AGENDA ITEM

June 9, 2011

For Meeting of 6-15-11

MEMORANDUM

TO: The Commission

FROM: Vice Chair Caroline C. Hunter

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


Attachment
FEDERAL ELECTION COMMISSION

11 CFR Part 114

[Notice 2011 – XX]

Independent Expenditures and Electioneering Communications

by Corporations and Labor Organizations

AGENCY: Federal Election Commission.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: The Federal Election Commission seeks comments on proposed changes to its rules regarding corporate and labor organization funding of expenditures, independent expenditures and electioneering communications. These and other proposed changes are in response to the decision of the Supreme Court in Citizens United v. FEC. The Commission has made no final decision on the issues presented in this rulemaking.

DATES: Comments must be received on or before August 15, 2011. Reply comments must be limited to the issues raised in the initial comments and must be received on or before August 25, 2011. The Commission will hold a hearing on these proposed rules and any modifications or amendments thereto that may be proposed, and will announce the date of 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 either 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 a paper copy follow-up. Paper comments and a paper
copy follow-up of faxed comments should 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 the commenter 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.
FOR FURTHER INFORMATION

CONTACT: Mr. Robert M. Knop, Assistant General Counsel, or Attorneys Ms. Esther D. Heiden, Ms. Cheryl A.F. Hemsley, Mr. Phillip A. Olaya or Ms. Joanna S. Waldstreicher, 999 E Street, NW., Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

SUPPLEMENTARY INFORMATION:

The Federal Election Campaign Act of 1971\(^1\) ("the Act"), as amended, prohibits corporations and labor organizations from using general treasury funds to make expenditures in connection with Federal elections. 2 U.S.C. 441b. Expenditure is defined as "(i) any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office; and (ii) a written contract, promise, or agreement to make an expenditure," 2 U.S.C. 431(9)(A); see also 11 CFR 100.111. The prohibition noted above includes “independent expenditures,” which are expenditures expressly advocating the election or defeat of a clearly identified candidate that are not made in concert or cooperation with, or at the request or suggestion of, the clearly identified candidate, the candidate’s authorized political committee, or their agents, or a political party committee and its agents. 2 U.S.C. 431(17); 11 CFR 100.16(a). The Bipartisan Campaign Reform Act of 2002 ("BCRA") amended the Act in part to also prohibit corporations and labor organizations from using general treasury funds to make electioneering communications. 2 U.S.C. 441b. Generally, electioneering communications are broadcast, cable, or

\(^{1}\) 2 U.S.C. 431 et seq.
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satellite communications that refer to a clearly identified candidate for Federal office, are
publicly distributed within sixty days before a general election or thirty days before a
primary election, and are targeted to the relevant electorate. See 2 U.S.C. 434(f)(3)(A)(i)
and (f)(3)(C); 11 CFR 100.29(a)(1)-(3). The Commission’s regulations prohibiting
independent expenditures and electioneering communications by corporations and labor
organizations are found at 11 CFR part 114. The Act and Commission regulations
further require the reporting of independent expenditures and electioneering
communications. See 2 U.S.C. 434(f); 11 CFR 104.20 and 109.10. Finally, the Act and
Commission regulations require communications expressly advocating the election or
defeat of a clearly identified candidate, as well as electioneering communications, to
include statements disclosing who paid for the communication, and whether the
communication was authorized by a Federal candidate or a Federal candidate’s
authorized political committee or its agents. 2 U.S.C. 441d(a); 11 CFR 110.11.

In Citizens United v. FEC, the Supreme Court held that the two statutory
provisions prohibiting corporations from making independent expenditures and
electioneering communications violate the First Amendment.

558 U.S. __, 130 S. Ct. 876 (2010). At the same time, the Supreme Court affirmed the
validity of the Act’s reporting and disclaimer requirements for independent expenditures
and electioneering communications at 2 U.S.C. 434(f) and 441d(a)(3) and (d)(2).

Citizens United, 130 S. Ct. at 913-16.

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2 Based on this decision, the James Madison Center for Free Speech filed a Petition for Rulemaking urging
the Commission to adopt regulations that conform to the decision in Citizens United and to remove 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.
The Commission seeks comment on: (1) eliminating the prohibitions in 11 CFR 114.2 and 114.14 on using corporate and labor organization general treasury funds to finance expenditures, independent expenditures and electioneering communications; (2) eliminating 11 CFR 114.15, which permits corporations and labor organizations to make electioneering communications that are not the functional equivalent of express advocacy; (3) eliminating the prohibitions in 11 CFR 114.3 and 114.4 regarding express advocacy in communications to the general public and revising the standards for voter registration and get-out-the-vote ("GOTV") drives; and (4) revising the Commission’s corporate facilitation rules in 114.2(f).

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. See Advisory Opinion 2010-11 (Commonsense Ten) at 3 n.3. 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 discussed 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 were unconstitutional. 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. Citizens United also overruled the part of the Court's decision upholding BCRA section 203's prohibition on corporate electioneering communications in McConnell v. FEC, 540 U.S. 93, 204-06 (2003) ("McConnell").

A. Before BCRA

The Act and Commission regulations prohibit corporations and labor organizations from using general treasury funds to make expenditures, including independent expenditures. 2 U.S.C. 441b(a) and (b)(2); 11 CFR 114.2(b)(2). A corporation or labor organization, however, may establish a separate segregated fund ("SSF"). 2 U.S.C. 441b(b)(2)(C); see also 11 CFR 114.5. The funds for a corporation's or labor organization's SSF can only be solicited from those within the corporation's or labor organization's restricted class (i.e., a corporation's executive and administrative personnel, stockholders, and the families of these groups, or a labor organization's members, executive or administrative personnel, and the families of both groups). See also 11 CFR 114.5(f) (establishing that SSFs are subject to the contribution limits for political committees). These SSF funds can then be contributed directly to candidates for federal office and other political committees, and may be used without limitation to pay for independent expenditures to communicate to the general public the corporation's or labor organization's views on such candidates.

In FEC v. Massachusetts Citizens For Life, Inc. ("MCFL"), the Supreme Court held that incorporated advocacy organizations possessing certain characteristics could not constitutionally be barred from using corporate funds to make independent expenditures.
479 U.S. 238 (1986). Specifically, the MCFL Court held unconstitutional the Act’s financing restrictions on corporate independent expenditures as applied to non-profit corporations that (a) were formed for the sole purpose of promoting political ideas, (b) did not engage in business activities, and (c) did not accept contributions from for-profit corporations or labor organizations. *Id.* at 263-64.

In *Austin*, the Supreme Court upheld prohibitions on the use of general treasury funds for communications that support or oppose any candidate for state office by corporations and labor organizations, relying on the government’s “anti-distortion interest.” 494 U.S. at 659. The Supreme Court based this holding on a compelling governmental interest in preventing “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas.” *Id.*

**B. Impact of BCRA**

When enacting section 203 of BCRA, Congress extended the Act’s restrictions on the use of general treasury funds for corporate and labor organization expenditures (including independent expenditures) under 2 U.S.C. 441b to electioneering communications. 2 U.S.C. 441b(b)(2); see also 2 U.S.C. 434(f)(3). The Commission implemented the electioneering communications provisions of BCRA by modifying sections 104.3, 114.2 and 114.10, and promulgating new regulations at 11 CFR 100.29 and 114.14. *See Explanation and Justification for Final Rules on Electioneering Communications, 67 FR 65190* (Oct. 22, 2002). In response to a *facial* challenge to the corporate-funding restrictions, reporting obligations, and disclaimer requirements
applicable to electioneering communications, the Supreme Court upheld BCRA’s
electioneering communication provisions at 2 U.S.C. 434(f), 441b, and 441d. See
McCunnell, 540 U.S. at 194, 201-02, 207-08. Specifically, the Supreme Court held that
the prohibition on the use of general treasury funds by corporations and labor
organizations to pay for electioneering communications in 2 U.S.C. 441b(b)(2) was not
unconstitutional, “to the extent that the issue ads broadcast during the 30- and 60-day
periods preceding federal primary and general elections are the functional equivalent of
express advocacy.” Id. at 206.

Subsequently, in Wisconsin Right to Life, Inc. v. FEC, 546 U.S. 410, 411-12
(2006) ("WRTL I"), the Supreme Court concluded that McConnell did not preclude as-applied challenges to the prohibitions on corporate and labor organization funding of
electioneering communications at 2 U.S.C. 441b. The Supreme Court thereafter
reviewed an as-applied challenge brought by a non-profit corporation seeking to use its
own general treasury funds, which included donations it had received from other
corporations, to pay for broadcast advertisements referring to Senator Feingold and
Senator Kohl during the electioneering communications window before the 2004 general
election in which Senator Feingold, but not Senator Kohl, was on the ballot. See FEC v.
that these communications were genuine issue ads run as part of a grassroots lobbying
campaign on the issue of Senate filibusters of judicial nominations. Id. at 457-61. The
WRTL II Court stated that BCRA’s prohibitions on corporate expenditures may be
applied constitutionally to either express advocacy, or, within the blackout periods, to its
functional equivalent. Id. at 465. The Court held that a communication is the “functional
equivalent of express advocacy” only if it is “susceptible of no reasonable interpretation
other than as an appeal to vote for or against a specific candidate.” Id. at 469. Applying
that standard, the Supreme Court held that section 441b(b)(2) was unconstitutional as
applied to the plaintiff’s advertisements because the advertisements were not the
“functional equivalent of express advocacy.” Id. at 476, 480-81. The Commission
adopted the regulation at 11 CFR 114.15 in response to the Supreme Court’s ruling in
WRTL II.

C. Citizens United

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

Citizens United filed suit seeking a preliminary injunction, arguing that the ban on
corporate electioneering communications at 2 U.S.C. 441b(b)(2) was unconstitutional as
applied to payments to make the film available through video-on-demand and that the
disclosure and disclaimer requirements at 2 U.S.C. 434(f) and 441d were unconstitutional
as applied to payments for the film and for three advertisements for the movie. The
District Court denied Citizens United a preliminary injunction and granted the
In *Citizens United*, the Supreme Court invalidated section 441b’s restrictions on corporate independent expenditures and electioneering communications. *Id.* at 913. The Supreme Court determined that the prohibition on corporate independent expenditures and electioneering communications is a ban on speech, and stated that “political speech must prevail against laws that would suppress it, whether by design or inadvertence.” *Id.* at 898.

In overruling *Austin*, the Supreme Court concluded the anti-distortion rationale used to warrant restrictions on corporate speech “interferes with the ‘open marketplace of ideas’ protected by the First Amendment.” *Id.* at 906. Moreover, “[a]ll speakers, including individuals and the media, use money amassed from the economic marketplace to fund their speech, and the First Amendment protects the resulting speech.” *Id.* at 905. Accordingly, the Supreme Court held that “the rule that political speech cannot be limited based on a speaker’s wealth is a necessary consequence of the premise that the First Amendment generally prohibits the suppression of political speech based on the speaker’s identity.” *Id.*

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

Citizens United also challenged the Act’s disclaimer and disclosure provisions at 434(f) and 441d as applied to the film and three advertisements for the film. Under the Act, electioneering communications must include a statement identifying the person responsible for payment for the advertisement. 2 U.S.C. 441d(a). Also, any person who spends more than $10,000 on electioneering communications within a calendar year must file a disclosure statement with the Commission identifying the person making the electioneering communication, the election to which the communication pertains, and the names of contributors who gave $1000 or more within a specified time period. 2 U.S.C. 434(f)(2). The Supreme Court rejected that challenge, noting that “transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages” Citizens United, 130 S. Ct. at 913-16. The Court found that disclaimer and disclosure requirements impose no ceiling on campaign activities, do not prevent anyone from speaking, and advance the public’s “interest in knowing who is speaking about a candidate shortly before an election.” Id. at 914-15. The Court also noted that “prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters.” Id. at 916.

