



FEDERAL ELECTION COMMISSION
Washington, DC 20463

RECEIVED
FEDERAL ELECTION
COMMISSION
SECRETARIAT

2002 JUL 29 P 4:52

JUL 29 2002

MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkon
Staff Director

FROM: Lawrence H. Norton
General Counsel

Rosemary C. Smith
Acting Associate General Counsel

Mai T. Dinh
Acting Assistant General Counsel

J. Duane Pugh, Jr.
Acting Special Assistant General Counsel

Anthony T. Buckley
Attorney

SUBJECT: Draft Notice of Proposed Rulemaking on Electioneering
Communications

AGENDA ITEM
For Meeting of: 8-1-02

SUBMITTED LATE

Attached is a draft Notice of Proposed Rulemaking ("NPRM") addressing issues relating to electioneering communications. This draft reflects discussion on these issues during the Regulations Committee meetings on May 24 and 29, and July 25, 2002.

Please note that the draft NPRM sets separate deadlines for commenters who wish to testify and those who do not. Commenters who request to testify must submit their requests and comments by August 21. Those who do not wish to testify must submit their comments on August 29.

Recommendation

The Office of General Counsel recommends that the Commission approve the attached Notice of Proposed Rulemaking for publication in the *Federal Register*.

Attachment

1 **FEDERAL ELECTION COMMISSION**

2 **11 CFR Parts 100, 104, 105 and 114**

3 **[NOTICE 2002->]**

4 **ELECTIONEERING COMMUNICATIONS**

5
6 **AGENCY:** Federal Election Commission.

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

8 **SUMMARY:** The Federal Election Commission is seeking comment on proposed
9 rules regarding electioneering communications, which are certain
10 broadcast, cable, and satellite communications that refer to a clearly
11 identified Federal candidate within 60 days of a general election or
12 within 30 days of a primary election for Federal office. The proposed
13 rules implement the Bipartisan Campaign Reform Act of 2002
14 (“BCRA”), which adds to the Federal Election Campaign Act (“FECA”
15 or “the Act”) new provisions regarding “electioneering
16 communications.” The proposed rules would require any person who
17 makes disbursements for electioneering communications in excess of
18 \$10,000 in a calendar year to file a disclosure statement within 24 hours
19 of the time the disbursements exceed \$10,000. Additionally, BCRA
20 prohibits incorporated entities and labor organizations from making
21 electioneering communications. The proposed rules would implement
22 this prohibition. Please note that the draft rules that follow do not
23 represent a final decision by the Commission on the issues presented by

1 this rulemaking. In fact, some of the draft rules are offered as
2 alternatives. Regardless, the Commission seeks comments on all of the
3 issues that are raised in this rulemaking. Further information is
4 provided in the supplementary information that follows.

5 **DATES:**

The Commission will hold a hearing on these proposed rules on
6 August 28-29, 2002, at 9:30 a.m. Commenters wishing to testify at the
7 hearing must submit their request to testify along with their written or
8 electronic comments by August 21, 2002. Commenters who do not
9 wish to testify must submit their written or electronic comments by
10 August 29, 2002.

11 **ADDRESSES:**

All comments should be addressed to Ms. Mai T. Dinh, Acting
12 Assistant General Counsel, and must be submitted in either electronic
13 or written form. Electronic mail comments should be sent to
14 Electioneering@fec.gov and must include the full name, electronic mail
15 address, and postal service address of the commenter. Electronic mail
16 comments that do not contain the full name, electronic mail address,
17 and the postal service address of the commenter will not be considered.
18 Faxed comments should be sent to (202) 219-3923, with printed copy
19 follow-up to ensure legibility. Written comments and printed copies of
20 faxed comments should be sent to Federal Election Commission, 999 E
21 Street, NW, Washington, DC 20463. Commenters are strongly
22 encouraged to submit comments electronically to ensure timely receipt
23 and consideration. The Commission will make every effort to post

1 public comments on its Web site within ten business days of the close
2 of each comment period. The hearing will be held in the Commission's
3 ninth floor meeting room, 999 E. St. N.W., Washington, D.C.

4 **FOR FURTHER**
5 **INFORMATION**
6 **CONTACT:**

Ms. Mai T. Dinh, Acting Assistant General Counsel, Mr. J. Duane
7 Pugh, Jr., Acting Special Assistant General Counsel, or Mr. Anthony T.
8 Buckley, Attorney, 999 E Street, NW, Washington, DC 20463,
9 (202) 694-1650 or (800) 424-9530.

10 **SUPPLEMENTARY**

11 **INFORMATION:** The Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155,
12 116 Stat. 81 (March 27, 2002), contains extensive and detailed amendments to the Federal
13 Election Campaign Act of 1971, as amended, 2 U.S.C. 431 et seq. This is one of a series of
14 Notices of Proposed Rulemakings ("NPRM") the Commission will publish over the next several
15 months in order to meet the rulemaking deadlines set out in BCRA.

16 This NPRM addresses electioneering communications, that is, certain broadcast, cable, or
17 satellite communications that refer to a clearly identified candidate for Federal election that are
18 made within 60 days of a general election or within 30 days of a primary election.

19 Other rulemaking have addressed or will address: 1) non-Federal funds or "soft money"
20 promulgated on June 22, 2002 (67 Fed. Register 49063 (July 29, 2002)); 2) coordinated and
21 independent expenditures;¹ 3) the so-called "millionaires' amendment," which increases
22 contribution limits for congressional candidates facing self-financed candidates on a sliding

¹ That future NPRM will also address electioneering communications that are coordinated with candidate and political party committees.

1 scale, based on the amount of personal funds the opponent contributes to his or her campaign;
2 4) new or amended contribution limitations and prohibitions; 5) other new and amended
3 provisions, including inaugural committees, fraudulent solicitations, disclaimers, personal use of
4 campaign funds, and civil penalties; 6) reporting; and 7) reorganization of “contribution” and
5 “expenditure” definitions. The reporting NPRM will contain the reporting rules proposed in
6 several of the other NPRMs and will restructure 11 CFR Part 104 to make the reporting rules
7 more user-friendly. The deadline for the promulgation of the remaining rules (including those
8 proposed in this NPRM) is 270 days after the date of BCRA’s enactment, or December 22, 2002.

9 **What is an electioneering communication?**

10 **I. Introduction**

11 BCRA at 2 U.S.C. 434(f)(3) defines a new term, called “electioneering communications.”
12 This term includes broadcast, cable, or satellite communications: (1) that refer to a clearly
13 identified Federal candidate; (2) that are transmitted within certain time periods before a primary
14 or general election; and (3) that are “targeted to the relevant electorate,” that is, the relevant
15 congressional district or State that candidates for the U.S. House of Representatives or the
16 U.S. Senate seek to represent. Communications that refer to candidates for President or
17 Vice-President do not need to be targeted to be electioneering communications. Those paying
18 for the communications must meet certain disclosure requirements, and they cannot use funds
19 from national banks, corporations, foreign nationals,² or labor organizations to pay for the
20 communications. See 2 U.S.C. 441b(b)(2) and 441e(a)(2), as amended by BCRA section 203(b)
21 and 303.

² The ban on foreign national funds will be addressed in a separate rulemaking.

1 BCRA's sponsors have explained that these new "electioneering communications"
2 provisions, set out at new 2 U.S.C. 434(f) and 441b(b)(2), are designed to ensure that campaign
3 advertisements are paid for with funds subject to the prohibitions and limitations of campaign
4 finance laws. According to the sponsors, putative "issue ads" have been used to circumvent
5 FECA's prohibition on the use of union and corporate treasury funds in connection with Federal
6 elections. In the sponsors' view, this is accomplished by creating and airing advertisements that
7 avoid the specific language that the Supreme Court has said expressly advocates the election or
8 defeat of a candidate. See 148 Cong. Rec. S2140-2141 (daily ed. March 20, 2002)(statement of
9 Sen. McCain); see also Buckley v. Valeo, 424 U.S. 1, 44, fn. 52 (1976); 11 CFR 100.22.³

10 BCRA's sponsors cited various studies and investigations that they say show that the
11 express advocacy test does not distinguish genuine issue ads from campaign ads. 148 Cong. Reg.
12 at S2140-2141 (statement of Sen. McCain). For example, Senator McCain cited a study by the
13 Brennan Center for Justice, Buying Time 2000, that found that "97 percent of the electioneering
14 ads reviewed" did not use the words and phrases, cited by the Buckley Court, and that more than
15 99 percent of the "group-sponsored soft money ads" studied were in fact campaign ads. Id.

³"Express advocacy" was first defined by the Supreme Court as "communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" Buckley at 44, fn. 52 (1976). The Supreme Court created the express advocacy test to save the statutory phrase "for the purpose of...influencing"-- the "critical phrase" within the definitions of "expenditure" and "contribution" at 2 U.S.C. 431(8) and (9)--from unconstitutional vagueness while furthering the goal of Congress "to insure both the reality and the appearance of the purity and openness of the federal election process." Buckley v. Valeo, 424 U.S. 1, 77-78 (1976). The Court's express advocacy test marked the dividing line between advocacy regulated by the FECA and the advocacy of "issues of public interest," both of which are constitutionally protected. Id. at 42, 44, 80.

1 at S2141. Senators Snowe and Jeffords stated that, because the electioneering communications
2 provisions focus on the key elements of when, how, and to whom a communication is made,
3 rather than relying on the express advocacy test or the intent of the advertiser, they are a clearer,
4 more accurate test of whether an advertisement is campaign-related. *Id.* at S2117-18 (statement
5 of Sen. Jeffords); S2135-37 (statement of Sen. Snowe).

6 Accordingly, the proposed rules would add a new definition for “electioneering
7 communication,” to be located at proposed 11 CFR 100.29. The new definition would be added
8 to current 11 CFR part 100 because it has general applicability to Title 11 of the Code of Federal
9 Regulations.

10 II. Alternative Definition

11 BCRA at 2 U.S.C. 434(f)(3)(A)(ii) provides an alternative definition of “electioneering
12 communication,” which would take effect in the event the definition in section 434(f)(3)(A)(i) is
13 held to be constitutionally insufficient “by final judicial decision.” The alternative definition of
14 “electioneering communication” is “any broadcast, cable, or satellite communication which
15 promotes or supports a candidate for that office, or attacks or opposes a candidate for that office
16 (regardless of whether the communication expressly advocates a vote for or against a candidate)
17 and which also is suggestive of no plausible meaning other than an exhortation to vote for or
18 against a specific candidate.” *Id.* The Commission is not proposing regulations to implement
19 this alternative statutory definition at this time. Proposing two definitions for the same term, one
20 to take effect only after the other may be held invalid, could be confusing to those who are
21 affected by this new law. Additionally, any court decision regarding 2 U.S.C. 434(f)(3)(A) may
22 provide guidance as to the appropriate standard. Consequently, the Commission intends to
23 promulgate regulations to implement this alternative definition when and if it becomes necessary

1 to do so. Nevertheless, in the alternative, the Commission seeks comment as to whether it should
2 promulgate an alternative definition now. If so, should this definition simply reiterate the
3 wording of the statute, or should it provide additional guidance as to what types of
4 communications promote, support, attack, or oppose a candidate and suggest no plausible
5 meaning other than an exhortation to vote for or against a candidate?

6 III. Definition of "Electioneering Communication"

7 A. Overview

8 BCRA amends 2 U.S.C. 434 by adding a new term, "electioneering communication," at
9 section 434(f)(3). BCRA defines "electioneering communication" as a broadcast, cable, or
10 satellite communication that (1) refers to a clearly identified candidate for Federal office; (2) is
11 made within 60 days before a general, special, or runoff election, or within 30 days before a
12 primary or preference election, or a convention or caucus of a political party that has authority to
13 nominate a candidate, for the office sought by the candidate; (3) does not fall within any of the
14 exceptions to the electioneering communication specified in the statute; and (4) in the case of a
15 candidate for an office other than President or Vice President, is targeted to the relevant
16 electorate. BCRA also provides exceptions to the definition, and authorizes the Commission to
17 approve additional exceptions.

18 The proposed definition of electioneering communication at proposed 11 CFR 100.29(a)
19 largely tracks the language in BCRA. However, the word "made" as in "made within 60 days"
20 would be changed to "publicly distributed" to clarify that it refers to the broadcasting or airing of
21 the communication rather than the making of a disbursement for an electioneering
22 communication. The proposed definition would also clarify that, in the case of a candidate for
23 nomination for President, the 30-day window applies in those States that will hold a primary or

1 preference election, or a convention or caucus of a political party that has authority to nominate a
2 candidate for President, during that time.

