorporated for liability purposes only;~~

~~(iii) The committee does not use any funds donated by corporations or labor organizations to make electioneering communications; and~~

~~(iv) The committee complies with the reporting requirements for electioneering communications at 11 CFR part 104.~~

11. Section 114.3 is amended by revising paragraphs (a), (c), and (c)(4) to read as follows:

§ 114.3 Disbursements for communications to the restricted class in connection with a Federal election.

(a) General.

(1) Corporations and labor organizations may make communications on any subject, including communications containing express advocacy, to their

1 restricted class or any part of that class. Corporations and labor
2 organizations may also make the communications permitted under 11 CFR
3 114.4 to their restricted class or any part of that class. The activities
4 permitted under this section may involve election-related coordination
5 with candidates and political committees. only to the extent permitted by
6 this section. See 11 CFR 100.16 and 114.2(c) regarding independent
7 expenditures and coordination with candidates.
8 (2) Incorporated membership organizations, incorporated trade associations,
9 incorporated cooperatives and corporations without capital stock may
10 make communications to their restricted class, or any part of that class as
11 permitted in paragraphs (a)(1) and (c) of this section.
12 * * * * *
13 (c) Communications containing express advocacy. Communications containing
14 express advocacy ~~which~~ that may be made to the restricted class include, but are not
15 limited to, the following examples: ~~set forth in paragraphs (c)(1) through (c)(4) of this~~
16 ~~section.~~
17 * * * * *
18 **ALTERNATIVE A for 114.3(c)(4)**
19 (4) Registration and get-out-the-vote drives.
20 (i) Voter registration and get-out-the-vote drives permitted. A
21 corporation or labor organization may conduct registration and get-
22 out-the-vote drives aimed at its restricted class. Registration and
23 get-out-the-vote drives include providing transportation to the

1 place of registration and to the polls. The corporation or labor
2 organization must not act in cooperation, consultation, or concert
3 with or at the request or suggestion of any candidates, candidates'
4 committees or agents, or political party regarding the planning,
5 organization, timing, or administration of a voter registration or
6 get-out-the-vote drive.
7 (ii) Disbursements for certain voter registration and get-out-the-vote
8 drives not expenditures or contributions. Disbursements for voter
9 registration and get-out-the-vote drives are not contributions or
10 expenditures, provided that the drive is conducted so that
11 information and other assistance regarding registering or voting,
12 including transportation and other services offered, is not withheld
13 or refused on the basis of support for or opposition to particular
14 candidates, or a particular political party. See 2 U.S.C.
15 441b(b)(2)(B). Such drives may include communications
16 containing express advocacy, such as urging individuals to register
17 with a particular party or to vote for a particular candidate or
18 candidates. ~~Information and other assistance regarding registering~~
19 ~~or voting, including transportation and other services offered, shall~~
20 ~~not be withheld or refused on the basis of support for or opposition~~
21 ~~to particular candidates, or a particular political party.~~
22 **ALTERNATIVE B for 114.3(c)(4)**

1 (4) Registration and get-out-the-vote drives. A corporation or a labor
2 organization may conduct registration and get-out-the-vote drives aimed at
3 its restricted class. Registration and get-out-the-vote drives include
4 providing transportation to the place of registration and to the polls. Such
5 drives may include communications containing express advocacy, such as
6 urging individuals to register with a particular party or to vote for a
7 particular candidate or candidates. Information and other assistance
8 regarding registering or voting, including transportation and other services
9 offered, shall not be withheld or refused on the basis of support for or
10 opposition to particular candidates, or a particular political party.
11 12. Section 114.4 is amended by revising paragraphs (a), (b), (c)(1), (c)(2),
12 (c)(3)(i), (c)(4), (c)(5), (c)(6) and (d), by redesignating paragraphs (b)(1)(i) – (b)(1)(viii)
13 as paragraphs (b)(1) – (b)(8), and by removing paragraphs (b)(2), (c)(3)(iv), (c)(3)(v),
14 (c)(5)(i), (c)(5)(ii), (c)(6)(i), (c)(6)(ii), and (c)(8) to read as follows:
15 **§ 114.4 Disbursements for communications by corporations and labor organizations**
16 **beyond the restricted class in connection with a Federal election.**
17 (a) General. A corporation or labor organization may communicate beyond the
18 restricted class in accordance with this section. Communications ~~which~~ that a
19 corporation or labor organization may make only to its employees (including its restricted
20 class) and their families, but not to the general public, are set forth in paragraph (b) of
21 this section. The communications that a corporation or labor organization may make to
22 the general public set forth in paragraph (c) of this section may also be made to the
23 corporation's or labor organization's restricted class and to other employees and their