II. Proposed 11 CFR 104.20 – Reporting electioneering communications

BCRA established reporting requirements for persons making disbursements for electioneering communications. See 2 U.S.C. 434(f). Specifically, every person who
makes a disbursement for the cost of electioneering communications aggregating in excess of $10,000 in a calendar year must file a reporting statement. 2 U.S.C. 434(f)(1). These statements must include, among other things: (1) the identification of the person making the disbursement for the electioneering communication, as well as the identification of any person sharing or exercising direction or control over the activities of such person, (2) if the person is not an individual, the principal place of business of the person, (3) the amount of each disbursement over $200 for the electioneering communication, and (4) all identified candidates referred to in the electioneering communication as well as the election in which those candidates are running for office. 2 U.S.C. 434(f)(2)(A)-(D). If the disbursements were paid out of a segregated bank account, the statements must also include the names and addresses of those contributors who gave $1,000 or more to that account “during the period beginning on the first day of the preceding calendar year and ending on the disclosure date.” 2 U.S.C. 434(f)(2)(E). Alternatively, if the disbursements were not paid out of a segregated bank account, the statements must include the names and addresses of those contributors who gave $1,000 or more to the person making the disbursement for the electioneering communication during that period. 2 U.S.C. 434(f)(2)(F).

The Commission originally promulgated 11 CFR 104.20 in 2002 to implement BCRA. In 2007, however, the Supreme Court in WRTL exempted electioneering communications that do not include the functional equivalent of express advocacy from the general prohibition on corporate funding of electioneering communications. In response to WRTL, the Commission revised its electioneering communications regulations as well as the electioneering communications reporting provision at 11 CFR

In Citizens United, the Court invalidated altogether the statutory prohibition on the making of electioneering communications by corporations and labor organizations. Citizens United, 130 S. Ct. at 916. Accordingly, corporations and labor organizations making electioneering communications are no longer subject to the restrictions in 11 CFR 114.15. For this reason, as discussed below in Section IX, the Commission is proposing to remove that regulation. Because 11 CFR 114.15 itself is no longer enforceable, the Commission intends to eliminate references to that provision in 11 CFR 104.20 and seeks comment on how to clarify the reporting requirements for electioneering communications. With respect to implementing changes to these provisions of the Commission’s regulations, the Commission requests comment on the clarity of current reporting obligations. Are the Commission’s forms for reporting these activities clear or should they be amended to provide for these changes?

A. 11 CFR 104.20(c) – Contents of electioneering communication disclosure statements

Current section 104.20(c) specifies the contents of reports filed by all persons when they make electioneering communications. The information that must be reported

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3 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).
depends on who is making disbursements for electioneering communications and how
that person pays for them. See 11 CFR 104.20 (c)(1)-(9).  

Current paragraph (c)(2) implements the statutory requirement to report the
identification of any “person sharing or exercising direction or control” over the activities
of the person who made any disbursements or who executed any contracts to make
disbursements for an electioneering communication. See 2 U.S.C. 434(f)(2)(A). The
term “persons sharing or exercising direction or control” is defined in the regulations at
11 CFR 104.20(a)(3).

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

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4 Paragraphs (c)(7)(i) and (c)(8) were promulgated as 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.
calendar year. Current paragraph (c)(7)(ii) differs from current paragraph (c)(7)(i) in that
the segregated bank account is not limited to donations solely from individuals.

Current paragraph (c)(8) requires the reporting of the name and address of each
person who donated an amount aggregating $1,000 or more within a certain time frame to
the person making the electioneering communication if (1) the electioneering
communication was not funded exclusively by one of these segregated bank accounts
described in paragraph (c)(7), and (2) was not made by a corporation or labor
organization pursuant to 11 CFR 114.15.

For electioneering communications made by corporations and labor organizations
pursuant to 11 CFR 114.15, the rules at 11 CFR 104.20(c)(9) currently specify that
information about donors must be reported only if the donations aggregating to $1,000 or
more were “made for the purpose of furthering electioneering communications.” 11 CFR
104.20(c)(9). This requirement was intended to provide the “public with information
about those persons who actually support the message conveyed by the [electioneering
communications] without imposing on corporations and labor organizations the
significant burden of disclosing the identities of the vast numbers of customers, investors,
or members, who have provided funds for purposes entirely unrelated to the making of
[electioneering communications].” 2007 EC E&J, 72 FR at 72911.

B. Electioneering Communications Reporting

The Commission intends to remove references to current 11 CFR 114.15 and
otherwise preserve the Commission’s existing rules at 11 CFR 104.20(c)(7) regarding the
use of segregated bank accounts. Removing the references to 11 CFR 114.15 would
therefore allow persons making electioneering communications to accept corporate and
labor funding in a segregated bank account under paragraph (c)(7)(ii). This change would be consistent with the Commission’s proposal to remove 11 CFR 114.15 itself from the regulations.

The Commission intends to remove the references to 11 CFR 114.15 in paragraphs (c)(8) and (c)(9) to reflect that corporations and labor organizations may now make electioneering communications that contain express advocacy or its functional equivalent.

III. 11 CFR 109.10 – Reporting independent expenditures

As explained in Section IV below, to comply with Citizens United the Commission proposes to revise 11 CFR 114.2(b)(2)(i) and (ii) to permit corporations and labor organizations to make independent expenditures from their general treasury funds. With respect to implementing changes to these provisions of the Commission’s regulations, the Commission requests comment on the clarity of current reporting obligations. Are the Commission’s forms for reporting these activities clear or should they be amended to provide for these changes?

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

Commission regulations implementing the statutory provisions invalidated by Citizens United are no longer valid. These regulations include portions of current 11 CFR part 114, which concern corporate and labor organization activity. In this rulemaking, the Commission proposes to amend 11 CFR 114.2, 114.3, and 114.4, to delete 11 CFR 114.10, 114.14, and 114.15, and to add a new 11 CFR 114.16. The Commission also seeks comment on whether to revise 11 CFR 114.2(f).
The Commission’s proposed changes to 11 CFR part 114 seek to comply with Citizens United by (1) modifying specific language within sections of part 114 that prohibit corporations and labor organizations from using general treasury funds to finance independent expenditures and electioneering communications and (2) removing language that is superfluous given the permissible uses of general treasury funds under Citizens United. Because Citizens United left intact the ban on corporate and labor organization contributions under 2 U.S.C. 441b, the Commission does not propose to change the provisions in 11 CFR part 114 that implement the contribution ban.

Among the Commission’s proposals to comply with Citizens United are alternatives for modifying current 11 CFR 114.2(b)(2)(i), which prohibits corporations and labor organizations from making expenditures, including independent expenditures. The Commission proposes to modify 11 CFR 114.2(b)(2)(i) in one of two ways: (1) narrow the prohibition to allow all expenditures except those that are coordinated with a candidate or a political party committee, including coordinated communications, or (2) narrow the prohibition to allow only communications that are not coordinated with a candidate or a political party committee, while continuing to prohibit non-expressive expenditures. These alternative approaches extend to specific applications of the expenditure prohibition to voter registration and get-out-the-vote (“GOTV”) drives, discussed below in the proposed changes to section 114.3 (with respect to the restricted class) and section 114.4 (with respect to the general public).

While the Commission proposes to retain the reporting requirements currently at 11 CFR 114.3(b), which requires corporations and labor organizations to report disbursements for communications containing express advocacy made to the restricted
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class, it recognizes that a communication containing express advocacy may now be made
both to the general public and the restricted class, thereby triggering different thresholds
for reporting obligations. With respect to 11 CFR 114.4, the Commission proposes to
eliminate the prohibition on making express advocacy communications to those outside
the restricted class, but would maintain the restrictions on coordinating with candidates
and political parties when making communications to those outside the restricted class.
Additionally, the Commission proposes to create a new 11 CFR 114.16 that incorporates
certain provisions of 11 CFR 114.10. These provisions would state that corporations and
labor organizations may make independent expenditures and electioneering
communications. These provisions would reference other Commission regulations that
now apply to corporations and labor organizations that make such independent
expenditures or electioneering communications, including references to the reporting
requirements for independent expenditures and electioneering communications under
11 CFR 104.4(a), 109.10(b), and 104.20(b), and the disclaimer provisions of 11 CFR
110.11. Finally, the Commission proposes to remove 11 CFR 114.10, 114.14, and
114.15, which implement exceptions to the general prohibition against corporate and
labor organization funding of independent expenditures and electioneering
communications, since, given the holding in Citizens United, exceptions to a prohibition
that no longer exists are no longer necessary.

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

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

\textbf{A. 11 CFR 114.2(b)(2)(i) – Prohibition on Corporate and Labor Organization Expenditures}

Current 11 CFR 114.2(b)(2)(i) generally prohibits corporations and labor organizations from making an “expenditure,” as defined in 11 CFR part 100, subpart D.

\(^5\) 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).

\(^6\) 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.”

\(^7\) See the discussion above regarding the applicability of the \textit{Citizens United} holding to labor organizations.
With certain exceptions, this prohibition applies to all expenditures whether they are independent, coordinated, or any other form of expenditure, including in-kind contributions. The Commission is considering two alternatives for revising 11 CFR 114.2(b)(2)(i). Both alternatives would permit corporations and labor organizations to make expenditures from their general treasury funds for communications that are not coordinated with a candidate or political party, and both alternatives would maintain the prohibition on corporate and labor organization expenditures for all activities that are coordinated with a candidate or political party as defined in 11 CFR 109.20 or 109.21.

The alternatives differ in that Alternative A would permit corporations and labor organizations to make all expenditures from their general treasuries for non-coordinated activities, while Alternative B would maintain the prohibition on non-expressive expenditures by corporations and labor organizations regardless of whether they are coordinated with a candidate or political party. The Commission invites comment on which, if either, of the two proposals would better implement Citizens United and why.

**Alternative A – Permit Corporations and Labor Organizations to Make Expenditures Except for Coordinated Expenditures and Coordinated Communications**

The Court in *Citizens United* stated that “by definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate.” *Citizens United*, 130 S. Ct. at 910. Alternative A would therefore comply with the Court’s holding by eliminating the existing broad prohibition on 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).
labor organization expenditures from general treasury funds, and replace it with a regulation specifically prohibiting only expenditures that are coordinated with a candidate or a political party committee, and coordinated communications.

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

The Commission also seeks comment on whether Alternative A should distinguish between expenditures for communications and other types of non-coordinated expenditures. Expenditures for all communications by corporations and labor organizations would be permitted under Alternative A so long as they are not coordinated with candidates or political parties. This would include both communications that contain express advocacy, which is one component of the statutory and regulatory definition of an “independent expenditure” (e.g., a television advertisement that urges its audience to vote for a clearly identified Senate candidate who is running for election in the state where the ad is aired), and those that do not contain express advocacy (e.g., a mass mailing that exhorts readers to vote for unspecified candidates who support a particular cause). Does the rationale of *Citizens United* apply equally to both of these types of communications?

Expenditures that are not for communications would also be permitted under Alternative A as long as these expenditures are not in-kind contributions or coordinated with candidates or political party committees. Examples would include payment for
transportation of volunteers to campaign events, certain payments for expenses of voter registration drives, or costs to use a venue for a rally or event not coordinated with a candidate or political party. Should such expenditures by corporations and labor organizations continue to be prohibited on the ground that, under Citizens United, the First Amendment does not protect them and therefore the statutory prohibition still applies? On the other hand, do expenditures, by definition, have an expressive element, i.e., because expenditures are made “for the purpose of influencing a Federal election”? Should expenditures such as those described above therefore be permitted on the grounds that, under Citizens United, the First Amendment protects, and the government has no compelling interest in prohibiting, any corporate or labor organization expenditure that is not coordinated with a candidate or political party and does not constitute an in-kind contribution? Did Citizens United reach this question?

For example, how should the Commission treat corporate or labor organization expenditures for transporting voters to polling places as part of a get-out-the-vote campaign supporting or opposing a specific candidate, when not coordinated with any candidate or political party? Such expenses might include the driver’s salary, vehicle rental, and fuel, and if workers were brought in from another geographical area to assist in the efforts, the corporation or labor organization might also be paying for their travel, lodging, and food costs. These payments would be permitted under Alternative A.