3 The Commission's current rules at 11 CFR 100.2 contain definitions of "general
4 election," "primary election," "runoff election," "caucus or convention," and "special election."
5 Under 11 CFR 100.2(f), a "special election" could be a primary, general, or runoff election.
6 BCRA, however, groups "special election" with general and runoff elections for purposes of an
7 electioneering communication. Proposed new paragraph 100.29(a)(2) would clarify that, for
8 purposes of section 100.29 only, "special elections" and "runoff elections" would be considered
9 primary elections, if held to nominate a candidate; and general elections, if held to elect a
10 candidate. Comments are sought on this approach.

11 B. Definition of "Refers to a Clearly Identified Candidate"

12 Proposed 11 CFR 100.29(b) would set out definitions of the terms used in 11 CFR
13 100.29(a). The first definition, at proposed 11 CFR 100.29(b)(1), defines the term "refers to a
14 clearly identified candidate." This term is already defined in the Commission's rules at 11 CFR
15 100.17, which states that "clearly identified" means the candidate's name, nickname, photograph,
16 or drawing appears, or the identity of the candidate is otherwise apparent through an
17 unambiguous reference such as "the President," "your Congressman," or "the incumbent," or
18 through an unambiguous reference to his or her status as a candidate such as "the Democratic
19 presidential nominee" or "the Republican candidate for Senate in the State of Georgia." The
20 proposed rule at 11 CFR 100.29(b) would track the language of the current rule in 11 CFR
21 100.17. This approach appears to be consistent with legislative intent. See 148 Cong.
22 Rec. S2144 (daily ed. Mar. 20, 2002) (statement of Sen. Feingold indicating that a
23 communication "refers to a clearly identified candidate" if it "mentions, identifies, cites, or

1 directs the public to the candidate's name, photograph, drawing or otherwise makes an
2 'unambiguous reference' to the candidate's identity"). Please note that the definition would not
3 be based on the intent or purpose of the person making the communication.

4 C. Definition of "Broadcast, Cable or Satellite Communication"

5 Proposed 11 CFR 100.29(b)(2) would define "broadcast, cable, or satellite
6 communication" to mean a communication that is publicly distributed by a television station,
7 radio station, cable television system, or satellite system. The term "distribute" reflects the
8 legislation's apparent focus on the means of dissemination rather than on the means of receipt.

9 The definition would exclude "webcasts" or other communications that are distributed
10 only over the Internet, but would include television or radio communications that are
11 simultaneously webcast over the Internet, or archived for listening over the Internet. Internet
12 subscribers would not be included in the calculation of how many persons a communication can
13 reach in a particular district or state. The Commission seeks comment on whether this is an
14 appropriate reading of the statute.

15 The legislative history, which is discussed below, makes it clear that this regulation
16 should be limited to television and radio. The Commission seeks comment to confirm that this
17 interpretation is correct. All other types of communications, such as print media, billboards,
18 telephones, and the internet, would therefore, not be considered electioneering communications.
19 Consequently, proposed 11 CFR 100.29(c)(1) would specifically list these as exceptions to the
20 definition.

21 The Commission also seeks comment on whether it would also be appropriate to exempt
22 some types of television and radio broadcasting from the definition of "broadcast, radio or
23 satellite." The Commission seeks comment on whether communications transmitted by digital

1 audio radio satellite would be considered electioneering communications. Although newly added
2 section 304(f)(3)(a) of BCRA seems to include communications by satellite without limitation as
3 to the type of transmission, section 316(c)(6)(B) suggests that the term is limited to "satellite
4 television service." Proposed 11 CFR 100.29(b) would exempt Low Power FM Radio (LPFM),
5 Low Power Television (LPTV), and citizens band (CB) radio. Are there other types of television
6 and broadcasting that should also be exempt? How should "web TV" (in which viewers access
7 the Internet using television sets) be treated for purposes of these rules?

8 D. Definition of "Targeted to the Relevant Electorate"

9 Proposed 11 CFR 100.29(b)(3) would track the language of BCRA at 2 U.S.C.
10 434(f)(3)(C) in defining "targeted to the relevant electorate" as a communication that can be
11 received by 50,000 or more persons: in the district the candidate seeks to represent, in the case of
12 a candidate for Representative in, or Delegate or Resident Commissioner to, the U.S. House of
13 Representatives; or in the State the candidate seeks to represent, in the case of a candidate for the
14 U.S. Senate.

15 Please note that the definition of "targeted to the relevant electorate" would include
16 communications that can be received beyond the relevant geographical area. A communication
17 that can also be received by large numbers of persons outside the relevant district or State would
18 still be considered a targeted communication, as long as 50,000 persons in the relevant area could
19 also receive it. Conversely, for example, an electioneering communication would not include a
20 communication that reaches fewer than 50,000 persons in the State or district where the clearly
21 identified candidate is running, even if at the same time it also reaches 50,000 or more persons in
22 a State or district where the clearly identified candidate is not running.

1 Regarding whether a communication reaches 50,000 or more persons, the Commission
2 seeks comment as to how to measure, and where to obtain the data concerning, the number of
3 persons a communication reaches. For example, what signal measurement (e.g., Grade B
4 contour) should be used in determining how many people a broadcast signal reaches, and how
5 does one determine if a broadcast station's signal could potentially reach 50,000 or more persons
6 in a particular district or state? Should a broadcast station be required to provide the Federal
7 Communications Commission with information regarding the cable system(s) and satellite
8 system(s) that carry it in order that the cable and satellite systems' audience can be included in
9 the calculation of the number of persons reached by the broadcast station? If such audiences
10 were included in this calculation, how could double counting of some viewers (those that can
11 receive the station's signal both over the air and through a cable or satellite system) be avoided?
12 Is subscriber information the only basis for measuring the audience of a cable or satellite system?
13 If so, must the FCC compel cable and satellite companies to provide it with this data because
14 they are the only possible source of this information? How should subscriber information be
15 converted into the chosen definition of "person" in new 2 U.S.C. 434(f)(3)(C), discussed herein?
16 If, for whatever reason, it cannot be determined whether a particular communication will reach
17 50,000 or more persons in a relevant district or state, should it be presumed that the
18 communication reaches fewer or more than 50,000 persons?

19 Theoretically, one ad could be publicly distributed via several small outlets, each of
20 which reaches fewer than 50,000 persons in the relevant area, but in the aggregate reach 50,000
21 or more persons in the relevant area. Practically, the size of radio and television audiences may
22 eliminate this concern. The Commission seeks comments on whether the regulations should

1 address this situation to require aggregation of recipients of the same ad from multiple outlets
2 and, if so, whether the regulations should aggregate substantially similar ads for this purpose.

3 The term "person" is defined in 2 U.S.C. 431(11) and in current Commission regulations
4 at 11 CFR 100.10 to mean an individual, partnership, association, corporation, labor organization
5 and any other organization or group of persons. It is not clear from the legislative history of
6 BCRA whether the term "person" in new 2 U.S.C. 434(f)(3)(C) is intended to be restricted to
7 only individuals, households, U.S. citizens, voters, those within the voting age population, or any
8 other category of "person." The Commission believes that BCRA's policies are best served by
9 construing the term "person" as applying to natural persons residing in a given jurisdiction,
10 regardless of their citizenship status or whether they are of voting age. The Commission seeks
11 comments on which interpretation is correct. Whatever definition of "person" commenters
12 choose should be associated with clearly identified sources of information needed to implement
13 this section of BCRA.

14 Pursuant to section 201(b) of BCRA⁴, the Federal Communications Commission must
15 "compile and maintain" any information the Federal Election Commission may require to ensure
16 that proper disclosure of electioneering communications is made. The FCC is required to make
17 such information publicly available on its website. These requirements appear to be necessary to
18 promote compliance with the disclosure requirements in the new law regarding electioneering
19 communications. Those who wish to make communications that meet the timing and medium
20 requirements of the electioneering communication definition, must be able to easily determine
21 whether the radio or television stations, cable systems, or satellite systems on which they wish to
22 publicly distribute their communications will reach 50,000 or more persons in the State or

⁴ This section of BCRA has not been codified.

1 congressional district in which the candidate mentioned in the communication is running for
2 office. Consequently, the Commission has preliminarily concluded that a database searchable by
3 State, congressional district, radio and television station call letters, cable system or satellite
4 system, and radio station frequencies, should be created, and that a search under any of these
5 options should reveal whether 50,000 or more persons in a specified State or congressional
6 district are capable of receiving a communication transmitted through a broadcast station, cable
7 system or satellite system. The Commission seeks comments as to whether any additional
8 information or searchable options for the FCC's website are necessary or desirable.

9 It would also be helpful for the FCC's website to contain a link to the new electioneering
10 communication forms (Form 9 and Schedule J) that the Commission will create for reporting
11 electioneering communications. Further, the Commission anticipates placing a link on its own
12 website to the page on the FCC website containing the database. The Commission seeks
13 comments on what, if any, additional features on the FEC or FCC websites should be made
14 available. Proposed 11 CFR 100.29(b)(4) would list the types of information the FCC may
15 determine it will provide on its website.

16 The Commission anticipates that the information on the FCC website will also allow
17 interested parties to determine easily whether a given communication is capable of reaching
18 50,000 persons. Thus, the information on the FCC website is intended to serve as definitive
19 evidence of whether a communication could have been received by 50,000 or more persons. For
20 example, if the information on the FCC website indicated that a certain radio station can reach
21 fewer than 50,000 persons in a certain congressional district, and an ad was run only on that
22 station 45 days before the general election that referred to a House candidate in that district, then
23 the persons paying for that communication would not have to disclose the communication under

1 the proposed reporting rules and would have a complete defense against any charge that they
2 violated that portion of BCRA. For a discussion of the determination of whether a
3 communication reaches 50,000 or more persons, see above. Comments are sought as to whether
4 this approach is correct and, if so, whether it should be explicitly referenced in the FEC's
5 regulations.

6 E. Presidential Primary Candidates

7 With respect to Presidential primary candidates, one plausible reading of 2 U.S.C.
8 434(f)(3)(C) is that a communication that refers to a Presidential candidate does not need to be
9 "targeted to the relevant electorate" to qualify as an "electioneering communication." Thus,
10 under this interpretation, a communication referring to a clearly identified primary candidate for
11 President that meets BCRA's timing and medium requirements, and that does not fall within any
12 of the statutory exceptions, might be considered an electioneering communication, regardless of
13 the number or geographic location of persons receiving the communication. For example, an ad
14 referring to a primary candidate for President that is run anywhere in the United States could be
15 considered an "electioneering communication" if the ad aired on a television or radio station
16 within 30 days of a primary election taking place anywhere in the United States, even if the
17 primary election were months away or had already taken place in the State or States in which the
18 ad actually aired.

19 However, the Commission is concerned that such a sweeping impact on communications
20 referring to Presidential primary candidates may not have been contemplated by Congress and
21 could raise constitutional concerns. Therefore, it is proposing, at new 11 CFR 100.29(a)(1)(iv),
22 that an advertisement be considered an electioneering communication only if the advertisement
23 can be received by 50,000 or more persons in either a State in which a Presidential primary will

1 occur within 30 days, or nationwide if within 30 days of the national nominating convention of
2 that candidate's party.

3 As an alternative means of addressing this concern, the Commission could draft a
4 definition of "publicly distributed within 30 days of a primary election" to make clear that an ad
5 mentioning a candidate for President is not deemed to have been transmitted within 30 days
6 before a primary election unless the ad is transmitted to an audience of 50,000 or more persons in
7 an area in which a primary election is scheduled within 30 days. Such a definition, which would
8 be placed within 11 CFR 100.29(b) rather than 11 CFR 100.29(a), would state that a
9 communication that refers to a clearly identified candidate for President or Vice President be
10 would be "publicly distributed" within 30 days before a primary election, preference election, or
11 convention or caucus of a political party only where the communication can be received by
12 50,000 or more persons within the State holding such election, convention or caucus. No such
13 clarification is necessary for Presidential and Vice-Presidential nominees in the 60 days
14 preceding the general election, as the date of the general election does not vary from State to
15 State.

16 Comments are sought on the alternative approaches, which are consistent with a
17 requirement that the communication occur within a fixed number of days before a primary
18 election, and would involve a far lesser impact on fundamental First Amendment rights. The
19 Commission especially seeks comment on whether either alternative is allowed under BCRA.

20

1 **What is not an Electioneering Communication?**

2 **I. Specific Types of Communications**

3 Consistent with 2 U.S.C. 434(f)(3)(B), proposed 11 CFR 100.29(c) would list examples
4 of communications that are not “electioneering communications.”

