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FEDERAL ELECTION COMMISSION
Washington, DC 20463

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MEMORANDUM

OCT - 8 2002

AGENDA ITEM
For Meeting of: 10-10-02

SUBMITTED LATE

TO: The Commission

THROUGH: James A. Pehrkon
Staff Director

FROM: Lawrence H. Norton
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SUBJECT: Final Rules and Explanation and Justification for Electioneering Communications

During the Commission's meeting on September 26, 2002, the Commission discussed the draft Final Rules circulated by the Office of General Counsel, Agenda Doc. 02-68, and amendments to the agenda document offered by various Commissioners. Several amendments were adopted at the table. Attached are the Final Rules that incorporate the amendments approved by the Commission as well as technical and conforming amendments, and, where necessary, added regulatory text to 11 CFR 114.10(e)(1)(i)(B) and explanation and justification. The changes from the previous document are highlighted. These Final Rules do not include regulatory text or explanation and justification for the Federal Communications Commission database, which was also discussed at the September 26, 2002 meeting. Those materials are being circulated under separate cover.

We note that the Commission's exemption from the definition of "electioneering communication" for communications paid for by organizations operating under 26 U.S.C. 501(c)(3) refers specifically to "any religious, educational, or charitable organization." *See* new 11 CFR 100.29(c)(6) [page 104, lines 13 to 16 in attached]. The

draft Explanation and Justification repeats the language from the Commission's exemption. *See* page 49, lines 19 to 21. However, 26 U.S.C. 501(c)(3) includes other organizational purposes, and it is not clear that the Commission intended to limit the exemption to certain organizations operating under section 501(c)(3). If the Commission wishes the exemption to be co-extensive with the tax code provision and include all 501(c)(3) organizations, the Office of General Counsel recommends that the Commission reopen this portion of the final rules and amend the text of 11 CFR 100.29(c)(6) to delete the words "religious, educational, or charitable," which appear on page 104, line 13 of the attached document. We would then recommend that the explanation and justification be revised to delete the sentence that begins on page 49, line 19 to 21, and replace it with the following: "It is the communications of these organizations that the Commission exempts from Title II, subtitle A of BCRA at 11 CFR 100.29(c)(6)."

Recommendation

The Office of General Counsel recommends that the Commission approve the attached added regulatory text to 11 CFR 114.10(e)(1) and the attached Explanation and Justification, and direct the Office of General Counsel to transmit the Final Rules and Explanation and Justification for publication in the *Federal Register*, and to transmit them to Congress.

Attachment

FEDERAL ELECTION COMMISSION

11 CFR Parts 100 and 114

[Notice 2002-XX]

Electioneering Communications

AGENCY: Federal Election Commission

ACTION: Final rules and transmittal of regulations to Congress.

SUMMARY: The Federal Election Commission promulgates new rules regarding electioneering communications, which are certain television and radio communications that refer to a clearly identified Federal candidate and that are publicly distributed to the relevant electorate within 60 days prior to a general election or within 30 days prior to a primary election for Federal office. The final rules implement a portion of the Bipartisan Campaign Reform Act of 2002 ("BCRA") that adds to the Federal Election Campaign Act ("FECA") new provisions regarding electioneering communications. BCRA defines "electioneering communications," exempts certain communications from the definition, provides limited authorization to the Commission to promulgate additional exemptions, and requires public disclosure of specified information regarding who made the electioneering communication and its cost. Additionally, BCRA prohibits corporations and labor organizations from making electioneering communications, and the final rules also implement this

prohibition. Further information is provided in the Supplementary Information that follows.

EFFECTIVE DATE: [Insert date 30 days after the date of publication in the Federal Register, but no earlier than November 6, 2002].

FOR FURTHER INFORMATION CONTACT: Ms. Mai T. Dinh, Acting Assistant General Counsel, Mr. J. Duane Pugh Jr., Acting Special Assistant General Counsel, or Mr. Anthony T. Buckley, Attorney, 999 E Street, N.W., Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

SUPPLEMENTARY INFORMATION: The Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155, 116 Stat. 81 (Mar. 27, 2002), contains extensive and detailed amendments to the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. 431 et seq. This is one of a series of rulemakings the Commission is undertaking to implement the provisions of BCRA.

Section 402(c)(1) of BCRA establishes a general deadline of 270 days for the Commission to promulgate regulations to carry out BCRA. The President of the United States signed BCRA into law on March 27, 2002, so the 270-day deadline is December 22, 2002. The final rules will take effect on November 6, 2002, which is the day following the November 5, 2002 general election, except the final rules do not apply to any runoff elections required by the results of the November 2002 general election. 2 U.S.C. 431 note.

Because of the brief time period before the deadline for promulgating these rules, the Commission received and considered public comments expeditiously. The Notice of

Proposed Rulemaking ("NPRM") on which these final rules are based was made publicly available on the FEC's website on August 2, 2002 and was published in the Federal Register on August 7, 2002. 67 FR 51,131 (Aug. 7, 2002). The written comments were due by August 21, 2002 for those who wished to testify or by August 29, 2002 for all other commenters. The names of commenters and their comments are available at http://www.fec.gov/register.htm under "Electioneering Communications." The Commission held a public hearing on the NPRM on August 28 and 29, 2002, at which it heard testimony from 12 witnesses. Transcripts of the hearing are available at http://www.fec.gov/register.htm under "Electioneering Communications."[1]

Under the Administrative Procedures Act, 5 U.S.C. 553(d), and the Congressional Review of Agency Rulemaking Act, 5 U.S.C. 801(a)(1), agencies must submit final rules to the Speaker of the House of Representatives and the President of the Senate and publish them in the Federal Register at least 30 calendar days before they take effect. The final rules on electioneering communications were transmitted to Congress on ~~September~~/October >>, 2002.

[1] Oral testimony at the Commission's public hearing and written comments are both considered "comments" in this document.

Explanation and Justification

Introduction

BCRA at 2 U.S.C. 434(f)(3) defines a new term, "electioneering communications." This term includes broadcast, cable, or satellite communications: (1) that refer to a clearly identified Federal candidate; (2) that are transmitted within certain time periods before a primary or general election; and (3) that are targeted to the relevant electorate, which is the relevant Congressional district or State that candidates for the U.S. House of Representatives or the U.S. Senate seek to represent. Those paying for electioneering communications cannot use funds from national banks, corporations, foreign nationals,[2] or labor organizations to pay for electioneering communications. See 2 U.S.C. 441b(b)(2) and 441e(a)(2). They must also meet certain disclosure requirements. See 2 U.S.C. 434(f). BCRA's sponsors have explained in the legislative debates and in their comments on this rulemaking that these new "electioneering communications" provisions, set out at 2 U.S.C. 434(f) and 441b(b)(2), are designed to ensure that such communications are paid for with funds subject to the prohibitions and limitations of FECA. According to the sponsors, "putative 'issue ads'" have been used to circumvent FECA's prohibition on the use of labor organization and corporate treasury funds in connection with Federal elections. See 148 Cong. Rec. S2141 (daily ed. Mar. 20, 2002) (statement of Sen. McCain). In the sponsors' view, this is accomplished by

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[2] The ban on foreign national funds is being addressed in a separate rulemaking. See NPRM on Contribution Limitations and Prohibitions, 67 FR 54,366, 54,372-75 and 54,379 (Aug. 22, 2002).

creating and airing advertisements that avoid the specific language that the Supreme Court said expressly advocates the election or defeat of a candidate. See 148 Cong. Rec. at S2140-2141; see also Buckley v. Valeo, 424 U.S. 1, 44 n.52 (1976); 11 CFR 100.22.[3]

BCRA's principal sponsors cited various studies and investigations that they say show that the express advocacy test does not distinguish genuine issue ads from campaign ads. 148 Cong. Reg. at S2140-2141 (statement of Sen. McCain). For example, Senator McCain cited a study by the Brennan Center for Justice, Buying Time 2000, that found that "97 percent of the electioneering ads reviewed" did not use the words and phrases cited by the Buckley Court, and that more than 99 percent of the "group-sponsored soft money ads" studied were in fact campaign ads. 148 Cong. Rec. at S2141. See also 148 Cong. Rec. S2137 (statement of Sen. Snowe referencing Annenberg Public Policy Center, Issue Advertising in the 1999-2000 Election Cycle (2001)). Senators Snowe and Jeffords stated that, because the electioneering communications provisions focus on the key elements of when, how, and to whom a communication is made, rather

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[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, 424 U.S. at 44 n.52. The Supreme Court created the express advocacy test to save the statutory phrase "for the purpose of . . . influencing" -- the "critical phrase" within the definitions of "expenditure" and "contribution" at 2 U.S.C. 431(8) and (9) -- from unconstitutional vagueness and overbreadth while furthering the goal of Congress "to insure both the reality and the appearance of the purity and openness of the federal election process." Buckley, 424 U.S. at 77-78. The Supreme Court's express advocacy test marks the dividing line between candidate advocacy regulated by the FECA and issue advocacy. Id. at 42, 44, 80.

than relying on the express advocacy test or the intent of the advertiser, they are a clearer, more accurate test of whether an advertisement is campaign-related. Id. at S2117-18 (statement of Sen. Jeffords); S2135-37 (statement of Sen. Snowe).

———The final rules add a new definition of "electioneering communication," located at 11 CFR 100.29. The new definition is added to current 11 CFR part 100 because it has general applicability to Title 11 of the Code of Federal Regulations. The final rules also amend 11 CFR 114.2 and 114.10 and create new section 114.14 to address the prohibition on corporations and labor organizations directly or indirectly disbursing funds for electioneering communications. In conjunction with these final rules, the Commission is also issuing Interim Final Rules regarding a Federal Communications Commission database that can be used to determine whether a communication is an electioneering communication.

Please note that the reporting requirements for electioneering communications are not part of the final rules. The Commission intends to incorporate the revised proposed rules into a Consolidated Reporting NPRM as discussed below in connection with 11 CFR Part 104. ~~In conjunction with these final rules, the Commission is also issuing Interim Final Rules regarding a Federal Communications Commission database that can be used in connection with determining whether a communication is an electioneering communication.~~ However, it is important to note that the Commission agrees with a commenter who observed that BCRA imposes reporting obligations and fund source limitations and prohibitions on the person making the electioneering communication, not on the broadcaster or satellite or cable system operator who publicly distributes it.

I. Definition of "Electioneering Communication"

A. 11 CFR 100.29(a) Operative Definition of "Electioneering Communication"

The definition of "electioneering communication" at 11 CFR 100.29(a) largely tracks the definition in BCRA at 2 U.S.C. 434(f)(3). Paragraph (a) defines "electioneering communication" as any broadcast, cable, or satellite communications that: (1) refers to a clearly identified Federal candidate; (2) is publicly distributed within certain time periods before an election; and (3) is targeted to the relevant electorate, that is, the relevant Congressional district or State that candidates for the U.S. House of Representatives or the U.S. Senate seek to represent.

Paragraph (a)(2) refers to the "public distribution" of a communication, while BCRA refers to the "making" of a communication. Making a communication could be interpreted to mean any of a number of actions in the process of issuing a communication, from the formulation of a concept for the communication through the public distribution of a communication. The regulation uses a different term than the statute to clarify that the operative event is the dissemination of the communication, rather than the disbursement of funds related to creating a communication. All of the commenters who addressed this provision, including the principal Congressional sponsors of BCRA, agreed with this clarification.

B. Alternative Definition of "Electioneering Communication"

BCRA at 2 U.S.C. 434(f)(3)(A)(ii) provides an alternative definition of "electioneering communication," ~~which~~that would take effect in the event the definition

in 2 U.S.C. 434(f)(3)(A)(i) is held to be constitutionally insufficient "by final judicial decision." The alternative definition of "electioneering communication" is "any broadcast, cable, or satellite communication which promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate) and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate." 2 U.S.C. 434(f)(3)(A)(ii). The Commission did not propose regulations to implement this alternative statutory definition in the NPRM. 67 FR 51,132. The Commission, however, did seek comment as to whether it should promulgate an alternative definition as part of these final rules. Specifically, the Commission inquired whether such a regulation should simply reiterate the wording of the statute, or whether it should provide additional guidance as to what types of communications promote, support, attack, or oppose a candidate and suggest no plausible meaning other than an exhortation to vote for or against a candidate.

Most of the commenters who addressed BCRA's alternative definition of "electioneering communication" agreed with the Commission's proposed approach to promulgate regulations to implement this alternative definition only when and if it becomes necessary to do so. In the absence of a judicial decision invalidating the existing definition, regulations related to the alternative definition would be potentially confusing and premature or even entirely unnecessary, according to these commenters. Additionally, some argued that any court decision regarding 2 U.S.C. 434(f)(3)(A) may provide guidance for the appropriate standard that the Commission should use in promulgating regulations under the alternative definition. Two commenters advocated

promulgating regulations now so that the pending litigation could be informed by the manner in which the Commission would enforce the alternative definition. They also argued that the period between a final decision in that litigation and the 2004 elections is likely to be too short to permit the Commission to complete a rulemaking in time to provide guidance, if the operative definition is invalidated. They further argued that the alternative definition's application to the entire election cycle, and not just the 30- or 60-day periods to which the current definition is limited, exacerbates the timing issue.

Because promulgating regulations that implement the alternative definition is premature and may cause confusion, the Commission does not intend to do so unless and until a final judicial decision makes it necessary to do so by holding that 2 U.S.C. 434(f)(3)(A)(i) is constitutionally insufficient. The Commission notes that if such a decision issues, the statutory alternative definition would become effective, and the decision may supplement the statute's language to provide guidance until the Commission issues implementing regulations.

C. Terms used in "Electioneering Communication" definition

Paragraph (b) of 11 CFR 100.29 defines some of the terms used in paragraph (a)'s definition of "electioneering communication." It has been reorganized from the NPRM so that the terms are defined in the order in which they appear in paragraph (a).

1. 11 CFR 100.29(b)(1) Definition of "Broadcast, cable, or satellite communication"

BCRA's legislative history establishes that electioneering communications are limited to television and radio communications, and not other media. The electioneering communication provisions originated as an amendment to the predecessor of BCRA introduced by Senators Snowe and Jeffords in 1998. That amendment, and all of the subsequent versions of that amendment prior to the 107th Congress, defined an electioneering communication to include "any broadcast from a television or radio broadcast station." See 144 Cong. Rec. S938 (daily ed. Feb. 24, 1998); see also S.26 (106th Congress), 145 Cong. Rec. S425 (daily ed. Jan. 19, 1999). Likewise, the floor debates on the electioneering communications provision during the 107th Congress frequently referred to television and radio ads. See, e.g., 148 Cong. Rec. S2117 (daily ed. Mar. 20, 2002) (remarks of Sen. Jeffords). During a final explanation of these provisions, Senator Snowe again stated that they would apply to "so-called issue ads run on television and radio only." 148 Cong. Rec. S2135 (daily ed. Mar. 20, 2002). During an early debate on the amendment, Senator Snowe was asked whether the definition of electioneering communication would "apply to the Internet." She replied, "No. Television and radio." See 144 Cong. Rec. S973 and S974 (daily ed. Feb. 25, 1998). Consistent with Congressional intent, new 11 CFR 100.29(b)(1) states that a broadcast, cable, or satellite communication is a communication that is publicly distributed by a television station, radio station, cable television system, or satellite system. This definition limits the scope of electioneering communications to television and radio.

(The exclusion of the Internet and other forms of communication is further discussed below in connection with 11 CFR 100.29(c)(1).)

Proposed 11 CFR 100.29(b)(2) would have exempted Low Power FM Radio, Low Power Television, and citizens band radio from inclusion in broadcast, cable, or satellite communication. NPRM, 67 FR 51,133. The commenters were divided on whether these communications media should be included or excluded. While many would probably agree with the commenter who stated that BCRA was primarily aimed at "traditional" radio and television, most who specifically mentioned Low Power FM Radio, Low Power Television, and citizens band radio believed that BCRA provided no authority to exclude these forms of radio and television. Among those opposed to the exemption were the six principal Congressional sponsors of BCRA. Considering BCRA's unqualified language, particularly in light of the comments, the Commission has decided not to ~~include the specific exclusion~~de ~~of~~ these forms of radio and television from the definition of "electioneering communications" in the final rule. In doing so, the Commission notes that any communication over these media would have to be received by 50,000 persons or more in the relevant Congressional district or ~~state~~State before the communication could be considered an electioneering communication. Additionally, the costs of the communication would have to exceed $10,000 before disclosure requirements applied. Finally, to the extent a fee for the public distribution of a communication is not charged, the communication is excluded from the definition of "electioneering communication" pursuant to 11 CFR 100.29(b)(3)(i).