In WRTL II, the Court explained, “Prior to BCRA, corporations were free under federal law to use independent expenditures to engage in political speech so long as that speech did not expressly advocate the election or defeat of a clearly identified candidate.” WRTL II at 457. Given this recognition by the Court in WRTL II, can Citizens United
now be read to restrict corporate and labor organization independent political spending outside of statutorily defined “independent expenditures”? In Citizens United, the Court described the statute at issue as an “expenditure ban,” 130 S. Ct. at 891, and a “prohibition on corporate expenditures”. Id. at 894. The Court further described the statute at issue in Austin as a “corporate expenditure restriction[.]” Id. at 903. In light of this language, the Court’s description of the state of the law in 2007 aside, does Alternative A’s removal of the ban on corporate and labor organization expenditures reflect the Court’s holding and rationale? See also EMILY’s List v. FEC, 581 F. 3d 1, 12 (D.C. Cir. 2009) (“But non-profit entities are entitled to make their expenditures-such as advertisements, get-out-the-vote efforts, and voter registration drives-out of a soft-money or general treasury account that is not subject to source and amount limits.”).

In Buckley v. Valeo, 424 U.S. 1 (1976), the Court reasoned that expenditure limitations cannot be sustained because spending limits “impose direct quantity restrictions” on political communication and association by persons and groups. A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs. Speeches and rallies generally necessitate hiring a hall and publicizing the
The electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech.

424 U.S. at 18-19.

The Court explained, "Being free to engage in unlimited political expression subject to a ceiling on expenditures is like being free to drive an automobile as far and as often as one desires on a single tank of gasoline." Id. at 19 n.18. If the Commission were to exclude only independent expenditures from the ban on corporate and labor organization expenditures, would the Commission be sustaining an expenditure ban?

The Commission seeks comments on the approach taken in this alternative.

Alternative B - Permit Corporations and Labor Organizations to Make Independent Expenditures but not Coordinated Communications or Non-Communicative Expenditures

Alternative B would implement Citizens United by amending the prohibition on corporate and labor organization expenditures to permit those entities to make independent expenditures from their general treasury funds for non-coordinated communications, but would continue to prohibit coordinated communications and non-communicative expenditures, including in-kind contributions.

Alternative B proposes to distinguish between expenditures for communications and other types of expenditures. As noted above, the Court in Citizens United stated that "[b]y definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate." Citizens United, 130 S. Ct. at 910. This
language indicates that the rationale of *Citizens United* applies to corporate and labor organization speech, but may not apply to non-communicative activity. Indeed, the definition of expenditure, which includes “any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office,” 2 U.S.C. 431(9)(A), covers non-communicative activity. The Commission is therefore proposing Alternative B to clearly distinguish between permissible independent expenditures for speech on the one hand, and types of non-speech and coordinated expenditures that would continue to be prohibited, on the other. Alternative B would apply the Court’s reasoning to communications generally, but would not apply to other types of expenditures under a reading of *Citizens United* that the Court addressed only electioneering communications and independent expenditures in the form of speech.

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

The Supreme Court has long distinguished between government restrictions on pure speech and government restrictions on conduct, including expressive conduct. See, e.g., Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991); Spence v. Washington, 418 U.S. 405 (1974); United States v. O’Brien, 391 U.S. 367 (1968). While restrictions on pure speech are subject to strict scrutiny by the courts, a “sufficiently important governmental interest in regulating the nonspeech element can justify incidental limits on First Amendment freedoms.” Barnes, 501 U.S. at 567 (quoting O’Brien, 391 U.S. at 376).

One Federal court has applied the distinction between speech and conduct to the expenditure rules administered by the Commission. In FEC v. Christian Coalition, the court considered regulations regarding the coordination of expenditures with campaigns. 52 F. Supp. 2d 45 (D.D.C. 1999). The court stated that “the First Amendment requires different treatment for ‘expressive,’ ‘communicative’ or ‘speech-laden’ coordinated expenditures, which feature the speech of the spender, from coordinated expenditures on non-communicative materials, such as hamburgers or travel expenses for campaign staff.” Id. at 85 n.45. The court limited its analysis to “expressive coordinated expenditures” because “[t]he interest-balancing process may well yield different results for non-expressive coordinated expenditures.” Id. at 91. The Commission’s rules on
coordination also distinguish between communications and “expenditures that are not
made for communications.” Explanation and Justification for Final Rules on Coordinated
and Independent Expenditures, 68 FR 421, 425 (Jan. 3, 2003); see also Statement of
Reasons of Vice Chairman David M. Mason and Commissioner Hans A. von Spakovsky,
MUR 5564, Alaska Democratic Party, at 7 (acknowledging that the Explanation and
Justification for 11 CFR 109.20 “does limit Section 109.20 to expenditures that are not
communications” and therefore “presents the difficult task of determining what is and
what is not a communication”).

“Independent expenditure” is a term that is defined in the Act and the
Commission’s regulations. Congress crafted the statutory definition of “independent
expenditure” to reflect the Court’s decision in Buckley. See H.R. Doc. No. 94-917, at 5
(1976). In Buckley, the Court construed the provision “expenditures . . . relative to a
clearly identified candidate” as “expenditures for communications that in express terms
advocate the election or defeat of a clearly identified candidate for federal office.”9
424 U.S. at 44 (emphasis added); see also id. at 80.

Indeed, the Citizens United Court, in the language quoted above, explicitly
referred to the “definition” of “independent expenditure.” The statute defines
“independent expenditure” as “an expenditure by a person . . . expressly advocating the
election or defeat of a clearly identified candidate.” 2 U.S.C. 431(17). The statute’s use
of the phrase “expressly advocating” underscores that the definition of independent
expenditure is limited to communications. In short, although other activities may indicate
support for a candidate, only communications can “expressly advocate.” The

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9 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.
Commission seeks comment on whether a court has ever afforded an expenditure other than a communication the same level of protection as an “independent expenditure.”

Furthermore, the Commission has, as a historical matter, consistently understood the statutory definition of “independent expenditure” to apply only to communications. The Commission’s current regulation defines “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) (emphasis added). See also 11 CFR 100.22 (“Expressly advocating means any communication that . . .”) (emphasis added).

The Commission included this language in the original regulation implementing the Act. 41 FR 35947 (Aug. 25, 1976). The Explanation and Justification for this regulation explained that the definition parallels the statute “with additional language from Buckley v. Valeo requiring that the expenditure be communicative in nature.” Explanation and Justification for Final Rules on Part 114, H.R. DOC. NO. 95-44, at 54 (1977).

As noted above, Citizens United concerned electioneering communications and independent expenditures in the form of “political speech”. The Court did not address conduct. Accordingly, the Commission seeks comment as to whether the decision in Citizens United should be read to apply to non-communicative activities.

Under proposed Alternative B, corporations and labor organizations would be permitted to make expenditures from general treasury funds solely for the type of activity described by the Supreme Court: “political speech presented to the electorate that is not coordinated with a candidate.” Under this proposed alternative, coordinated communications as well as all non-communicative expenditures would continue to be
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prohibited, on the grounds that the holding in **Citizens United** did not extend to non-
speech expenditures, which were not before the Court.

The Commission seeks comment on whether Alternative B is consistent with the
**Citizens United** decision. Does the proposal eliminate too much or too little of the
statutory prohibition on corporate and labor organization expenditures? Is Alternative B
specific enough as to the types of expenditures corporations and labor organizations may
constitutionally make, according to **Citizens United**? Does the Act contemplate the
proposed distinction between speech and non-speech expenditures? Does **Citizens
United** or other Supreme Court precedent permit or require this distinction? Would
sustaining a ban on non-speech expenditures further the government’s interest in
preventing corruption or the appearance of corruption? The Commission also seeks
comment on whether Alternative B should be modified to preserve more of the existing
rules.

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

Currently, 11 CFR 114.2(b)(2)(ii) prohibits corporations and labor organizations
from “making expenditures with respect to a Federal election . . . for communications to
those outside their 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.” Because the Supreme Court held in **Citizens United** that corporations and labor
organizations may constitutionally make expenditures for communications containing
express advocacy to those not in their restricted classes, the Commission proposes to remove paragraph (b)(2)(ii).

Currently, 11 CFR 114.2(b)(3) prohibits corporations and labor organizations from making payments for electioneering communications to those outside their restricted classes unless permissible under 11 CFR 114.10 or 114.15. This provision does not apply to State party committees and State candidate committees that incorporate under 26 U.S.C. 527(e)(1), provided that (1) the committee is not a political committee as defined in 11 CFR 100.5; (2) the committee incorporated for liability purposes only; (3) the committee does not use any funds donated by corporations or labor organizations to make electioneering communications; and (4) the committee complies with the reporting requirements for electioneering communications at 11 CFR part 104.

Because the Supreme Court held in Citizens United that corporations may make electioneering communications, including to audiences outside their restricted classes, the Commission proposes to remove paragraph (b)(3) of section 114.2.

C. 11 CFR 114.2(f) – Facilitating the making of contributions

The Act and Commission regulations prohibit corporations and labor organizations from making contributions to candidates or political committees in connection with a Federal election. 2 U.S.C. 441b(a); 11 CFR 114.2(b)(1). Corporations and labor organizations are also generally prohibited from facilitating the making of contributions to candidates or political committees. 11 CFR 114.2(f)(1). Facilitation means “using corporate or labor organization resources or facilities to engage in fundraising activities in connection with any Federal election.” Id. Examples of facilitation include (a) ordering or directing subordinates to plan, organize, or carry out a
fundraising project as part of their work responsibilities, using corporate or labor
organization resources, (b) providing materials for the purpose of transmitting or
delivering contributions, such as stamps and envelopes, and (c) using coercion to urge
individuals to make contributions. 11 CFR 114.2(f)(2). See Explanation and
Justification for Final Rules on Corporate and Labor Organization Activity, 60 FR 64620,

In light of the holding in Citizens United, the Commission is seeking comment on
whether its regulations on corporate and labor organization facilitation should be revised.
As discussed above, the Citizens United decision invalidated restrictions on corporate
independent expenditures and electioneering communications. However, the Court noted
that “Citizens United has not made direct contributions to candidates, and it has not
suggested that the Court should reconsider whether contribution limits should be
subjected to rigorous First Amendment scrutiny.” 130 S. Ct. at 909. See also Buckley,
424 U.S. at 28-29 (“Significantly, the Act's contribution limitations in themselves do not
undermine to any material degree the potential for robust and effective discussion of
candidates and campaign issues by individual citizens, associations, the institutional
press, candidates, and political parties.”). Absent prearrangement and coordination, are
the corporate and labor organization activities prohibited by these provisions “direct
contributions” under the Act? See Buckley, 424 U.S. at 47 (“The absence of
prearrangement and coordination of an expenditure with the candidate or his agents not
only undermines the value of the expenditure to the candidate, but also alleviates the
danger that expenditures will be given as quid pro quo for improper commitments from
the candidate.”) If the basis for the regulation is the provision of the Act held

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unconstitutional in *Citizens United*, in the absence of “prearrangement and coordination” of this and related activity with a candidate, does the Commission have legal authority, in light of the holding of *Citizens United*, to retain this restriction?

“Facilitation” is designed to result in the receipt of direct contributions by Federal candidates and political committees. *Citizens United* left undisturbed the prohibition on contributions by corporations and labor organizations. While removing the prohibitions on corporate and labor organization independent expenditures and electioneering communications as required by *Citizens United*, should the Commission also revise this provision of the Commission’s regulations? Do the Commission’s facilitation regulations impermissibly restrict activities that are constitutionally protected, when the activities are conducted independent of a candidate or political party committee? If so, do these regulations need to be modified to fully implement *Citizens United* or do the current regulations continue to satisfy the Act in identifying the line between conduct that is permissible and that which is not? On the other hand, if the basis for this regulation is the Act’s prohibition on corporate and labor organization contributions, given that *Citizens United* left undisturbed the prohibition on contributions by corporations and labor organizations, should the Commission revise 11 CFR 114.2(f)?