1 families. Communications ~~which~~ that a corporation or labor organization may make only
2 to its restricted class are set forth at 11 CFR 114.3. The activities described in paragraphs
3 (b) and (c) of this section may be coordinated with candidates and political committees
4 only to the extent permitted by this section. See 11 CFR 100.16, 109.21, and 114.2(c)
5 regarding independent expenditures and coordination with candidates. Incorporated
6 membership organizations, incorporated trade associations, incorporated cooperatives,
7 and corporations without capital stock will be treated as corporations for the purposes of
8 ~~making communications beyond the restricted class under~~ this section.
9 (b) Communications by a corporation or labor organization involving candidate and
10 party appearances to employees beyond its restricted class.
11 ~~(1) Candidate and party appearances on corporate premises or at a meeting,~~
12 ~~convention or other function.~~ Corporations and labor organizations may
13 permit candidates, candidates' representatives or representatives of
14 political parties on corporate or labor organization premises or at a
15 meeting, convention, or other function of the corporation or labor
16 organization to address or meet its restricted class and other employees of
17 the corporation or labor organization and their families, in accordance
18 with the conditions set forth in paragraphs ~~(b)(1)(i) through (b)(1)(viii)~~
19 (b)(1) through (b)(8) of this section. Other guests of the corporation or
20 labor organization who are being honored or speaking or participating in
21 the event and representatives of the news media may be present. A
22 corporation or labor organization may bar all candidates, candidates'
23 representatives, and representatives of political parties from addressing or

meeting its restricted class and other employees of the corporation or labor organization and their families on corporate premises or at any meeting, convention or other function of the corporation or labor organization.

(~~i~~1) If a candidate for the House or Senate or a candidate's representative is permitted to address or meet employees, all candidates for that seat who request to appear must be given a similar opportunity to appear;

(~~ii~~2) If a Presidential or Vice Presidential candidate or candidate's representative is permitted to address or meet employees, all candidates for that office who are seeking the nomination or election, and who meet pre-established objective criteria under 11 CFR 110.13(c), and who request to appear must be given a similar opportunity to appear;

(~~iii~~3) If representatives of a political party are permitted to address or meet employees, representatives of all political parties that had a candidate on the ballot in the last general election or that are actively engaged in placing or will have a candidate or candidates on the ballot in the next general election and who request to appear must be given a similar opportunity to appear;

(~~iv~~4) The candidate's representative or party representative (other than an officer, director or other representative of a corporation or official, member or employee of a labor organization) or the candidate, may ask for contributions to his or her campaign or party, or ask that contributions to the separate segregated fund of the corporation or labor organization be designated for his or her campaign or party. The candidate, candidate's

representative, or party representative shall not accept contributions before, during or after the appearance while at the meeting, convention or other function of the corporation or labor organization, but may leave campaign materials or envelopes for members of the audience. A corporation or labor organization, its restricted class, or other employees of the corporation or labor organization or its separate segregated fund, including any official or member of the labor organization shall not, either orally or in writing, solicit or direct or control contributions by members of the audience to any candidate or party in conjunction with any appearance by any candidate or party representative under this section, and shall not facilitate the making of contributions to any such candidate or party (see 11 CFR 114.2(f));

(~~v~~5) A corporation or labor organization or its separate segregated fund shall not, in conjunction with any candidate, candidate representative or party representative appearance under this section, expressly advocate the election or defeat of any clearly identified candidate(s) or candidates of a clearly identified political party and shall not promote or encourage express advocacy by employees or labor organization members;

(~~vi~~6) No candidate, candidate's representative or party representative shall be provided with more time or a substantially better location than other candidates, candidates' representatives, or party representatives who appear, unless the corporation is able to demonstrate that it is clearly