2. 11 CFR 100.29(b)(2) Definition of "Refers to a clearly identified candidate"

Section 100.29(b)(2) defines the phrase "refers to a clearly identified candidate." This phrase is already defined in the Commission's rules at 11 CFR 100.17, which states that "clearly identified" means the candidate's name, nickname, photograph, or drawing appears, or the identity of the candidate is otherwise apparent through an unambiguous reference such as "the President," "your Congressman," or "the incumbent," or through an unambiguous reference to his or her status as a candidate such as "the Democratic presidential nominee" or "the Republican candidate for Senate in the State of Georgia." The final rule tracks the language of the current rule in 11 CFR 100.17. This approach appears to be consistent with legislative intent. See 148 Cong. Rec. S2144 (daily ed. Mar. 20, 2002) (statement of Sen. Feingold indicating that a communication "refers to a clearly identified candidate" if it "mentions, identifies, cites, or directs the public to the candidate's name, photograph, drawing or otherwise makes an 'unambiguous reference' to the candidate's identity"). Please note that the definition would not be based on the intent or purpose of the person making the communication. Of the six commenters who addressed this issue, five supported the Commission's proposal, while the sixth found it vague and too broad. Given the well-established body of law construing this term, the Commission does not agree with this latter comment.

3. 11 CFR 100.29(b)(3) Definition of "Publicly distributed"

a. 11 CFR 100.29(b)(3)(i) General definition

Section 100.29(b)(3)(i) defines "publicly distributed" as "aired, broadcast, cablecast or otherwise disseminated for a fee through the facilities of a television station, radio station, cable television system, or satellite system." Because BCRA ~~includes~~ applies expressly to "any broadcast, cable, or satellite communication," ~~the underlying technology is irrelevant and~~ the Commission intends this definition to include any technological methods of disseminating a communication through the facilities listed above. One commenter cautioned that some telephone calls and email messages can be transmitted, in part, through the facilities of a television station, radio station, cable television system, or satellite system and might therefore meet the definition of "publicly distributed" as proposed in the NPRM. 67 FR 51,145. However, a communication must be available to 50,000 or more persons in a particular Congressional district or State in order to be an electioneering communication, and it is highly unlikely the communications the commenter addressed would be so widely disseminated.

b. 11 CFR 100.29(b)(3)(i) "For a fee"

The Commission specifically asked in the NPRM if the definition of "electioneering communication" should be limited to paid advertisements. See 67 FR 51,136. Much of the legislative history and virtually all of the studies cited in legislative history and presented to the Commission in the course of this rulemaking focused on paid advertisements in considering what should be included within electioneering communications. See, e.g., 148 Cong. Rec. S2112, S2114-16, S2117, S2117, S2124, S2135, S2140-41, S2154, and S2155 (daily ed. Mar. 20, 2002) (remarks of Sens.

Schumer, Levin, Cantwell, Jeffords, McConnell, Snowe, McCain, Feinstein, and Dodd, respectively); Campaign Finance Institute Task Force on Disclosure, Issue Ad Disclosure: Recommendations for a New Approach (2001); Annenberg Public Policy Center, Issue Advertising in the 1999-2000 Election Cycle (2001); Craig B. Holman and Luke P. McLoughlin, Brennan Center for Justice, Buying Time 2000: Television Advertising in the 2000 Federal Elections (2001), Executive Summary reprinted in 148 Cong. Rec. S2118 (daily ed. Mar. 20, 2002); and Jonathan S. Krasno and Daniel E. Seltz, Brennan Center for Justice, Buying Time: Television Advertising in the 1998 Congressional Elections (2000).

Many commenters who addressed this specific issue agreed that the legislative history abundantly documents that paid advertisements were the focus of the electioneering communication provisions. One commenter suggested that the electioneering communication regulations should cover program-length, paid advertisements, known as "infomercials," as well as the shorter paid advertisements, known as commercials. Several other commenters discussed entertainment programming, educational programming, or documentaries and argued that BCRA was not intended to reach these communications.

One commenter argued, however, that limiting electioneering communications to paid programming would permit corporations that operate broadcast, cable, or satellite systems to distribute communications that would be electioneering communications but for this limitation, and that such a result is plainly inconsistent with BCRA. This commenter also cited the $10,000 threshold for reporting electioneering communications,

which provides partial relief to those who distribute advertisements or programming without paying for distribution costs.

~~On this basis~~Based on the legislative history of BCRA, the Commission has determined that electioneering communications should be limited to paid programming. The Commission has added an additional element to the definition of "publicly distributed" in the final rules that was not in the definition proposed in the NPRM. The final rule at 11 CFR 100.29(b)(3)(i) includes the qualifier "for a fee" to reflect the Commission's determination that electioneering communications should be limited to paid programming. By including this qualifier, the Commission limits the definition of "electioneering communications" to those communications for which the operator of a broadcast station, cable system, or satellite system seeks or receives payment for the public distribution of the communication.[4] The Commission believes the addition of "for a fee" to the definition of "publicly distributed" implements the well-documented Congressional intent regarding which communications are included within the definition of "electioneering communications." As suggested by the question in the NPRM, the Commission believes this ~~implementation~~ is best accomplished by incorporating the criterion in the definition, rather than creating an exemption from the definition.

A communication's production costs will not be considered fees for this purpose; the fees included in the definition are limited to charges for ~~the~~ distribution ~~costs~~. Therefore, under this criterion both program-length paid shows, including infomercials,

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[4] Thus, the maker of an electioneering communication cannot avoid the definition of "electioneering communications" by failing to pay the distributor's fee.

and commercials ~~will remain~~are subject to the electioneering communication requirements.

~~One commenter argued, however, that limiting electioneering communications to paid programming would permit corporations that operate broadcast, cable, or satellite systems to distribute communications that would be electioneering communications but for this limitation, and that such a result is plainly inconsistent with BCRA. This commenter also cited the $10,000 threshold for reporting electioneering communications, which provides partial relief to those who distribute advertisements or programming without paying for distribution costs.~~

The Commission has carefully considered the concern that corporate-owned broadcast, cable, or satellite systems could evade the prohibition on corporate contributions by providing free airtime for communications. ~~As a preliminary matter, the Commission notes that any programming, including any advertisement, thatincludes express advocacy for or against any candidate, any programming that includes campaign materials or portions thereof, and any programming that is coordinated with any candidate or political party committee, would continue to be subject to the limitations and prohibitions on contributions and expenditures, including theexemptions applicable thereto, if, for example, a corporation provided airtime at less than the usual and normal cost.~~ The Commission ~~also~~ notes that a broadcaster, or a cable or satellite system operator's judgment to provide free distribution services shares some characteristics of the broadcaster or system operator's editorial judgments involved in the use of the news story exemption, which is recognized in FECA, BCRA, and Commission regulations. 2 U.S.C. 431(9)(B); 2 U.S.C. 434(f)(3)(B)(i); and 11 CFR 100.132. ~~Thus, if a~~

~~broadcaster, or cable or satellite system operator conducts business in its usual fashion and charges its usual and normal fee for the public distribution of a communication, then it faces no liability under the electioneering communications provisions at 2 U.S.C. 434(f)(3) and 441b(a)(2). The reporting requirements and fund source prohibitions of those provisions impose liability on the person paying the public distribution or production costs of an electioneering communication.[5]~~ Thus, a broadcaster's decision to provide free airtime for communications will not create liability for the person that produced the communication.

c. 11 CFR 100.29(b)(3)(ii) Additional definition for presidential primaries and conventions

BCRA defines electioneering communication to include communications that "in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate." 2 U.S.C. 434(f)(3)(A)(i)(III). BCRA then defines "targeting to the relevant electorate," referring to Congressional candidates only. 2 U.S.C. 434(f)(3)(C). Thus, as discussed in the NPRM, a plausible reading of BCRA is that a communication that refers to a presidential or vice-presidential candidate does not need to be targeted to the relevant electorate to qualify as an electioneering communication. 67 FR 51,134. Under this interpretation, a communication that refers to a clearly identified presidential or vice-presidential candidate and that meets the timing and medium requirements for electioneering

~~[5] Under the scenario described above in which, for example, a broadcaster makes a prohibited contribution, it would face liability for its own actions in doing so.~~

communications would be considered an electioneering communication, without considering the number or geographic locations of persons receiving the communication. For example, a television ad that clearly identifies a presidential primary candidate that is run anywhere in the United States could be considered an electioneering communication if the ad aired within 30 days of a primary election taking place anywhere in the United States, even if, in the States in which the ad actually aired, the primary election were months away or had already taken place.

The Commission expressed concerns regarding this interpretation in the NPRM. Such a sweeping impact on communications would be insufficiently linked to pending primary elections, may not have been contemplated by Congress, and could raise constitutional concerns.[6] So interpreted, the restrictions on electioneering communications would take effect even if an ad were aired only in a State that has already held its primary, and thus would restrict ads more than 60 days before a general election, arguably in contravention of BCRA.

The Commission invited comment on three different interpretations of BCRA's requirements for an electioneering communication that refers to presidential or vice-presidential primary candidates. The Commission first proposed two alternative regulatory provisions addressing this issue when it defines how a BCRA provision would apply with respect to presidential candidates. 67 FR 51,134. One alternative was linked

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[6] Considering the 2000 calendar, such an interpretation would have resulted in nationwide application of the electioneering communication rules to communications mentioning a presidential or vice-presidential candidate for more than 270 days between late-December of 1999 to the election in November 2000.

to BCRA's definition of "electioneering communications" as communications "made within . . . 30 days before a primary . . . election." 2 U.S.C. 434(f)(3)(A)(i)(II)(bb). In contrast to 2 U.S.C. 434(f)(3)(A)(i)(III), which is expressly limited to candidates other than President or Vice President, section 434(f)(3)(A)(i)(I) refers to "candidate[s] for Federal office" without qualification. Thus, candidates for President are included among those contemplated in section 434(f)(3)(A)(i)(I) and (II). Consequently, the express language of the statute permits the Commission to define when a communication that refers to a clearly identified candidate for President is made within 30 days before a primary or national nominating convention.

The Commission proposed ~~defining this phrase's application to references to presidential candidates to mean~~ that a communication that refers to a clearly identified candidate for President would be "publicly distributed within 30 days before a primary election, preference election, or convention or caucus of a political party," only where and when the communication can be received by 50,000 or more persons within the State holding such election, convention or caucus. (This portion of the "electioneering communication" definition was included as Alternative 1-B in proposed 11 CFR 100.29(b)(4).)

As an alternative means of addressing the concerns about the potential sweep of the electioneering communication ~~requirements related~~ provisions to presidential primary candidates, the Commission proposed ~~adding a provision to the general definition of electioneering communication. This provision would have stated~~ that a communication would be considered an electioneering communication only if it can be received by 50,000 or more persons in either a State in which a presidential primary will occur within

30 days, or nationwide if within 30 days of the national nominating convention of that candidate's party. (This provision appeared in the proposed rules as Alternative 1-A in 11 CFR 100.29(a)(1)(iv).)

Separately, the Commission sought comments on whether BCRA's electioneering communications restrictions as applied to communications depicting presidential and vice-presidential candidates could not be triggered by a primary election, but would be limited to the 30 days before a party's national nominating convention and the 60 days before the general election. 67 FR 51,135. This interpretation was based on the phrasing of BCRA's limitation of electioneering communications to those made "within 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate." 2 U.S.C. 434(f)(3)(A)(i)(II)(bb) (emphasis added). This interpretation viewed the restrictive adjective clause "that has authority to nominate a candidate" as modifying all the preceding objects: both "a convention or caucus of a political party" and "a primary or preference election." Because the presidential candidates of the two major parties can only be nominated at their party's national nominating convention, no State primary or preference election would satisfy this aspect of the definition. Thus, the only communications that refer to major party presidential candidates that could be considered electioneering communications are those within 30 days of the convention or 60 days of the general election.

Many commenters addressed this issue. Three commenters believe that any effort by the Commission to make the 50,000 person standard applicable to communications that refer to presidential candidates is inconsistent with the plain language of the statute.

Twelve commenters rejected this view, supporting either Alternative 1-A or 1-B. Many of the comments discussed the effect of the alternatives on national nominating conventions. Most of those who favored Alternative 1-A, the addition to the general definition of "electioneering communications," stated that they did so because they approved of its express application to communications 30 days before the national nominating convention. They argued that the national nominating conventions are elections with a national effect, so the relevant base of viewers or listeners for a communication shortly before a convention is nationwide, like the general election. One of those who favored Alternative 1-B, the specification of how "made within 30 days before a primary election" would apply to presidential primaries, suggested that the Commission expand the alternative to cover ads 30 days prior to the conventions. Another commenter who favored Alternative 1-A also stated that Alternative 1-B would be sufficient if expanded to address explicitly national nominating conventions. Only one commenter was opposed to including national nominating conventions. That commenter argued that because only delegates can vote at national nominating conventions, it is inappropriate to require that the communication reach more than 50,000 persons nationally.

Commenters who rejected the interpretation that electioneering communications cannot be related to presidential primaries because none have "the authority to nominate a candidate" described the narrow interpretation as plainly inconsistent with BCRA.[7] In

[7] The lone commenter who supported the interpretation preferred it because of the more limited result.

doing so, the comments argued that the clause "that has authority to nominate a candidate," modifies "a convention or caucus of a political party" only, so that "a primary or preference election . . . for the office sought by the candidate" is not modified by the "authority" clause. The enclosure of the "authority" clause in a pair of commas supports this reading of the provision, according to these commenters. The principal Congressional sponsors of BCRA were among those who endorsed this interpretation.

The Commission ~~rejects the interpretation of~~ declines to interpret BCRA ~~that would eliminate application of~~ to exempt presidential primaries from the electioneering communication provisions ~~with respect to presidential primaries~~. The Commission also rejects the interpretation of BCRA that would lead to a nationwide application of the electioneering communication provisions with respect to presidential primaries. Instead, the Commission has determined that in defining "publicly distributed," the regulation will further specify how a communication is publicly distributed within 30 days of a presidential primary or preference election or a national nominating convention. Given the number of states that hold presidential primaries over the course of several months using a variety of methods to select delegates to the national nominating conventions, the Commission is issuing clarifying regulations. Similarly, the multiple days over which national nominating conventions generally are conducted also call for specificity as to precisely when the 30-day period begins and ends. New ~~paragraph~~ section -100.29(b)(3)(ii) incorporates the language from Alternative 1-A in the NPRM and uses the device of Alternative 1-B, which was defining "publicly distributed" in these circumstances. Thus, under 11 CFR 100.29(b)(3)(ii)(A), in order to qualify as an electioneering communication, a broadcast, cable, or satellite communication that refers

to a clearly identified candidate for his or her party's nomination for President or Vice President must be publicly distributed within 30 days before a primary election in such a way that the communication can be received by 50,000 or more persons within the State holding the primary election.

One commenter inquiresd whether the 30-day period prior to a national nominating convention begins 30 days prior to the first or last day of the convention. A plain language reading of BCRA leads to the conclusion that the period to which the electioneering communication provisions apply begins 30 days prior to the first day of a convention or caucus and continues to the end of the convention or caucus. For each day within this period, at least one day of the convention or caucus will be in the subsequent 30 days. The Commission specifies in the final rule at section 100.29(b)(3)(ii)(B) that the period begins running 30 days before the first day of the national nominating convention.

The Commission notes that a caucus or convention that selects or apportions delegates to a national nominating convention or expresses a preference for the nomination of presidential candidates would be considered a primary election pursuant to 11 CFR 100.2(c)(2), 100.2(c)(3), and 9032.7. ~~Thus, if any~~In some States, caucuses or conventions that occur prior to the statewide caucus, convention, or primary determine the distribution of the statewide delegation to the national nominating convention among candidates for President or Vice President. ~~, the earlier caucus or convention also marks the end of a 30-day period of electioneering communications. Of course, these procedures can be changed by State law or State political party procedures. The Commission regularly publishes on its website a list of the States' primaries, conventions, and caucuses. That list will specify which events trigger the 30-day periods of~~

~~electioneering communication application.~~ In such cases, the Commission would likely consider the caucus or convention that selects or apportions delegates to a national nominating convention to be the triggering event for purposes of the 30-day period in 11 CFR 100.29(a)(2). In light of the variations in party procedures among the States, and in order to avoid confusion over which event in a political party's nominating process in a particular State will trigger the 30-day electioneering communication period for candidates for President or Vice President who seek that political party's nomination, the Commission will publish on its website a list of the one event for each political party in each State that triggers the 30-day period for candidates for President or Vice President who seek that political party's nomination.

The Commission has also determined that a similar clarification for the 60 days preceding the general election is unnecessary because the date of the general election does not vary across the States. Without the ambiguity caused by the multiple dates and jurisdictions of the primary elections, BCRA's plain language clearly establishes the time period for electioneering communications related to the presidential general election. 2 U.S.C. 434(f)(3)(A)(i)(II)(aa).

4. 11 CFR 100.29(b)(4) Clarifying primary and general elections

The Commission's current rules at 11 CFR 100.2 contain definitions of "general election," "primary election," "runoff election," "caucus or convention," and "special election" that will be applicable to 11 CFR 100.29. Under 11 CFR 100.2(f), a "special election" ~~could~~can be a primary, general, or runoff election. BCRA, however, groups "special election" with general and runoff elections for purposes of an electioneering

communication. In the NPRM, proposed section 100.29(a)(2) would have clarified that, for purposes of section 100.29, "special elections" and "runoff elections" would be treated consistently with 11 CFR 100.2(f); that is, they could be considered primary elections, if held to nominate a candidate; and general elections, if held to elect a candidate. 67 FR 51,132.