In a related context, should the Commission revise 11 CFR 110.6(b)(2)(ii), which provides that any person who is prohibited from making contributions or expenditures in connection with an election for Federal office is prohibited from acting as a conduit for contributions earmarked to candidates or their authorized committees? While removing the prohibitions on corporate and labor organizations independent expenditures and
VII. Proposed 11 CFR 114.3 – Disbursements for communications to the restricted class by corporations and labor organizations in connection with a Federal election

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

The Commission’s current regulations at 11 CFR 114.4 set out the restrictions and prohibitions for communications by corporations and labor organizations beyond the restricted class, both to employees outside the restricted class, and to the general public. Citizens United held, consistent with the First Amendment, that corporations and labor organizations may not be prohibited from making independent expenditures beyond the restricted class. However, the Act exempts communications made by corporations and labor organizations to their restricted class from the definition of expenditure, whether or not they contain express advocacy, and, as discussed in greater detail below, establishes different reporting requirements for these communications in 2 U.S.C. 431(9)(B)(iii). Because of this statutory distinction between express advocacy communications to the restricted class and express advocacy communications made beyond the restricted class,
the Commission proposes to maintain the current structure in which 11 CFR 114.3 addresses disbursements for communications made to the restricted class, and 11 CFR 114.4 addresses disbursements for communications made to those outside the restricted class, with certain proposed changes discussed below. The Commission requests comment on this approach. Would combining 11 CFR 114.3 and 114.4 be more readily understandable to the public now that corporations and labor organizations can make express advocacy communications beyond the restricted class? Should the Commission maintain the separate regulations as they are now, or divide them in a different way?

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

The Commission does not propose any changes to 11 CFR 114.3(a). That provision states that corporations and labor organizations may communicate on any subject with their restricted class, including communications containing express advocacy. Section 114.3(a) also states that corporations and labor organizations may coordinate their activities under section 114.3 with candidates and political committees, but only to the extent permitted by section 114.3. For example, under paragraph (c)(2), corporations and labor organizations may coordinate with a candidate in planning a candidate appearance before members of the restricted class. Paragraph (c)(4), however, prohibits corporations and labor organizations from coordinating voter registration and GOTV drives with candidates, candidates’ committees, or political parties.

B. 11 CFR 114.3(b) – Reporting of express advocacy communications

1. Reporting of express advocacy communications solely to the restricted class
The proposed rules would not change the requirement, currently at 11 CFR 114.3(b), that corporations and labor organizations report disbursements for communications containing express advocacy made to the restricted class in accordance with 11 CFR 100.134 and 104.6. The Act exempts express advocacy communications made by corporations and labor organizations to their restricted class from the definition of “expenditure.” 2 U.S.C. 431(9)(B)(iii). However, the Act requires that corporations and labor organizations that make disbursements for express advocacy communications to the restricted class in excess of $2,000 for any election file quarterly reports in an election year and pre-election reports for any general election. 2 U.S.C. 431(9)(B)(iii); 434(a)(4)(A)(i) and (ii). This statutory requirement is implemented in the Commission regulations at current 11 CFR 100.134(a), 104.6(a), and 114.3(b).

2. Reporting of express advocacy communications beyond the restricted class

As discussed in Section VI below, proposed 11 CFR 114.16(b) would require corporations and labor organizations that choose to make independent expenditures for communications to persons beyond the restricted class to report these independent expenditures under 2 U.S.C. 434(c). This provision requires that “every person (other than a political committee) who makes independent expenditures in an aggregate amount or value in excess of $250 during a calendar year” report such expenditures to the Commission. Thus, under 2 U.S.C. 434(c), corporations and labor organizations that make such independent expenditures must now file a report in the first reporting period in which independent expenditures exceed the $250 reporting threshold and in any succeeding reporting period during the same calendar year during which the corporation or labor organization makes additional independent expenditures of any amount. These
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reports must disclose the identity of any person who receives any disbursement during
the reporting period in an aggregate amount greater than $200 during the calendar year in
connection with an independent expenditure made by the corporation or labor
organization. The reports must also disclose, among other things, certain contributions
received by the person making the independent expenditure, the date, amount, and
purpose of the independent expenditure, a statement indicating whether the independent
expenditure is in support of, or in opposition to a candidate, and a certification that the
independent expenditure is not made in cooperation, consultation, or concert with, or at
the request of, any candidate, or any authorized committee or agent of such committee.

2 U.S.C. 434(c). Therefore, after Citizens United, corporations and labor organizations
must report independent expenditures made beyond the restricted class once the $250 per
year threshold is met, and must report express advocacy communications to the restricted
class once the $2,000 per election threshold is met.

The Commission does not propose to change the language of the reporting
requirements at current 11 CFR 114.3(b) because Citizens United did not affect the
provision of the Act at 2 U.S.C. 431(9)(B)(iii) that exempts express advocacy
communications to the restricted class from the definition of “expenditure” and
establishes the reporting requirement for such communications. Therefore, the
Commission may not need to change its reporting regulations under that statutory
provision. The Commission requests comment on this approach.

3. Reporting of express advocacy communications both to the restricted class and
outside the restricted class
The Commission seeks comment on how spending for communications by a corporation or labor organization directed both to the restricted class and outside the restricted class should be reported. If a corporation or labor organization makes a single disbursement for a communication containing express advocacy that is made both to the general public, which is an independent expenditure, and the restricted class, which is exempt from the definition of expenditure, should the corporation or labor organization allocate the expense between the cost of the communication made to the restricted class and the cost of the communication made beyond the restricted class and report the allocated expenses separately under the two reporting regimes? How would costs be allocated for a broadcast communication, such as a television advertisement, that is not specifically directed at identifiable members of the restricted class? Alternatively, would the fact that the communication went beyond the restricted class mean that the entire disbursement is an independent expenditure, and therefore must be reported only under the independent expenditure reporting regime? For items like bumper stickers and T-shirts, when a corporation or labor organization pays for the items and distributes them to members of the restricted class, does the fact that they can be seen beyond the restricted class transform their classification? Given that the statutory provision has not changed, is there a better way to reconcile the two reporting regimes for disbursements for communications containing express advocacy made to the restricted class and independent expenditures for communications made to those outside the restricted class?

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

Section 114.3(c) governs several of the types of communications that may be made to the restricted class: publications; candidate and party appearances; phone banks;
and voter registration and get-out-the-vote ("GOTV") drives, and sets forth certain requirements and restrictions that apply to each. Paragraph (c)(1) states that a corporation or labor organization may distribute printed materials expressly advocating the election or defeat of a clearly identified candidate or candidates of a political party to its restricted class, provided that certain requirements and restrictions are met. The provision requires that the material be produced at the expense of the corporation or labor organization, reflect the views of the corporation or the labor organization, and may not be a republication or reproduction of campaign materials prepared by the candidate, candidate's committee, or candidate's authorized agents.

Paragraph (c)(2) permits corporations and labor organizations to invite a candidate, candidate's representative, or party representative to address the restricted class at meetings, conventions, and other functions of the corporation or labor organization. Section 114.3(c)(2) currently permits the candidate, candidate's representative, or party representative to ask for and accept contributions to his or her campaign or party, and to ask that contributions to the corporation or labor organization's separate segregated fund be designated for his or her campaign or party. Paragraph (c)(2) prohibits officers, directors, or other representatives of the corporation or labor organization from collecting contributions on behalf of the candidate or party committee. Finally, the provision addresses news media coverage of these appearances.

The Commission does not propose to change the provisions of 11 CFR 114.3(c)(1) and (2).
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Section 114.3(c)(3) specifically permits corporations and labor organizations to establish and operate phone banks to urge members of their restricted class to register and/or vote for a particular candidate or candidates, or to register with a particular political party. Because corporations and labor organizations may continue to establish and operate such phone banks, the Commission does not propose to change this provision. However, because Citizens United struck down the prohibition on express advocacy communications by corporations and labor organizations beyond the restricted class, is it still necessary to have a separate provision expressly permitting corporations and labor organizations to use phone banks to urge members of the restricted class to register or vote for a particular candidate or candidates? Are there any costs associated with a phone bank that lack a sufficient nexus to the communicative activity such that they should continue to be prohibited as non-communicative expenditures? The Commission requests comments on whether to remove paragraph (c)(3) from section 114.3.

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

Current 11 CFR 114.3(c)(4) permits a corporation or a labor organization to conduct voter registration and GOTV drives “aimed at its restricted class.” It states that voter registration and GOTV drives include providing transportation to the place of registration and to the polls. The current provision further permits such drives to include communications containing express advocacy, “such as urging individuals to register with a particular political party or to vote for a particular candidate.” 11 CFR 114.3(c)(4). The current provision prohibits corporations and labor organizations from withholding or refusing to give information and other assistance regarding registering or
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voting “on the basis of support for or opposition to particular candidates, or a particular political party.” Id.

The Commission is proposing two alternatives to revise paragraph (c)(4). Both alternatives would make a technical change to remove the language stating that urging individuals to register with a given party constitutes express advocacy because such language may, but does not necessarily, involve expressly advocating the election or defeat of one or more clearly identified candidates. Alternative A would also remove the existing requirement that corporations or labor organizations not withhold or refuse to give information or other assistance on the basis of support for, or opposition to, particular candidates or a particular political party, but maintain the exemption from the definition of “contribution or expenditure” under 2 U.S.C. 441b(b)(2)(B) for voter registration and GOTV drives that meet that requirement. Alternative B would not make any changes to current 11 CFR 114.3(c)(4) except the technical change. The Commission invites comment on which, if either, of the two proposals better complies with Citizens United and why. Alternative A – Remove requirement that corporations and labor organizations not withhold or refuse to provide assistance on the basis of support for, or opposition to, particular candidates or a particular party

This alternative would remove the prohibition on withholding or refusing to provide information or other assistance regarding registering or voting based on support for or opposition to particular candidates, or a particular party. Instead, Alternative A would only prohibit corporations and labor organizations from conducting voter registration or GOTV drives and that are coordinated with a candidate or political party.

As discussed in Section III.A above, one approach to revising the Commission’s
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regulations to comply with the decision in Citizens United would be to eliminate the
existing broad prohibition on corporate and labor organization expenditures, and instead
prohibit only those expenditures that are coordinated with a candidate or a political party
committee and coordinated communications. Similarly, Alternative A would permit
corporations and labor organizations to conduct voter registration and GOTV drives
without restriction, so long as they were not coordinated with a candidate or political
party.

Alternative A would, however, maintain the statutory exception to the definition
of “contribution or expenditure” for nonpartisan voter registration and GOTV drives. See
2 U.S.C. 441b(b)(2)(B). Thus, Alternative A would state that disbursements for voter
registration and GOTV drives are not contributions or expenditures if the drive is
conducted in such a manner that the corporation or labor organization does not withhold
or refuse to provide information or other assistance regarding registering or voting on the
basis of support for or opposition to particular candidates or a particular political party.

The Commission requests comment on this proposal. Does Alternative A
appropriately comply with Citizens United? Does the proposal eliminate too much or too
little in implementing the remaining prohibitions on corporate and labor organization
expenditures?

Additionally, corporations and labor organizations are not currently required to
report certain expenditures, such as driver salaries and the cost of fuel, because they are
neither communications containing express advocacy nor electioneering communications.
Is this consistent with the uniform treatment of all expenditures under Alternative A?
Should this reporting regime inform the Commission’s choice of alternatives for amending section 114.4?

In WRTL II the Court explained that “‘First Amendment freedoms need breathing space to survive.’” WRTL II, at 468-469, 127 S.Ct. 2652 (quoting NAACP v. Button, 371 U.S. 415, 433, (1963)). In Citizens United, the Court rejected an interpretation of the law that required an “intricate case-by-case determination” to verify whether political speech is banned, given that a corporation has a constitutional right to speak. 130 S.Ct. at 892. By not weighing the expressive elements of expenditures, does Alternative A avoid the need for intricate case-by-case determinations?

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

Alternative B would make no changes to the existing regulation at 11 CFR 114.3(c)(4) other than the technical change discussed above. As discussed in Section III.A above, one alternative for revising the Commission’s regulations to comply with the decision in Citizens United would be to specifically exclude expenditures for communications from the broader prohibition on expenditures, while still prohibiting corporate and labor organization expenditures such as in-kind contributions, coordinated expenditures, or expenditures that do not involve communications. Like proposed Alternative B for 11 CFR 114.2(b)(2)(i), Alternative B for 11 CFR 114.3(c)(4) would also distinguish between speech and non-speech activity.