5 It appears clear from the legislative history of BCRA that the term “electioneering
6 communications” only applies to communications that are publicly distributed by television or
7 radio, and not through other media. For this reason the definition of “electioneering
8 communications” is narrowly tailored, listing only three types of communications: broadcast,
9 cable, and satellite communications.

10 The electioneering communication provisions were originally offered as an amendment to
11 the predecessor of BCRA by Senators Snowe and Jeffords in 1998. That amendment, and all
12 versions of that amendment prior to the 107th Congress, defined an electioneering
13 communication to include “any broadcast from a television or radio broadcast station.” See 144
14 Cong. Record S938 (daily ed, Feb. 24, 1998); see also S.26 (106th Congress), 145 Cong. Rec.
15 S425 (daily ed. Jan. 19, 1999). Likewise, the floor debates on the electioneering provision during
16 the 107th Congress frequently referred to “television and radio ads.” During a final explanation
17 of these provisions, Senator Snowe again stated that they would apply to “so-called issue ads run
18 on television and radio only.” 148 Cong. Rec. S2135 (daily ed. Mar. 20, 2002)(statement of Sen.
19 Snowe).

20 Consistent with this legislative history, proposed 11 CFR 100.29(c)(1) provides examples
21 of communications that are not included in the definition of “electioneering communication.”

22 The proposed list of exemptions includes communications appearing in print media, including a
23 newspaper or magazine, handbills, brochures, yard signs, posters, billboards, and other written

1 materials, including mailings; communications over the Internet, including electronic mail; and
2 telephone communications.

3 The Internet is included in the above list of exceptions because, in most instances, it is
4 not a broadcast, cable, or satellite communication, and it is not sufficiently akin to television and
5 radio. During an early debate on the amendment, Senator Snowe was asked whether the
6 definition of electioneering communication would “apply to the Internet.” She replied, “No.
7 Television and radio.” See 144 Cong. Rec. S973 and S974 (daily ed. Feb. 25, 1998)(statement of
8 Sen. Snowe). The Commission seeks comment confirming that this is a correct interpretation of
9 BCRA.

10 II. The News Story, Commentary, or Editorial Exception

11 Proposed 11 CFR 100.29(c)(2) tracks the language in BCRA at 2 U.S.C. 434(f)(3)(B)(i)
12 by excluding communications that appear in a “news story, commentary, or editorial” distributed
13 from a broadcasting station, unless the broadcasting station is owned or controlled by any
14 political party or committee, or candidate. The proposed rule, however, would add that the
15 exception would apply to broadcasting stations owned or controlled by a party, committee, or
16 candidate if the communication meets the requirements of 11 CFR 100.132(a) and (b). Please
17 note that this portion of BCRA refers only to “broadcasting stations.” While this is consistent
18 with the use of the term throughout 2 U.S.C. 431, which sets out general definitions under the
19 FECA, it is narrower than the term “broadcast, cable or satellite communication” found in the
20 general definition of “electioneering communication” at 2 U.S.C. 434(f)(3)(A). The Commission
21 is proposing to use the broader term in section 100.29(c)(2), as the legislative history gives no
22 reason for this disparate treatment. However, it welcomes comments on whether the narrower
23 term would be appropriate. In the alternative, the Commission could decline to create a new

1 media exemption for electioneering communications, but instead rely on its existing media
2 exemption at 11 CFR 100.8(b)(2). The Commission seeks comment on which is the appropriate
3 course of action.

4 III. Exception for Expenditures and Independent Expenditures

5 Proposed 11 CFR 100.29(c)(3) implements the language in BCRA at 2 U.S.C.
6 434(f)(3)(B)(ii) excluding communications that are “expenditures” or “independent
7 expenditures” from the definition of “electioneering communications.” Senator Feingold
8 explained that independent expenditures were excluded because they contain express advocacy,
9 apparently in contrast to electioneering communications, which do not contain express advocacy.
10 See 148 Cong. Rec. S1993 (daily ed. Mar. 18, 2002) (statement and section-by-section analysis
11 of BCRA by Sen. Feingold).

12 The interpretation put forward by the Commission in the proposed regulations would be
13 that any disbursement of funds for a communication that constitutes a separately reportable
14 candidate-specific expenditure or an independent expenditure under FECA (which includes in-
15 kind contributions and coordinated party expenditures) is not an electioneering communication.
16 In addition, any expenditure of an authorized committee would remain subject to FECA’s regular
17 reporting requirements. 2 U.S.C. 434(b)(4)(A). Thus, authorized committees would not be
18 required to file an additional electioneering communication report for expenditures for
19 communications that would otherwise meet the definition of electioneering communication.
20 Consequently, the segregated bank account provisions of 2 U.S.C. 434(f)(2)(E) would not apply
21 to such expenditures either.

22 It can be argued that FECA adequately addresses expenditures, independent expenditures
23 and authorized committee outlays, and BCRA’s Title II was intended to address disbursements

1 that are not subject to FECA's treatment of such expenditures. Similarly, the exclusion may
2 represent an effort to avoid duplicative reporting requirements. To include communications that
3 are expenditures and independent expenditures would subject such communications to
4 duplicative and often conflicting reporting requirements. Likewise, the Commission notes that
5 all expenditures of authorized committees are, by definition, for the purpose of influencing the
6 candidate's election to Federal office. For this reason, the Commission proposes excepting from
7 the definition of electioneering communication expenditures for any public communication made
8 by a Federal candidate or officeholder's authorized campaign committee. The Commission seeks
9 comment on this approach, recognizing that the receipts and disbursements of authorized
10 committees must be reported under the Act, including a candidate's expenditures for public
11 communications, which are subject, additionally, to disclaimer provisions. If so, should the
12 regulations limit the exclusion to expenditures and independent expenditures that are subject to
13 other reporting requirements?

14 The Commission also seeks comment on whether the same exemption should apply to the
15 authorized campaign committees of non-Federal candidates or officeholders. In addition, given
16 that national party committees are barred after the effective date of BCRA from spending
17 non-Federal funds, and are already required to report all of their receipts and disbursements, the
18 Commission seeks comment on whether national party committees should be exempted from
19 separately reporting electioneering communications.

20 The Commission seeks comment on the approach and issues raised above and on any
21 other interpretation of the exemption of 2 U.S.C. 434(f)(3)(B)(ii) that reconciles the exclusion of
22 expenditures and independent expenditures from the definition of electioneering communication
23 with FECA's treatment of expenditures and independent expenditures.

1 IV. Exception for Candidate Debates or Forums

2 Proposed 11 CFR 100.29(c)(4) tracks the language in BCRA at 2 U.S.C. 434(f)(3)(B)(iii)
3 excluding communications that constitute “a candidate debate or forum conducted pursuant to
4 regulations adopted by the Commission, or which solely promotes such a debate or forum and is
5 made by or on behalf of the person sponsoring the debate or forum.”

6 The Commission’s regulations at 11 CFR 110.13(a)(2) and 114.4(f) authorize
7 incorporated broadcasters and other media organizations to stage and cover candidate debates
8 without making impermissible contributions or expenditures. Section 110.13(c) requires those
9 organizations staging debates to use pre-established objective criteria in determining which
10 candidates may participate in a debate. It further prohibits staging organizations from using
11 nomination by a major party as the sole objective criterion for choosing candidates to participate
12 in a general election debate.⁵

⁵ The Commission received a Petition for Rulemaking from a number of corporations owning and operating news organizations, television stations, newspapers, cable channels, and other media ventures, as well as media trade associations. The petition asked the Commission to amend its regulation on sponsorship of candidate debates to “make clear that it does not apply to the sponsorship of a candidate debate by a news organization or a trade organization composed of, or representing, members of the press.” The petition asserts that any regulation of the sponsorship of debates by news organizations or related trade associations is contrary to the clear intent of the U.S. Congress, irreconcilable with other FEC decisions, in conflict with the regulatory decisions of the Federal Communications Commission, and unconstitutional. A Notice of Availability for the petition was published on May 9, 2002 (65 Fed. Reg. 31164). Two comments were received by the end of the public comment period, on June 10, 2002. However, the Commission intends to defer consideration of whether to issue a Notice of Proposed Rulemaking until after the statutorily required BCRA rulemakings are completed by the end of the year. In the meantime, the Commission’s debate regulations remain in effect.

1 V. Other Exceptions

2 New 2 U.S.C. 434(f)(3)(B)(iv) provides that “to ensure the appropriate implementation”
3 of the electioneering communication provisions, the Commission may promulgate regulations
4 exempting other communications from the “electioneering communications” definition, provided
5 that the exemption otherwise complies with the new electioneering communication provision and
6 is not described in 2 U.S.C. 431(20)(A)(iii) (“public communications” that refer to a clearly
7 identified candidate for Federal office that promote or support a candidate for that office, or
8 attack or oppose a candidate for that office). The Commission is interested in receiving specific
9 suggestions on whether there should be exemptions for communications that refer to a clearly
10 identified candidate but that promote local tourism, or a ballot initiative, or a referendum.
11 Absent such exemptions, such communications could be electioneering communications even if
12 they contain only a glimpse of a Federal candidate. Proposed 11 CFR 100.29(c)(1), (c)(5), (c)(6)
13 (including four alternatives) and (c)(7) would set forth such exemptions. Proposed paragraph
14 (c)(1) was discussed above.

15 Proposed paragraph (c)(5) would exempt a communication that refers to a bill or law by
16 its popular name where that name happens to include the name of a Federal candidate, if the
17 popular name is the sole reference made to a Federal candidate.

18 Four alternatives (Alternatives 1-A, 1-B, 1-C, and 1-D) for proposed paragraph (c)(6)
19 would exempt communications that are devoted to urging support for or opposition to particular
20 pending legislation or other matters, where the communications request recipients to contact a
21 named Senator or Member of the House of Representatives regarding the issue. The
22 Commission seeks comment as to which, if any, alternative is most consonant with the language
23 and purposes of BCRA.

1 Proposed paragraph (c)(7) would exempt communications by State or local candidates or
2 officeholders that refer to a clearly identified federal candidate, provided that such mention of a
3 federal candidate was merely incidental to the candidacy of one or more individuals for State or
4 local office. For example, under this approach an ad for a State or local candidate that featured
5 such candidate's views on education would not be rendered an electioneering communication if
6 the ad were to indicate whether the State or local candidate supported or opposed the President's
7 education policy.

8 The Commission seeks comments as to whether any other communications should be
9 exempt from the "electioneering communication" definition, as well as whether the proposed
10 exemptions are too broadly or narrowly crafted. For example, the Brennan Center report cited by
11 Senator McCain states that so-called "genuine" issue ads discuss public policy issues and usually
12 contain a toll-free number, whereas so-called "sham" issue ads do not. Buying Time 2000,
13 p. 31-32. In light of this study, and to avoid overbreadth, should the Commission exempt ads
14 that (1) do not include express advocacy; and (2) include both a telephone number and a
15 reference to a specific piece of legislation either by formal name (for example, the "Bipartisan
16 Campaign Reform Act of 2002"), popular name (for example, "Shays-Meehan"), or bill number
17 (for example, "H.R. 2356")?

18 If the Commission creates an exemption like any of the proposed alternatives at
19 paragraph (c)(6), because most Congressional offices do not maintain toll free numbers, should it
20 be sufficient to list a non-toll free number? Must the number be to a Congressional or district
21 office? Is it acceptable to provide the number for a campaign office? Alternatively, to what
22 extent should these distinctions turn on whether the ad refers to a general issue, such as
23 Medicare, without mentioning specific legislation? See Buying Time 2000, p. 103.

1 Another possible exemption might be for entertainment shows, such as television talk
2 shows which fall outside of the news exemption, which feature a candidate as a guest, or a
3 television drama or comedy in which a picture of a candidate appears. The Commission seeks
4 comments on the appropriateness of all of the above-mentioned possible exemptions from the
5 "electioneering communication" definition, and whether additional exemptions should be
6 considered. Should the definition of electioneering communication be limited to paid
7 advertisements? Should the Commission limit any of the exemptions to ads that do not promote,
8 support, attack, or oppose any clearly identified candidate?

9 **Who may make or fund electioneering communications?**

10 BCRA allows the following persons to make electioneering communications:
11 1) individuals; 2) political committees, including authorized committees, party committees,
12 separate segregated funds, and nonconnected committees; 3) political organizations described in
13 26 U.S.C. 527 that are not political committees; 4) organizations described in 26 U.S.C.
14 501(c)(3) that are not incorporated; 5) organizations described in 26 U.S.C. 501(c)(4) as long as
15 they meet certain requirements, discussed more fully below; and 6) partnerships and other
16 unincorporated entities, such as limited liability companies (LLCs) and some trade associations
17 and membership organizations, as long as they do not use funds received from corporations or
18 labor organizations to pay for the electioneering communications. The Commission seeks
19 comment on whether there is any section in BCRA that would prevent an entity prohibited from
20 making an electioneering communication from being affiliated with an entity that is permitted to
21 make electioneering communications, provided that the permissible entity received no prohibited
22 funds from the prohibited entity.