Several commenters supported ~~the~~ proposed section 100.29(a)(2). The principal Congressional sponsors of BCRA were among the supporters, and they also noted that Title II of BCRA will not apply to any runoff or special election resulting from the 2002 general election. See 2 U.S.C. 431 note [BCRA, section 402(a)(4), 116 Stat. at 112]. In order to be consistent with section 100.2(f), the final rules incorporate the language of proposed section 100.29(a)(2). However, the final rules place the provisions pertaining to special or runoff elections in 11 CFR 100.29(b)(4).

~~In contrast, one~~One commenter found the Commission's definition of these terms, both in existing regulations and in the proposed regulations, to be problematic. This commenter argued that the definition of "election" should be restricted to include only elections in which the candidate referred to is running, citing another party's primary as an example that should be excluded. ~~Because BCRA refers to primary or preference elections "for the office sought by the candidate," the regulation cannot exclude primary or preference elections for that office, even if the candidate is not participating in that party's primary or preference election.~~ The Commission agrees, and has added language to proposed section 100.29(a)(2) to clarify that a primary, preference election, convention or caucus held by a political party (including those that constitute a special election or a run-off election) triggers a 30-day period that is only applicable to candidates who seek

the nomination of that political party. Thus, for example, the date on which the Libertarian Party's candidate for Senate is nominated would have no bearing on communications that refer to a clearly identified candidate who seeks the Democratic Party's nomination for the same Senate seat, unless a candidate were to seek the nomination of both parties for that Senate seat.

The same commentser also stated that no legitimate purpose is served by including elections in which a candidate is unopposed, as required by current 11 CFR 100.2(a). The final rules follow the proposed rules because nothing in BCRA or its legislative history reflects any Congressional intent to distinguish between elections in which a candidate has opposition and those in which he or she does not.

A commenter requested clarification regarding "preference election" as used in 2 U.S.C. 434(f)(3)(A)(i)(II)(bb) and 11 CFR 100.29(a)(2). Section 100.2(c)(2) defines a "preference election" to be a primary election, while, in contrast, BCRA's electioneering communication provision refers separately to primary and preference elections. However, the Commission believes no substantive difference was intended, so the proposed regulation at 11 CFR 100.29(a)(2) follows the statute.

The same commenter also raised the issue of an independent candidate's ability to choose when the primary is considered to occur pursuant to 11 CFR 100.2(a)(4). ~~Because knowledge of this choice is not likely to be widely available, the Commission will not use the selected date as the end of the 30-day period withrespect to any candidate other than the candidate who selected this date. Anyone who issues a communication that refers to a clearly identified candidate for Federal office can fairly be expected to know or determine when that candidate is considered to participate in a primary election. Please note that the~~

The final rule text does not specifically state the Commission's intention in this regard, as ~~this situation is unlikely to occur.~~ the Commission decided it was not necessary to address the issue at this time.

This commenter also expressed concern that the dates of non-major parties nominating conventions may not be widely known among members of the public. BCRA's reference to a convention of a political party that has authority to nominate a candidate for the office sought by the candidate is not limited to major party conventions. Consequently, the Commission does not have the authority under BCRA to exclude non-major parties by regulation.

Finally, the commenter questions the application of the timing requirements for electioneering communications in States that may have precinct, county, district, or regional caucuses or conventions that select delegates to the statewide caucus or convention. As the commenter points out, the statewide caucus or convention has the authority to nominate a candidate, so the statewide caucus or convention satisfies section 100.29(a)(2). If none of the earlier caucuses or conventions has the authority to nominate a candidate, by definition, they would not mark the end of a 30-day period under section 100.29(a)(2). This same analysis also answers the commenter's concern about States that have caucuses or conventions prior to a primary election. For example, Connecticut and Utah have conventions prior to primary elections scheduled for the 2002 Congressional races. BCRA's limitation on "conventions and caucuses" to those "that [have] the authority to nominate a candidate" addresses this situation by excluding convention and caucuses that do not have that authority. As noted above in connection with 11 CFR 100.29(b)(4), a caucus or convention that selects or apportions delegates to

a national nominating convention would ~~also~~likely mark the end of a 30-day period of electioneering communications.~~—~~; the Commission will provide guidance on its website on a State-by-State, party-by-party basis.

5. 11 CFR 100.29(b)(5) Definition of "Targeted to the relevant electorate"

BCRA defines "targeted to the relevant electorate" at 2 U.S.C. 434(f)(3)(C) as a communication that can be received by 50,000 or more persons either in the Congressional district the candidate seeks to represent, in the case of a candidate for Representative, Delegate, or Resident Commissioner to the U.S. House of Representatives; or in the State the candidate seeks to represent, in the case of a candidate for the U.S. Senate. The NPRM included proposed section 100.29(b)(3) that followed the statutory language, and that proposal is now made final at 11 CFR 100.29(b)(5). NPRM, 67 FR 51,133. The commenters who addressed this provision agreed with tracking the statutory language in the regulation and focused their comments on the interpretative questions posed in the NPRM.[8]

The definition of "targeted to the relevant electorate" includes communications that can be received beyond the relevant geographical area. A communication that can be

[8] One commenter claimed that BCRA's targeting definition is backward. This commenter~~'s notion of~~ argued that targeting ~~was~~ should be limited to ~~an~~ ads ~~that was~~ crafted specifically for a particular district or State. Such a focus would ~~reveal that the purpose of~~ ensure that the ad's purpose was to influence the election in a manner objectively discernaible, and it would distinguish an electioneering communication from an issue ad, which presumably would seek a broader audience. However, even this commenter recognized at the Commission's hearing that the Commission must use BCRA's targeting definition.

received by large numbers of persons outside the relevant district or State is nonetheless a targeted communication, as long as 50,000 persons in the relevant area can also receive it. Conversely, an electioneering communication would not include a communication that reaches fewer than 50,000 persons in the State or district where the clearly identified candidate is running, even if at the same time it also reaches 50,000 or more persons in a State or district where the clearly identified candidate is not running. The Commission noted this interpretation in the NPRM, and most of the commenters who addressed it supported the interpretation. One commenter suggested that the Commission address in the final rule what it deemed an adjoining market problem. The commenter thought an ad that is broadcast on stations intended for an audience in one State might reach more than 50,000 persons in another State, for example, because media markets may extend beyond State lines. The commenter posited the example of an ad broadcast on Massachusetts television stations that is intended to influence a Member of Congress from Massachusetts ~~to oppose~~ with respect to a bill that is supported by the President. Such an ad might be broadcast more than 30 days before the Massachusetts primary, so it would not be an electioneering communication, even if it clearly identified the Member who is seeking reelection. However, because several Massachusetts television stations' broadcast signals reach a large audience in New Hampshire, if the ad also clearly identifies a President seeking reelection, it would constitute an electioneering communication if it is broadcast within 30 days of the New Hampshire presidential primary election. However, BCRA is clear: if a communication can be received in a State or district by 50,000 or more persons, and if it meets the timing, content, and medium requirements related to electioneering communications, the communication is an

electioneering communication, regardless of how many potential audience members or what percentage of the total potential audience reside in another State or district. Therefore, the final rule at section 100.29(b)(5) does not reflect the commenter's suggestion.

D. The Federal Communications Commission and determining the size of a potential audience

The subsidiary definitions proposed in the NPRM included a provision at 11 CFR 100.29(b)(5) that addresses how to obtain information about a communication's potential audience. 67 FR 51,134. The proposed provision explained that the Federal Communications Commission's website would provide information about the number of individuals in Congressional districts or States that can receive a communication publicly distributed by a television station, radio station, cable television system, or satellite system. Based on this proposal and the comments received on the issues raised by it, the Commission is promulgating an Interim Final Rule in a separate rulemaking.

E. Exemptions from definition of "~~E~~electioneering ~~C~~communication" in BCRA

BCRA generally defines "electioneering communications" at 2 U.S.C. 434(f)(3)(A) and provides three exceptions to the definition in section 434(f)(3)(B)(i) through (iii). BCRA also provides the Commission with authority to promulgate regulations that exempt additional communications from the definition of "electioneering communications." 2 U.S.C. 434(f)(3)(B)(iv). BCRA also imposes a

significant limitation on this authority: the Commission may exempt only communications that do not promote, support, attack, or oppose a Federal candidate. Id.

In the Commission's regulations, 11 CFR 100.29(a) and (b) define "electioneering communications," and section 100.29(c) provides for exceptions to the definition. The exceptions in 11 CFR 100.29(c)(1) through (4) are based on the express language of BCRA. The Commission proposed a number of additional exemptions in the NPRM. After carefully considering the extensive written comments and testimony, which highlighted the difficulties involved in crafting permissible exemptions, the Commission has decided to promulgate two exemptions: one for State and local candidates, 11 CFR 100.29(c)(5), and another for certain nonprofit organizations operating under 26 U.S.C. 501(c)(3). The Commission has also decided not to promulgate any further exemptions at this time pursuant to the authority in 2 U.S.C. 434(f)(3)(B)(iv) because ~~such~~ some of the additional exemptions ~~would~~ suggested in the NPRM might cover certain communications that one could reasonably ~~say~~ conclude promote, support, attack, or oppose a Federal candidate.

1. 11 CFR 100.29(c)(1) Communications other than broadcast, cable of satellite

BCRA expressly limits electioneering communications to broadcast, cable, or satellite communications. As discussed above in connection with 11 CFR 100.29(b)(1), the legislative history establishes that BCRA's focus was on radio and television ads. Based on the statutory language and the legislative history, the final rule at 11 CFR 100.29(c)(1) provides examples of communications that are not included in the definition

of electioneering communication. The list of exemptions includes communications appearing in print media, including a newspaper or magazine, handbills, brochures, bumper stickers, yard signs, posters, billboards, and other written materials, including mailings; communications over the Internet, including electronic mail; and telephone communications.

Most of the comments received on proposed 11 CFR 100.29(c)(1) discussed the exemption for the Internet. Those who did comment on the remainder of the paragraph, including the principal Congressional sponsors of BCRA, agreed that it conformed to BCRA ~~including the principal Congressional sponsors of BCRA~~.

The Internet is included in the list of exceptions in the final rules in section 100.29(c)(1) because, in most instances, it is not a broadcast, cable, or satellite communication~~, and it is not sufficiently akin to television and radio for communications carried over the Internet to be considered television or radio~~. BCRA's legislative history, which is discussed above in connection with 11 CFR 100.29(b)(1), establishes Congress's intent to exclude communications over the Internet from the electioneering communication provisions. The Commission concludes that Congress did not seek to regulate the Internet in subtitle A of Title II of BCRA. The relatively few commenters who opposed the Internet exemption did not disagree with this conclusion; rather, they argued that as the Internet develops, aspects of it might come to be used in a manner like radio or television. To these commenters, this potential evolution of the Internet calls for a more precise approach and makes the exemption as ~~drafted~~proposed too broad a treatment of this issue. The Commission has decided to include the exemption in the

final rules, rather than attempt to craft a regulation that responds to unknown, future developments.

The NPRM noted that "webcasts" or other communications that are distributed only over the Internet would be excluded from the definition of electioneering communications, but television or radio communications that are simultaneously "webcast" over the Internet or archived for viewing or listening over the Internet would be included in the definition of electioneering communications. 67 FR 51,133. Some comments on the definition of "broadcast, cable, or satellite communication" in proposed section 100.29(b)(1) and the exemption in proposed section 100.29(c)(1) suggest that a clarification is in order. The discussion in the NPRM was intended to make clear that if a communication meets the content, timing, media, and potential audience criteria for an electioneering communication, webcasting that communication, or archiving it for later viewing via the Internet, will not remove the television or radio aspect of the communication from the definition of "electioneering communication." Thus, the exemption for communications on the Internet is not so broad that it could inoculate a television and radio communication that otherwise satisfies the electioneering communication criteria from the electioneering communication rules, merely because the communications is also webcast or archived for later viewing or listening over the Internet. The Internet aspect of the communication, including the number of potential recipients, will not be considered in determining whether a communication meets the definition of an "electioneering communication."

The NPRM also asked how WebTV should be treated. 67 FR 51,133. One commenter stated that WebTV is an alternative means of accessing the Internet, so it

would be subject to the Internet exemption in section 100.29(c)(1). Another commenter argued that the regulation should explain that the Internet exemption applies no matter what equipment is used to access the Internet. ~~The exemption is not limited to any particular equipment configuration.~~ The Commission agrees that ~~A~~accessing the Internet with WebTV or any other technology is included within the Internet exemption. Because the exemption is not limited to any particular technology to access the Internet, the text of the final rule follows the proposed rule.

Some argued that the exemption in proposed 11 CFR 100.29(c)(1) should be expanded to include public access television and radio channels and digital audio radio satellite. Others argued that because those services are undeniably television, radio, and satellite, any exemption for them would be contrary to the plain language of BCRA. The Commission agrees with the latter viewpoint, so no specific exemption of this nature is included in the final rules.

2. 11 CFR 100.29(c)(2) Exemption for a news story, commentary or editorial

The exemption for a news story, commentary or editorial in 11 CFR 100.29(c)(2) closely follows the statutory language from 2 U.S.C. 434(f)(3)(B)(i), which exempts such communications from the definition of "electioneering communication," unless the facilities distributing the communication are owned or controlled by any political party or committee, or a candidate. The final rule adds that communications distributed by such facilities are exempt from the electioneering communication definition if the communications meet the requirements of 11 CFR 100.132(a) and (b).

The commenters supported a rule that refers to the existing media exemption. The commenters also supported the regulation's inclusion of broadcast, cable, and satellite communications, in place of the statute's reference to broadcast communications. The legislative history gives no reason to narrow this particular aspect of electioneering communications, and the commenters, including the principal Congressional sponsors of BCRA, agreed with the consistent use of the broader phrase.

Some of the comments suggested additional exemptions for documentaries, educational programming, or entertainment, which apparently reflects a concern that this exemption would be narrowly interpreted. The Commission interprets "news story commentary, or editorial" to include documentaries and educational programming in this context. Entertainment programming is not mentioned in BCRA, so the final regulation does not include it either. Please note, however, that the limitation of the definition of "electioneering communications" to those in which a fee is charged or paid for a public distribution, will likely exempt from the definition of "electioneering communications" nearly all of the entertainment programming discussed by the commenters.

3. 11 CFR 100.29(c)(3) Exemption for expenditures and independent expenditures

Title II, subtitle A of BCRA also specifically provides an exemption for communications that constitute expenditures or independent expenditures under the Federal Election Campaign Act. 2 U.S.C. 437(f)(3)(B)(ii). In the NPRM, two alternatives were proposed to implement this provision. 67 FR 51,135-36. The first alternative reiterated the statutory exemption as proposed in section 100.29(c)(3). Under

this alternative, any expenditure of a Federal political committee and any independent expenditure would not be subject to the electioneering communication reporting requirements, but would remain subject to FECA's other reporting requirements and its prohibitions and limitations on funding sources. The comments from BCRA's principal sponsors explained that the electioneering communication provisions were "mainly concerned with election-related disbursements that avoided regulation under FECA." They stated that because expenditures and independent expenditures are subject to regulation under FECA, the statutory exemption from Title II, subtitle A of BCRA ensures that BCRA's Title II, subtitle A applies to disbursements that are not subject to FECA's other requirements, prohibitions, and limitations. The exemption's purpose, the sponsors therefore argue, is to avoid requiring political committees to report the same expenditures twice.

Most who commented on this issue urged the Commission to implement Alternative 2-A, which repeats the statutory language. Only one commenter preferred Alternative 2-B, which would have limited the exemption to "candidate-specific expenditures" that are reportable as an in-kind contribution or a party committee coordinated expenditure, or an independent expenditure. This commenter preferred what it characterized as duplicative reporting required under that alternative to a reporting scheme it considered incomplete. The commenter agreed, however, that the purpose of the exemption for expenditures was to avoid duplicative and potentially conflicting reporting requirements. Because Alternative 2-B would lead to duplicative reporting and because Alternative 2-A includes BCRA's language, the Commission has decided that the final rule will include Alternative 2-A's language, with one modification.

It is possible that a group could pay for an ad and claim that the payment is an expenditure because it was for the purpose of influencing a Federal election, as expenditure is defined in 2 U.S.C. 431(9). As such, the group could claim that the ad was exempt from the definition of "electioneering communication" as an expenditure pursuant to 2 U.S.C. 437(f)(3)(B)(ii). However, the group could simultaneously claim that ~~if the group's~~ its major purpose is something other than influencing Federal elections, ~~then~~ and therefore it is not required to register as a political committee or to report its expenditures. Thus, the group running an ad could invoke the BCRA exemption for expenditures, which prevents double reporting, and simultaneously claim the expenditure is not subject to FECA reporting requirements because the group is not a political committee under FECA. To prevent such a situation, the Commission has clarified the final rule at 11 CFR 100.29(c)(3) to limit the exemption to expenditures and independent expenditures that are required to be reported as such under the Act and the Commission's regulations. This clarification follows suggestions from several commenters, including the principal Congressional sponsors of BCRA. Under this regulation, the campaign committees of Federal candidates and the national party committees will be totally exempt from the electioneering communications provisions.