In promulgating the current regulation at 11 CFR 114.3(c)(4), the Commission distinguished between the “‘pure speech’ aspects of the drives [that] may be partisan,” and the non-speech activity aspects of the drives, which “must be conducted in a nonpartisan manner.” Explanation and Justification for Final Rules on Part 114,
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Because Alternative B takes the approach that Citizens United did not overturn the prohibition on corporate and labor organization expenditures that do not involve political speech, under Alternative B the Commission would still be obligated to regulate the nonspeech aspects of voter registration and GOTV drives in order to implement 2 U.S.C. 441b. Alternative B reflects the principle that, as the Supreme Court has articulated, “[i]t is possible to find some kernel of expression in almost every activity a person undertakes . . . but such a kernel is not sufficient to bring the activity within the protection of the First Amendment.” Dallas v. Stanglin, 490 U.S. 19, 25 (1989). These expenses might include the driver’s salary, vehicle rental, and fuel, and travel, lodging, and food costs if workers on the drive were brought in from other locations to participate in the voter registration or GOTV drive.

In Alternative B, as in Alternative A, a corporation or labor organization would continue to be able to make voter registration or GOTV communications, including express advocacy, to the restricted class under 11 CFR 114.3(c)(4). Furthermore, as in Alternative A, in Alternative B voter registration and GOTV drives conducted in accordance with proposed 11 CFR 114.3(c)(4) would remain exempt from the definition of “expenditure” under 2 U.S.C. 441b(b)(2)(B). However, under Alternative B, corporations and labor organizations would remain prohibited from engaging in non-communicative activities related to voter registration and GOTV drives other than those conducted in accordance with proposed 11 CFR 114.3(c)(4).
The Commission requests comments on this approach. Is Alternative B consistent with the holdings in Citizens United and Buckley? Is it appropriate to interpret these holdings as related to speech and therefore not to extend these holdings to these types of conduct? Alternatively, do all aspects of voter registration and GOTV drives possess inherently communicative qualities that would not warrant a lower standard of constitutional scrutiny? The Commission seeks comment on where voter registration and GOTV drives fall on the spectrum ranging from speech to conduct. Are these activities “imbued with elements of communication”?

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

Current 11 CFR 114.4 sets out a number of exceptions to the prohibitions on corporations and labor organizations making expenditures. The regulation permits certain communications and activities directed beyond the restricted class, both to employees outside the restricted class and the general public. This section also permits certain communications made to those outside the restricted class to be coordinated, to a limited extent, with candidates. Specifically, section 114.4(b) covers candidate and party appearances on corporate or labor organization premises or at a meeting, convention, or other function that are attended by employees beyond the restricted class. Section 114.4(c) identifies the types of communications that may be made to the general public, namely: (1) voter registration and voting communications; (2) official registration and voting information; (3) voting records; (4) voter guides; (5) endorsements; (6) candidate appearances on educational institution premises; and (7) electioneering communications, and the relevant requirements and restrictions that apply to each. The proposed changes
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to 11 CFR 114.4 would eliminate the prohibition on express advocacy communications made beyond the restricted class, but would maintain the restrictions on coordination with candidates and political parties in communications beyond the restricted class.

A. Proposed 11 CFR 114.4(a) – General

Current 11 CFR 114.4(a) states that any communications that a corporation or labor organization may make to the general public may also be made to the restricted class, and to employees outside the restricted class. Paragraph (a) also sets out the structure of the rest of section 114.4. Finally, paragraph (a) indicates that communications described in section 114.4 may be coordinated with candidates and political committees only to the extent permitted in section 114.4. The Commission is proposing minor changes to the wording of paragraph (a) to clarify the meaning of the provisions.

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

Current 11 CFR 114.4(b)(1) sets forth the circumstances under which a corporation may coordinate with a candidate or party committee to make communications to employees beyond the restricted class by permitting candidates, candidates’ representatives, or representatives of political parties to appear on corporate premises or at meetings, conventions, or other corporate functions. Current 11 CFR 114.4(b)(2) applies these regulations and restrictions to labor organizations. The Commission proposes to reorganize current 11 CFR 114.4(b)(1) and (b)(2) by consolidating the provisions into proposed 11 CFR 114.4(b). The proposed
reorganization would move the language regarding labor organizations currently located
in paragraph (b)(2) to paragraph (b)(1), which would be redesignated as 11 CFR
114.4(b). Current paragraphs (b)(1)(i) through (b)(1)(viii) would be redesignated as
paragraphs (b)(1) through (b)(8), and would apply to both corporations and labor
organizations.

The Commission does not propose to make any other changes to the language of
proposed 11 CFR 114.4(b), other than this reorganization. Current 11 CFR
114.4(b)(1)(v) and (b)(2)(ii) prohibit corporations and labor organizations from expressly
advocating the election or defeat of a clearly identified candidate or candidate of a clearly
identified political party “in conjunction with” a candidate, candidate representative, or
party representative appearance described under current paragraph (b) of section 114.4.
Expenditures for appearances coordinated with candidates and political parties may
therefore constitute in-kind contributions under the Act. 2 U.S.C. 441a(a)(7)(B)(i) and
(ii); see also 11 CFR 109.20.

Because section 114.4(b) implements the Act’s contribution ban, which was
left undisturbed by Citizens United, the Commission does not propose any substantive
changes to this provision. The Commission seeks comment on this approach, and
whether the activities covered by section 114.4(b) involve independent political speech
addressed by Citizens United. The Commission also notes that the rule at section
114.4(b) applies to appearances attended by the “restricted class and other employees of
the corporation, and their families,” while section 114.4(c) applies to communications to
the general public. Though not reflected in the statute, this distinction follows
Congressional intent to allow some corporate and labor organization activity beyond the
restricted class that would otherwise be a prohibited in-kind contribution. See 1977 E&J, H.R. Doc. No. 94-44 at 105 ("This provision is based on traditional types of ‘good
government’ programs established by corporations for all employees and the traditional
practice of candidates touring the facilities to shake hands with employees. In the
conference debates, Congressman Wiggins and Hays agreed that the bill would allow
such activities to continue if the programs were conducted on an equitable and non-
partisan basis.").

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

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

1. **Removal of express advocacy prohibition**

   Proposed 11 CFR 114.4(c)(1) would remove the current language specifically permitting qualified nonprofit corporations under 11 CFR 114.10(c) to include express advocacy in any communication made to the general public. After *Citizens United*, all corporations and labor organizations may include express advocacy in any communication made to the general public that is not coordinated with candidates or political parties. Hence, this language is now superfluous.

   Current 11 CFR 114.4(c)(2) through (c)(6) govern several types of communications that corporations and labor organizations may make to the general public and set out the conditions under which corporations and labor organizations may make them. These communications are: voter registration and GOTV communications; official voter registration and voting information; voting records; voter guides; and endorsements. All five of these paragraphs currently prohibit corporations or labor organizations from expressly advocating the election or defeat of clearly identified candidates in these communications. Proposed 11 CFR 114.4(c)(2) through (6) would eliminate the prohibition on express advocacy contained in each of the current paragraphs when these communications are not coordinated with any candidate or political party.

   The Commission requests comment on these proposed deletions.

2. **Proposed 11 CFR 114.4(c)(2) – Voter registration and GOTV communications**
Current 11 CFR 114.4(c)(2) contains a list of media through which corporations and labor organizations may make registration and voting communications to the general public. The list currently includes: posters; billboards; broadcasting media; newspapers; newsletters; brochures; and “similar means of communication with the general public.”

11 CFR 114.4(c)(2). The Commission proposes to add mail, Internet communications, emails, text messages, and telephone calls to the list. These changes are intended to reflect additional common means of political communication. The Commission requests comment on these proposed additions. Are there any other methods of communications that should be specifically included in the list?

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

Current 11 CFR 114.4(c)(5) sets forth certain requirements for and restrictions on the preparation and distribution of voter guides by corporations and labor organizations to the general public. This provision currently requires that voter guides present the position of two or more candidates on campaign issues. It further requires that all candidates for a particular seat or office be given an equal opportunity to respond, and prohibits the corporation or labor organization from giving greater prominence to any one candidate or substantially more space for a candidate’s responses, and from including an electioneering message in the voter guide or accompanying materials. Paragraph (c)(5) would be revised by eliminating the requirement that the voter guide contain the positions of two or more candidates, or that all candidates for a particular office or seat be permitted to respond. The prohibitions on giving one candidate more prominence or space on electioneering communications would also be deleted. The Commission proposes these deletions to conform its voter guide rules to the holding in Citizens United.
that corporations and labor organizations may expressly advocate the election or defeat of
candidates, and may make electioneering communications to the general public, that are
not coordinated with candidates. The Commission requests comments on these proposed
changes.

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

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

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

The Commission does not propose any changes to the text of current 11 CFR
114.4(c)(7). This paragraph addresses candidate appearances on the premises of
incorporated nonprofit educational institutions. Current 11 CFR 114.4(c)(7)(ii) prohibits
incorporated educational institutions from expressly advocating the election or defeat of
candidates in conjunction with candidate or political committee appearances for which
the educational institution provided access to the premises at no charge or at less than the usual and normal charge. Paragraph (c)(7) prohibits incorporated educational institutions from favoring any one candidate or political party in allowing appearances on the educational institution's premises at no charge or at less than the usual or normal charge. Corporations are prohibited from making contributions to, or giving anything of value to, a federal candidate, which includes free or below usual and normal charge use of facilities. 2 U.S.C. 441b(a) and (b)(2); see also 11 CFR 100.52(d) and 114.2(a).

Because incorporated educational institutions’ ability to permit candidate appearances on their premises for no charge or at less than usual and normal charge is an exception to the general prohibition on corporate in-kind contributions, which was not affected by Citizens United, the Commission does not propose any changes to this provision. The Commission requests comments on this approach.

6. Proposed 11 CFR 114.4(c)(8) – Electioneering communications to the general public

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

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10 A corresponding provision governing candidate appearances on the premises of unincorporated public nonprofit education institutions is located at 11 CFR 110.12.
Current 11 CFR 114.4(c)(8) further permits qualified nonprofit corporations (“QNCs”) to make electioneering communications to the general public in accordance with current 11 CFR 114.10. Section 114.10(d)(2) permits QNCs to make any electioneering communication. Because Citizens United struck down the prohibition on corporations and labor organizations making electioneering communications, the exception to the prohibition on electioneering communications at 11 CFR 114.4(c)(8) is no longer necessary. Therefore, the Commission proposes to eliminate current 11 CFR 114.4(c)(8) in its entirety to comply with the Supreme Court’s decision in Citizens United.

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

Current 11 CFR 114.4(d) permits corporations and labor organizations to conduct voter registration and GOTV drives aimed at the general public. It states that registration and GOTV drives include providing transportation to the place of registration and to the polls. The current provision prohibits such drives from including communications containing express advocacy and states that the drives may not be coordinated with any candidate or political party. The current provision prohibits corporations or labor organizations from withholding or refusing to give information and other assistance regarding registering or voting on the basis of support for, or opposition to, particular candidates or a particular political party; from directing the drives primarily at individuals based on registration with a particular party; and from paying individuals conducting such drives on the basis of number of individuals registered or transported to the polls who support a particular candidate or candidates or political party. The Commission is proposing two alternatives to revise the provision currently located at
11 CFR 114.4(d). Both Alternatives A and B would remove the prohibition on communications expressly advocating the election or defeat of candidates or political parties made in connection with a voter registration or GOTV drive. Alternative A, however, would also remove all of the existing requirements and prohibitions regarding voter registration and GOTV drives, with the exception of the prohibition on coordination with candidates or political parties. Alternative A would maintain the exemption from the definition of “expenditure” under 2 U.S.C. 431(9)(B)(ii) and 11 CFR 100.133 for voter registration and GOTV drives that meet the existing requirements and prohibitions.

In contrast, Alternative B would retain current 11 CFR 114.4(d), except that it would remove the prohibition on express advocacy currently at 11 CFR 114.4(d)(1). The Commission has not made any determination as to which of these proposed alternatives it should adopt in the final rules. The Commission invites comment on which, if either, of the two proposals better implements Citizens United and why.