1 **Who may not make or fund electioneering communications?**

2 **I. Effect of the Snowe-Jeffords and Wellstone Amendments on 501(c)(4) and 527**
3 **organizations**

4 The BCRA provisions popularly known as the Snowe-Jeffords amendment expanded the
5 prohibitions on corporations and labor organizations to prohibit use of general treasury funds to
6 make electioneering communications. 2 U.S.C. 441b(b)(2). BCRA treats an electioneering
7 communication as being made by a corporation or labor organization if that corporation or labor
8 organization directly or indirectly disburses any amount for any of the costs of the electioneering
9 communication. 2 U.S.C. 441b(c)(3)(A). The Snowe-Jeffords provisions included an exception,
10 however, allowing corporations organized under 26 U.S.C. 501(c)(4) or 26 U.S.C. 527(e)(1) to
11 make electioneering communications, as long as they use funds that do not come from prohibited
12 sources.⁶ As noted by Senator Snowe, these same section 501(c)(4) and 527 organizations must
13 comply with BCRA's newly-enacted disclosure provisions. See 2 U.S.C. 434(f); see also
14 proposed 11 CFR 104.19. Under Snowe-Jeffords, organizations that engaged in business
15 activities or accepted corporate or labor organization funds would have been permitted to
16 establish a segregated bank account to which only individuals (U.S. citizens, U.S. nationals, and
17 green card holders) could contribute to pay for all electioneering communications. 2 U.S.C.
18 441b(c)(3)(B). It is important to note that the account required by Snowe-Jeffords is not a
19 separate segregated fund or a political committee within the meaning of 2 U.S.C. 431(4)(B), and

⁶ During the Senate debate, Senator McCain described these provisions as intended to be consistent with FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986) ("MCFL"). 148 Cong. Rec. S2141(daily ed. Mar. 20, 2002)

1 does not have the same registration, reporting and recordkeeping obligations of such a fund or
2 committee.

3 The Snowe-Jeffords amendment was substantially modified in this regard by the
4 Wellstone amendment. 2 U.S.C. 441b(c)(6). Where Snowe-Jeffords exempted section 501(c)(4)
5 and section 527 corporations from the prohibition on using treasury funds to make electioneering
6 communications under certain circumstances, the Wellstone amendment withdraws that
7 exemption in the case of what are called "targeted communications." 2 U.S.C. 441b(c)(6)(A).
8 The Wellstone amendment then defines "targeted communication" to encompass all
9 electioneering communications. Specifically, it defines "targeted communication" to mean "an
10 electioneering communication (as defined in section 304(f)(3)) [2 U.S.C. 434(f)(3)] that is
11 distributed from a television or radio broadcast station or provider of cable or satellite television
12 service and, in the case of a communication which refers to a candidate for an office other than
13 President or Vice-President, is targeted to the relevant electorate." 2 U.S.C. 441b(c)(6)(B). The
14 Wellstone amendment then defines "targeted to the relevant electorate" by referencing the
15 definition in the Snowe-Jeffords amendment. 2 U.S.C. 441b(c)(6)(C). Under the interpretation
16 of the Wellstone amendment in the proposed rules, "targeted communication" would not be
17 limited to communications referring only to candidates for the U.S. House of Representatives and
18 the U.S. Senate directed to the relevant electorate, but would also include communications that
19 refer to Presidential and Vice Presidential candidates, with all of the relevant restrictions being
20 applicable. Further, it appears that Senator Wellstone intended his amendment to be applicable
21 to Presidential and Vice-Presidential elections. During the Senate debate, one of the examples of
22 the communications his amendment was intended to reach were ads run by an organization
23 during a presidential primary campaign. See 147 Cong. Rec. S2848 (daily ed. Mar. 26, 2001).

1 An alternative interpretation of BCRA would remove communications that refer to a
2 candidate for the office of President or Vice-President from the definition of “targeted
3 communication.” This interpretation of 2 U.S.C. 441b(c)(6)(B) is based on the reading that
4 because the second condition in the section does not apply to candidates for President or
5 Vice-President, the Wellstone amendment does not apply to these candidates. Under this
6 interpretation, incorporated section 501(c)(4) organizations and section 527 organizations that
7 accept corporate and labor organization funds would be able to make electioneering
8 communications with respect to Presidential and Vice-Presidential elections, as described above,
9 using funds that do not come from corporations, labor organizations or foreign nationals.
10 Although this alternative is not set out in the proposed rules that follow, the Commission seeks
11 comment on it.

12 Because the Wellstone amendment defines “targeted communication” to include all
13 electioneering communications, see 2 U.S.C. 441b(c)(6)(B), the result of the Wellstone
14 amendment is that any corporations whatever, including incorporated 501(c)(4) and 527
15 organizations, are prohibited from making electioneering communications. Because the
16 restrictions exist within the ambit of section 441b, the Wellstone amendment does not restrict
17 unincorporated 501(c)(4) and 527 organizations from making electioneering communications.

18 An initial reading of the Wellstone amendment suggests that it may go further than
19 allowed by MCFL, in that it bans electioneering communications from all section 501(c)(4)
20 corporations. In order to interpret the Wellstone amendment consistent with MCFL, an
21 exception to the ban on corporations making electioneering communications should apply to
22 section 501(c)(4) corporations that meet the conditions for MCFL groups at 11 CFR 114.10.

1 Proposed 11 CFR 114.2(b)(2) would ban only electioneering communications by incorporated
2 section 501(c)(4) organizations that do not meet the 11 CFR 114.10 conditions.

3 Alternatively, in the absence of the Wellstone amendment, the Snowe-Jeffords provision
4 by itself would have allowed all incorporated tax-exempt organizations that are described in
5 26 U.S.C. 501(c)(4), and political organizations described in 26 U.S.C. 527, to make
6 electioneering communications, provided their funds do not come from corporations or labor
7 organizations. 2 U.S.C. 441b(c).

8 II. Proposed Rules at 11 CFR 114.2, 114.10, and 114.14

9 To implement the new restrictions on corporate and labor organization activity, current
10 11 CFR 114.2(b) would be revised to reflect the restrictions found in the Snowe-Jeffords
11 provision and the Wellstone amendment. For purposes of clarity, current paragraph 114.2(b)
12 would be restructured. The general prohibition on corporations and labor organizations making
13 contributions would be placed in proposed paragraph 114.2(b)(1). The corresponding
14 prohibitions on corporate and labor organization expenditures would be located in
15 paragraph (b)(2)(i). The restriction on express advocacy by corporations and labor organizations
16 to those outside the restricted class would be moved to proposed paragraph 114.2(b)(2)(ii).
17 Proposed paragraph 114.2(b)(2)(iii) would contain the new prohibition on electioneering
18 communications by corporations and labor organizations.

19 Current paragraph 114.2(b) references the exception at 11 CFR 114.10 for qualified
20 nonprofit corporations that wish to make independent expenditures. As redrafted, the reference
21 to section 114.10 would also apply to electioneering communications.

22 Section 114.10 itself would be redrafted to incorporate references to electioneering
23 communications. Thus, the title of section 114.10 would be redrafted to reflect its application to

1 electioneering communications, as would the discussion of the scope of section 114.10 found at
2 paragraph 114.10(a). Current paragraph 114.10(d) would be redesignated as "Permitted
3 corporate independent expenditures and electioneering communications." Current
4 paragraph 114.10(d)(2) would be redesignated as proposed paragraph 114.10(d)(3). Proposed
5 paragraph 114.10(d)(2) would track the language of current paragraph 114.10(d)(1), except that it
6 would substitute "electioneering communication" for "independent expenditure," and it would
7 reference the definition of "electioneering communication" at 11 CFR 100.29.

8 The procedures for certification of qualified nonprofit corporation status would be revised
9 to provide separate procedures for those making electioneering communications. Thus, the
10 procedures for corporations making independent expenditures, which are currently found at
11 11 CFR 114.10(e)(1)(i), and (ii), would be redesignated as 11 CFR 114.10(e)(1)(i)(A) and (B).
12 Proposed 11 CFR 114.10(e)(1)(ii)(A) and (B) would be added to describe the procedures for
13 demonstrating qualified nonprofit corporation status when making electioneering
14 communications. In all respects this provision is similar to the one for qualified nonprofit
15 corporations making independent expenditures, except that the threshold for certification would
16 be \$10,000. The amount would be set at \$10,000 because that is the amount that first triggers the
17 reporting requirement for electioneering communications.

18 Further, 11 CFR 114.10(g) would be revised to require qualified nonprofit corporations to
19 comply with the requirements of 11 CFR 110.11 regarding non-authorization notices
20 ("disclaimers") when making electioneering communications. BCRA amended 2 U.S.C. 441d to
21 require disclaimers for electioneering communications. Section 110.11 will be amended in a
22 separate rulemaking.

1 Proposed paragraph 114.10(h) would serve as a notification to qualified nonprofit
2 corporations that they may establish a segregated bank account for the purpose of depositing
3 funds to be used to pay for electioneering communications, as identified in 11 CFR 104.19(b)(6)
4 and (7).

5 Proposed paragraph 114.10(i) would track the language in 2 U.S.C. 441b(c)(5), which
6 states that nothing in 2 U.S.C. 441b(c) shall be construed to authorize an organization exempt
7 from taxation under section 501(a) of the Internal Revenue Code of 1986 to carry out any activity
8 that is prohibited under the Internal Revenue Code. For the reasons explained above, the
9 proposed rule would clarify that this statutory prohibition specifically applies to any qualified
10 nonprofit corporation.

11 Certain courts have interpreted MCFL to allow an incorporated 501(c)(4) organization to
12 accept a de minimis amount of corporate or labor organization funds and still be able to make
13 independent expenditures without violating 2 U.S.C. 441b. See, e.g., Minnesota Citizens
14 Concerned for Life, Inc. v. Federal Election Commission, 936 F.Supp. 633 (D.Minn. 1996),
15 aff'd, 113 F.3d 129 (8th Cir. 1997).⁷ Regarding BCRA, the Commission understands that the
16 phrase “paid for exclusively by funds provided by individuals” at 2 U.S.C. 441b(c)(2), when read
17 in conjunction with the Wellstone amendment at 2 U.S.C. 441b(c)(6)(A), is intended to establish

⁷ Prior to enactment of BCRA, the MCFL status of incorporated 501(c)(4) organizations could change from year to year depending on the absolute total amount of corporate contributions received by these organizations. Federal Election Commission v. National Rifle Association, 254 F.3d 173 (D.C. Cir 2001). In FEC v. NRA, the court held that \$1000 in corporate contributions that the NRA received in 1980 was de minimis and did not affect its MCFL status for that year; however, the corporate contributions of \$7,000 and \$39,786 that it received in 1978 and 1982, respectively, were substantial and rendered the NRA ineligible for the MCFL exception in 1978 and 1982. Id. at 192.

1 a bright-line rule that, even if an organization accepted only a de minimis amount of corporate or
2 labor organization funds, it is nevertheless barred under 2 U.S.C. 441b from making an
3 electioneering communication. The Commission seeks comment as to whether the conclusion
4 regarding acceptance of de minimis amounts of corporate or labor organization general treasury
5 funds is appropriate and likely to survive constitutional scrutiny and, if so, whether it should be
6 stated in the rule. Comment is sought, however, as to whether the certification of its status under
7 11 CFR 114.10(e) as a qualified nonprofit corporation should be revised for purposes of making
8 either independent expenditures or electioneering communication so that a corporation could
9 certify its status on the basis of a court decision rather than the criteria in the Commission's
10 regulations.

11 Further, proposed 11 CFR 114.14 would be added to the regulations to implement the
12 provisions in 2 U.S.C. 441b(b)(2), (c)(1) and (c)(3) prohibiting corporations and labor
13 organizations from directly or indirectly disbursing any amount from general treasury funds for
14 any of the costs of an electioneering communication.⁸ Proposed 11 CFR 114.14(a) would
15 contain the prohibition that applies to corporations and labor organizations generally, and is
16 meant to eliminate any instance of a corporation or labor organization providing funds out of
17 their general treasury funds for the purpose of paying for an electioneering communication,
18 including through a non-Federal account. The Commission does not view BCRA as in any way

⁸ The prohibition on direct disbursements of corporate or labor organization funds is contained at proposed new 11 CFR 114.2(b)(2). National banks would also be subject to proposed 11 CFR 114.14 through the operation of current 11 CFR 114.2(a)(2).