4. 11 CFR 100.29(c)(4) Exemption for candidate debates or forums

BCRA includes an exemption at 2 U.S.C. 434(f)(3)(B)(iii) for a communication that "constitutes a candidate debate or forum conducted pursuant to regulations adopted by the Commission, or which solely promotes such a debate or forum and is made by or on behalf of the person sponsoring the debate or forum." The final rules in 11

CFR 100.29(c)(4) implement this provision and refer to 11 CFR 110.13, which contains the Commission's current regulation on candidate debates. All of the commenters that addressed this issue agreed with the proposed rules in 11 CFR 100.29(c)(4), except that one commenter argued that the requirements of section 110.13 should not apply in this context to limit the exemption from the electioneering communication definition. However, BCRA expressly refers to regulations adopted by the Commission in this regard, and 11 CFR 110.13 applies to candidate debates. The Commission finds no reason to adopt a different standard in the electioneering communication exemption. Additionally, pursuant to the operation of sections 110.13 and section 114.4(f),[9] if the conduct of a debate does not meet the requirements of section 110.13, any corporate or labor organization funding for such a debate would constitute a prohibited contribution or expenditure.[10]

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[9] Nonprofit corporations are permitted by 11 CFR 114.4(f) to use their funds and funds donated by corporations or labor organizations to stage debates in accordance with 11 CFR 110.13. 11 CFR 114.1(a)(2)(x) exempts any activity specifically permitted by 11 CFR part 114 from the definition of "contribution and expenditure."

[10] 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.

F. Regulatory exemptions from definition of "Electioneering Communication"

In addition to the exemptions expressly created by BCRA, the statute also provides that "to ensure the appropriate implementation" of the electioneering communication provisions, the Commission may promulgate regulations exempting other communications from the "electioneering communications" definition. 2 U.S.C. 434(f)(3)(B)(iv). However, the statutory authorization to exempt communications is expressly limited in two ways. The exemption must be promulgated consistent with the requirements of the new electioneering communication provision, and the exempted communication must not be a "public communication" that refers to a clearly identified candidate for Federal office and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office. 2 U.S.C. 434(f)(3)(B)(iv) (referencing 2 U.S.C. 431(20)(A)(iii)).

Some of the commenters argued that the exemption authority provided to the Commission is extremely limited. Relying upon legislative history, the principal Congressional sponsors of BCRA explained the exemption authority would "allow the Commission to exempt communications that 'plainly and unquestionably' are 'wholly

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A Notice of Availability for the petition was published on May 9, 2002. 65 FR 31,164. Two comments were received by the end of the public comment period, on June 10, 2002. Some commenters on the Electioneering Communications rulemaking urged the Commission to accelerate consideration of the petition. However, the Commission intends to defer consideration of whether to issue a Notice of Proposed Rulemaking until after the statutorily required BCRA rulemakings are completed by the end of the year. In the meantime, the Commission's debate regulations remain in effect.

unrelated' to an election and do not 'in any way' support or oppose a candidate. In addition, any exemption that applies to entities other than parties and candidates must preserve the 'bright line' quality of the original provision." See 148 Cong. Rec. H410-411 (daily ed. Feb. 13, 2002) (statement of Rep. Shays). ~~The Commission is concerned that this characterization of the limitation is so restrictive that almost no exemption could satisfy it. Indeed, such an interpretation would render meaningless the statute's express grant of exemption-creating authority to the Commission.~~

In its consideration of potential exemptions, the Commission has used the express language of the statute as its guide for the extent of its exemption authority. ~~On the other hand~~Nevertheless Thus, the Commission acknowledges that the statute ~~severely~~ limits its exemption authority by providing that the Commission may not exempt communications that promote, support, attack or oppose a candidate. The Commission's exemption authority is also limited by ~~the Congressional intent to maintain~~ BCRA's use of "bright line" distinctions between electioneering communications and other communications.

In the NPRM, the Commission proposed regulatory text for three exemptions in addition to the statutory exemptions. Proposed 11 CFR 100.29(c)(5) through (7). ~~Four alternatives, designated Alternative 3-A through 3-D, were included for one of these exemptions. 11 CFR 100.29(c)(6).~~ Among these was a proposed exemption available to State and local candidates. See NPRM, proposed 11 CFR 100.29(c)(7), 67 FR 51,145. Additionally, several commenters suggested an exemption for any communication made by a tax-exempt organization described in 26 U.S.C. 501(c)(3). ~~the Commission sought comment on several other potential exemptions. 67 FR 51,136.~~ As described in detail below, the Commission adopted only these two exemptions, one for communications

paid for by State or local candidates that is similar to the exemption at proposed 11 CFR 100.29(c)(7), and the other for communications paid for by certain nonprofit organizations operating under 26 U.S.C. 501(c)(3). ~~has concluded that none of the exemptions are consistent with the limited authority provided to the Commission by the statute to make exemptions for communications that do not promote, support, attack, or oppose a Federal candidate. Consequently, the Commission is not promulgating any of the exemptions to the definition of "electioneering communication" discussed or proposed in the NPRM beyond those provided by the express language of BCRA.~~

1. 11 CFR 100.29(c)(5): Exemption for State and local candidates

The Commission proposed an exemption in the NPRM that would cover communications by State and local candidates and officeholders that refer to a clearly identified Federal candidate, provided that mention of a Federal candidate is merely incidental to the candidacy of one or more individuals for State or local office. 67 FR 51,136. For example, under this approach, an ad for a State or local candidate that featured such candidate's views on education would not have been rendered an electioneering communication if the ad were to indicate whether the candidate supported or opposed the President's education policy.

Four commenters thought the Commission's formulation of such an exemption was vague, subject to abuse, not supported by BCRA, and therefore beyond the Commission's exemption authority. Nonetheless, these same commenters supported an alternative formulation that exempts communications by State or local candidates or State or local political parties that refer to clearly identified Federal candidates, provided the

communications do not promote, support, attack or oppose a Federal candidate. By using that standard, the commenters believed the exemption would also serve to harmonize the operation of Titles I and subtitle A of Title II of BCRA as they apply to State and local parties and their candidates.

~~The interaction of Titles I and II of BCRA is clear with respect to expenditure of Federal funds and the use of Levin funds because neither can result in electioneering communications. Any expenditures or independent expenditures of Federal funds that are required to be reported under FECA or Commission regulations will be exempt from the definition of "electioneering communications" pursuant to 11 CFR 100.29(c)(3). Any use of Levin funds cannot constitute an electioneering communication because Levin funds cannot be disbursed for communications that refer to a clearly identified candidate for Federal office under 11 CFR 300.32(c)(1), and a reference to a clearly identified Federal candidate is a necessary element of an electioneering communication.~~

~~The use of non-Federal funds, however, raises issues concerning the interaction of Titles I and II of BCRA.~~ Under certain circumstances, Title I of BCRA permits State, district, or local party committees, organizations, or their candidates to use non-Federal funds for communications that clearly identify a Federal candidate, but do not promote, support, attack, or oppose any Federal candidate. See 2 U.S.C. 431(20)(A)(iii) and 11 CFR 100.24(b)(3) (defining Federal election activity to include only those public communications that promote, support, attack or oppose a clearly identified Federal candidate); 2 U.S.C. 441i(b)(1) and 11 CFR 300.32(a)(1) (association of State office candidates or incumbents required to use Federal funds for Federal election activity); 2 U.S.C. 441i(b)(1) and 11 CFR 300.32(a)(2) (same for State, district, and local party

committees); 2 U.S.C. 441i(f)(1) and 11 CFR 300.721 (State and local candidates ~~not~~ required to use Federal funds for a communication that does ~~not~~ promote, support, attack or oppose a Federal candidate). Therefore, according to these commenters, absent an exemption, if a State, district, or local party committee, organization, or a State or local candidate creates and distributes a radio or television communication that refers to a clearly identified Federal candidate, but does not promote, support, attack or oppose any Federal candidate, and is not otherwise a contribution or expenditure, Title I of BCRA would permit ~~in some circumstances~~ the use of non-Federal funds to pay for that communication. However, if the same communication were publicly distributed and met the timing and targeting requirements of subtitle A of Title II, then the communication would also be an electioneering communication, so the use of corporate or labor organization funds to pay for it would be prohibited by subtitle A of Title II. According to these commenters, this inconsistent result is contrary to the intention of Title I in permitting the use of non-Federal funds for these purposes. Additionally, the principal Congressional sponsors argue that "effectively tak[ing] state candidates and parties out of the Title II prohibitions and reporting requirements . . . is consistent with the purposes of BCRA."

~~The Commission disagrees. The electioneering communication provisions are very specific in their application to a narrow group of communications. 2 U.S.C. 434(f)(3). Similarly, the prohibition on corporate or labor organization contributions and expenditures specifically and expressly includes payments for any electioneering communication. 2 U.S.C. 441b(b)(2). Because these provisions very specifically apply to electioneering communications, and because at most, Title I of~~

~~BCRA and its regulations permit the use of non-Federal funds for communications under certain circumstances, the electioneering communications provisions of Title II must prevail in any conflict in the specific circumstances governed by 2 U.S.C. 441b(b)(2). Thus, to the extent Titles I and II of BCRA need harmonization, they are harmonized by noting that the electioneering communication reporting requirements and fund source prohibitions apply to any communication meeting the definition of "electioneering communication" and not exempt from that definition, without regard to what Title I of BCRA or the regulations promulgated thereunder may permit.~~

~~Furthermore, while the Commission may agree that many of the communications that would qualify for the exemption proposed by the sponsors and several of the other commenters could be primarily related to the State, district, or local election, the Commission does not agree that communications within the narrow confines of the content, timing, media, and audience criteria of electioneering communication could not in many instances be reasonably understood to also promote, support, attack or oppose a Federal candidate. BCRA easily could have exempted State, district, or local committees of political parties and candidates for and individuals holding such offices, particularly when the very provision involved already includes four exemptions. Consequently, the final rules do not include this exemption for State, district, or local committees of political parties and candidates for and individuals holding public office. Finally, the Commission notes once again that the exemption almost certainly would not comply with the sponsors' proposed standard that exempted communications must be "plainly and unquestionably wholly unrelated to a Federal election."~~

The Commission agrees that an exemption for State and local candidates that is within the parameters of 2 U.S.C. 434(f)(3)(B)(iv) is appropriate in order to harmonize Title I and subtitle A of Title II of BCRA. Accordingly, the final rules include an exemption from the definition of "electioneering communication" for communications that are not described in 2 U.S.C. 431(20)(A)(iii) and that are paid for by State or local candidates in connection with an election to State or local office. See 11 CFR 100.29(c)(5). Thus, this exemption covers public communications by State and local candidates that do not promote, support, attack, or oppose federal candidates. See new 11 CFR 300.72 exempting these communications from certain requirements of Title I of BCRA.

In contrast, however, State and local candidates making public communications that satisfy the description set forth in 2 U.S.C. 431(20)(A)(iii) (i.e. public communications by State and local candidates that promote, support, attack, or oppose Federal candidates), are governed by Title I of BCRA and not by subtitle A of Title II of BCRA. Thus, under 2 U.S.C. 441i(f), 11 CFR 100.5(a), and 11 CFR 300.71, these communications must be paid for with Federal funds meeting the limits, prohibitions, and reporting requirements of the Act, including the contribution limits set forth at 2 U.S.C. 441a(a)(1)(C) applicable to political committees that are not the authorized campaign committees of Federal candidates. The reporting obligations of State and local candidates making communications promoting, supporting, attacking, or opposing federal candidates are governed by a number of provisions depending on the exact nature of the communications and the persons making them. See, e.g., 11 CFR 300.36(a)(associations and groups of State and local candidates that are not political committees), 11 CFR

300.36(b)(associations and groups of State and local candidates that are political committees), 11 CFR 300.71(individuals who are State or local candidates), and 2 U.S.C. 434(g)(any person who makes an independent expenditure).

2. 11 CFR 100.29(c)(6): Exemption for 501(c)(3) organizations

The Commission received comment from members of the non-profit community expressing concern that subtitle A of Title II of BCRA could inadvertently stifle the ability of charitable organizations to carry out their core functions by limiting or prohibiting their advertising on television and radio. One commenter wrote that a broad reading of BCRA could mean that "[c]harities would be prohibited from broadcasting fundraising appeals or public service announcements that feature people who are candidates if the appeals run within 30 days of a primary or 60 days of a general election. Documentaries and other educational programming featuring individuals who are candidates would also be banned."

Several commenters requested that the Commission exercise its authority to craft exemptions for communications that do not promote, support, attack, or oppose a candidate for federal office when made by corporations organized under 26 U.S.C. 501(c)(3). These commenters pointed out that the tax code expressly prohibits organizations described in section 501(c)(3) from "participat[ing] in, or interven[ing] in ... any political campaign on behalf of (or in opposition to) any candidate for public office." 26 U.S.C. 501(c)(3). As such, noted another commenter, because "501(c)(3) organizations are absolutely prohibited by the [Internal Revenue Code] from engaging in or funding any activity that even insinuates support or opposition to a candidate for

public office, they are held to a demonstrably higher regulatory standards than other corporations." Therefore, the commenter concluded, "BCRA's application to 501(c)(3)s [would] prohibit[] activity that is already forbidden," and the activities the Internal Revenue Service permits 501(c)(3) organizations to engage in are activities "that BCRA was not intended to reach."

Many commenters noted that the penalties for violating the Internal Revenue Code prohibitions are severe, viz., "revocation of tax-exempt status [and] other potential penalties ... including substantial taxes on the electioneering activity and penalties that personally apply to managers of an organization that knowingly violate the prohibition."

Some supporters of BCRA submitted comments discouraging the creation of a categorical exemption for 501(c)(3) organizations. Many such commenters referred to statements made by Representative Shays, a chief sponsor of the BCRA legislation, as definitive evidence that Congress did not intend BCRA to give the Commission authority to create such an exemption. See 148 Cong. Rec. H411 (daily ed. Feb. 13, 2002) (Statement of Rep. Shays). In written comments to the Commission, however, the congressional sponsors, including Representative Shays, drew a distinction between Congress' decision not to include a statutory exemption and the Commission's discretion to create a regulatory exemption, based upon the Commission's understanding of the needs of these organizations balanced against the past practices of non-profits in this area. "[W]hile the issues of Public Service Announcements and ads created by 501(c)(3) charities were raised during the drafting of Title II, Congress did not create statutory exemptions for these types of ads. Before doing so, the Commission must be convinced

that such ads have been run in the past during the pre-election windows and that exempting them will not create opportunities for evasion of the statute."

Testimony on these issues was elicited in a public hearing, specifically, as to whether there is a history of ads run by 501(c)(3) organizations close to elections and whether theses organizations tend to violate the Internal Revenue Service prohibitions against political activity. Witnesses agreed that this activity was rare, but also that 501(c)(3) corporations make extraordinary efforts to avoid Internal Revenue Service prohibitions against political activity when ads are run. The representative of one non-profit organization testified that "[t]here's no demonstrated record of abuse by public charities in terms of electioneering. That's not the group that the campaign finance laws were meant to address...." The Commission also notes that all of the examples mentioned in testimony as the type of ads that Congress meant to limit were based on ads run by 501(c)(4) or other types of organizations, not 501(c)(3) organizations.

More compelling, however, was the testimony of one non-profit organization as to the effect on charitable organizations that could arise should the Commission fail to provide an exemption. One witness testified that, "already the tax rules are complicated enough. If you throw in election law on top of that, there are many groups that will just throw up their hands and say we're not going to get involved [in grassroots lobbying activity], it's just too risky, it's too much to take on."

Second, many commenters expressed concern that investigations under BCRA, even when a complaint is without merit, could have a disastrous effect on a charitable organization. One witness stated, "[w]e've already seen some evidence of people on different sides of issues reporting the groups that have opposed them on the issues to

various authorities looking for an investigation, and even if a non-profit had in no way violated campaign finance laws, especially if it were a public charity, just being investigated by the FEC would have a devastating effect on the organization." The same witness also noted that the Commission's advisory opinion process would not be a satisfactory alternative, as too many organizations would fear that any request they direct to the Commission would only raise with the Internal Revenue Service the issue of whether they are contemplating electoral activity. Other non-profit organizations testified that they did not have the financial resources to retain legal counsel and seek an advisory opinion from the Commission, although legal counsel is not required to seek an advisory opinion. The Commission also notes that the rationale for exempting 501(c)(3) organizations applies to all such organizations, which makes a regulatory exemption more appropriate than an exemption granted in an advisory opinion, which is necessarily limited to the particular facts and circumstances of the request and is granted on a case-by-case basis.