Alternative A – Remove all restrictions on voter drives except for the prohibition on coordinating with candidates and political parties

This alternative would remove all the requirements for and restrictions on voter registration and GOTV drives at current 11 CFR 114.4(d)(3) through (6), with the exception of the prohibition on coordinating drives with candidates or political parties, currently at 11 CFR 114.4(d)(2). As discussed in Sections III.A and IV.E above, one approach to revising the Commission’s regulations to comply with the decision in Citizens United would be to eliminate the existing broad prohibition on corporate and labor organization expenditures, and instead prohibit only those expenditures that are coordinated with a candidate or a political party committee, including coordinated

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communications. Similarly, Alternative A would permit corporations and labor organizations to conduct voter registration and GOTV drives without restriction, as long as they were not coordinated with a candidate or political party.

Alternative A would, however, maintain the statutory exemption at 2 U.S.C. 431(9)(B)(ii) for voter registration and GOTV drives. Proposed Alternative A would state that disbursements for voter registration and GOTV drives are not expenditures if the drive meets the requirements for, and restrictions on, voter registration and GOTV drives that are currently located at 11 CFR 114.4(d)(1) and (3)-(6). These requirements would include the prohibition on express advocacy, as well as the prohibition on withholding or refusing to provide information or other assistance regarding registration or voting on the basis of support for, or opposition to, particular candidates or a particular political party.

The Commission requests comment on this proposal. Does this alternative appropriately comply with Citizens United? Does the proposal eliminate too much or too little in implementing the remaining prohibitions on corporate and labor organization expenditures?

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

Alternative B would make no changes to the existing regulation at 11 CFR 114.4(d), except to remove the prohibition on corporations and labor organizations making communications expressly advocating the election or defeat of clearly identified candidates currently at 11 CFR 114.4(d)(1). As discussed in Sections III.A and IV.E above, Alternative B excludes expenditures for communications from the prohibition on
expenditures, while still prohibiting other corporate and labor organization expenditures, such as in-kind contributions, coordinated expenditures, and expenditures that are not for communications.

After Citizens United, corporations and labor organizations are no longer prohibited from making independent communications. Because Alternative B concludes that Citizens United left in place the prohibition on corporate and labor organization expenditures that do not involve communications, under this alternative, the Commission would continue to implement the statutory restrictions on the nonspeech aspects of voter registration and GOTV drives, such as the costs associated with driving voters to registration sites or the polls or “providing babysitting services to enable voters to go to the polls.” 1977 E&J, H.R. Doc. No. 95-44, at 106. Therefore, under Alternative B, three current provisions would remain in effect: (1) directing voter drives at individuals based on party affiliation; (2) withholding or refusing to provide information or other assistance regarding registration or voting on the basis of support for, or opposition to, particular candidates or a particular political party; and (3) paying individuals conducting voter drives based on the number of individuals registered or transported to support a particular candidate or political party. Voter registration and GOTV drives conducted in accordance with proposed Alternative B would remain exempt from the definition of “expenditure” under 2 U.S.C. 431(9)(B)(ii).

The current rule at 11 CFR 114.4, like the rule at 114.3, recognizes the difference between expenditures for communications and for non-communicative activities. Current 114.4(c)(2) specifically allows for voter registration or GOTV communications to the general public, provided that the communications do not contain express advocacy, while
current 114.4(d), following 2 U.S.C. 441b(b)(2)(B), exempts voter registration and
GOTV drives conducted in a nonpartisan manner from the definition of expenditure. In
Alternative B, as in Alternative A, a corporation or labor organization would be able to
make voter registration or GOTV communications, including express advocacy, to the
general public under proposed 11 CFR 114.4(c)(2). Furthermore, as in Alternative A, in
Alternative B voter registration and GOTV drives conducted in accordance with
proposed 11 CFR 114.4(d) would remain exempt from the definition of “expenditure”
under 2 U.S.C. 441b(b)(2)(B). However, under Alternative B corporations and labor
organizations would remain prohibited from engaging in non-communicative activities
related to voter registration and GOTV drives other than those conducted in accordance
with proposed 11 CFR 114.4(d). The Commission request comments on this proposal.
E. Unchanged provisions of current 11 CFR 114.4

The Commission is not proposing any changes to current 11 CFR 114.4(e) or (f).

Current 11 CFR 114.4(e) states that incorporated membership organizations, incorporated trade associations, incorporated cooperatives, and corporations without capital stock may permit candidate and party representative appearances before members and employees and their families on the organization’s premises, or at a meeting, convention, or other function of the organization, in accordance with proposed 11 CFR 114.4(c)(1) through (c)(8). The Commission requests comments on this approach.

Current 11 CFR 114.4(f) addresses candidate debates staged or funded by non-profit organizations described in 11 CFR 110.13 using funding from corporations and labor organizations. The Commission is not proposing any changes to this provision, but invites comment as to whether any revisions are needed to comply with the Citizens United opinion.

VIII. Proposed removal of 11 CFR 114.10 – Nonprofit corporations exempt from the prohibitions on making independent expenditures and electioneering communications; and proposed 11 CFR 114.16 – Independent expenditures and electioneering communications made by corporations and labor organizations

The Commission promulgated 11 CFR 114.10 in response to the Supreme Court’s decision in FEC v. Massachusetts Citizens For Life, 479 U.S. 238 (1986) (“MCFL”) and, in part, to the Supreme Court’s decision in Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990). In MCFL, the Court considered the application of the independent expenditure prohibition in 2 U.S.C. 441b to MCFL, a nonprofit corporation organized to promote specific ideological beliefs. The Court concluded that, because MCFL did not
have the potential to corrupt the electoral process, it did not implicate the concerns that prompted regulation of corporations by Congress. See MCFL, 479 U.S. at 259. The rules at 11 CFR 114.10 created a regulatory exception to the independent expenditure ban in section 441b for organizations with the same characteristics as MCFL, referred to as “qualified nonprofit corporations” or “QNCs.” After Congress enacted BCRA’s electioneering communications provisions in 2002, the Commission added an exception in 11 CFR 114.10 for QNCs making electioneering communications. Because Citizens United struck down the statutory bans on independent expenditures and electioneering communications for all corporations and labor organizations, the regulatory exceptions for QNCs are now superfluous. Therefore, the Commission proposes to remove 11 CFR 114.10 in its entirety.

The Commission further proposes to adopt a new regulation at 11 CFR 114.16 that would explicitly permit all corporations and labor organizations to make independent expenditures and electioneering communications. As discussed below, proposed 11 CFR 114.16 is modeled on parts of current 11 CFR 114.10. These include: (1) the reporting requirements for QNCs making independent expenditures or electioneering communications at 11 CFR 114.16(e); (2) the solicitation disclaimer requirement at 11 CFR 114.10(f); (3) non-authorization disclaimer requirement at 11 CFR 114.10(g); (4) the provision in 11 CFR 114.10(h) permitting QNCs to establish segregated bank accounts for disbursements for electioneering communications; and (5) 11 CFR 114.10(i), which states that nothing in section 114.10 authorizes any organization exempt from taxation under 26 U.S.C. 501(a) to carry out any activity that it is prohibited from
undertaking by the Internal Revenue Code. The Commission seeks comment as to whether any or all of these proposed regulations is necessary.

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

Current 11 CFR 114.10(d) specifically permits QNCs to make independent expenditures and electioneering communications. Because Citizens United made independent expenditures and electioneering communications permissible for all corporations and labor organizations, proposed 11 CFR 114.16(a) would expand current 11 CFR 114.10(d) to cover all corporations and labor organizations. As discussed above, the Commission seeks comments on whether it would it be helpful for corporations and labor organizations to have a regulation explicitly permitting them to make independent expenditures and electioneering communications. Should the regulation instead more broadly state that corporations and labor organizations may make any communication in connection with an election so long as it is not a coordinated communication under 11 CFR 109.21? Alternatively, is it sufficient to remove the current prohibitions in 11 CFR 114.2(b)(2) and (b)(3) on corporations and labor organizations making disbursements for independent expenditures and electioneering communications from general treasury funds?

B. Reporting independent expenditures and electioneering communications

Current 11 CFR 114.10(e)(2) sets forth the reporting requirements for QNCs making independent expenditures and electioneering communications. Proposed 11 CFR 114.16(b) would adopt and expand this language to cover independent expenditures and electioneering communications made by all corporations and labor organizations.
Proposed 11 CFR 114.16(b)(1) would state that corporations and labor organizations that make independent expenditures aggregating in excess of $250 with respect to a given election in a calendar year must file reports according to 11 CFR part 104. Section 104.4(a) requires that “every person that is not a political committee must report independent expenditures in accordance with paragraphs (e) and (f) of this section and 11 CFR 109.10” (emphasis added). Proposed 11 CFR 114.16(b)(2) would state that corporations or labor organizations that make electioneering communications aggregating in excess of $10,000 in a calendar year must file statements as required by 11 CFR 104.20(b). Section 104.20(b), in turn, requires that “every person who has made an electioneering communication . . . aggregating in excess of $10,000 during any calendar year” file a statement on FEC Form 9, containing information set out in paragraph (c) of that section (emphasis added). Given that the requirements at 11 CFR 104.4 and 104.20 already cover corporations and labor organizations, is it necessary to have an additional regulation that states that corporations and labor organizations are subject to these requirements?

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

Current 11 CFR 114.10(f) requires that solicitations for donations by QNCs disclose to potential donors that their donations may be used for political purposes, such as supporting or opposing candidates. Similarly, proposed 11 CFR 114.16(c) would incorporate this requirement, but would expand it to cover solicitations for donations that may be used for political purposes where the solicitations are made by any corporation or labor organization. The requirement at current section 114.10(f) derives from the Supreme Court’s decision in MCFL. Explanation and Justification for Final Rules on
Express Advocacy; Independent Expenditures; Corporate and Labor Organization

Expenditures, 60 FR 35292, 35303 (July 6, 1995). In holding the prohibition on independent expenditures unconstitutional as applied to QNCs, the Supreme Court said “[t]he rationale for regulation is not compelling with respect to independent expenditures by [MCFL]” because “[i]ndividuals who contribute to appellee are fully aware of its political purposes, and in fact contribute precisely because they support those purposes.” MCFL, 479 U.S. at 260-61. “Given a contributor’s awareness of the political activity of [MCFL], as well as the readily available remedy of refusing further donations, the interest [of] protecting contributors is simply insufficient to support § 441b’s restriction on the independent spending of MCFL.” Id. at 262 (emphasis added.)

In Citizens United, the Court upheld the disclaimer requirements of 2 U.S.C. 441d(d)(2) and the disclosure requirements of 2 U.S.C. 434(f). In analyzing the disclaimer requirements, the Court stated that “[t]he disclaimers required by [BCRA] § 311 ‘provide the electorate with information,’ McConnell, 540 U.S. at 196, and ‘insure that the voters are fully informed’ about the person or group who is speaking, Buckley, 424 U.S. at 76.” Citizens United, 130 S. Ct. at 915 (additional citation omitted).

Regarding disclosure requirements, the Court cited its previous explanation that “disclosure is a less restrictive alternative to more comprehensive regulations of speech.” Id. The Court further stated that “[t]he First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.” Id. at 916.
Although the Supreme Court's decision in *Citizens United* striking down the independent expenditure and electioneering communications ban in section 441b may well have rendered the QNC exception unnecessary, is the solicitation disclosure requirement in *MCFL* still important in ensuring that the electorate has the information necessary to make informed decisions? The Commission seeks comment as to whether any or all of these proposed regulations is necessary. If the statutory basis for such a requirement remains sound, does language in the Court's opinion in *Citizens United* regarding disclosure and disclaimers mean that the Commission may and should continue to require QNCs to provide disclosure to potential donors? If so, should the rules at 11 CFR 114.10(c) defining "QNC" be retained so that these entities will be apprised of this requirement? Should the Commission establish a broader disclosure requirement so that all corporations and labor organizations must disclose to those they solicit that any money given to the corporation or labor organization may be used for political purposes, such as making communications supporting or opposing candidates? In the alternative, should the Commission require corporations and labor organizations to state in such disclosures that the funds received may be used specifically for independent expenditures or electioneering communications, as opposed to "political purposes" generally?

Alternatively, because *Citizens United* struck down the statutory bans on independent expenditures and electioneering communications for all corporations and labor organizations, is the regulatory requirement that QNC include a solicitation disclaimer now superfluous? Should the Commission instead remove 11 CFR 114.10(f) in its entirety and not incorporate it into proposed section 114.16?
D. Non-authorization notice

Current 11 CFR 114.10(g) requires that QNCs comply with the disclaimer requirements of 11 CFR 110.11. As discussed in Section IV.C above, the Court in Citizens United upheld the disclaimer provisions of 2 U.S.C. 441d. 130 S. Ct. at 914-16.