1 prohibiting or restricting corporations and labor organizations from paying for electioneering
2 communications out of funds raised and spent by the Federal accounts of their separate
3 segregated funds. The Commission seeks comment on what factors should be used to determine
4 that the purpose element of this prohibition has been met.

5 Proposed paragraph (b) of new 11 CFR 114.14 would prohibit any person who accepts
6 corporate or labor organization funds from using those funds to pay for an electioneering
7 communication, or to provide those funds to any other person who would subsequently use those
8 funds to pay for all or part of the costs of an electioneering communication. This proposed rule
9 would be similar to the ban on contributions made in the name of another. See 2 U.S.C. 441f;
10 11 CFR 110.4(b). The rule would be intended to effectuate BCRA's treatment of an
11 electioneering communication as being made by a corporation or labor organization if such an
12 entity indirectly disburses any amount for the cost of the communication out of their general
13 treasury funds. 2 U.S.C. 441b(c)(3)(A).

14 The Commission also seeks comments on contributor liability. Should contributors be
15 held liable in instances where their contributions were not intended to be used for electioneering
16 communications but the recipient used them for that purpose regardless of the contributors'
17 intent?

18 Proposed paragraph (c) of 11 CFR 114.14 would provide certain limited exceptions to
19 allow corporations or labor organizations to provide funds that might subsequently be used for
20 electioneering communications. The first exception would cover salary, royalties, or any other
21 income earned from bona fide employment or other contractual arrangements, including a
22 pension or other retirement income. The second exception would cover interest earnings, stock
23 or other dividends, or proceeds from the sale of stock or other investments. These exceptions are

1 drawn from 11 CFR 110.10, which applies only to candidates' funds, by recognizing that such
2 amounts constitute personal funds. The third proposed exception covers a corporation or labor
3 organization payment of the fair market value for goods provided or services rendered to the
4 corporation or labor organization.

5 Proposed paragraph 11 CFR 114.14(d) would require persons who receive funds from a
6 corporation or a labor organization to be able to demonstrate through a reasonable accounting
7 method that no such funds were used to pay for any portion of an electioneering communication.
8 The Commission seeks comment on whether a specific accounting method should be required,
9 such as first-in-first-out (FIFO), last-in-first-out (LIFO), or any other method.

10 The Commission seeks comment on whether proposed 11 CFR 114.14 covers all
11 instances where corporate or labor organization general treasury funds might indirectly be used to
12 pay for electioneering communications, without going beyond the bounds of BCRA.

13 **Are amounts given to persons making electioneering communications contributions?**
14 **When are these amounts subject to the contribution limits? Would they trigger political**
15 **committee status?**

16 In the new reporting provisions of BCRA, monies provided for electioneering
17 communications are characterized as "funds contributed," and the persons providing the monies
18 as "contributors." 2 U.S.C. 434(f)(2)(E) and (F). BCRA amends the FECA's prohibitions
19 against corporate and labor organization contributions and expenditures at 2 U.S.C. 441b(b)(2)
20 by defining "contribution or expenditure" to include "any direct or indirect payment . . . for any
21 applicable electioneering communication." It also amends the ban on contributions and
22 donations by foreign nationals at 2 U.S.C. 441e to include electioneering communications. The
23 Commission would interpret this statutory language to mean that such monies would be

1 "contributions" when provided by any person to political committees and, therefore, would be
2 subject to the contribution limits and prohibitions of the FECA, as amended by BCRA.
3 However, funds provided to persons that are not political committees would not be
4 "contributions" and hence would not be subject to the contribution limits or prohibitions. Nor
5 would these amounts trigger political committee status when given to an organization that is not
6 already a political committee. Please note that amounts donated by an entity covered by 2 U.S.C.
7 441b or by a foreign national covered by 2 U.S.C. 441e nonetheless are subject to the bans on
8 electioneering communications contained in those provisions. The Commission requests
9 comments on this approach.

10 BCRA also prohibits the national party committees from donating non-Federal funds for
11 any purpose, including electioneering communications. 2 U.S.C. 441i(a). BCRA prohibits a
12 State, district, or local committee of a political party from donating non-Federal funds for ads
13 that refer to a clearly identified candidate for Federal office and promote, support, attack or
14 oppose that candidate. 2 U.S.C. 431(20)(A)(iii) and 441i(b). Such ads, with rare exception,
15 encompass electioneering communications. For these reasons, the Commission would interpret
16 monies provided by any person for electioneering communications to political committees that
17 are the national, State, district or local committee of a political party ("party committees") to be
18 contributions subject to the limitations or prohibitions of the FECA, as amended by BCRA.
19 However, comments are sought as to whether funds provided for electioneering communications
20 to a non-Federal account of a separate segregated fund or a non-connected committee should or
21 should not be contributions subject to limitations or prohibitions, if the funds are not provided by
22 a corporation, labor organization, foreign national or party committee, and if they are not
23 coordinated with any candidate.

1 Funds provided by persons other than corporations, unions, foreign nationals or party
2 committees to persons that are not political committees are not contributions. Thus, these
3 amounts would not trigger political committee status when given to an organization that is not
4 already a political committee. Persons that are not party committees or political committees,
5 including individuals, would be able to raise and spend funds for electioneering communications
6 without limitation as to amount, unless the funds are provided by corporations, unions, foreign
7 nationals or party committees. The Commission requests comments on this approach.

8 **Who must report electioneering communications?**

9 **I. Who is included in "persons"?**

10 BCRA, as codified at 2 U.S.C. 434(f)(1), requires all persons making electioneering
11 communications to file statements when the disbursements for the electioneering
12 communications exceed \$10,000 in a calendar year. Under 2 U.S.C. 431(11) and 11 CFR
13 100.10, "persons" includes "an individual, partnership, committee, association, corporation, labor
14 organization, and any other organization or group of persons." This definition of "person" would
15 apply to proposed 11 CFR 104.19(a).

16 While all political committees are included as "persons" who would be required to report
17 electioneering communications under proposed section 104.19(a), BCRA excludes
18 communications that constitute an expenditure or an independent expenditure under FECA from
19 the definition of electioneering communications. 2 U.S.C. 434(f)(3)(B)(ii). Thus, political
20 committees will not be required to report their expenditures as electioneering communications.

21 The Commission seeks comments on eliminating this exemption when the authorized
22 committee of a candidate makes an expenditure for a communication that refers to that candidate
23 or that candidate's opponent. Under this approach, which is not included in the proposed rules

1 that follow, if a candidate committee makes an expenditure for a communication that refers to
2 that candidate or that candidate's opponent and that meets the definition of electioneering.
3 communication (other than the exclusion of expenditures in 2 U.S.C. 434(f)(3)(B)(ii)), then the
4 candidate committee would have to report the cost as an electioneering communication within
5 the 24-hour time requirement, if the costs of such ads exceed \$10,000. The Commission
6 recognizes that these amounts would be reported a second time on the authorized committee's
7 regular report as expenditures. Comment is sought as to whether this limitation on the
8 exemption for authorized committees would be consistent with BCRA.

9 The Commission requests comments on whether State and local party committees should
10 be exempt from "persons" who must file reports of electioneering communications. State and
11 local party committees' candidate-specific expenditures and independent expenditures that are
12 otherwise reportable as such are not subject to the definition of electioneering communications
13 under the Commission's construction of 2 U.S.C. 434(f)(3)(B)(ii). See above. However, certain
14 other disbursements by a State party committee that include a reference to a clearly identified
15 Federal candidate would be subject to the definition of electioneering communication, such as
16 issue ads that do not require candidate-specific reporting. Exempting State and local party
17 committees from 11 CFR 104.19 would mean that they would report such disbursements on their
18 regular reporting schedule, as current law allows, rather than under the electioneering
19 communications reporting requirements. Comments are requested.

20 II. Who is responsible for filing reports by organizations that are not political committees?

21 Under the Commission's regulations at 11 CFR 104.1 and the FECA at 2 U.S.C. 432(i)
22 and 434(a)(1), the treasurer is the individual responsible for the accuracy, and the filing, of a
23 political committee's reports. BCRA requires organizations that are not political committees to

1 report their electioneering communications. 2 U.S.C. 434(f)(2)(E). However, such organizations
2 are not required by BCRA or the FECA to have a treasurer who is responsible for the filing. The
3 Commission requests comments on whether to require that the individual responsible for filing
4 the statement of electioneering communications on behalf of an organization that is not a
5 political committee have actual knowledge of the receipts and disbursements for, and the
6 contents and timing of, the electioneering communications.

7 **When must electioneering communications be reported?**

8 The question of when electioneering communications must be reported presents several
9 subsidiary issues. First, does the \$10,000 threshold include the costs for producing
10 electioneering communications, or for airing electioneering communications, or both? Second,
11 must the electioneering communications be reported at the time the disbursements exceed
12 \$10,000 in a calendar year, or not until the disbursements exceed \$10,000 and the
13 communications have been aired? Third, when does the 24-hour period begin and end, and what
14 would serve as proof of timely filing? These issues are discussed below.

15 I. Does the \$10,000 reporting threshold include the direct costs of both producing and airing
16 electioneering communications, or does it include only one or the other?

17 BCRA requires disbursements, and contracts to make disbursements, for the direct costs
18 of producing and airing electioneering communications to be reported within 24 hours of the
19 "disclosure date." 2 U.S.C. 434(f)(1). However, BCRA defines "disclosure date" as the date on
20 which the direct costs of producing or airing exceed \$10,000. 2 U.S.C. 434(f)(4). Thus, the
21 proposed rules would require that when the direct costs of either producing or airing
22 electioneering communications exceed \$10,000, the person making the electioneering
23 communications must report the direct costs of both producing and airing the electioneering

1 communications within 24 hours. Specifically, proposed 11 CFR 104.19(a) would require every
2 person who makes disbursements, or who executes contracts to disburse funds for the direct costs
3 of producing or airing electioneering communications aggregating in excess of \$10,000, to report
4 certain information regarding the sources of the funds used for producing and airing the
5 electioneering communications.

6 The Commission requests comments on this interpretation. Does BCRA intend for
7 persons to report only if the aggregate production costs or the aggregate airing costs exceed
8 \$10,000? For example, if Person K pays \$7,000 to produce an electioneering communication
9 and \$7,000 to air the communication, would Person K have any reporting requirements at all
10 because neither the cost of production nor the cost of airing the communication when treated
11 separately exceeded \$10,000? Alternatively, does the statute intend for persons to report when
12 the aggregate of all direct production costs and all direct airing costs exceed \$10,000? For
13 example, if Person J pays \$7,000 to produce an electioneering communication and pays \$7,000 to
14 air it, would Person J be required to report all \$14,000 because the aggregate costs of producing
15 and airing exceed \$10,000?

16 Proposed paragraph (a)(2) would provide guidance with regard to what are considered to
17 be direct costs of producing or airing an electioneering communication. The proposed regulation
18 would provide a list of costs that would be considered "direct." The list would not be exhaustive.
19 As proposed, the direct costs of producing a communication would include any costs charged by
20 a production company, such as studio rental time, staff salaries, costs of video or audio recording
21 media, hired talent, and any other cost involved in producing the video or audio communication.
22 Direct costs of airtime would include the cost of airtime on broadcast, cable or satellite radio and
23 television stations, and the charges for a broker to purchase the airtime. The Commission seeks

1 comments on other examples of direct costs of producing or airing electioneering
2 communications.

3 Direct costs for producing or airing electioneering communications would not include the
4 cost of polling to determine the contents of a communication or whether to create or air the
5 communication. Additionally, such costs would not include the cost of a focus group or other
6 polling to determine the effectiveness of the communication. The Commission seeks comment
7 on whether these exceptions should be specifically included in the rules and what other types of
8 costs should be excluded from "direct costs." Further, the Commission seeks comment on
9 whether these lists should be exhaustive, thereby including everything that would be considered a
10 direct cost.

11 II. Must reports be filed when the disbursements exceed the threshold, or when the
12 electioneering communication is aired?

13 As noted above, BCRA requires persons making electioneering communications to report
14 the disbursements for such communications within 24 hours of the "disclosure date." 2 U.S.C.
15 434(f)(1). "Disclosure date" is defined at 2 U.S.C. 434(f)(4) as the date "during any calendar
16 year by which a person has made disbursements for the direct costs of producing or airing
17 electioneering communications aggregating in excess of \$10,000." Therefore, proposed 11 CFR
18 104.19(a) would track the statutory language to require that statements of electioneering
19 communications be filed within 24 hours of the time the \$10,000 threshold is exceeded.
20 Following the statutory language, proposed paragraph (a) would require that persons begin
21 aggregating the direct costs of producing or airing electioneering communications anew after
22 each disclosure date. Each time the aggregation of disbursements for electioneering

1 communications exceeds \$10,000 (since the most recent disclosure date), an additional statement
2 of electioneering communications would be required.