Section 501(c)(3) of the Internal Revenue Code exempts from taxation certain trusts and corporations organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition, or for the prevention of cruelty to children or animals. The Commission exempts from Title II, subtitle A of BCRA at 11 CFR 100.29(c)(6) communications paid for by any religious, educational, or charitable organization operating under 26 U.S.C. 501(c)(3).

Section 501(c)(3) organizations are barred as a matter of law from being involved in partisan political activity. The Commission believes the purpose of BCRA is not

served by discouraging such charitable organizations from participating in what the public considers highly desirable and beneficial activity, simply to foreclose a theoretical threat from organizations that has not been manifested, and which such organizations, by their very nature, do not do.

In exempting 501(c)(3) organizations from Title II, subtitle A of BCRA, the Commission is not delegating enforcement of the electioneering communication provisions to the Internal Revenue Service. Rather the Commission anticipates that the Internal Revenue Service will continue to review the activities of 501(c)(3) organizations to make sure those organizations comply with the tax code, without reference to Title II of BCRA. Should the Internal Revenue Service determine, under its own standards for enforcing the tax code, that an organization has acted outside its 501(c)(3) status, the organization would be open to complaints that it has violated or is violating Title II of BCRA. Additionally, under 2 U.S.C. 438(f), the Commission and the Internal Revenue Service must work together to promulgate rules that are mutually consistent. The final rules, including new 11 CFR 100.29(c)(6), therefore, do not permit any activity that is prohibited under the Internal Revenue Code and regulations prescribed thereunder.

G. Other exemptions considered

In the NPRM, the Commission proposed for an exemption related to the popular name of legislation. Proposed 11 CFR 100.29(c)(5). Four alternatives, designated Alternative 3-A through 3-D, were included for another exemption related to grass-roots lobbying. 11 CFR 100.29(c)(6). Additionally, the Commission sought comment on several other potential exemptions. 67 FR 51,136. As described in detail below, the

Commission has concluded that none of these exemptions is consistent with the limited authority provided to the Commission by the statute to make exemptions for communications that do not promote, support, attack or oppose a Federal candidate. Consequently, the Commission is not promulgating any of the other exemptions to the definition of "electioneering communication" proposed in the NPRM.

1. Proposed 11 CFR 100.29(c)(5): Popular name of legislation

In the NPRM, the Commission proposed an exemption at 11 CFR 100.29(c)(5) that would have exempted a communication that refers to a bill or law by its popular name where that name happens to include the name of a Federal candidate, if the popular name is the sole reference made to a Federal candidate. 67 FR 51,136. Many commenters were opposed to this exemption.

The argument most frequently cited in opposition to this exemption is the absence of an objective standard for the popular name of a bill or law. This lack of an objective standard would make the proposed exemption an easy means of evading the electioneering communication provisions, because a constructed popular name could be used to link a candidate to a popular or unpopular position. In the view of these commenters, such communications could easily promote, support, attack or oppose a Federal candidate, which would make an exemption for these communications beyond the Commission's authority.

Even some of the supporters of this exemption acknowledged the problem of the lack of an objective standard as to what constitutes a popular name of a bill or law. Three supporters proposed responses: one suggested that the Commission limit its exemption to

only the original sponsors of the legislation, which would exclude co-sponsors. Another suggested that the Commission limit the exemption to "the unique name generally used by the media." A third suggested that the exemption be limited to communications publicly distributed nationwide. According to this commenter, if such communications use a candidate's name as the popular name of a bill, the nationwide audience would demonstrate the purpose of the communication is truly related to the legislation, and not the particular candidate's election because only a small portion of the audience for a nationwide communication could vote for or against the candidate. This rationale for this proposal applies only to non-presidential candidates.

Opponents of this proposed exemption also argued it was unnecessary. They observed that speakers who wished to communicate about a bill or legislation could use the candidate's name and simply avoid that candidate's particular State or Congressional district during the narrow time period covered by the definition of "electioneering communication." Additionally, even during that time and in that district, the commenters pointed out that the legislation could be discussed without mentioning the particular candidate. Thus, to these commenters, the absence of the exemption would have a limited impact on speakers, but the presence of an exemption would provide the opportunity for significant abuse.

The Commission is persuaded by the examples cited by the commenters and other examples from its own history of enforcement actions that communications that mention a candidate's name only as part of a popular name of a bill can nevertheless be crafted in a manner that could reasonably be understood to promote, support, attack or oppose a candidate. Furthermore, this type of exemption is not necessary because communications

can easily discuss proposed or pending legislation without including a Federal candidate's name by using a variety of other means of identifying the legislation. In addition, the Commission recognizes that there are valid concerns as to which names to include in a bill's popular name, which are not necessarily resolved by the mechanical use of the name of only the original sponsors. Nor would this approach adequately address the names of the sponsors of amendments to the legislation. Consequently, the final rules do not include an exemption for such communications.

2. Proposed 11 CFR 100.29(c)(6) Exemption for lobbying communications

The Commission proposed four alternatives designated Alternatives 3-A through 3-D in the NPRM that would exempt communications that are devoted to urging support for or opposition to particular pending legislation or other matters, where the communications request recipients to contact various categories of public officials regarding the issue. 67 FR 51,136.

Alternative 3-A would have excluded any communication devoted exclusively to urging support for or opposition to particular pending legislation or executive matters, where the communication only requests recipients to contact an official without promoting, supporting, attacking, or opposing a candidate or indicating the candidate's position on the legislation in question. Alternative 3-B would have excluded any communication concerning only a pending legislative or executive matter, in which the only reference to a Federal candidate is a brief suggestion that the candidate be contacted and urged to take a particular position, and no reference to a candidate's record, position, statement, character, qualifications, or fitness for an office or to an election, candidacy, or

voting is included. Alternative 3-C would have excluded any communication that does not include express advocacy, and that refers either to a specific piece of legislation or to a general public policy issue and contains contact information for the person whom the communication urges the audience to contact. Alternative 3-D would have excluded any communication that urges support of or opposition to any legislation or policy proposal and only refers to contacting a clearly identified incumbent candidate to urge the legislator to support or oppose the matter, without referring to any of the legislator's past or present positions.

A wide range of commenters addressed these alternatives, and none of the alternatives ~~were~~ was favorably received. The most frequently expressed comments were that each of the alternatives could be easily evaded so that a communication that met the requirements for an exemption nonetheless would also promote, support, attack, or oppose a Federal candidate. Each of the alternatives included terms that commenters found vague. The "promote, support, attack, or oppose" standard was considered inappropriate by some for this context, which will apply to entities other than candidates and political party committees~~, where the presumption that candidates' and political party committees' activities are election-related makes the standard arguably more clear~~. Alternative 3-C's exemption of all communications was singled out by some commenters who argued it would completely undermine BCRA's requirement because it would exempt virtually all of the ads that led Congress to enact the electioneering communication provisions; however, this alternative was also supported by other commenters who found it the least objectionable of the four alternatives. Several

commenters argued that the apparent distinction between incumbent legislators and all other candidates in Alternative 3-D could raise constitutional issues.

Some commenters urged the Commission to promulgate another proposal that shares most of the elements of Alternative 3-B. With disagreement about only one issue, these commenters proposed an exemption for communications that contain the following elements: (A) the communication is devoted exclusively to a pending legislative or executive branch matter and (B) its only reference to a clearly identified Federal candidate is a statement urging the public to contact the Federal candidate or a reference that asks the candidate to take a particular position on the pending legislative or executive branch matter. The proposed formulation of the exemption advocated by these commenters would not extend to any communication that included any reference to any of the following: any political party, the candidate's record or position on any issue, or the candidate's character, qualifications or fitness for office or to the candidate's election or candidacy. Other commenters went further than this proposal and also required that the candidate not be named or appear in the communication; the candidate could only be identified as "Your Congressman" or a similar reference that does not include the candidate's name.

The Commission concludes that communications exempted under any of the alternatives for this proposal could well be understood to promote, support, attack, or oppose a Federal candidate. Although some communications that are devoted exclusively to pending public policy issues before Congress or the Executive Branch may not be intended to influence a Federal election, the Commission believes that such communications could be reasonably perceived to promote, support, attack, or oppose a

candidate in some manner. The Commission has determined that all of the alternatives for this proposed exemption, including those proposed by the commenters, do not meet this statutory requirement. ~~Without question, these proposed exemptions would not meet the sponsors' suggested standard for exemptions, which would be limited to communications "plainly and unquestionably wholly unrelated to an election."~~

~~3. Proposed 11 CFR 100.29(c)(7) Exemption available to State candidates and State and local party committees~~

~~The Commission proposed an exemption in the NPRM that would cover communications by State and local candidates and officeholders that refer to a clearly identified Federal candidate, provided that mention of a Federal candidate is merely incidental to the candidacy of one or more individuals for State or local office. 67 FR 51,136. For example, under this approach, an ad for a State or local candidate that featured such candidate's views on education would not be rendered an electioneering communication if the ad were to indicate whether the candidate supported or opposed the President's education policy. Four commenters thought the Commission's formulation of such an exemption was vague, subject to abuse, not supported by BCRA, and therefore beyond the Commission's exemption authority. Nonetheless, these same commenters supported an alternative formulation that exempts communications by State or local candidates or State or local political parties that refer to clearly identified Federal candidates, provided the communications do not promote, support, attack or oppose a Federal candidate. By using that standard, the commenters believed the exemption would~~

~~also serve to harmonize the operation of Titles I and II of BCRA as they apply to State and local parties and their candidates.~~

~~The interaction of Titles I and II of BCRA is clear with respect to expenditure of Federal funds and the use of Levin funds because neither can result in electioneering communications. Any expenditures or independent expenditures of Federal funds that are required to be reported under FECA or Commission regulations will be exempt from the definition of "electioneering communications" pursuant to 11 CFR 100.29(c)(3). Any use of Levin funds cannot constitute an electioneering communication because Levin funds cannot be disbursed for communications that refer to a clearly identified candidate for Federal office under 11 CFR 300.32(c)(1), and a reference to a clearly identified Federal candidate is a necessary element of an electioneering communication.~~

~~The use of non-Federal funds, however, raises issues concerning the interaction of Titles I and II of BCRA. Under certain circumstances, Title I of BCRA permits State, district, or local party committees, organizations, or their candidates to use non-Federal funds for communications that clearly identify a Federal candidate, but do not promote, support, attack, or oppose any Federal candidate. See 2 U.S.C. 431(20)(A)(iii) and 11 CFR 100.24(b)(3) (defining Federal election activity to include only those public communications that promote, support, attack or oppose a clearly identified Federal candidate); 2 U.S.C. 441i(b)(1) and 11 CFR 300.32(a)(1) (association of State office candidates or incumbents required to use Federal funds for Federal election activity); 2 U.S.C. 441i(b)(1) and 11 CFR 300.32(a)(2) (same for State, district, and local party committees); 2 U.S.C. 441i(f)(1) and 11 CFR 300.72 (State and local candidates not required to use Federal funds for a communication that does not promote, support, attack~~

~~or oppose a Federal candidate). Therefore, according to these commenters, absent an exemption, if a State, district, or local party committee, organization, or a State or local candidate creates and distributes a radio or television communication that refers to a clearly identified Federal candidate, but does not promote, support, attack or oppose any Federal candidate, and is not otherwise a contribution or expenditure, Title I of BCRA would permit in some circumstances the use of non-Federal funds to pay for that communication. However, if the same communication were publicly distributed and met the timing and targeting requirements of Title II, then the communication would also be an electioneering communication, so the use of corporate or labor organization funds to pay for it would be prohibited by Title II. According to these commenters, this inconsistent result is contrary to the intention of Title I in permitting the use of non-Federal funds for these purposes. Additionally, the principal Congressional sponsors argue that "effectively tak[ing] state candidates and parties out of the Title II prohibitions and reporting requirements . . . is consistent with the purposes of BCRA."~~

~~The Commission disagrees. The electioneering communication provisions are very specific in their application to a narrow group of communications. 2 U.S.C. 434(f)(3). Similarly, the prohibition on corporate or labor organization contributions and expenditures specifically and expressly includes payments for any electioneering communication. 2 U.S.C. 441b(b)(2). Because these provisions very specifically apply to electioneering communications, and because at most, Title I of BCRA and its regulations permit the use of non-Federal funds for communications under certain circumstances, the electioneering communications provisions of Title II must prevail in any conflict in the specific circumstances governed by 2 U.S.C. 441b(b)(2).~~

~~Thus, to the extent Titles I and II of BCRA need harmonization, they are harmonized by noting that the electioneering communication reporting requirements and fund source prohibitions apply to any communication meeting the definition of "electioneering communication" and not exempt from that definition, without regard to what Title I of BCRA or the regulations promulgated thereunder may permit.~~

~~Furthermore, while the Commission may agree that many of the communications that would qualify for the exemption proposed by the sponsors and several of the other commenters could be primarily related to the State, district, or local election, the Commission does not agree that communications within the narrow confines of the content, timing, media, and audience criteria of electioneering communication could not in many instances be reasonably understood to also promote, support, attack or oppose a Federal candidate. BCRA easily could have exempted State, district, or local committees of political parties and candidates for and individuals holding such offices, particularly when the very provision involved already includes four exemptions. Consequently, the final rules do not include this exemption for State, district, or local committees of political parties and candidates for and individuals holding public office. Finally, the Commission notes once again that the exemption almost certainly would not comply with the sponsors' proposed standard that exempted communications must be "plainly and unquestionably wholly unrelated to a Federal election."~~

~~G. Other proposed exemptions~~

~~The NPRM requested commenters to identify other exemptions to the definition of "electioneering communication" that the commenters believed the Commission should~~

~~consider. In addition to proposing regulations for several exemptions, the Commission also invited comments on several additional potential exemptions. Most of the comments regarding exemptions were based on those that the Commission proposed in the NPRM and are therefore discussed above in connection with proposed 11 CFR 100.29(c)(5) through (7).~~

~~1.~~3. Exemption for business advertisements

In the NPRM, the Commission ~~expressed interest in~~ invited suggestions on whether to promulgate an exemption for communications that refer to a clearly identified candidate in the context of promoting a candidate's business, including a professional practice, for example. 67 FR 51,136. However, no draft exemption was included in the proposed rules.

The commenters who addressed this issue urged the Commission to adopt an exemption for such advertisements, arguing that candidates who use television or radio to promote their commercial interests have an interest in continuing to do so during the relevant periods before elections. One commenter suggested that a narrowly drawn exemption would be appropriate and that it should be limited to ads that promote the business's product or service and that identify the candidate only by stating his or her name as part of the name of the business. This commenter believed that if the candidate appeared or spoke in such ads, they would constitute electioneering communications.

The Commission has determined that a narrow exemption for such ads is not appropriate and cannot be promulgated consistent with the Commission's authority under 2 U.S.C. 434(f)(3)(B)(iv). Based on past experience, the Commission believes that it is

likely that, if run during the period before an election, such communications could well be considered to promote or support the clearly identified candidate, even if they also serve a business purpose unrelated to the election.

~~2. Certain tax-exempt organizations~~

~~Several commenters from the nonprofit sector raised the possibility of an exemption for any communication made by a tax-exempt organization described in 26 U.S.C. 501(c)(3). That portion of the Internal Revenue Code prohibits organizations described in section 501(c)(3) from "participat[ing] in, or interven[ing] in . . . any political campaign on behalf of (or in opposition to) any candidate for public office." 26 U.S.C. 501(c)(3). Some of these commenters argued that this standard, combined with the severe penalties authorized for organizations and individuals found in violation of the standard, make regulating these tax-exempt organizations under BCRA superfluous. Consequently, they urged the Commission to exempt any communication that is paid for by an organization described in 26 U.S.C. 501(c)(3) provided the communication does not constitute a violation of the Internal Revenue Code prohibitions.~~

~~Others were opposed to this proposal. The principal sponsors of BCRA pointed out that the Congress considered such an exemption as they framed this legislation. However, Congress chose not to enact such an exemption and thus BCRA's sponsors urged the Commission to ensure it acted on a well-developed factual record before implementing such an exemption.~~

~~In the debates in the House of Representatives, immediately before the recorded vote on the final bill, one of the principal sponsors acknowledged the prohibitions of the Internal Revenue Code, and stated: "Notwithstanding this prohibition, some such~~

~~charities have run ads in the guise of so-called "issue advocacy" that clearly have had the effect of promoting or opposing Federal candidates. Because of these cases, we do not intend that Section 201(3)(B)(iv) be used by the FEC to create any per se exemption from the definition of 'electioneering communications' for speech by Section 501(c)(3) charities." 148 Cong. Rec. H411 (daily ed. Feb. 13, 2002) (statement of Rep. Shays).~~

~~The Commission has decided not to include a per se exemption for a communication by an organization described in 26 U.S.C. 501(c)(3). Such a blanket exemption is too broad for the limited exemption authority BCRA provides to the Commission. The Commission also has rejected a limited exemption based on the provisions of the Internal Revenue Code. While the Commission defers to the Internal Revenue Service's enforcement of the Internal Revenue Code, the civil enforcement of BCRA lies within the jurisdiction and responsibility of this Commission and cannot be left to another agency's policing of those subject to another statute. Additionally, under 2 U.S.C. 438(f), the Commission and the Internal Revenue Service must work together to promulgate rules that are mutually consistent.~~

34. Ballot ~~I~~initiatives and referenda

In the NPRM, the Commission ~~expressed interest in receiving~~ invited specific suggestions on whether communications that promote a ballot initiative or referendum should be exempt from the definition of "electioneering communications." 67 FR 51,136. The NPRM did not, however, include regulatory language for this potential exemption.