1 impractical to provide all candidates, candidates' representatives, and
2 party representatives with similar times or locations;
3 (~~vii~~7) Coordination with each candidate, candidate's agent, and candidate's
4 authorized committee(s) may include discussions of the structure, format,
5 and timing of the candidate appearance and the candidate's positions on
6 issues, but shall not include discussions of the candidate's plans, projects,
7 or needs relating to the campaign; and
8 (~~viii~~8) Representatives of the news media may be allowed to be present during a
9 candidate, candidate representative, or party representative appearance
10 under this section, in accordance with the procedures set forth at 11 CFR
11 114.3(c)(2)(iv).
12 ~~(2) Candidate and party appearances on labor organization premises or at a~~
13 ~~meeting, convention or other function. A labor organization may permit~~
14 ~~candidates, candidates' representatives or representatives of political~~
15 ~~parties on the labor organization's premises or at a meeting, convention, or~~
16 ~~other function of the labor organization to address or meet its restricted~~
17 ~~class and other employees of the labor organization, and their families, in~~
18 ~~accordance with the conditions set forth in paragraphs (b)(1) (i) through~~
19 ~~(iii), (vi) through (viii), and paragraphs (b)(2) (i) and (ii) of this section.~~
20 ~~Other guests of the labor organization who are being honored or speaking~~
21 ~~or participating in the event and representatives of the news media may be~~
22 ~~present. A labor organization may bar all candidates, candidates'~~
23 ~~representatives and representatives of political parties from addressing or~~

1 ~~meeting its restricted class and other employees of the labor organization~~
2 ~~and their families on the labor organization's premises or at any meeting,~~
3 ~~convention or other function of the labor organization.~~
4 ~~(i) The candidate's representative or party representative (other than~~
5 ~~an official, member or employee of a labor organization) or the~~
6 ~~candidate, may ask for contributions to his or her campaign or~~
7 ~~party, or ask that contributions to the separate segregated fund of~~
8 ~~the labor organization be designated for his or her campaign or~~
9 ~~party. The candidate, candidate's representative or party~~
10 ~~representative shall not accept contributions before, during or after~~
11 ~~the appearance while at the meeting, convention or other function~~
12 ~~of the labor organization, but may leave campaign materials or~~
13 ~~envelopes for members of the audience. No official, member, or~~
14 ~~employee of a labor organization or its separate segregated fund~~
15 ~~shall, either orally or in writing, solicit or direct or control~~
16 ~~contributions by members of the audience to any candidate or party~~
17 ~~representative under this section, and shall not facilitate the making~~
18 ~~of contributions to any such candidate or party. See 11 CFR~~
19 ~~114.2(f).~~
20 ~~(ii) A labor organization or its separate segregated fund shall not, in~~
21 ~~conjunction with any candidate or party representative appearance~~
22 ~~under this section, expressly advocate the election or defeat of any~~

~~clearly identified candidate(s), and shall not promote or encourage express advocacy by its members or employees.~~

(c) Communications by a corporation or labor organization to the general public.

(1) General. A corporation or labor organization may make independent expenditures or electioneering communications pursuant to 11 CFR 114.16. This section addresses specific ~~the~~ communications, described in paragraphs (c)(2) through (c)(~~5~~7) of this section, a corporation or labor organization may make to the general public. The general public includes anyone who is not in the corporation's or labor organization's restricted class. The corporation or labor organization must not act in cooperation, consultation, or concert with or at the request or suggestion of any candidates, candidates' committees or agents, or political party committee or party committee's agent regarding the preparation, contents and distribution of any of the communications described in paragraphs (2) through (7) below. ~~The provisions of paragraph (c) of this section shall not prevent a qualified nonprofit corporation under 11 CFR 114.10(c) from including express advocacy in any communication made to the general public under paragraphs (c)(2) through (c)(5)(i) of this section.~~

(2) Voter registration and get-out-the-vote~~voting~~ communications. A corporation or labor organization may make voter registration and get-out-the vote communications to the general public.~~, provided that the communications do not expressly advocate the election or defeat of any clearly identified candidate(s) or candidates of a clearly identified political~~

~~party. The preparation and distribution or registration and get-out-the-vote communications shall not be coordinated with any candidate(s) or political party.~~ A corporation or labor organization may make communications permitted under this paragraph (c)(2) through posters, billboards, broadcasting media, newspapers, newsletter, brochures, mail, Internet communications, emails, text messages, telephone calls, or similar means of communication with the general public.

(3) Official registration and voting information.

(i) A corporation or labor organization may distribute to the general public, or reprint in whole and distribute to the general public, any registration or voting information, such as instructional materials, ~~which~~ that has been produced by the official election administrators.

(ii) A corporation or labor organization may distribute official registration-by-mail forms to the general public. A corporation or labor organization may distribute absentee ballots to the general public if permitted by the applicable State law.