Section 441d(a) requires that certain communications include statements identifying the person who paid for the communication and whether the communication is authorized by any candidate or candidate’s committee, and sets out the requirements for such statements. These communications include all public communications by any person that expressly advocate the election or defeat of a clearly identified candidate, and all electioneering communications by any person. 2 U.S.C. 441d(a). The Act defines “person” to include corporations and labor organizations. 2 U.S.C. 431(11).

Section 110.11 implements the requirements of 2 U.S.C. 441d. Because the requirements of 2 U.S.C. 441d and 11 CFR 110.11 apply to public communications containing express advocacy and electioneering communications made by any person, the provision applies automatically to corporations and labor organizations following Citizens United. Therefore, if a corporation or labor organization makes an independent expenditure or electioneering communication as permitted after Citizens United, the communication must include a statement identifying, among other things, the name and address of the corporation or labor organization that paid for the communication.

Proposed 11 CFR 114.16(d) would follow current 11 CFR 114.10(g), but would expand it to require that all corporations and labor organizations comply with 11 CFR 110.11. Although the requirements at 2 U.S.C. 441d and 11 CFR 110.11 already apply to corporations and labor organizations, should proposed section 114.16 explicitly state that...
all corporations and labor organizations must comply with the requirements of 11 CFR

E. Segregated bank account

The Commission proposes a regulation to affirmatively state that a corporation or labor organization may establish a segregated bank account for the making of electioneering communications. Current 11 CFR 114.10(h) states that a QNC may, but is not required to, establish a segregated bank account into which it deposits only funds donated or otherwise provided by individuals, as described in 11 CFR part 104, from which it makes disbursements for electioneering communications. Proposed 11 CFR 114.16(e) would adopt this language and expand it to state that any corporation or labor organization may establish such an account. The current regulation at 11 CFR 114.10(h) implements 2 U.S.C. 434(f)(2)(E) and (F), which sets out the reporting requirements for every person making disbursements for electioneering communications paid out of segregated bank accounts. Aside from this reporting requirement, however, the Act does not otherwise affirmatively state that a person may set up such segregated bank account. Furthermore, 11 CFR 114.10(h) is the only place in the current regulations that affirmatively states that a person may, but is not required to, set up such a segregated bank account, and this regulation is limited to QNCs.

The Commission requests comment on the proposed regulation affirmatively stating that any corporation or labor organization may, but is not required to, set up a segregated bank account for the purpose of making electioneering communications, as described in 2 U.S.C. 434(f)(2)(E). Is such a regulation necessary, given that the

11 This provision applies to corporation and labor organizations but not to political committees, because political committees do not make electioneering communications. 2 U.S.C. 434(f)(3).
reporting requirements in the Act already contemplate the existence of such a segregated bank account? Should the Commission adopt a broader regulation that would permit, but not require, any person to set up such an account?

Finally the Commission requests comments on whether it would be advisable and appropriate to promulgate a regulation allowing all persons other than political committees to set up and use segregated bank accounts for making independent expenditures. Would such a proposal provide sufficient disclosure? Section 434(f)(2)(E), which establishes the reporting requirements for disbursements for electioneering communications made from the segregated bank accounts, only requires the reporting entity to report the names and addresses of those whose contributions to that segregated bank account aggregated $1,000 or more to that segregated bank account within a certain timeframe. If the Commission were to adopt a regulation allowing similar segregated bank accounts for making independent expenditures parallel to the bank accounts used for electioneering communications, how should the reporting requirements of 2 U.S.C. 434(c) and 434(f)(2)(E) govern such an account?

F. Activities prohibited by the Internal Revenue Code

Current 11 CFR 114.10(i) states that nothing in section 114.10 shall be construed to authorize any organization exempt from taxation under 26 U.S.C. 501(a) to carry out any activity that it is prohibited from undertaking by the Internal Revenue Code. The Commission proposes to move this provision to new section 114.16(f). The language referring specifically to QNCs would be removed, for the reasons discussed above. The Commission requests comments on this proposed change.
Draft B

The Commission requests comments on proposed section 114.16. Because Citizens United struck down the statutory bans on independent expenditures and electioneering communications for all corporations and labor organizations, are the regulatory exceptions for QNCs now superfluous? Rather than moving the provisions to proposed section 114.16, should the Commission instead remove 11 CFR 114.10 in its entirety?

IX. Proposed removal of 11 CFR 114.14 and 114.15

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

Prior to WRTL II and Citizens United, corporations and labor organizations were prohibited from making electioneering communications outside the restricted class, either directly, or by providing funds to other persons for the purpose of making electioneering communications. 2 U.S.C. 441b(b)(2); 11 CFR 114.14 (2003). In promulgating 11 CFR 114.14, the Commission explained that the purpose of the rule was to prevent “any instance of a corporation or labor organization providing funds out of their general treasury funds to pay for an electioneering communication, including through a non-Federal account.” Explanation and Justification for Final Rules on Electioneering Communications, 67 FR 65190, 65207 (Oct. 23, 2002) (“2002 EC E&J”). In WRTL II, the Court held that the statutory prohibition on corporations and labor organizations making electioneering communications outside the restricted class was unconstitutional as applied to electioneering communications that were not the “functional equivalent” of
express advocacy. 551 U.S. 449, 456-57 (2007). The Court further defined the
“functional equivalent” of express advocacy to mean that the communication is
“susceptible of no reasonable interpretation other than as an appeal to vote for or against
a specific candidate. Id. at 469-70.

In response to the Court’s decision in WRTL II, the Commission promulgated
11 CFR 114.15. Explanation and Justification for Final Rules on Electioneering
section 114.15 permits corporations and labor organizations to make electioneering
communications outside the restricted class, unless the communication is susceptible of
no reasonable interpretation other than as an appeal to vote for or against a clearly
identified Federal candidate. The regulation also contains a safe harbor for when an
electioneering communication is permissible, and sets out criteria to use in considering
whether a communication that does not meet the safe harbor is nonetheless permissible.
The regulation also requires corporations and labor organizations that make
electioneering communications aggregating in excess of $10,000 in a calendar year to
report them in accordance with 11 CFR 104.20.

To comply with the Court’s decision in WRTL II, the Commission also made
changes to 11 CFR 114.14, limiting the prohibition to providing funds for those
electioneering communications that were impermissible under 11 CFR 114.15. 2007 EC
E&J, 72 FR at 72912. Because corporations and labor organizations were still prohibited
from using general treasury funds to make electioneering communications that were the
functional equivalent of express advocacy, however, the Commission maintained the
prophylactic prohibition on corporations and labor organizations providing funds to other persons for such impermissible electioneering communications. 11 CFR 114.14.

The Court held in Citizens United that corporations may make electioneering communications. Because 11 CFR 114.14 is a prophylactic regulation designed to prohibit corporations and labor organizations from doing through other persons what the corporation or labor organization could not do directly, the decision in Citizens United could be interpreted to have rendered the prohibition in 11 CFR 114.14 unnecessary. The Commission therefore seeks comment on removing the prohibition in this section altogether.

On the other hand, the Commission also seeks comment on whether it would be appropriate to retain section 114.14 because Citizens United did not address the ban on corporate contributions, including “any direct or indirect payment . . . to any candidate, campaign committee, or political party or organization . . . or for any applicable electioneering communication.” 2 U.S.C. 441b(b)(2). In considering this issue, the Commission notes that section 434(f) of the Act requires that entities that make electioneering communications report certain information to the Commission, including the identity of persons who have provided funds to segregated bank accounts for the purpose of making electioneering communications. 2 U.S.C. 434(f). The Commission promulgated 11 CFR 104.20(c)(7) to implement this statutory requirement. Explanation and Justification for Final Rules on Bipartisan Campaign Reform Act of 2002 Reporting, 68 FR 404, 413 (Jan. 3, 2003). In doing so, the Commission interpreted the statute to treat funds provided for the purpose of making electioneering communications as “donations,” rather than as “contributions” under the Act. Id. Should this same reading
of section 434(f) apply to corporate and labor organization funds provided to other persons for the purpose of making electioneering communications? If such funds are donations, they would not violate the prohibition on corporate and labor organizations contributions in section 441b(a). The Commission seeks comment on the relationship between the treatment of funds provided by individuals to other persons for electioneering communications as donations in 11 CFR 104.20(c)(7) and the treatment of funds provided by corporations and labor organizations to other persons for electioneering communications as contributions in 2 U.S.C. 441b(b)(2).

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

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

The Commission certifies that the attached proposed rules, if adopted, would not have a significant economic impact on a substantial number of small entities. There are two bases for this certification. First, there are few small entities that would be affected by these proposed rules. The Commission’s proposed revisions may affect some for-profit corporations, labor organizations, individuals, and some non-profit organizations.
Individuals and labor organizations are not “small entities” under 5 U.S.C. 601(6). Many non-profit organizations that might use general treasury funds to make independent expenditures or electioneering communications are not “small organizations” under 5 U.S.C. 601(4) because they are not financed by a small identifiable group of individuals, but rather rely on contributions from a large number of individuals to fund operations and activities.

Second, the proposed rules would not have a significant economic impact on the small entities affected by this rulemaking. Overall, the proposed rules would relieve a funding restriction that the current rules place on some corporations and labor organizations. The proposed rules would allow small entities to engage in activity they were previously prohibited from funding with corporation or labor organization funds. Thus, while one effect of the proposed rule would be to increase substantially the number of corporations and labor organizations that use general treasury funds to make independent expenditures or electioneering communications, these entities will do so voluntarily and not because of any new federal requirement to do so. Although they would incur some costs in complying with the obligation to report independent expenditures and electioneering communications, these costs would not be very great and thus would not have a significant economic impact on the small entities affected by this rulemaking. In fact, the obligation for corporations and labor organizations to report electioneering communications should not be burdensome because the trigger to report electioneering communications remains high. Further, because qualified non-profit corporations would continue to be able to make independent expenditures and electioneering communications just as they have done before, their reporting obligations
Draft B

will not change or become more burdensome because of this rulemaking. Therefore, the attached rule would not have a significant economic impact on a substantial number of small entities.

List of Subjects

11 CFR Part 114

Business and industry, elections, labor.
Draft B

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

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

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

Authority: 2 U.S.C. 431(1), 431(8), 431(9), 432(i), 434, 438(a)(8) and (b), 439a, 441a, and 36 U.S.C. 510.

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

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

(7) * * *

(i) If the 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 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 disbursements 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.

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)

1. 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.

2. In section 114.2, paragraph (b) would be revised to read as follows:
§114.2 Prohibitions on contributions, and expenditures and electioneering communications.

* * * * *

(b) * * *

ALTERNATIVE A for 114.2(b)(2)

(2) Except as provided at 11 CFR 114.10, corporations and labor organizations are prohibited from:

(i) Making coordinated expenditures as defined in 11 CFR part 100, subpart D 109.20 and coordinated communications as defined in 11 CFR 109.21,
or

(ii) Making expenditures with respect to a Federal election (as defined in 11 CFR 114.1(a)), for communications to those outside the 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.

ALTERNATIVE B for 114.2(b)(2)

(2) Except as provided at 11 CFR 114.10, corporations and labor organizations are prohibited from:

(i) Making expenditures as defined in 11 CFR part 100, subpart D, except for payments for communications that are not coordinated communications as defined in 11 CFR 109.21,
or

(ii) Making expenditures with respect to a Federal election (as defined in 11 CFR 114.1(a)), for communications to those outside the
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.
§27(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.

3. Section 114.3 is amended by revising paragraphs (a), (c) introductory
material, 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 restricted class or any part of that class. Corporations and labor organizations may also make the communications permitted under 11 CFR 114.4 to their restricted class or any part of that class. The activities permitted under this section may involve election-related coordination with candidates and political committees. only to the extent permitted by this section. See 11 CFR 100.16 and 114.2(c) regarding independent expenditures and coordination with candidates.

(2) Incorporated membership organizations, incorporated trade associations, incorporated cooperatives and corporations without capital stock may make communications to their restricted class, or any part of that class as permitted in paragraphs (a)(1) and (c) of this section.