The comments received on this issue were divided. Supporters of this exemption argued that the subject matters of these communications and the purpose of those who sponsor these ads make them an unlikely vehicle to be used to promote, support, attack, or oppose a Federal candidate. One of the commenters argued that disbursements promoting or opposing a ballot initiative or referendum represents "the type of speech indispensable to decisionmaking in a democracy" and are therefore entitled to the highest degree of First Amendment protection. See First National Bank of Boston v. Bellotti, 435 U.S. 765, 777 (1978). Opponents of the exemption argued that such an exemption would be subject to abuse because communications that promote, support, attack, or oppose a Federal candidate could be tailored easily to qualify for any such exemption. In fact, one commenter directly challenged the argument that communications about ballot initiatives or referenda are unlikely to relate to Federal candidates. This commenter stated: "Increasingly, political consultants have been putting initiatives . . . on the ballot specifically to [affect] candidate races. It is too easy to imagine an initiative designed to provoke a backlash against a targeted candidate for the House or Senate." This commenter distinguished Bellotti's protections as applying to communications about referenda, but not necessarily communications that clearly identify a Federal candidate.

No such exemption is included in the final rules. The Commission believes that communications qualifying for a ballot initiative or referendum exemption could well be understood to promote, support, attack, or oppose Federal candidates. As ballot initiatives or referenda become increasingly linked with the public officials who support or oppose them, communications can use the initiative or referenda as a proxy for the candidate, and in promoting or opposing the initiative or referendum, can promote or

oppose the candidate. Consequently, it would be quite difficult to exempt such communications without violating the limited exemption authority provided to the Commission by BCRA in 2 U.S.C. 434(f)(3)(B)(iv).

45. Public service announcements

The NPRM asked whether public service announcements should be exempted. Generally speaking, public service announcements (or "PSAs") can be communications for which the broadcaster or satellite or cable system operator does not charge a fee for publicly distributing. 67 FR 51,136. As such, these communications would not meet the definition of "electioneering communications" pursuant to the operation of 11 CFR 100.29(b)(3)(i). However, broadcasters, and satellite and cable system operators do sometimes charge fees for publicly distributing other communications commonly known as PSAs and either the person who produced the PSA or some third party pays for its public distribution. Because of this fee, these PSAs ~~are~~ would be subject to the definition of "electioneering communications," unless exempted. In support of an exemption for all PSAs, several commenters pointed to the many worthy causes that use PSAs to accomplish their missions and not to influence Federal elections. Other commenters, however, did not dispute the existence of PSAs that are not related to Federal elections, but instead pointed to the possibility that such an exemption could be easily abused by using a PSA to associate a Federal candidate with a public-spirited endeavor in an effort to promote or support that candidate. Other commenters explained that historically PSAs have been used for "electorally related purposes" and that such communications are "at the very heart of what the statute is trying to get to."

While the Commission ~~agrees with some of the comments~~ acknowledges that many worthy causes use PSAs for purposes wholly unrelated to Federal elections, the Commission ~~believes~~ nonetheless concludes that television and radio communications that include clearly identified candidates and that are distributed to a large audience in the candidate's State or district for a fee are appropriately subject to the electioneering communications provisions in BCRA. Even without such an exemption, ~~Certainly,~~ an enormous array of ~~alternative~~ communications could still promote PSA subject matters during the periods before elections, ~~even if the appearance of~~ so long as Federal candidates are not clearly identified~~in PSAs during these periods is governed by the electioneering communications provisions~~. Consequently, a PSA exemption is not included in the final rules.

~~5~~6. Local tourism

The NPRM asked if communications that use Federal candidates to encourage local tourism should be exempted from the "electioneering communications" definition. 67 FR 51,136. Only a few commenters addressed this issue, and they supported such an exemption. However, the Commission believes that these communications could ~~also~~ serve two purposes: promoting local tourism, but doing so in a way that also could be reasonably perceived to promote or support the Federal candidate appearing in the communication. Because such an exemption may encompass communications that could be viewed to promote, support, attack, or oppose a Federal candidate, the Commission has decided not to include such an exemption in the final rules.

II. Ban on the Use of Corporate and Labor Organization Funds

BCRA amends 2 U.S.C. 441b by extending the prohibition on the use of corporate and labor organization treasury funds to the financing, directly or indirectly, of electioneering communications. The NPRM proposed to implement this restriction in several ways: through the amendment of 11 CFR 114.2 to reflect the stated restriction; through the amendment of 11 CFR 114.10 to ~~extend the provisions that~~ allow qualified non-profit corporations ("QNCs") to make not only independent expenditures, ~~to~~ but also to make electioneering communications; and through the creation of 11 CFR 114.14 to restrict the indirect use of corporate and labor organization treasury funds to finance electioneering communications.

A. 11 CFR 114.2 Prohibitions on Contributions and Expenditures by Corporations and Labor Organizations.

In the NPRM, the Commission proposed to revise 11 CFR 114.2(b) by restructuring the current provisions into paragraphs (b)(1) and (b)(2)(i) and (ii). The proposed rule would also add a new paragraph (b)(2)(iii) that would address electioneering communications by corporations and labor organizations. For the reasons stated below, the Commission has adopted the language of proposed section 114.2(b) in the final rules. Therefore, paragraph (b)(1) states the general prohibition on corporations and labor organizations making contributions; paragraph (b)(2)(i) provides for the corresponding prohibitions on corporate and labor organization expenditures; paragraph (b)(2)(ii) restricts express advocacy by corporations and labor organizations to those

outside the restricted class; and paragraph (b)(2)(iii) prohibits electioneering communications by corporations and labor organizations to those outside the restricted class. Additionally, paragraph (b)(2)(iii) does not apply to State party committees and State candidate committees that incorporate under 26 U.S.C. 527(e)(1) and are not political committees. The additional language to this paragraph is to ensure that these incorporated State party and candidate committees are permitted to engage in electioneering communications in the same manner as unincorporated State party committees and candidate committees that are not political committees. ~~However, t~~The prohibitions in paragraph (b)(2) do not apply to qualified nonprofit corporations ("QNCs") as described in 11 CFR 114.10.

1. Qualified Nonprofit Corporations

Several commenters addressed the application of 11 CFR part 114 to QNCs. The Commission received three comments regarding the overall revisions to section 114.2, one of which was from the sponsors of BCRA. All three sets of comments agreed with the revisions that implement BCRA's changes to 2 U.S.C. 441b, and specifically agreed with the proposed rules permitting QNCs to make electioneering communications. Several other commenters addressed only the provision that allows QNCs to make electioneering communications. These commenters supported the proposal, viewing this as a correct application of the Supreme Court's decision in FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986) ("MCFL").

Two commenters responded in favor of a proposal in the NPRM that the Wellstone amendment, which establishes rules for "targeted communications," should not

be read to apply to communications that refer to a clearly identified candidate for President or Vice President. See 2 U.S.C. 441b(c)(6). Under this interpretation, incorporated 501(c)(4) organizations that do not qualify as QNCs, and incorporated section 527 organizations that are not political committees registered with and reporting to the Commission, would be able to make electioneering communications that refer to a clearly identified candidate for President or Vice President, as long as they did not use impermissible funds, because such communications are not "targeted." These commenters both argued that this interpretation can be supported by the language of the statute and that it would mitigate constitutional concerns about the statute's application.

Two other commenters argued specifically against this view, one of whom noted that this is an incorrect interpretation of 2 U.S.C. 441b(c)(6) and that this section is properly interpreted to cover all communications that mention candidates for President or Vice President. The second commenter stated that, to the extent that the Commission proposes to construe presidential primary elections to be subject to a targeting requirement for purposes of the definition of "electioneering communication," it should also construe the Wellstone amendment to apply to such targeted communications. A third commenter argued that the Wellstone provision is directly contrary to MCFL, and that, as a result, this commenter supported in principle the application of the QNC exception.

Three commenters argued that the ban on corporate expenditures is unconstitutional under the MCFL ruling. According to one of these commenters, Congress was aware of the MCFL ruling when it passed BCRA, and could have made an exemption for MCFL corporations if it had wanted to. Because Congress did not create

such an exemption, the Commission has no legal ability to do so, according to this commenter. This commenter also stated that the Commission should "follow a policy of non-enforcement with regard to qualified non-profits." The other commenters presented similar arguments. They argued that it was clear that "the purpose of the provision was to close a 'loophole' that would allow all 'interest groups,' regardless of their status, to run 'sham issue ads.'" See, e.g., 147 Cong. Rec. S2846 (daily ed. Mar. 26, 2001) (statement of Sen. Wellstone). These commenters further argued that, "even supporters of BCRA recognized that the Wellstone amendment would present constitutional problems in the wake of the Supreme Court's decision in MCFL. See, e.g., 147 Cong. Rec. S2883 (Mar. 26, 2001) (statement of Sen. Edwards)." According to these commenters, it is undeniable from the text of BCRA that Congress intended to ban even MCFL corporations from making expenditures for electioneering communications, and the Commission cannot save the statute from facial invalidity by promulgating contradictory regulations.

With respect to the argument that the Commission cannot allow QNCs to make electioneering communications because to do so would violate BCRA, the Commission notes that, during the final passage of BCRA, additional statements were made regarding the prohibition on corporate expenditures. At that time, one of the principal sponsors of BCRA stated that, "[t]he legislation does not purport in any way, shape or form to overrule or change the Supreme Court's construction of the Federal Election Campaign Act in MCFL. Just as an MCFL-type corporation, under the Supreme Court's ruling, is exempt from the current prohibition on the use of corporate funds for expenditures containing 'express advocacy,' so too is an MCFL-type corporation exempt from the

prohibition in the Snowe-Jeffords amendment on the use of its treasury funds to pay for 'electioneering communications.' Nothing in the bill purports to change MCFL."
148 Cong. Rec. S2141 (daily ed. Mar. 20, 2002) (statement of Sen. McCain).

Although Senator McCain referred to "Snowe-Jeffords" without mentioning the Wellstone amendment, he clearly explained that under the proposed legislation, an MCFL corporation would be allowed to use its treasury funds to pay for electioneering communications. He specifically referred to that part of the Snowe-Jeffords amendment that prohibits the "use of [a corporation's] treasury funds to pay for 'electioneering communications,'" the main provision of this amendment that remains unaltered by the passage of the Wellstone amendment. See id.

In addition, the original Snowe-Jeffords amendment applied to all section 501(c)(4) and 527 corporations, not just MCFL corporations. Senator McCain's statement thus recognizes that MCFL will have the same effect under BCRA for electioneering communications as it did under the FECA for independent expenditures, which must contain express advocacy.

Further, the original Snowe-Jeffords amendment would not have allowed the use of treasury funds that came from corporations and labor organizations; rather, entities that accept corporate and labor organization funds would have been required to pay for electioneering communications exclusively with funds provided by individuals who are United States citizens or nationals or lawfully admitted for permanent residence, 2 U.S.C. 441b(c)(2), and unless a section 501(c)(4) corporation deposited these funds into a separate account, the statute would have considered that 501(c)(4) corporation to have paid for the electioneering communication with impermissible corporate or labor

organization funds. 2 U.S.C. 441b(c)(3)(B). Senator McCain's reference to treasury funds, therefore, manifests an understanding that the MCFL protections are built into the Snowe-Jeffords and Wellstone amendments.

Thus, the Commission concludes that the legislative history indicates that the intent of BCRA was to treat electioneering communications in a similar manner as independent expenditures. Part of that treatment is the application of MCFL to electioneering communications made by these QNCs.

2. Affiliation of Entities Permitted to Make Electioneering Communications with Those Entities That Are Not Permitted; Effect of Prior Incorporation.

The Commission ~~also~~ sought comments on ~~two possible scenarios: 1)~~ whether an entity prohibited from making an electioneering communication, i.e. a labor organization or a corporation that is not a QNC, may be affiliated with an entity that is permitted to make electioneering communications, provided that the entity permitted to make such communications received no prohibited funds from the entity prohibited from doing so.~~; and 2) whether a 501(c)(4) organization or a 527 organization that was previously incorporated and has changed its status to become a limited liability company or similar type of entity under State law would be permitted to pay for electioneering communications with funds that were donated by individuals to the organization during the time it was incorporated.~~

~~Four commenters, including the principal sponsors of BCRA, opposed allowing entities to make electioneering communications when they are affiliated with entities that are not permitted to do so.~~ Several commenters offered interpretations of section

441b(c)(3)(A), which treats an electioneering communication as made by a prohibited entity if the prohibited entity "directly or indirectly disburses any amount" for the cost of the communication. One commenter interpreted this to mean that a permitted entity may not receive any funds or financial support from a prohibited entity if the permitted entity intends to make electioneering communications. Another commenter stated that Congress expressly determined that corporate and union funds may not be used by any person to make electioneering communications, but that Congress stopped short of prohibiting "affiliated" organizations from using funds from individuals to make electioneering communications. That commenter also stated that it would be inappropriate for the Commission to consider unilaterally imposing restrictions that are not required by statutory language, particularly when Congress expressly included provisions addressing closely related entities elsewhere. See, e.g. 2 U.S.C. 323(d).

Other commenters, including BCRA's sponsors, did not specifically refer to the affiliation question, but stated that corporations and labor organizations must be prohibited from setting up, operating, or controlling unincorporated accounts that are not federal political committees. However, BCRA's sponsors and other commenters agreed that BCRA does not prohibit corporations or labor organizations from using their separate segregated funds to pay for electioneering communications, even though corporate treasury funds may be used for the establishment, administration, and solicitation of contributions to these separate segregated funds. See 11 CFR 114.5(b). BCRA's sponsors noted ~~These commenters concluded that this relationship results in a direct or indirect payment for an electioneering communication, which would be a violation of BCRA. See 2 U.S.C. 441b(c)(3)(A). These commenters pointed out that the separate~~

~~segregated funds of corporations and labor organizations may pay for what would otherwise be electioneering communications, and~~ that this situation was specifically discussed during the Senate debate concerning BCRA. See, e.g., 148 Cong. Rec. S2141 (daily ed. Mar. 20, 2002) (statement of Sen. McCain) ("Under the bill, corporations and labor unions could no longer spend soft money on broadcast, cable or satellite communications that refer to a clearly identified candidate for federal office during the 60 days before a general election and the 30 days before a primary, and that are targeted to the candidate's electorate. These entities could, however, use their PACs to finance such ads. This will ensure that corporate and labor campaign ads proximate to Federal elections, like other campaign ads, are paid for with limited contributions from individuals and that such spending is fully disclosed.")

~~In contrast, three commenters argued in favor of allowing these types of affiliated organizations to make electioneering communications. Two of these~~ Several commenters argued that nothing in BCRA ~~prevents such affiliation.~~prevents an organization that is prohibited from making an electioneering communication from affiliating with an organization that can. One pointed out that organizations that are not permitted to make electioneering communications may be affiliated with a QNC, which is expressly permitted to make electioneering communications.

~~The third~~ One commenter supporting this position argued that, on at least one occasion, the Supreme Court has "allowed Congress to restrict constitutionally protected speech while noting that the organization subject to the restriction was permitted to create an affiliate organization that was not subject to the restriction," citing Regan v. Taxation With Representation, 461 U.S. 540 (1983) (where the Supreme Court upheld statutory

limits on lobbying by charitable organizations, but noted that such organizations had the option of creating an affiliated section 501(c)(4) organization to engage in unlimited lobbying). This commenter also argued that MCFL demonstrated the Supreme Court's "reluctance to burden protected speech, and, at the very least, suggests that the Court would reject any restriction on organizations affiliating to expand the scope of permissible communications."

The Commission has concluded that section 441b(c)(3)(A) and its ~~the~~ legislative history supports the determination that the general treasury funds of a corporation or labor organization may not be used to establish, administer, or solicit funds for, an affiliated organization that would accept funds from individuals to pay for electioneering communications. This is because the establishment, administration, or solicitation of funds for, the affiliate would result in the indirect payment of impermissible funds for electioneering communications. Senator McCain's statement above reflects Congressional intent that communications meeting the timing, content and audience elements of an electioneering communication must be financed with permissible funds contributed by individuals to separate segregated funds, and not with corporate or labor organization funds. Such communications are considered expenditures, not electioneering communications. See 11 CFR 100.29(c)(3). As expenditures, they are paid for by an entity, the SSF, which is permitted under section 441b of the FECA to use corporate or labor organization funds for its establishment, administration, and for the solicitation of contributions. However, BCRA provides no comparable opportunity for a corporation or labor organization to establish, administer, or solicit for an entity that makes electioneering communications.