(iii) A corporation or labor organization may donate funds to State or local government agencies responsible for the administration of elections to help defray the costs of printing or distributing voter registration or voting information and forms.

~~(iv) The corporation or labor organization shall not, in connection with any such distribution, expressly advocate the election or defeat of~~

1 ~~any clearly identified candidate(s) or candidates of a clearly~~
2 ~~identified political party and shall not encourage registration with~~
3 ~~any particular political party.~~
4 ~~(v) The reproduction and distribution of registration or voting~~
5 ~~information and forms shall not be coordinated with any~~
6 ~~candidate(s) or political party.~~
7 (4) Voting records. A corporation or labor organization may prepare and
8 distribute to the general public the voting records of Members of
9 Congress~~, provided that the voting record and all communications~~
10 ~~distributed with it do not expressly advocate the election or defeat of any~~
11 ~~clearly identified candidate, clearly identified group of candidates or~~
12 ~~candidates of a clearly identified political party. The decision on content~~
13 ~~and the distribution of voting records shall not be coordinated with any~~
14 ~~candidate, group of candidates or political party.~~
15 (5) Voter guides. A corporation or labor organization may prepare and
16 distribute to the general public voter guides ~~consisting of two or more~~
17 ~~candidates' positions on campaign issues~~, including voter guides obtained
18 from a nonprofit organization that is described in 26 U.S.C. 501 (c)(3) or
19 (c)(4). ~~, provided that the voter guides comply with either paragraph~~
20 ~~(c)(5)(i) or (c)(5)(ii) (A) through (E) of this section. The sponsor may~~
21 ~~include in the voter guide biographical information on each candidate,~~
22 ~~such as education, employment positions, offices held, and community~~
23 ~~involvement.~~

1 ~~(i) The corporation or labor organization must not act in cooperation,~~
2 ~~consultation, or concert with or at the request or suggestion of the~~
3 ~~candidates, the candidates' committees or agents regarding the~~
4 ~~preparation, contents and distribution of the voter guide, and no~~
5 ~~portion of the voter guide may expressly advocate the election or~~
6 ~~defeat of one or more clearly identified candidate(s) or candidates~~
7 ~~of any clearly identified political party.~~
8 ~~(ii) (A) The corporation or labor organization must not act in cooperation,~~
9 ~~consultation, or concert with or at the request or suggestion of the~~
10 ~~candidates, the candidates' committees or agents regarding the~~
11 ~~preparation, contents and distribution of the voter guide;~~
12 ~~(B) All of the candidates for a particular seat or office shall be~~
13 ~~provided an equal opportunity to respond, except that in the~~
14 ~~case of Presidential and Vice Presidential candidates the~~
15 ~~corporation or labor organization may choose to direct the~~
16 ~~questions only to those candidates who –~~
17 ~~(1) Are seeking the nomination of a particular political~~
18 ~~party in a contested primary election; or~~
19 ~~(2) Appear on the general election ballot in the state(s)~~
20 ~~where the voter guide is distributed or appear on the~~
21 ~~general election ballot in enough states to win a~~
22 ~~majority of the electoral votes;~~

1 ~~(C) No candidate may receive greater prominence in the voter~~
2 ~~guide than other participating candidates, or substantially~~
3 ~~more space for responses;~~
4 ~~(D) The voter guide and its accompanying materials shall not~~
5 ~~contain an electioneering message; and~~
6 ~~(E) The voter guide and its accompanying materials shall not~~
7 ~~score or rate the candidates' responses in such a way as to~~
8 ~~convey an electioneering message.~~
9 (6) Endorsements. A corporation or labor organization may endorse a
10 candidate, and may communicate the endorsement to its restricted class or
11 to the general public. ~~through the publications described in 11 CFR~~
12 ~~114.3(c)(1) or during a candidate appearance under 11 CFR 114.3(c)(2),~~
13 ~~provided that no more than a de minimis number of copies of the~~
14 ~~publication which includes the endorsement are circulated beyond the~~
15 ~~restricted class. The corporation or labor organization may publicly~~
16 ~~announce the endorsement and state the reasons therefore, in accordance~~
17 ~~with the conditions set forth in paragraphs (c)(6) (i) and (ii) of this section.~~
18 The Internal Revenue Code and regulations promulgated thereunder
19 should be consulted regarding restrictions or prohibitions on endorsements
20 by nonprofit corporations described in 26 U.S.C. 501(c)(3).
21 ~~(i) The public announcement of the endorsement may be made~~
22 ~~through a press release and press conference. Disbursements for~~
23 ~~the press release and press conference shall be de minimis. The~~