(c) Communications containing express advocacy. Communications containing express advocacy which may be made to the restricted class include, but are not limited to, the following examples; set forth in paragraphs (c)(1) through (c)(4) of this section.

ALTERNATIVE A for 114.3(c)(4)

(4) Registration and get-out-the-vote drives.

   (i) Voter registration and get-out-the-vote drives permitted. A corporation or labor organization may conduct registration and get-
out-the-vote drives aimed at its restricted class. Registration and
get-out-the-vote drives include providing transportation to the
place of registration and to the polls. 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.

(ii) Disbursements for certain voter registration and get-out-the-vote
drives not expenditures or contributions. Disbursements for voter
registration and get-out-the-vote drives are not contributions or
expenditures, provided that the drive is conducted so that
information and other assistance regarding registering or voting,
including transportation and other services offered, is not withheld
or refused on the basis of support for or opposition to particular
candidates, or a particular political party. See 2 U.S.C.
441b(b)(2)(B). Such drives may include communications
containing express advocacy, such as urging individuals to register
with a particular party or to vote for a particular candidate or
candidates. 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.
ALTERNATIVE B for 114.3(c)(4)

(4) Registration and get-out-the-vote drives. A corporation or a labor organization may conduct registration and get-out-the-vote drives aimed at its restricted class. Registration and get-out-the-vote drives include providing transportation to the place of registration and to the polls. Such drives may include communications containing express advocacy, such as urging individuals to register with a particular party or to vote for a particular candidate or candidates. 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.

4. Section 114.4 is amended by revising paragraphs (a), (b), (c)(1), (c)(2), (c)(3)(i), (c)(4), (c)(5), (c)(6) and (d), by redesignating paragraphs (b)(1)(i) – (b)(1)(viii) as paragraphs (b)(1) – (b)(8), and by removing paragraphs (b)(2), (c)(3)(iv), (c)(3)(v), (c)(5)(i), (c)(5)(ii), (c)(6)(i), (c)(6)(ii), and (c)(8) to read as follows:

§ 114.4 Disbursements for communications by corporations and labor organizations beyond the restricted class in connection with a Federal election.

(a) General. A corporation or labor organization may communicate beyond the restricted class in accordance with this section. Any communications that a corporation or labor organization may make to the general public under paragraph (c) of this section, and may also be made to the corporation's or labor organization's restricted class and to other employees and their families. Communications which a corporation or labor organization may make only to its employees (including its restricted class) and their
families, but not to the general public, are set forth in paragraph (b) of this section. Any communications that a corporation or labor organization may make to the general public are set forth in paragraph (c) of this section, and may also be made to the corporation's or labor organization's restricted class and to other employees and their families. Communications which a corporation or labor organization may make only to its restricted class are set forth at 11 CFR 114.3. The activities described in paragraphs (b) and (c) of this section may be coordinated with candidates and political committees only to the extent permitted by this section. See 11 CFR 100.16, 109.21, and 114.2(c) regarding independent expenditures and coordination with candidates. Incorporated membership organizations, incorporated trade associations, incorporated cooperatives, and corporations without capital stock will be treated as corporations for the purposes of making communications beyond the restricted class under this section. (b) Communications by a corporation or labor organization involving candidate and party appearances to employees beyond its restricted class. (1) Candidate and party appearances on corporate premises or at a meeting, convention or other function. Corporations and labor organizations may permit candidates, candidates' representatives or representatives of political parties on corporate or labor organization premises or at a meeting, convention, or other function of the corporation or labor organization to address or meet its restricted class and other employees of the corporation or labor organization and their families, in accordance with the conditions set forth in paragraphs (b)(1)(i) through (b)(1)(viii) (b)(1) through (b)(8) of this section. Other guests of the corporation or
labor organization who are being honored or speaking or participating in
the event and representatives of the news media may be present. A
corporation or labor organization may bar all candidates, candidates' 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.

(i) 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) 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) 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) 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));

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;
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 impractical to provide all candidates, candidates’ representatives, and party representatives with similar times or locations;

Coordination with each candidate, candidate’s agent, and candidate’s authorized committee(s) may include discussions of the structure, format, and timing of the candidate appearance and the candidate’s positions on issues, but shall not include discussions of the candidate’s plans, projects, or needs relating to the campaign; and

Representatives of the news media may be allowed to be present during a candidate, candidate representative, or party representative appearance under this section, in accordance with the procedures set forth at 11 CFR 114.3(c)(2)(iv).

Candidate and party appearances on labor organization premises or at a meeting, convention or other function. A labor organization may permit candidates, candidates’ representatives or representatives of political parties on the labor organization’s premises or at a meeting, convention, or other function of the labor organization to address or meet its restricted class and other employees of the labor organization, and their families, in accordance with the conditions set forth in paragraphs (b)(1) (i) through (iii), (vi) through (viii), and paragraphs (b)(2) (i) and (ii) of this section.
Other guests of the labor organization who are being honored or speaking or participating in the event and representatives of the news media may be present. A labor organization may bar all candidates, candidates' representatives and representatives of political parties from addressing or meeting its restricted class and other employees of the labor organization and their families on the labor organization's premises or at any meeting, convention or other function of the labor organization.

(i) The candidate's representative or party representative (other than an 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 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 labor organization, but may leave campaign materials or envelopes for members of the audience. No official, member, or employee of a labor organization or its separate segregated fund shall, either orally or in writing, solicit or direct or control contributions by members of the audience to 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).
(ii) A labor organization or its separate segregated fund shall not, in conjunction with any candidate or party representative appearance 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 the communications described in paragraphs (c)(2) through (c)(5) of this section 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 (e) of this section shall not prevent a qualified nonprofit corporation under 11 CFR 114.10(e) 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 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 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.
The corporation or labor organization shall not, in connection with any such distribution, expressly advocate the election or defeat of any clearly identified candidate(s) or candidates of a clearly identified political party and shall not encourage registration with any particular political party.

The reproduction and distribution of registration or voting information and forms shall not be coordinated with any candidate(s) or political party.

Voting records. A corporation or labor organization may prepare and distribute to the general public the voting records of Members of Congress, provided that the voting record and all communications distributed with it do not expressly advocate the election or defeat of any clearly identified candidate, clearly identified group of candidates or candidates of a clearly identified political party. The decision on content and the distribution of voting records shall not be coordinated with any candidate, group of candidates or political party.

Voter guides. A corporation or labor organization may prepare and distribute to the general public voter guides consisting of two or more candidates' positions on campaign issues, including voter guides obtained from a nonprofit organization that is described in 26 U.S.C. 501 (c)(3) or (c)(4), provided that the voter guides comply with either paragraph (e)(5)(i) or (e)(5)(ii) (A) through (E) of this section. The sponsor may include in the voter guide biographical information on each candidate;
such as education, employment-positions, offices held, and community
involvement.

(i) — The corporation or labor organization must not act in cooperation,
consultation, or concert with or at the request or suggestion of the
candidates, the candidates' committees or agents regarding the
preparation, contents and distribution of the voter guide, and no
portion of the voter guide may expressly advocate the election or
defeat of one or more clearly identified candidate(s) or candidates
of any clearly identified political party.

(ii)(A) The corporation or labor organization must not act in cooperation,
consultation, or concert with or at the request or suggestion of the
candidates, the candidates' committees or agents regarding the
preparation, contents and distribution of the voter guide;

(B) — All of the candidates for a particular seat or office shall be
provided an equal opportunity to respond, except that in the
case of Presidential and Vice-Presidential candidates the
corporation or labor organization may choose to direct the
questions only to those candidates who—

(1) — Are seeking the nomination of a particular political
party in a contested primary election; or

(2) — Appear on the general-election ballot in the state(s)
where the voter guide is distributed or appear on the
general election ballot in enough states to win a majority of the electoral votes;

(C) No candidate may receive greater prominence in the voter guide than other participating candidates, or substantially more space for responses;

(D) The voter guide and its accompanying materials shall not contain an electioneering message; and

(E) The voter guide and its accompanying materials shall not score or rate the candidates' responses in such a way as to convey an electioneering message.

(6) Endorsements. A corporation or labor organization may endorse a candidate, and may communicate the endorsement to its restricted class or to the general public, through the publications described in 11 CFR 114.3(c)(1) or during a candidate appearance under 11 CFR 114.3(c)(2), provided that no more than a de minimis number of copies of the publication which includes the endorsement are circulated beyond the restricted class. The corporation or labor organization may publicly announce the endorsement and state the reasons therefore, in accordance with the conditions set forth in paragraphs (c)(6)(i) and (ii) of this section.

The Internal Revenue Code and regulations promulgated thereunder should be consulted regarding restrictions or prohibitions on endorsements by nonprofit corporations described in 26 U.S.C. 501(c)(3).
(i) The public announcement of the endorsement may be made through a press release and press conference. Disbursements for 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 community or the general public (whichever is invited) on the educational institution's premises at no charge or at less than the usual and normal charge, if:

(A) The educational institution makes reasonable efforts to ensure that the appearances constitute speeches, question and answer sessions, or similar communications in an academic setting, and makes reasonable efforts to ensure that the appearances are not conducted as campaign rallies or events; and

(B) The educational institution does not, in conjunction with the appearance, expressly advocate the election or defeat of any clearly identified candidate(s) or candidates of a clearly identified political party, and does not favor any one candidate or political party over any other in allowing such appearances.

(8) Electioneering communications. Any corporation or labor organization may make electioneering communications to the general public that are permissible under 11 CFR 114.15. Qualified nonprofit corporations, as defined in 11 CFR 114.10(e), may make electioneering communications in accordance with 11 CFR 114.10(d).
ALTERNATIVE A for 114.4(d)

(d) Voter registration and get-out-the-vote drives.

(1) Voter registration and get-out-the-vote drives permitted. A corporation or labor 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)(6) of this section. 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. Voter registration and get-out-the-vote drives include providing transportation to the polls or to the place of registration.

(2) Disbursements for certain voter registration and get-out-the-vote drives not expenditures. Voter registration or get-out-the-vote drives that are conducted in accordance with paragraphs (d)(2)(i) through (d)(2)(v) of this section are not expenditures.

(i) 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) The registration or get-out-the-vote drive shall not be coordinated with any candidate(s) or political party.

(ii) 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.

(iii) 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.

(iv) 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.

(v) The corporation or labor organization shall notify those receiving information or assistance of the requirements of paragraph (d)(4) of this section. The notification shall be made in writing at the time of the registration or get-out-the-vote drive.

ALTERNATIVE B for 114.4(d)
(d) **Voter registration and get-out-the-vote drives.** A corporation or labor 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. 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. 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.

4. 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.

(54) 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.

(65) 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.

5. Section 114.10 is removed and reserved.

§ 114.10 [Removed and reserved].

6. Section 114.14 is removed and reserved.

§ 114.14 [Removed and reserved].

7. Section 114.15 is removed and reserved.

§ 114.15 [Removed and reserved].

8. 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.
Draft B

(b) Reporting independent expenditures and electioneering communications.

(1) Corporations and labor organizations that make independent expenditures aggregating in excess of $250 with respect to a given election in a calendar year shall file reports as required by 11 CFR 104.4(a) and 109.10(b).

(2) Corporations and labor organizations that make electioneering communications aggregating in excess of $10,000 in a calendar year shall file the statements required by 11 CFR 104.20(b).

(c) Solicitation; disclosure of use of contributions for political purposes. Whenever a corporation or labor organization solicits donations that may be used for political purposes, the solicitation shall inform potential donors that their donations may be used for political purposes, such as supporting or opposing candidates.

(d) Non-authorization notice. Corporations or labor organizations making independent expenditures or electioneering communications under this section shall comply with the requirements of 11 CFR 110.11.

(e) Segregated bank account. A corporation or labor organization may, but is not required to, establish a segregated bank account into which it deposits only funds donated or otherwise provided by individuals, as described in 11 CFR part 104, from which it makes disbursements for electioneering communications.

(f) Activities prohibited by the Internal Revenue Code. Nothing in this section shall be construed to authorize any organization exempt from taxation under 26 U.S.C.
Draft B

501(a) to carry out any activity that it is prohibited from undertaking by the 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