3 Alternatively, the Commission could determine that a person makes disbursements for
4 electioneering communications only when a communication is aired, and require reporting of
5 disbursements that meet the statute's monetary thresholds at that time. One policy reason
6 supporting such an interpretation is the practical difficulty or impossibility of determining
7 whether a given communication has met BCRA's targeting requirements before a
8 communication is actually aired. Another reason is that until a person or entity actually airs an
9 electioneering communication, it is impossible to know with certainty that the person or entity
10 ever will air a communication that constitutes an electioneering communication under BCRA;
11 accordingly, to require reporting beforehand could lead to speculative and even inaccurate
12 reporting through no fault of the reporting person or entity. Finally, there could be constitutional
13 issues with compelling disclosure of potential electioneering communications before they are
14 finalized and aired, particularly when such disclosure could force reporting entities to divulge
15 confidential strategic and political information, and could force them to report information, under
16 the penalty of perjury, that later turns out to be misleading or inaccurate if the reporting entity
17 does not subsequently air any electioneering communications. The Commission seeks comments
18 on these issues and specifically whether, in light of these constitutional and policy concerns, it
19 should consider construing BCRA's electioneering communication reporting requirements to
20 apply only when an electioneering communication is actually aired. The Commission further
21 requests comments on whether it should limit reporting of electioneering communications to only
22 the 30 days before a primary election or the 60 days before a general election.

1 The current rules at 11 CFR 104.5 set forth filing dates for each type of filer (e.g.,
2 authorized committees, unauthorized committees, party committees) and for other required
3 reports that are not part of the regular filing schedule (e.g., certain reports of independent
4 expenditures). Proposed new paragraph (i) of section 104.5 would state the filing deadlines for
5 24-hour statements of electioneering communications and would cross-reference proposed
6 section 104.19.

7 BCRA at 2 U.S.C. 434(f)(2) requires, as do the proposed regulations at 11 CFR 104.5(i),
8 that statements of electioneering communications be filed under penalty of perjury. Note that
9 24-hour reports of independent expenditures are also required to be filed under penalty of
10 perjury.⁹ Perjury consists of a false statement as to material fact willfully made under an oath
11 authorized by a law of the United States taken before a competent tribunal, officer, or person.
12 28 U.S.C. 1621. In addition, 18 U.S.C. 1001(a)(3) establishes criminal penalties for “knowingly
13 and willfully making or using false writings or documents” in connection with matters within the
14 jurisdiction and before a government agency. Lastly, such violations may be subject to the
15 FECA at 2 U.S.C. 437g, which establishes civil penalties of specified amounts for violations of
16 the FECA. The Commission seeks comment on how 2 U.S.C. 437g would apply to violations of

⁹ Like independent expenditure reporting, one concern regarding reporting expenditures for communications before the communications are publicly disseminated, is the possibility that the report will be erroneous if the communication is never publicly disseminated. Thus, if a person pays more than \$10,000 for the production or airing of an electioneering communication and properly reports those payments within 24 hours, but later decides not to air the ad, that person would not have committed perjury as long as the report reflected what the person knew to be true at the time it was filed.

1 the requirements for electioneering communications, given that the defined terms in 2 U.S.C.
2 437g are different than the terms used in 2 U.S.C. 434(f).

3 III. Filed within 24 hours vs. Received within 24 hours

4 Under 2 U.S.C. 434(f)(1), electioneering communications must be reported within
5 24 hours of the time the \$10,000 threshold is exceeded (i.e., on the “disclosure date”, see below).
6 The Commission proposes to add new paragraph (f) to 11 CFR 100.19 to require these 24-hour
7 statements to be received by the Commission within 24 hours of the disclosure date, rather than
8 filed within 24 hours of the disclosure date. In addition, to assist filers with meeting this
9 deadline, the proposed rule would allow them to file their 24-hour statements by facsimile
10 machine or e-mail. This proposed paragraph would follow the timing and filing methods of
11 24-hour reports for independent expenditures. The Commission proposes this interpretation to
12 achieve the kind of disclosure contemplated by the 24-hour requirement. Under the proposed
13 rules, a 24-hour statement of electioneering communications would be available to the public no
14 later than 48 hours after its receipt by the Commission. Further, since these statements are
15 required within 24-hours of the disclosure date, they are similar to 24-hour reports of
16 independent expenditures and, thus, should be treated similarly. The Commission requests
17 comments on this interpretation of “filed” in 2 U.S.C. 434(f).

18 The Commission recently concluded that sending 24-hour reports of independent
19 expenditures by mail is not a viable option because it is unlikely that these reports will be
20 received by the Commission within 24 hours of the making of the independent expenditure. (See
21 Explanation and Justification for Independent Expenditure Reporting Rules, 65 Fed. Register
22 12834, March 20, 2002.) Thus, current paragraph (b) of 11 CFR 100.19 does not allow 24-hour
23 reports of independent expenditures to be considered filed when postmarked, even if sent by

1 registered or certified mail. These reports are only considered timely filed if they are received by
2 the Commission or Secretary of the Senate within 24 hours of the time the independent
3 expenditure was made. For the same reasons, the Commission is also proposing to amend
4 paragraph (b) to preclude filing 24-hour statements of electioneering communications by certified
5 or registered mail. However, as explained above, these statements could be filed by facsimile
6 machine or electronic mail, except by those persons who are required to file electronically under
7 11 CFR 104.18.

8 In addition to the substantive revisions noted above, all paragraphs in section 100.19
9 would be given titles to assist the reader in finding the appropriate information, and technical
10 changes would be made to paragraph (d).

11 IV. When does the 24 hour period begin and end?

12 The Commission currently considers the term "24 hours" with regard to certain reports of
13 independent expenditures to mean 24 contiguous hours even if the time period begins or ends on
14 a weekend or holiday. The proposed rules would interpret the 24-hour reporting requirement for
15 statements of electioneering communications the same way, since neither FECA nor BCRA
16 appear to contemplate a different result. Both facsimile and electronic mail transmissions may be
17 filed at any time and have a date and time stamp embedded for purposes of proof. However, the
18 Commission requests comments on whether to use a different interpretation of "24 hours" for
19 electioneering communications than is currently used for 24-hour reports of independent
20 expenditures. For example, if the \$10,000 threshold is exceeded on a Saturday at 5 pm, should
21 the statement be filed by Sunday at 5 pm or Monday at 5 pm? Would it be confusing to filers if
22 this rule were different for electioneering communication statements than for other notices,
23 statements or reports?

1 The Commission also requests comments on how a person should prove that he or she
2 timely sent these 24-hour statements. For example, if reports were sent by fax, would a copy of
3 the sender's fax cover page containing the date and time of the transmission be sufficient to
4 prove timely receipt?

5 **What information must be reported about electioneering communications?**

6 BCRA at 2 U.S.C. 434(f)(2) requires that all persons making electioneering
7 communications report the funds spent on those communications. This new statute is very
8 specific regarding the types of information that must be reported. Consequently, the proposed
9 rules at 11 CFR 104.19 would closely follow the statutory reporting requirements for
10 "electioneering communications." These new 24-hour statements will require the Commission to
11 create a new form for reporting electioneering communications. The Commission intends to
12 create FEC Form 9 for persons other than political committees and to create Schedule J as part of
13 FEC Form 3, 3X, or, 3P, as appropriate, for political committees. These forms would be
14 available on the Commission's website and by Faxline.

15 Proposed 11 CFR 104.19(a) is discussed above. (See Who must report electioneering
16 communications? When must electioneering communications be reported?)

17 Proposed 11 CFR 104.19(b) would specify the contents of the statement required under
18 BCRA and the proposed rules. Because BCRA quite specifically addresses the contents of these
19 statements, the proposed rules closely follow the statutory language. See 2 U.S.C. 434(f)(2). As
20 discussed above, both BCRA and the proposed rules would require that these 24-hour reports be
21 filed under the penalties for perjury.

1 Proposed paragraph (b)(1) would require the identification¹⁰ of the person making the
2 disbursement(s) for electioneering communications. If the person making the disbursement is not
3 an individual, proposed paragraph (b)(1) would also require the person's principal place of
4 business.

5 Proposed paragraph (b)(2) would require the identification of any person sharing or
6 exercising direction or control over the activities of the person making the disbursement. The
7 Commission requests comments as to whether "direction or control over the activities" should be
8 further defined, and if so, what types of actions would constitute "direction or control over the
9 activities?"

10 The Commission also seeks comment on whether it should draw upon in whole or in
11 part its existing earmarking regulations, 11 CFR 110.6(d), in determining the scope of the
12 statutory phrase "direction or control." These rules provide that if a conduit exercises any
13 direction or control over the choice of the recipient candidate, the earmarked contribution shall
14 be considered a contribution by both the original contributor and the conduit for both limitation
15 and reporting purposes. The Commission determined that a conduit exercised direction over a
16 contribution when it determined whether a contribution should be made, and, if so, the recipient,
17 the amount, and the timing of any contribution. See Advisory Opinion ("AO") 1986-4. In two
18 other AOs, the Commission determined that conduits did not exercise direction or control over a
19 contribution when the original contributor made the same choices. See AO 1981-57 and

¹⁰ 11 CFR 100.12 defines "identification" as: "in the case of an individual, his or her full name, including: First name, middle name or initial, if available, and last name; mailing address; occupation; and the name of his or her employer; and, in the case of any other person, the persons full name and address."

1 AO 1980-46. The Commission seeks comment on whether a similar analysis should be used to
2 define "direction and control" in this rulemaking.

3 The recently promulgated regulations on non-Federal funds (published July 29, 2002)
4 contained a definition of "direct" with regard to the making of contributions. That regulation
5 defines "to direct" as "to ask a person who has expressed an intent to make a contribution,
6 donation, or transfer of funds, or to provide anything of value, to make that contribution,
7 donation, or transfer of funds, or to provide that thing of value, including through a conduit or
8 intermediary." 11 CFR 300.2(n). The Commission requests comments as to whether this
9 definition of "to direct" could be adopted for purposes of this rulemaking as the definition of
10 "direction." The Commission further requests comments on whether "direction" and "control"
11 should have the same meaning and, if not, what the distinction is.

12 Another issue that might be addressed is whether direction or control should be limited to
13 influence over certain aspects of the electioneering communications (e.g., the contents, timing,
14 frequency, duration or intended audience of the communication, or the specific media outlet
15 used). In the alternative, should these terms encompass all activities of the person making the
16 electioneering communication, even when those activities are not related to the electioneering
17 communication? This approach is reflected in Alternative 2-B of the proposed rule at 11 CFR
18 104.19(b)(2).

19 The Commission requests comments on these issues as well as any other issues relevant
20 to this point.

21 Proposed paragraph (b)(3) would require the identification of the custodian of the books
22 and accounts of the person or persons making the disbursements.

1 Proposed paragraph (b)(4) would require the amount of each disbursement of more than
2 \$200 during the period covered by the statement, the date the disbursement was made, and the
3 identification of the person to whom the disbursement was made.

4 Alternative 3-A of proposed paragraph (b)(5) would closely track the wording of BCRA
5 by requiring the identification of all elections to which the electioneering communications
6 pertain and the names (if known) of the candidates clearly identified or to be clearly identified in
7 the communication. Alternative 3-B of proposed paragraph (b)(5) would require disclosure of all
8 clearly identified candidates referred to in the communication and the elections in which they are
9 candidates. The Commission seeks comment on whether Alternative 3-B is preferable to the
10 statutory language, in that it is easier to follow and takes into consideration 2 U.S.C. 434(f)(3),
11 which makes reference to a clearly identified candidate a threshold requirement for a
12 communication to be deemed an electioneering communication.

13 Proposed paragraph (b)(6) would apply only to qualified nonprofit corporations under
14 11 CFR 104.10 that pay for electioneering communications only from a segregated bank account
15 under 11 CFR 114.10(h). This proposed paragraph follows 2 U.S.C. 434(f)(2)(E) by providing
16 that if a qualified nonprofit corporation pays for its electioneering communications only from its
17 segregated bank account, it must report the name and address of only those individuals who
18 provided \$1,000 or more to the account, aggregating from January 1 of the preceding calendar
19 year. If a qualified nonprofit corporation pays for its electioneering communications from any
20 account other than its segregated bank account, it would be required to report all contributors
21 who contributed \$1,000 or more to the organization in general (as opposed to the segregated
22 bank account for electioneering communications) under proposed paragraph (b)(7). Proposed
23 paragraph (b)(7) would apply to qualified nonprofit corporations that pay for electioneering

1 communications from an account other than that described in 11 CFR 114.10(h), and to all other
2 persons who make electioneering communications.