The Commission does not, however, see any statutory basis for creating restrictions on electioneering communications by a permitted entity whose affiliation with a prohibited entity is based on non-financial factors (e.g., overlapping officers or members). See 11 CFR 100.5(g). So long as such entities maintain separate finances, the permitted entity's electioneering communications would not be treated as having been made by the prohibited entity, because there would be no direct or indirect disbursement by the prohibited entity. Likewise, the Commission does not see any basis for restricting individuals who work for entities barred from making electioneering communications from pooling their own funds to finance electioneering communications, provided no corporate or labor organization funds are used.

~~Further, MCFL's reluctance to burden protected speech is fully acknowledged in the rules at 11 CFR 114.10, which allow QNCs to make electioneering communications. MCFL requires no further accommodation.~~

The Commission also sought comment on whether a 501(c)(4) organization or a 527 organization that was previously incorporated and has changed its status to become a limited liability company or similar type of entity under State law would be permitted to pay for electioneering communications with funds that were donated by individuals to the organization during the time it was incorporated. ~~With respect to the question of whether a formerly incorporated 501(c)(4) or 527 organization can pay for electioneering communications with funds received from individuals while in its corporate form, the one~~ One commenter who addressed this question argued that these funds should be considered corporate funds ~~which~~that cannot be used to pay for electioneering communications. The Commission agrees.

B. 11 CFR 114.10 Exemption for Qualified Nonprofit Corporations

MCFL's exemption for QNCs to make independent expenditures is codified in 11 CFR 114.10.[11] In the NPRM, the Commission proposed revising 11 CFR 114.10 to set out standards for establishing QNC status for those section 501(c)(4) corporations wishing to make electioneering communications as well as independent expenditures. For the reasons stated below, the Commission has decided to incorporate the language of the proposed rules, with certain modifications for filing certification of QNC status, into the final rules. Therefore, the title of section 114.10 is redrafted to reflect its application to electioneering communications, as is the discussion of the scope of section 114.10 found in paragraph (a). The title of section 114.10 is slightly different from what was proposed in the NPRM. There are no changes to paragraphs (b) and (c). Paragraph (d) is redesignated as "Permitted corporate independent expenditures and electioneering communications." Paragraph (d)(1) remains unchanged substantively, but contains a

[11] In filing for QNC status, a corporation certifies that it meets five qualifications: 1) that it is a social welfare organization as described in 26 U.S.C. 501(c)(4); 2) that its only purpose is issue advocacy, election influencing activity or research, training or educational activities tied to the corporation's political goals; 3) that the corporation does not engage in business activities; 4) that the corporation has no shareholders or persons, other than employees and creditors, who either have an equitable or similar interest in the corporation or who receive a benefit that they lose if they end their affiliation; and 5) that the corporation was not established by a corporation or labor organization, does not accept direct or indirect donations from such organizations and, if unable to demonstrate that it has not accepted such donations, has a written policy against accepting donations from them. See 11 CFR 114.10(c)(1) through (5).

correction to the citation of the definition of "independent expenditure." Paragraph (d)(2) tracks the language of paragraph (d)(1), except that it substitutes "electioneering communication" for "independent expenditure," and it references the definition of "electioneering communication" at 11 CFR 100.29. Former paragraph (d)(2) is redesignated as paragraph (d)(3), with an additional reference to paragraph (d)(2).

1. Certifying QNC Status

The NPRM also proposed that the procedures for the certification of qualified nonprofit corporation status be revised to provide separate procedures for those making electioneering communications. The Commission has decided to adopt the proposed rules pertaining to these procedures. Thus, the procedures for corporations making independent expenditures, which were found at 11 CFR 114.10(e)(1)(i) and (ii), are now redesignated as 11 CFR 114.10(e)(1)(i)(A) and (B). Paragraphs (e)(1)(ii)(A) and (B) are added to describe the procedures for demonstrating qualified nonprofit corporation status when making electioneering communications. ~~In all respects these~~ These provisions are similar to the provisions for qualified nonprofit corporations making independent expenditures, except that the threshold for certification is $10,000. Further,~~, and statements that~~ corporations are not required to submit certifications prior to making independent expenditures or electioneering communications ~~have been eliminated~~. The pre-BCRA rules are being modified to permit corporations that have received a favorable judicial ruling concerning their QNC status, in litigation in which the same corporation was a party, to certify that application of that ruling to the corporation's activities in subsequent years confers QNC status. ~~This last change was made because these~~

~~statements became superfluous given the fact that the due date for~~ Advance certifications are not necessary given that the Commission anticipates that reporting ~~is now~~ will be tied to the date that the independent expenditure is publicly disseminated or the electioneering communication is ~~made~~publicly distributed. The ~~e~~Explanation and ~~j~~Justification for the Commission's decision to adopt the proposed revisions to 11 CFR 114.10 are discussed in further detail below.

Several commenters asserted that the threshold for certifying QNC status should be lower, and they specifically mentioned setting it at the same level as that for QNCs that wish to make independent expenditures. One commenter argued that setting the level at $10,000 would only make sense if a corporation could only spend $10,000 of its treasury funds on electioneering communications before encountering the 2 U.S.C. 441b prohibition. Another commenter stated that the level for certifying should be set at $250 for the QNC "to establish its right to spend any corporate funds on electioneering communications," and that "an MCFL corporation can spend its funds on electioneering communications only if it establishes it is qualified to do so, even if its spending never reaches the $10,000 threshold amount." The sponsors of BCRA also argued that the threshold for certifying QNC status should be $250, using the same reasoning as above.

Certain commenters suggested that the Commission should establish a different QNC standard for corporations that wish to make electioneering communications than the standard for those that wish to make independent expenditures, noting, in one instance, that "the MCFL exemption must be expanded . . . in response to the greater speech burden at issue in the context of 'electioneering communications' versus express advocacy." According to this commenter, "[w]ith respect to express advocacy, the

Government's regulatory interest (however weak) is at its zenith, and the category of speech that is burdened is strictly defined. 'Electioneering communications,' however, constitute a much larger category of political expression that is further removed from advocating for a particular candidate; the Government's regulatory interest is therefore even more attenuated and the burden upon political speakers' expression is heightened." Another commenter argued that "the regulatory regime managing any exemption from coverage should be tailored to reflect the much weaker interests at stake." This commenter also stated that, under the proposed regulations, groups can never know in advance whether their QNC certification will be accepted, thus leaving them to "speak at their peril."

Several commenters, as noted above, argued that the Commission could not create an exception for MCFL corporations. By extension, these commenters opposed the certification procedure at 11 CFR 114.10.

The Commission concludes that the proposed rule is better left intact in the final rules. Several reasons lead to this conclusion. First, the Commission is aware of nothing suggesting that Congress intended a ~~lower~~ threshold lower than $10,000 for filing the certification, and setting the certification threshold at the level that first triggers reporting under the statute minimizes the burden on QNCs. In this respect, the certification threshold for electioneering communications is comparable to the certification threshold for independent expenditures. Further, as noted above, the Commission has concluded that statements of electioneering communications need not be filed until the communication is publicly distributed, because until such time as the communication can be received by 50,000 persons, it is not an "electioneering communication." Likewise,

until a person makes an electioneering communication, the Commission has no reason to seek certification of QNC status. Further, the threshold provides a clear rule that is easy to follow.

Moreover, while one commenter argued that "an MCFL corporation can spend its funds on electioneering communications only if it establishes it is qualified to do so," this misconstrues the certification of QNC status. Corporations may spend funds for electioneering communications as long as they meet the requirements of qualified non-profit corporation status. If they spend $10,000 or more, they must certify to the Commission that they meet this status. However, they need not obtain prospective approval of QNC status prior to making electioneering communications or, for that matter, independent expenditures.[12] Further, if a corporation does not qualify for QNC status, it is not permitted to use any general treasury funds for electioneering communications, and there was nothing in the proposed rules, nor is there anything in the final rules, to suggest otherwise.

Further, the commenters advancing the argument that the Commission should create an entirely different standard for QNC status with respect to electioneering communications, than the standard for QNC status with respect to independent expenditures, miss a central point that concerned the sponsors of BCRA: that certain communications that do not necessarily expressly advocate for a candidate's election or

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[12] Of course, ~~if~~ corporations ~~do wish~~are free to file for QNC status before making ~~an~~ electioneering communications ~~in order to avoid~~ if they are concerned about "speaking at their peril," ~~they are free to do so.~~

defeat, may nevertheless have an impact on ~~attempt to influence how people will vote in an election; and that when these communications are paid for with corporate and labor organization funds, they evade the ban at 2 U.S.C. 441b~~. There is no indication that Congress intended the MCFL exception to apply differently to groups making electioneering communications than to those making independent expenditures. The qualifications for QNC status in pre-BCRA 11 CFR 114.10(c) are objective ~~ones~~qualifications that would be apparent to any ~~organization~~corporation contemplating whether to make an electioneering communication.

Nevertheless, the Commission recognizes that certain courts have held that organizations incorporated under 26 U.S.C. 501(c)(4) that do not meet all of the strictures contained in the Commission's regulations at 11 CFR 114.10(c)(1) through (c)(5) may still make independent expenditures without violating the prohibition at 2 U.S.C. 441b(a). It is appropriate for the Commission to allow the prevailing organization to certify its status based on the court ruling when conducting activities in that specific jurisdiction. Accordingly, the Commission is modifying pre-BCRA 11 CFR 114.10(e)(1) (new paragraph 114.10(e)(1)(i)(B)), to allow organizations that prevail in litigation to certify their QNC status based on the favorable ruling. This modification to the rules does not require any modification to the current certification on the Commission's Form 5 for independent expenditures, and on the new form the Commission intends to create for electioneering communications, Form 9. On Form 5, that certification reads, in relevant parts: "[I]f the independent expenditures are reported herein were made by a corporation, I certify that the corporation is a [QNC] under the Commission's regulations." This statement would remain true regardless of the reason for QNC status: either compliance

with the Commission's standards in section 114.10(c) of the regulations, or pursuant to judicial decision, as contemplated by new paragraph (e)(1)(i)(B) of section 114.10. Because paragraph (e)(1)(i)(B) is referenced by the paragraph that addresses certification for QNCs making electioneering communications, paragraph (e)(1)(ii)(B), this holds equally for electioneering communications.

2. Disclaimers

Section 11 CFR 114.10(g) is revised to require qualified nonprofit corporations to comply with the requirements of 11 CFR 110.11 regarding non-authorization notices ("disclaimers") when making electioneering communications. The final rule mirrors the proposed rule. BCRA amended 2 U.S.C. 441d to require disclaimers for electioneering communications. No comments were received regarding this provision.

3. Segregated Bank Account

Identical in substance to the proposed rule, section 114.10(h) states that qualified nonprofit corporations may establish a segregated bank account for the purpose of depositing funds to be used to pay for electioneering communications, as identified in 11 CFR part 104. The one revision is a change to correct the citation to where the rules address the segregated bank account. This proposal met with general approval by the commenters.

Proposed paragraph 114.10(i) would track the language in 2 U.S.C. 441b(c)(5), which states that nothing in 2 U.S.C. 441b(c) shall be construed to authorize an organization exempt from taxation under 26 U.S.C. 501(a) to carry out any activity that is

prohibited under the Internal Revenue Code. No comments were received regarding this paragraph; this paragraph appears in the final rules.

4. "De Minimis" Standard

The Commission also sought comment on whether a provision should be added to the rules incorporating a de minimis standard for QNCs, in light of court decisions such as Minnesota Citizens Concerned for Life, Inc. v. FEC, 936 F. Supp. 633 (D. Minn. 1996), aff'd, 113 F.3d 129 (8th Cir. 1997) ("MCCL"). MCCL allowed QNCs to engage in a certain amount of business activity, ~~and~~ accept a de minimis amount of funds from corporations and labor organizations, and still qualify for QNC status. In making this ruling, the court of appeals relied on its previous ruling in Day v. Holahan, 34 F.3d 1356 (8th Cir. 1994), in which the court addressed a Minnesota statute that had been based on the Supreme Court's MCFL ruling, and which was similar to the Commission's rules at 11 CFR 114.10. In Day, the court noted that the key issue was "the amount of for-profit corporate funding a nonprofit receives, rather than the establishment of a policy not to accept significant amounts. . . . [T]he facts before us in this case present no risk of 'the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas.' The state, far from having shown that MCCL is amassing great wealth as a result of corporate donations, implicitly concedes that MCCL has not received any significant contributions from for-profit corporations." Day, 34 F.3d at 1364 (citation omitted).

Several commenters opposed a de minimis exception. One of these commenters cited the Supreme Court's language in MCFL regarding the policy of the organization against accepting contributions from corporations or labor organizations. The second commenter argued that the Commission does not have the authority to write a de minimis standard, suggesting it could only do so if BCRA is unconstitutional, and further asserting that only the courts may pass on the constitutionality of legislation passed by Congress. This commenter further argued that there has been no court case that has addressed whether a de minimis standard is required for electioneering communications. Further, this commenter stated that MCFL did not contemplate such an exception. BCRA's principal sponsors also argued that no section 501(c)(4) organization that accepts even a de minimis amount of corporate or labor organizations funds can meet the definition of a QNC. They argue that this position is consistent with MCFL, and nothing in the legislative history of BCRA suggests a contrary intent.

Other commenters supported a de minimis exception. One commenter argued that the Commission should apply the MCCL standards. This commenter maintained that MCCL expands the reach of MCFL, but is constitutionally consistent with it. The commenter further argued that, without such an allowance, organizations that accept a small amount of corporate or labor organization funding would face uncertainty about their status as QNCs and their ability to make electioneering communications.

Another commenter also supported allowing corporations that accept "a modest or incidental or de minimis amount" of corporate or labor organization funds to qualify for QNC status, stating that many organizations that accept such funds remain overwhelmingly supported by individual members and contributors who subscribe to the

views and advocacy of the organization. Other commenters argued that the failure to adopt such a provision would result in a failure to cure the unconstitutionality of the electioneering communications provisions. Another commenter argued that the consensus view of the courts of appeals that have considered the question is that there should be a de minimis standard. This commenter further argued that the Commission should adopt the standard articulated in North Carolina Right to Life v. Bartlett, 168 F.3d 705 (4th Cir. 1999) (where the court determined that the acceptance of up to eight percent of overall revenues did not preclude North Carolina Right to Life from qualifying for a state MCFL exemption because the corporate funds were "but a fraction of its overall revenue" and were not "of the traditional form").

The final rules maintain the prohibition against QNCs accepting any funds from corporations or labor organizations and do not allow them to accept a de minimis amount. The Commission has previously considered the issue of whether to allow QNCs to accept a de minimis amount of corporate or labor organization funding. See Explanation and Justification for Regulations on Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures, 60 FR 35,292 (July 6, 1995). At that time, the Commission noted that "[t]he MCFL Court was concerned that business corporations and labor organizations could improperly influence qualified nonprofit corporations and use them as conduits to engage in political spending," and that "the Court saw MCFL's policy of not accepting business corporation or labor organization donations as the way to address these concerns." 60 FR at 35,301. Further, the Commission cited the Supreme Court's decision in Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990), to support a complete ban on the acceptance of corporate or labor organization funds, noting

the Court's concerns that "the danger of 'unfair deployment of wealth for political purposes' exists whenever a business corporation or labor organization is able to funnel donations through a qualified nonprofit corporation." 60 FR at 35,301. Accordingly, the Commission determined that qualified nonprofit corporations should not be allowed to accept any funds from corporations or labor organizations.

The Commission recognizes that certain courts of appeals have recognized a de minimis exception permitting the acceptance by QNCs of corporate and labor organization funds. These circuit courts, however, have not defined the exception in the same terms, and therefore, two circuits would not necessarily apply the de minimis exception to the same set of circumstances. Compare MCCL, 936 F. Supp 633 (D. Minn. 1996) (MCFL-corporation status allowed where organization has not received "any significant contributions from for-profit corporations") with NCRL, 168 F.3d 705 (4th Cir. 1999) (MCFL-corporation status allowed where up to eight percent of the organization unspecified overall revenues came from corporations, where such corporate payments were "not of the traditional form"). Although the Commission does not believe it is appropriate to establish a de minimis exception at this time, the Commission retains the discretion to revisit this issue in a subsequent rulemaking proceeding or otherwise. See 62 FR 65,040 (Dec. 10, 1997) (pending MCFL Petition for Rulemaking). Court rulings regarding the effect of de minimis corporate funding on QNC certifications for specific organizations are discussed, above, and are addressed in the final rules at 11 CFR 114.10(e)(1)(i)(B).