~~disbursements shall be considered de minimis if the press release and notice of the press conference is distributed only to the representatives of the news media that the corporation or labor organization customarily contacts when issuing non-political press releases or holding press conferences for other purposes.~~

~~(ii) The public announcement of the endorsement may not be coordinated with the candidate, the candidate's agents or the candidate's authorized committee(s).~~

(7) Candidate appearances on educational institution premises

(i) Rental of facilities at usual and normal charge. Any incorporated nonprofit educational institution exempt from Federal taxation under 26 U.S.C. 501(c)(3), such as a school, college or university, may make its facilities available to any candidate or political committee in the ordinary course of business and at the usual and normal charge. In this event, the requirements of paragraph (c)(7)(ii) of this section are not applicable.

(ii) Use of facilities at no charge or at less than the usual and normal charge. An incorporated nonprofit educational institution exempt from Federal taxation under 26 U.S.C. 501(c)(3), such as a school, college or university, may sponsor appearances by candidates, candidates' representatives or representatives of political parties at which such individuals address or meet the institution's academic

1 community or the general public (whichever is invited) on the
2 educational institution's premises at no charge or at less than the
3 usual and normal charge, if:
4 (A) The educational institution makes reasonable efforts to
5 ensure that the appearances constitute speeches, question
6 and answer sessions, or similar communications in an
7 academic setting, and makes reasonable efforts to ensure
8 that the appearances are not conducted as campaign rallies
9 or events; and
10 (B) The educational institution does not, in conjunction with
11 the appearance, expressly advocate the election or defeat of
12 any clearly identified candidate(s) or candidates of a clearly
13 identified political party, and does not favor any one
14 candidate or political party over any other in allowing such
15 appearances.
16 ~~(8) Electioneering communications. Any corporation or labor organization~~
17 ~~may make electioneering communications to the general public that are~~
18 ~~permissible under 11 CFR 114.15. Qualified nonprofit corporations, as~~
19 ~~defined in 11 CFR 114.10(c), may make electioneering communications in~~
20 ~~accordance with 11 CFR 114.10(d).~~
21 **ALTERNATIVE A for 114.4(d)**
22 (d) Voter registration and get-out-the-vote drives.

1 (1) Voter registration and get-out-the-vote drives permitted. A corporation or
2 labor organization may support or conduct voter registration and get-out-
3 the-vote drives that are aimed at employees outside its restricted class and
4 the general public ~~in accordance with the conditions set forth in~~
5 ~~paragraphs (d)(1) through (d)(6) of this section~~. The corporation or labor
6 organization must not act in cooperation, consultation, or concert with or
7 at the request or suggestion of any candidates, candidates' committees or
8 agents, or political party regarding the planning, organization, timing, or
9 administration of a voter registration or get-out-the-vote drive. Voter
10 registration and get-out-the-vote drives include providing transportation to
11 the polls or to the place of registration.
12 (2) Disbursements for certain voter registration and get-out-the-vote drives
13 not expenditures. Voter registration or get-out-the-vote drives that are
14 conducted in accordance with paragraphs (d)(2)(i) through (d)(2)(v) of this
15 section are not expenditures.
16 (i) The corporation or labor organization shall not make any
17 communication expressly advocating the election or defeat of any
18 clearly identified candidate(s) or candidates of a clearly identified
19 political party as part of the voter registration or get-out-the-vote
20 drive.
21 ~~(2) The registration or get-out-the-vote drive shall not be coordinated~~
22 ~~with any candidate(s) or political party.~~