3 Proposed paragraph (b)(7) would follow 2 U.S.C 434(f)(2)(F) by requiring the name
4 and address of any contributor who contributed an amount aggregating \$1,000 or more since the
5 first day of the preceding calendar year to the person making the disbursement. Note that BCRA
6 also requires the name and addresses of every U.S. citizen, U.S. national, or permanent resident
7 contributing \$1,000 or more to "a segregated bank account." See 2 U.S.C. 434(f)(2)(E).
8 Sections 434(f)(2)(E) and 441b(c)(3)(B) of FECA, when read together, appear to contemplate
9 that this segregated bank account is required only for section 501(c)(4) corporations. However,
10 as explained above, section 501(c)(4) corporations (with the possible exception of qualified
11 nonprofit corporations under MCFL) are prohibited from making electioneering
12 communications. Therefore, the Commission proposes to omit this information from the
13 required contents of reports, for all persons except qualified nonprofit corporations. Comments
14 are sought on this approach.

15 In following 2 U.S.C. 434(f)(2)(E) and (F), proposed 11 CFR 104.19(b)(6) and (7)
16 would require the identification of those persons who have contributed in excess of \$1,000 since
17 January 1 of the preceding calendar year. The Commission requests comments on whether to
18 require all donations from these donors to be itemized every time the person making the
19 electioneering communication files reports even if some of them were previously reported. An
20 alternative would be to require the itemization of these funds in the same way that contributions
21 are currently itemized under 11 CFR 104.8 on Schedule A. Thus, each time a person provides
22 funds to the person making the electioneering communications, the filer would report the receipts
23 but would not be required to itemize them until they aggregate in excess of \$1,000. However, for

1 each contribution/donation thereafter, the filer would be required to report the "to-date" total
2 along with the itemization of any new funds provided by that donor since the last report, but the
3 filer would not be required to re-report previous contribution/donations in each subsequent
4 report. The Commission envisions that this alternative would require FEC Form 9 and
5 Schedule J to contain space for reporting donations that would be similar to the current
6 Schedule A. Comments are requested on this approach and on other possible methods of
7 implementation of 2 U.S.C. 434(f)(2)(E) and (F) to avoid duplicative reporting.

8 Proposed paragraph (b)(8) would require the reporting of the disclosure date, as defined
9 in proposed 11 CFR 104.19(a)(1). While BCRA does not specifically require the disclosure date
10 to be reported, the Commission notes the necessity of this information as the triggering
11 mechanism for filing the statement. This is similar to requiring the date an independent
12 expenditure aggregating in excess of \$1,000 is made during the 24-hour reporting period. The
13 Commission requests comments on whether or not to require persons making electioneering
14 communications to report the disclosure date.

15 Proposed paragraph (c) would require all persons (except qualified nonprofit
16 corporations) making electioneering communications or accepting contributions for the purpose
17 of making electioneering communications to comply with the Commission's current
18 recordkeeping regulations at 11 CFR 104.14. Qualified nonprofit corporations would be exempt
19 from the recordkeeping requirements in order to mirror the requirements for such entities that
20 make independent expenditures. The Commission seeks comment on what records should be
21 required to be maintained by persons who make electioneering communications. Should the
22 recordkeeping requirements for electioneering communications and independent expenditures be
23 the same? If so, what should those requirements be?

1 **Where must electioneering communications statements be filed?**

2 Currently, the FECA and 11 CFR 105.2 require that reports by, and solely regarding,
3 candidates for the U.S. Senate be filed with the Secretary of the Senate as custodian for the
4 Commission. BCRA requires that statements of electioneering communications that refer to
5 Senate candidates must be filed with the Commission. 2 U.S.C. 434(f)(1). Therefore, proposed
6 revisions to 11 CFR 105.2 would renumber the current section 105.2 as paragraph 105.2(a) under
7 the heading of "General rule." Proposed new paragraph (b) would contain the exceptions to that
8 rule, i.e., persons who make electioneering communications that refer to candidates for Senate
9 would report to the Commission rather than to the Secretary of the Senate. BCRA also requires
10 that all 24-hour and 48-hour reports of independent expenditures be filed with the Commission
11 regardless of whether they support or oppose a candidate for Senate. 2 U.S.C. 434(g)(3)(A).
12 These independent expenditure reports would be added to revised section 105.2 in a separate
13 rulemaking at a later point.

14
15 **Certification of No Effect Pursuant to 5 U.S.C. 605(b) (Regulatory Flexibility Act)**

16 The Commission certifies that these proposed rules, if promulgated, would not have a
17 significant economic impact on a substantial number of small entities. The basis of this
18 certification is that since all political committees already have reporting requirements, these
19 additional statements do not create a significant new burden. Persons other than political
20 committees would not have to report until they exceed a \$10,000 threshold, at which point their
21 reporting obligations would be no more than what is strictly necessary to comply with the new
22 statutory requirements. In addition, they would have considerable flexibility in the method of
23 filing the requisite statement.

- 1 **List of Subjects**
- 2 11 CFR Part 100
- 3 Elections.
- 4 11 CFR Part 104
- 5 Campaign funds, political committees and parties, reporting and recordkeeping requirements.
- 6 11 CFR Part 105
- 7 Campaign funds, political candidates, political committees and parties, reporting and
- 8 recordkeeping requirements.
- 9 11 CFR Part 114
- 10 Business and industry, elections, labor.
- 11

1 For the reasons set out in the preamble, it is proposed to amend subchapter A of chapter I of
2 title 11 of the Code of Federal Regulations as follows:

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

4 1. The authority citation for part 100 would continue to read as follows:

5 Authority: 2 U.S.C. 431, 434, and 438(a)(8).

6 2. Paragraphs (b) and (d) of section 100.19 would be revised, titles would be added to
7 paragraphs (a), (c), and (e), and paragraph (f) would be added to read as follows:

8 **§ 100.19 File, filed or filing (2 U.S.C. 434(a))**

9 * * * * *

10 (a) Where to deliver reports. * * *

11 (b) Timely filed. General rule. A document, other than a 24-hour report of an independent
12 expenditure under 11 CFR 104.4(b) or 109.2(e) report or statement covered by paragraphs (c)
13 through (f) of this section, is timely filed upon deposit as registered or certified mail in an
14 established U.S. Post Office and postmarked no later than midnight of the day of the filing date,
15 except that pre-election reports so mailed must be postmarked no later than midnight of the
16 fifteenth day before the date of the election. Documents sent by first class mail must be received
17 by the close of business on the prescribed filing date to be timely filed.

18 (c) Electronic filing. * * *

19 (d) 24-hour reports of independent expenditures. A 24-hour report of independent
20 expenditures under 11 CFR 104.4(b) or 109.2(c) is timely filed when it is received by the
21 appropriate filing officer as listed in 11 CFR 104.4(c) after a disbursement is made, or, in the
22 case of a political committee, a debt reportable under 11 CFR 104.11(b) is incurred, for an
23 independent expenditure, but no later than 24 hours from the time the independent expenditure

1 was made. In addition to other permissible means of filing, a 24-hour report of independent
2 expenditures may be filed using a facsimile machine or by electronic mail if the filer is not
3 required to file electronically in accordance with 11 CFR 104.18.

4 (e) 48-hour statements of last-minute contributions. * * *

5 (f) 24-hour statements of electioneering communications. A 24-hour statement of
6 electioneering communications under 11 CFR 104.19 is timely filed when it is received by the
7 Commission within 24 hours of the disclosure date (see 11 CFR 104.19(a)(1)). In addition to
8 other permissible means of filing, a 24-hour statement of electioneering communications may be
9 filed using a facsimile machine or by electronic mail if the filer is not required to file
10 electronically in accordance with 11 CFR 104.18.

11 3. New section 100.29 would be added to read as follows:

12 **§ 100.29 Electioneering communication**

13 (a) (1) Electioneering communication means any broadcast, cable, or satellite
14 communication that:

15 (i) Refers to a clearly identified candidate for Federal office;

16 (ii) Is publicly distributed within 60 days before a general election for the
17 office sought by the candidate; or within 30 days before a primary or
18 preference election, or a convention or caucus of a political party that has
19 authority to nominate a candidate, for the office sought by the candidate;

20 (iii) Is targeted to the relevant electorate, in the case of a candidate for Senate
21 or the House of Representatives; and

22 (iv) In the case of a candidate for nomination for President:

1 (A) Can be received by 50,000 or more persons in a State where a
2 primary election, as defined in 11 CFR 9032.7, is being held if
3 - publicly distributed within 30 days before the election; or

4 (B) Can be received by 50,000 or more persons anywhere in the United
5 States if publicly distributed within 30 days before the national
6 nominating convention.

7 (2) For purposes of this section only, a special election or a runoff election is a
8 primary election if held to nominate a candidate. A special election or a runoff
9 election is a general election if held to elect a candidate.

10 (b) For purposes of this definition--

11 (1) Refers to a clearly identified candidate means that the candidate's name,
12 nickname, photograph, or drawing appears, or the identity of the candidate is
13 otherwise apparent through an unambiguous reference such as "the President,"
14 "your Congressman," or "the incumbent," or through an unambiguous reference to
15 his or her status as a candidate such as "the Democratic presidential nominee" or
16 "the Republican candidate for Senate in the State of Georgia."

17 (2) Broadcast, cable, or satellite communication means a communication that is
18 publicly distributed by a television station, radio station, cable television system,
19 or satellite system, but does not include any communication publicly distributed
20 exclusively by Low Power FM Radio, Low Power Television or Citizens Band
21 Radio, as those terms are defined by the Federal Communications Commission.

22 (3) Targeted to the relevant electorate means the communication can be received by
23 50,000 or more persons--

1 (i) In the district the candidate seeks to represent, in the case of a candidate
2 for Representative in or Delegate or Resident Commissioner to, the
3 Congress; or

4 (ii) In the State the candidate seeks to represent, in the case of a candidate for
5 Senator.

6 (4) For purposes of paragraph (b)(3) of this section, information on the number of
7 persons in the congressional district or State that can receive a communication
8 publicly distributed by a television station, radio station, a cable television system,
9 or satellite system, is available on the Federal Communications Commission's
10 website, www.fcc.gov. A link to that site is available on the Federal Election
11 Commission's website, www.fec.gov.

12 (5) Publicly distributed means aired, broadcast, cablecast or otherwise disseminated
13 through the facilities of a television station, radio station, cable television system,
14 or satellite system. This definition also applies to the term "airing" in 11 CFR
15 104.5 and 104.19.

16 (c) Electioneering communication does not include any communication that:

17 (1) Is publicly distributed through a means of communication other than a broadcast,
18 cable, or satellite television or radio station. For example, electioneering
19 communication does not include communications appearing in print media,
20 including a newspaper or magazine, handbill, brochure, yard sign, poster,
21 billboard, and other written materials, including mailings; communications over
22 the Internet, including electronic mail; or telephone communications;

1 (2) Appears in a news story, commentary, or editorial distributed through the facilities
2 of any broadcast, cable, or satellite television or radio station, unless such
3 facilities are owned or controlled by any political party, political committee, or
4 candidate. A news story distributed through a broadcast, cable, or satellite
5 television or radio station owned or controlled by any political party, political
6 committee, or candidate is nevertheless exempt if the news story meets the
7 requirements described in 11 CFR 100.132(a) and (b);

8 (3) Constitutes a candidate-specific expenditure reportable as an expenditure, an in-
9 kind contribution or a party coordinated expenditure or an independent
10 expenditure;

11 (4) Constitutes a candidate debate or forum conducted pursuant to 11 CFR 110.13, or
12 that solely promotes such a debate or forum and is made by or on behalf of the
13 person sponsoring the debate or forum;

14 (5) Refers to a bill or law by its popular name where that name includes the name of a
15 Federal candidate, provided that the popular name is the sole reference made to a
16 Federal candidate;

17 Alternative 1-A

18 (6) Is devoted exclusively to urging support for or opposition to particular pending
19 legislation, where the communication only request recipients to contact a specific
20 Member of Congress, without promoting, supporting, attacking or opposing the
21 Member, or indicating the Member's past or current position on the legislation;

1 Alternative 1-B

2 (6) Concerns only a pending legislative or executive matter, and the only reference to
3 a Federal candidate is a brief suggestion that he or she be contacted and urged to
4 take a particular position on the matter, and there is no reference to the candidate's
5 record, position, statement, character, qualifications, or fitness for an office or to
6 an election, candidacy, or voting;

7 Alternative 1-C

8 (6) (i) Does not include express advocacy;
9 (ii) Refers to a specific piece of legislation or legislative proposal, either by
10 formal name, popular name or bill number; or refers to a general public
11 policy issue capable of redress by legislation or executive action; and
12 (iii) Contains a phone number, toll free number, mail address, or electronic
13 mail address, internet home page or other world wide web address for the
14 person or entity that the ad urges the viewer or listener to contact;

15 Alternative 1-D

16 (6) Urges support of or opposition to any legislation, resolution, institutional action,
17 or any policy proposal and only refers to contacting a clearly identified candidate
18 who is an incumbent legislator to urge such legislator to support or oppose the
19 matter, without referring to any of the legislator's past or present positions; or
20 (7) Refers to a clearly identified Federal candidate in a public communication by a
21 candidate for State or local office, individual holding State or local office, or an
22 association or similar group of candidates for State or local office or of
23 individuals holding State or local office, if such mention of a Federal candidate is

1 merely incidental to the candidacy of one or more individuals for State or local
2 office.

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

4 4 The authority citation for part 104 would continue to read as follows:

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

6 5. In section 104.5, paragraph (i) would be added as follows:

7 **§ 104.5 Filing dates (2 U.S.C. 434(a)(2)).**

8 * * * * *

9 (i) 24-hour statements of electioneering communications. Every person who makes a
10 disbursement or executes a contract to make a disbursement for the direct costs of producing or
11 airing electioneering communications as defined in 11 CFR 100.29 aggregating in excess of
12 \$10,000 during any calendar year shall, within 24 hours of each disclosure date, file with the
13 Commission a statement under penalty of perjury in accordance with 11 CFR 104.19.

14
15 6. New section 104.19 would be added to read as follows:

16 **§ 104.19 Reporting electioneering communications (2 U.S.C. 434(f)).**

17 (a) Who must report. Every person who makes a disbursement or executes a contract to
18 make a disbursement for the direct costs of producing or airing electioneering communications as
19 defined in 11 CFR 100.29 aggregating in excess of \$10,000 during any calendar year shall,
20 within 24 hours of the disclosure date, file with the Commission a statement under penalty of
21 perjury containing the information set forth in paragraph (b) of this section. Persons other than
22 political committees must file these 24-hour statements on FEC Form 9. Political committees
23 must file these 24-hour statements on Schedule J of FEC Forms 3, 3X, or 3P.

1 (1) Disclosure date means during a calendar year:

2 (i) The first date by which a person has made one or more disbursements, or
3 has executed one or more contracts to make disbursements, for the direct
4 costs of producing or airing electioneering communications aggregating in
5 excess of \$10,000; and

6 (ii) Any other date in a calendar year by which a person has made one or more
7 disbursements, or has executed one or more contracts to make
8 disbursements, for the direct costs of producing or airing electioneering
9 communications aggregating in excess of \$10,000 since the most recent
10 disclosure date during such calendar year.

11 (2) Direct costs of producing or airing electioneering communications include, but are
12 not limited to, the following:

13 (i) Costs charged by a production company, such as studio rental time, staff
14 salaries, costs of video or audio recording media, and talent; and

15 (ii) The cost of airtime on broadcast, cable or satellite radio and television
16 stations, and the charges for a broker to purchase the airtime.

17 (b) Contents of statement. Every person described in paragraph (a) of this section shall
18 disclose the following information:

19 (1) The identification (see 11 CFR 100.12) of the person making the disbursement
20 and, if the person is not an individual, the person's principal place of business;

1 Alternative 2-A

2 (2) The identification (see 11 CFR 100.12) of any person sharing or exercising
3 direction or control over the electioneering communication activities of the person
4 making the disbursement;

5 Alternative 2-B

6 (2) The identification (see 11 CFR 100.12) of any person sharing or exercising
7 direction or control over the contents, timing, duration, intended audience,
8 frequency of placement of the electioneering communication or the specific media
9 outlet used;

10 (3) The identification (see 11 CFR 100.12) of the custodian of the books and accounts
11 from which the disbursements for electioneering communications were made;

12 (4) The amount of each disbursement of more than \$200 during the period covered by
13 the statement, the date the disbursement was made, and the identification (as
14 defined in 11 CFR 100.12) of the person to whom that disbursement was made;

15 Alternative 3-A

16 (5) All elections to which the electioneering communication pertains and all names (if
17 known) of clearly identified candidates referred to or to be referred to in the
18 communication;

19 Alternative 3-B

20 (5) All clearly identified candidates referred to in the communication and the
21 elections in which they are candidates;

22 (6) If the disbursements are paid out of a segregated bank account of a qualified
23 nonprofit corporation under 11 CFR 114.10(h) consisting of funds provided solely

1 by individuals who are U. S. citizens, U.S. nationals, or who are lawfully admitted
2 for permanent residence under 8 U.S.C. 1101(a)(20), the name and address of
3 each contributor who contributed an amount aggregating \$1,000 or more to the
4 segregated bank account, aggregating since the first day of the preceding calendar
5 year;

6 (7) If the disbursements are not paid out of the segregated bank account of a qualified
7 nonprofit corporation under 11 CFR 114.10(h), the name and address of each
8 contributor who contributed an amount aggregating \$1,000 or more to the person
9 making the disbursement, aggregating since the first day of the preceding calendar
10 year; and

11 (8) The disclosure date as defined in this section.

12 (c) Recordkeeping.

13 All persons, except qualified nonprofit corporations (see 11 CFR 114.10), who make
14 electioneering communications or who accept contributions for the purpose of making
15 electioneering communications, must maintain records in accordance with 11 CFR 104.14.

16 **PART 105 – DOCUMENT FILING (2 U.S.C. 432(g))**

17 7. The authority citation for part 105 would be revised to read as follows:

18 Authority: 2 U.S.C. 432(g), 434, 438(a)(8).

19 8. Section 105.2 would be revised to read as follows:

20 **§ 105.2 Place of filing; Senate candidates, their principal campaign committees, and**
21 **committees supporting only Senate candidates (2 U.S.C. 432(g)(2)).**

22 (a) General Rule. Except as provided in paragraph (b) of this section all designations,
23 statements, reports, and notices as well as any modification(s) or amendment(s) thereto, required

1 to be filed under 11 CFR parts 101, 102, and 104 by a candidate for nomination or election to the
2 office of United States Senator, by his or her principal campaign committee or by any other
3 political committee(s) that supports only candidates for nomination for election or election to the
4 Senate of the United States shall be filed in original form with, and received, by the Secretary of
5 the Senate, as custodian for the Commission.

6 (b) Exceptions. Statements of electioneering communications filed in accordance with
7 11 CFR 104.19, regardless of whether the communication refers to a candidate for Senate, House
8 of Representatives or President or Vice President, must be filed in original form with, and
9 received by the Commission.

10 **PART 114 — CORPORATE AND LABOR ORGANIZATION ACTIVITY**

11 9. The authority citation for part 114 would continue to read as follows:

12 Authority: 2 U.S.C. 431(8)(B), 431(9)(B), 432, 434(a)(11), 437d(a)(8), 438(a)(8), 441b.

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

14 **§ 114.2 Prohibitions on contributions and expenditures.**

15 * * * * *

16 (b) (1) Any corporation whatever or any labor organization is prohibited from making a
17 contribution as defined in 11 CFR 100.7(a). Any corporation whatever or any
18 labor organization is prohibited from making a contribution as defined in 11 CFR
19 114.1(a) in connection with any Federal election.

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

22 (i) Making expenditures as defined in 11 CFR 100.8(a);

1 (ii) Making expenditures with respect to a Federal election (as defined in 11
2 CFR 114.1(a)), for communications to those outside the restricted class
3 that expressly advocate the election or defeat of one or more clearly
4 identified candidate(s) or the candidates of a clearly identified political
5 party; or

6 (iii) Making payments for an electioneering communication to those outside
7 the restricted class.

8 * * * * *

9 11. In section 114.10, paragraphs (a), (d), (e) and (g) would be revised and paragraphs (h)
10 and (i) would be added to read as follows:

11 **§ 114.10 Nonprofit corporations exempt from the prohibition on independent expenditures**
12 **and electioneering communications.**

13 (a) Scope. This section describes those nonprofit corporations that qualify for an exemption
14 in 11 CFR 114.2. It sets out the procedures for demonstrating qualified nonprofit corporation
15 status, for reporting independent expenditures and electioneering communications, and for
16 disclosing the potential use of donations for political purposes.

17 * * * * *

18 (d) Permitted corporate independent expenditures and electioneering communications.

19 (1) A qualified nonprofit corporation may make independent expenditures, as defined
20 in 11 CFR part 109, without violating the prohibitions against corporate
21 expenditures contained in 11 CFR part 114.

1 (2) A qualified nonprofit corporation may make electioneering communications, as
2 defined in 11 CFR 100.29, without violating the prohibitions against corporate
3 expenditures contained in 11 CFR part 114.

4 (3) Except as provided in paragraph (d)(1) and (2) of this section, qualified nonprofit
5 corporations remain subject to the requirements and limitations of 11 CFR part
6 114, including those provisions prohibiting corporate contributions, whether
7 monetary or in-kind.

8 (e) Qualified nonprofit corporations; reporting requirements.

9 (1) Procedures for demonstrating qualified nonprofit corporation status.

10 (i) If a corporation makes independent expenditures under paragraph (d)(1) of
11 this section that aggregate in excess of \$250 in a calendar year, the
12 corporation shall certify, in accordance with paragraph (e)(1)(i)(B) of this
13 section, that it is eligible for an exemption from the prohibitions against
14 corporate expenditures contained in 11 CFR part 114.

15 (A) This certification is due no later than the due date of the first
16 independent expenditure report required under paragraph (e)(2)(i)
17 of this section. However, the corporation is not required to submit
18 this certification prior to making independent expenditures.

19 (B) This certification may be made either as part of filing FEC Form 5
20 (independent expenditure form) or, if the corporation is not
21 required to file electronically under 11 CFR 104.18, by submitting
22 a letter in lieu of the form. The letter shall contain the name and
23 address of the corporation and the signature and printed name of

1 the individual filing the qualifying statement. The letter shall also
2 certify that the corporation has the characteristics set forth in
3 paragraphs (c)(1) through (c)(5) of this section.

4 (ii) If a corporation makes electioneering communications under paragraph
5 (d)(2) of this section that aggregate in excess of \$10,000 in a calendar
6 year, the corporation shall certify, in accordance with paragraph
7 (e)(1)(ii)(B) of this section, that it is eligible for an exemption from the
8 prohibitions against corporate expenditures contained in 11 CFR part 114.

9 (A) This certification is due no later than the due date of the first
10 electioneering communication statement required under paragraph
11 (e)(2)(ii). However, the corporation is not required to submit this
12 certification prior to making electioneering communications.

13 (B) This certification must be made as part of filing FEC Form 9
14 (electioneering communication form).

15 (2) Reporting independent expenditures and electioneering communications.

16 (i) Qualified nonprofit corporations that make independent expenditures
17 aggregating in excess of \$250 in a calendar year shall file reports as
18 required by 11 CFR 109.2.

19 (ii) Qualified nonprofit corporations that make electioneering communications
20 aggregating in excess of \$10,000 in a calendar year shall file statements as
21 required by 11 CFR 104.19.

22 * * * * *

1 (g) Non-authorization notice. Qualified nonprofit corporations making independent
2 expenditures or electioneering communications under this section shall comply with the
3 requirements of 11 CFR 110.11.

4 (h) A qualified nonprofit corporation may, but is not required to, establish a segregated bank
5 account into which it deposits only funds provided by individuals, as described in 11 CFR
6 104.19(b)(6).

7 (i) Nothing in this section shall be construed to authorize any organization exempt from
8 taxation under 26 U.S.C. 501(a), including any qualified nonprofit corporation, to carry out any
9 activity that it is prohibited from undertaking by the Internal Revenue Code, 26 U.S.C. 501, et
10 seq.

11 12. Section 114.14 would be added to read as follows:

12 **§ 114.14 Further restrictions on the use of corporate and labor organization funds for**
13 **electioneering communications.**

14 (a) No corporation or labor organization may give, disburse, donate or otherwise provide
15 funds, the purpose of which is to pay for an electioneering communication, to any other person.

16 (b) No person who accepts funds given, disbursed, donated or otherwise provided by a
17 corporation or labor organization may use those funds to:

18 (1) Pay for any electioneering communication; or

19 (2) Provide any portion of those funds to any person, for the purpose of defraying any
20 of the costs of an electioneering communication.

21 (c) The prohibitions at paragraphs (a) and (b) of this section shall not apply to funds
22 disbursed by a corporation or labor organization, or received by a person, that constitute -