1 (ii~~3~~) The registration drive shall not be directed primarily to individuals
2 previously registered with, or intending to register with, the
3 political party favored by the corporation or labor organization.
4 The get-out-the-vote drive shall not be directed primarily to
5 individuals currently registered with the political party favored by
6 the corporation or labor organization.
7 (iii4) These services shall be made available without regard to the
8 voter's political preference. Information and other assistance
9 regarding registering or voting, including transportation and other
10 services offered, shall not be withheld or refused on the basis of
11 support for or opposition to particular candidates or a particular
12 political party.
13 (iv~~5~~) Individuals conducting the registration or get-out-the-vote drive
14 shall not be paid on the basis of the number of individuals
15 registered or transported who support one or more particular
16 candidates or political party.
17 (v~~6~~) The corporation or labor organization shall notify those receiving
18 information or assistance of the requirements of paragraph (d)(4)
19 of this section. The notification shall be made in writing at the
20 time of the registration or get-out-the-vote drive.
21 **ALTERNATIVE B for 114.4(d)**
22 (d) Voter registration and get-out-the-vote drives. A corporation or labor
23 organization may support or conduct voter registration and get-out-the-vote drives that

are aimed at employees outside its restricted class and the general public in accordance with the conditions set forth in paragraphs (d)(1) through (d)(5) of this section. Voter registration and get-out-the-vote drives include providing transportation to the polls or to the place of registration.

~~(1) The corporation or labor organization shall not make any communication expressly advocating the election or defeat of any clearly identified candidate(s) or candidates of a clearly identified political party as part of the voter registration or get-out-the-vote drive.~~

(~~2~~1) ~~The registration or get-out-the-vote drive shall not be coordinated with any candidate(s) or political party.~~ The corporation or labor organization must not act in cooperation, consultation, or concert with or at the request or suggestion of any candidates, candidates' committees or agents, or political party regarding the planning, organization, timing, or administration of a voter registration or get-out-the-vote drive.

(~~3~~2) The registration drive shall not be directed primarily to individuals previously registered with, or intending to register with, the political party favored by the corporation or labor organization. The get-out-the-vote drive shall not be directed primarily to individuals currently registered with the political party favored by the corporation or labor organization.

(43) These services shall be made available without regard to the voter's political preference. Information and other assistance regarding registering or voting, including transportation and other services offered,

shall not be withheld or refused on the basis of support for or opposition to particular candidates or a particular political party.

(~~5~~4) Individuals conducting the registration or get-out-the-vote drive shall not be paid on the basis of the number of individuals registered or transported who support one or more particular candidates or political party.

(~~6~~5) The corporation or labor organization shall notify those receiving information or assistance of the requirements of paragraph (d)(43) of this section. The notification shall be made in writing at the time of the registration or get-out-the-vote drive.

9. Section 114.10 is removed and reserved.

§ 114.10 [Removed and reserved].

13. Section 114.14 is removed and reserved.

§ 114.14 [Removed and reserved].

14. Section 114.15 is removed and reserved.

§ 114.15 [Removed and reserved].

15. Section 114.16 is added to read as follows:

Section 114.16 is added to read as follows:

§ 114.16 Independent expenditures and electioneering communications made by corporations and labor organizations.

(a) General. Corporations and labor organizations may make independent expenditures, as defined in 11 CFR 100.16, and electioneering communications, as defined in 11 CFR 100.29.

(b) Reporting independent expenditures and electioneering communications.

1 (1) Corporations and labor organizations that make independent expenditures
2 aggregating in excess of $250 with respect to a given election in a
3 calendar year shall file reports as required by 11 CFR 104.4(a) and
4 109.10(b).
5 (2) Corporations and labor organizations that make electioneering
6 communications aggregating in excess of $10,000 in a calendar year shall
7 file the statements required by 11 CFR 104.20(b).
8 (c) Solicitation; disclosure of use of contributions for political purposes. Whenever
9 a corporation or labor organization solicits donations that may be used for
10 political purposes, the solicitation shall inform potential donors that their
11 donations may be used for political purposes, such as supporting or opposing
12 candidates.
13 (d) Non-authorization notice. Corporations or labor organizations making
14 independent expenditures or electioneering communications under this section
15 shall comply with the requirements of 11 CFR 110.11.
16 (e) Segregated bank account. A corporation or labor organization may, but is not
17 required to, establish a segregated bank account into which it deposits only funds
18 donated or otherwise provided by individuals, as described in 11 CFR part 104,
19 from which it makes disbursements for electioneering communications.
20 (f) Activities prohibited by the Internal Revenue Code. Nothing in this section shall
21 be construed to authorize any organization exempt from taxation under 26 U.S.C.
22 501(a) to carry out any activity that it is prohibited from undertaking by the
23 Internal Revenue Code, 26 U.S.C. 501, et seq.

On behalf of the Commission,

_____

Cynthia L. Bauerly
Chair
Federal Election Commission

DATED: _____
BILLING CODE: 6715-01-P