C. 11 CFR 114.14 Further Restrictions on the Use of Corporate and Labor Organization Funds for Electioneering Communications

In the NPRM, the Commission proposed a new rule, 11 CFR 114.14, to implement the provisions in 2 U.S.C. 441b(b)(2), (c)(1) and (c)(3) prohibiting corporations and labor organizations from directly or indirectly disbursing any amount from general treasury funds for any of the costs of an electioneering communication. Proposed 11 CFR 114.14(a) would have contained the prohibition that applies to corporations and labor organizations generally. The rule is meant to eliminate any instance of a corporation or labor organization providing funds out of their general treasury funds to pay for an electioneering communication, including through a non-Federal account. This met with general approval from the commenters and remains in the final rule as paragraph (a)(1). As noted in the NPRM, the Commission does not view BCRA as in any way prohibiting or restricting payments for electioneering communications from otherwise lawful funds raised and spent by the Federal account of a separate segregated fund.

1. Contributor Liability by Corporations and Labor Organizations

The NPRM also sought comments on the standards to be employed to determine ~~contributor~~ liability ~~by~~ of the corporation or labor organization providing the funds. One commenter stated that the standard should be whether the corporation or labor organization intends that the person to whom it supplies the funds will use them for an electioneering communication, or whether it knows or should know that the funds will be used for an electioneering communication. Another commenter suggested that, if the

funds are provided for another purpose, that should, absent evidence to the contrary, lead to the conclusion that this regulation has not been violated. Further, if the funds are provided ~~with~~ subject to a prohibition against their use to pay for electioneering communications, that should, absent evidence to the contrary, lead to the same conclusion. Another commenter suggests that a corporation or labor organization should be liable if it "specifically directs" or "suggests" that the funds be used for electioneering communications, or if it knows or should know that the funds will be used for electioneering communications. The sponsors of BCRA also suggested this latter standard.

Paragraph (a)(2) sets forth the standards to be applied in determining whether the knowledge requirement exists by providing three alternative ways, any one of which would establish that a corporation or labor organization has knowingly given, disbursed, donated, or otherwise provided, funds used to pay for an electioneering communication.

The first knowledge standard is that of actual knowledge. The second standard requires awareness on the part of the corporation or labor organization of certain facts that would lead a reasonable person to conclude that there is a substantial probability funds will be used to pay for an electioneering communication. This second standard is in effect a "reason to know" standard, and is different from a "should have known" standard. Restatement (Second) of Agency, sec. 9, cmts. d and e (1958). The third standard addresses situations in which the corporation or labor organization is or becomes aware of facts that should have led any reasonable person to inquire about the intent of the person receiving the funds for their use, however, the corporation or labor organization failed to so inquire. This third alternative is in effect a willful blindness

standard covering situations in which a known fact may not equal a substantial probability of illegality but at least should prompt an inquiry.

The final rules at new 11 CFR 114.14(b), like the proposed rule, prohibit any person who accepts corporate or labor organization funds from using those funds to pay for an electioneering communication, or to provide those funds to any other person who would subsequently use those funds to pay for all or part of the costs of an electioneering communication. The rule is intended to effectuate BCRA's treatment of an electioneering communication as being made by a corporation or labor organization if such an entity indirectly disburses any amount for the cost of the communication from their general treasury funds. 2 U.S.C. 441b(c)(3)(A). No commenter addressed this rule.

Proposed paragraph (c) of 11 CFR 114.14 would have provided certain limited exceptions to allow corporations or labor organizations to provide funds that might subsequently be used for electioneering communications. These exceptions are salary, royalties, or other income earned from bona fide employment or other contractual arrangements, including pension or other retirement income; interest earnings, stock or other dividends, or proceeds from the sale of the person's stocks or other investments; or receipt of payment representing fair market value for goods or services rendered to a corporation or labor organization. No commenter suggested any other instances of corporate or labor organization general treasury funds that might properly be used to pay for electioneering communications other than those listed at paragraphs (c)(1) through (3), and the proposed exceptions received general support from the commenters. These exceptions are being included in the final rules.

2. Accounting of Funds to Ensure That No Funds Received From Corporations or Labor Organizations Are Used for Electioneering Communications

Section 114.14(d)(1), like the proposed rules, requires persons who receive funds from a corporation or a labor organization that do not meet the exceptions of paragraph (c) ~~to be able~~ to demonstrate through a reasonable accounting method that no such funds were used to pay for any portion of an electioneering communication. The Commission sought comment on whether a specific accounting method should be required, such as first-in-first-out, last-in-first-out, or any other method. Several commenters did not propose specific methods, but urged the Commission to require "a more specific and stringent accounting method," or "a higher standard of accounting than 'reasonable' methods." The principal sponsors of BCRA stated that the Commission "should insist on a high level of certainty in any accounting method used to make this demonstration."

Further, commenting on the special account available to QNCs at 11 CFR 114.10(h), several commenters suggested that this option be available to all persons who make electioneering communications. One commenter stated that it interpreted paragraph (h) to permit non-QNC entities to set up such an account. Likewise, the sponsors of BCRA noted that QNCs are not the only entities that might want to set up such accounts.

While the Commission did not intend to exclude non-QNCs from establishing segregated bank accounts similar to those described at paragraph (h), the proposed rules were not explicit that non-QNCs may do so. Moreover, as section 114.10 applies only to

QNCs, some non-QNCs may not realize that such an account would be available to them.

Accordingly, the Commission has added a provision to 11 CFR 114.14(d) that specifically allows any person who wishes to make electioneering communications to establish a separate bank account from which it pays for electioneering communications. 11 CFR 114.14(d)(2). This account must only contain funds contributed directly to it by individuals who are United States citizens or nationals or lawfully admitted for permanent residence. If persons use only funds from such an account to pay for an electioneering communication, then they will have demonstrated against any charge to the contrary that they did not use funds from a corporation or labor organization to pay for the communication, and their disclosure of their contributors will be limited to the names and addresses of those persons who donated or otherwise provided funds to the account. However, if a person uses any other funds from outside of this account to pay for the electioneering communication, then it will have to disclose the names and addresses of all persons who contributed to the entity, as required by 11 CFR 104.171(c)(8), and will have to provide a more detailed accounting to demonstrate that the funds used did not come from a corporation or labor organization. The ability to establish this segregated bank account is also intended to address, in part, the concerns of those commenters who objected to disclosing their entire donor base.

III. Reporting Requirements

In the NPRM, the Commission stated that one of the other BCRA-related rulemaking projects is reporting. 67 FR 51,131. This reporting rulemaking is intended to consolidate all of the proposed amendments to 11 CFR part 104 included in the various BCRA-related NPRMs ~~and other reporting-related regulations~~ into one NPRM. Because public disclosure is one of the most important aspects of the FECA, the Commission concluded that a consolidated rulemaking on reporting would allow the public, especially those required to file reports and statements under the FECA and BCRA, to review, understand, and comment on the new and revised reporting requirements as the result of BCRA in a comprehensive manner. ~~The reporting rulemaking, which will be entitled "Consolidated Reporting," will simultaneously reorganize 11 CFR part 104 to make it easier to read locate pertinent provisions.~~

Consequently, the final rules on electioneering communications do not include the changes to 11 CFR 100.19, 104.19, and 105.2 that were part of the proposed rules. Rather, a brief discussion of the major issues and comments relating to the reporting of electioneering communications is included in this Explanation and Justification. See below. The Consolidated Reporting NPRM will include revised proposed rules for electioneering communications reporting that will take into consideration the comments that the Commission received in response to the Electioneering Communications NPRM.

A. Disclosure Date

BCRA requires persons who make electioneering communications to file disclosure statements with the FEC within 24 hours of the disclosure date. 2 U.S.C. 434(f)(1). In the previously published NPRM, proposed section 104.19(~~b~~a)(1)(i) and (ii) would define "disclosure date" as the date on which "a person has made one or more disbursements, or has executed one or more contracts to make disbursements, for the direct costs of producing or airing electioneering communications aggregating in excess of $10,000." NPRM, 67 FR at 51,145. The NPRM, however, sought comment on whether the disclosure date should be the date on which the electioneering communications are publicly distributed. Thus, under this scenario, an organization could make disbursements or enter into a contract to make disbursements that exceed $10,000 but would not be required to disclose the disbursements or contract until the electioneering communications is aired, broadcast or otherwise disseminated by television, radio, cable, or satellite.

All nine commenters who addressed this issue disagreed with the proposed rule and advocated adopting a final rule that would define "disclosure date" as the date of the airing of the electioneering communication. They argued that there is no electioneering communication, and therefore no reporting requirement, until the communication is actually aired or otherwise publicly distributed. One witness at the hearing did acknowledge that in some cases it may be difficult to ascertain when an electioneering communication airs for purposes of triggering the 24-hour reporting period because some contracts may not specify a time that the communication will be aired or because in some instances the broadcaster may fail to air the communication during the block of time

specified in the contract. This issue will be further explored in the consolidated reporting NPRM.

B. Direction or Control

The previously published NPRM included two proposed alternatives, identified as Alternative 4-A and Alternative 4-B, to implement the BCRA requirement to disclose "any person sharing or exercising direction or control over the activities" of the person making the disbursement for electioneering communications. See 2 U.S.C. 434(f)(2)(A); 67 FR 51,146 ~~(Insert date of publication in the Federal Register)~~ Aug. 7, 2002). Many of the commenters expressed ~~concern~~ the belief that both alternatives are vague and could encompass a large number of people, especially if the communications are made by membership organizations. Some of the commenters were also concerned that disclosing this information may reveal sensitive or confidential information and the decision-making process of organizations, especially non-profit organizations, thereby placing them at a competitive disadvantage. For these reasons, these commenters argued that the Commission should require limited, if any, disclosure of persons who share or exercise direction or control over the person who makes disbursements for electioneering communications or the activities involved in making electioneering communications.

In contrast, several commenters, including the Congressional sponsors of BCRA, disagreed with both alternatives, arguing that neither would disclose sufficiently the information required by BCRA. See id. They argued that the purpose of this disclosure requirement in 2 U.S.C. 434(f)(2)(A) is to reveal not only those who have direction or

control over the electioneering communications but also those who have direction or control over the organization that makes the electioneering communications.

This issue will be further explored in the consolidated reporting NPRM.

C. Identification of Candidates and Elections

~~———~~Under 2 U.S.C. 434(f)(2)(D), candidates clearly identified in the electioneering communications, and the elections to which the electioneering communications pertain, must be ~~listed~~ disclosed in 24-hour statements filed with the ~~FEC~~Commission. The previously published NPRM provided two alternatives to proposed 11 CFR 104.19(b)(5), identified as Alternative 5-A and Alternative 5-B, that would implement this statutory provision. 67 FR 51,146. Both alternatives would require disclosure of the election and each clearly identified candidate that would be referred to in the electioneering communication, but contain different language. Commenters preferred the language of Alternative 5-B because it would be easier to read and would be more consistent with 2 U.S.C. 434(f)(2)(D). This will be further explored in the consolidated reporting NPRM to follow.

D. Disclosure of Contributors and Donors

BCRA requires persons who make electioneering communications and who establish segregated bank accounts for electioneering communications to disclose the names and addresses of contributors who contribute an aggregate of $1,000 or more to

that segregated bank account. 2 U.S.C. 434(f)(2)(E).[13] If the organization that makes electioneering communications does not use a segregated bank account, then BCRA requires it to disclose the names and addresses of all contributors who contribute an aggregate of $1,000 or more to that organization from the beginning of the preceding year through the disclosure date. 2 U.S.C. 434(f)(2)(F). In reading these two sections of BCRA together with 2 U.S.C. 441b(c)(3)(B), the Commission stated in the NPRM that these disclosure requirements for segregated bank accounts appear to apply only to qualified nonprofit corporations organized under 26 U.S.C. 501(c)(4). See 67 FR 51,143. Therefore, previously proposed 11 CFR 104.19(b)(6) would have required only QNCs to disclose their contributors for purposes of electioneering communications.

The NPRM explained that proposed section 104.19(b)(7) would clearly state that all persons who are permitted to make electioneering communications under BCRA, including QNCs that do not use segregated bank accounts, would be required to disclose their contributors who contribute an aggregate of over $1,000 during the given time period. 67 FR 51,143. ~~However~~Nevertheless, some commenters interpreted proposed section 104.19(b)(7) to apply only to QNCs and objected to limiting the disclosure requirements to only QNCs. They argued that BCRA does not limit the requirements of 2 U.S.C. 434(f)(2)(E) and (F) to just QNCs. Consequently, they recommended that all persons who may make electioneering communications should be required to disclose

[13] Please note that this discussion uses the terms "contributors" and "contribute." However, in certain circumstances, it may be more appropriate to refer to "donors" and "donations." This distinction will be addressed in more detail in the consolidated reporting NPRM to follow.

their contributors under proposed section 104.19(b)(7), and that the option for segregated bank accounts in proposed section 104.19(b)(6) should be extended to all persons who may make electioneering communications. This topic will also be addressed in the consolidated reporting NPRM to be published shortly.

One commenter argued that the members of the organizations it represented could be subject to negative consequences if their names are disclosed in connection with an electioneering communication. As a preliminary matter, the Commission notes that any group ~~can take advantage of the option of~~ may opt to use a separate bank account under 11 CFR 114.14(d)(2), which would provide limited disclosure. The FECA provides for an advisory opinion process concerning the application of any of the statutes within the Commission's jurisdiction or any regulations promulgated by the Commission, and such a group could also seek an advisory opinion from the Commission to determine if the group would be entitled to an exemption from disclosure that would be analogous to the exemption provided to the Socialist Workers Party in Advisory Opinions 1990-13 and 1996-46 (both of which allowed the Socialist Workers Party to withhold the identities of its contributors and persons to whom it had disbursed funds because of a reasonable probability that the compelled disclosure of the party's contributors' names would subject them to threats, harassment, or reprisals from either ~~G~~government officials or private parties~~.~~). BCRA's legislative history recognizes the need for limited exceptions in these circumstances. See 148 Cong. Rec. S2136 (daily ed. Mar. 20, 2002) (remarks of Sen. Snowe).

E. NPRM on Consolidated Reporting

As stated above, the Consolidated Reporting NPRM will include revised proposed rules for reporting electioneering communications. The Commission appreciates the comments that it received and anticipates that they will prove useful in revising the proposed rules. The Commission encourages the commenters, as well as others who did not comment on the initial proposed rules, to review the revised proposed rule that will be part of the Consolidated Reporting NPRM and to submit comments at the appropriate time.

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

The Commission certifies that the attached final rules do not have a significant economic impact on a substantial number of small entities. The bases of this certification are several. First, the only burden the final rules impose is on persons who make electioneering communications, and that burden is a minimal one, requiring persons who make such communications to provide the names and addresses of those who made donations to that person, when the costs of the electioneering communication exceed $10,000. If that person is a corporation that qualifies as a QNC, then it must also certify that it meets that status. The number of small entities affected by the final rules is not substantial.

The Commission has adopted several rules that seek to reduce any burden that might accrue to persons who must file reports. First, the Commission has interpreted the reporting requirement such that no reporting is required until after an electioneering communication is publicly distributed. In many cases, this will only require that person to file one report with the Commission. Also, the Commission has allowed all persons paying for electioneering communications to establish segregated bank accounts, and to report the names and addresses of only those persons who contributed to those accounts. Further, the Commission has interpreted the statute to not require that a certification of QNC status be filed until the person is also required to file a disclosure report. These are significant steps the Commission has taken to reduce the burden on those who would make electioneering communications. The overall burden on the small entities affected by the final rules will not amount to $100 million on an annual basis.

Furthermore, because the Commission has interpreted BCRA to mean that political committees do not, by definition, make disbursements for electioneering communications, neither BCRA nor the final rules require any additional reports by any type of Federal political committee. Moreover, the requirements of these final rules are no more than what is strictly necessary to comply with the new statute enacted by Congress.

List of Subjects

11 CFR Part 100

Elections.

11 CFR Part 114

Business and industry, elections, labor.

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

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

1. The authority citation for 11 CFR part 100 is revised to read as follows:

Authority: 2 U.S.C. 431, 434~~(a)(11)~~, 438(a)(8).

2. New section 100.29 is added to read as follows:

§ 100.29 Electioneering communication (2 U.S.C. 434(f)(3)).

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

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

(2) Is publicly distributed within 60 days before a general election for the office sought by the candidate; or within 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate, and the candidate referenced is seeking the nomination of that political party; and

(3) Is targeted to the relevant electorate, in the case of a candidate for Senate or the House of Representatives.

(b) For purposes of this section--

(1) Broadcast, cable, or satellite communication means a communication that is publicly distributed by a television station, radio station, cable television system, or satellite system.

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

(3) (i) Publicly distributed means aired, broadcast, cablecast or otherwise disseminated for a fee through the facilities of a television station, radio station, cable television system, or satellite system.

(ii) In the case of a candidate for nomination for President or Vice President, publicly distributed means the requirements of paragraph (b)(3)(i) of this section are met and the communication:

(A) Can be received by 50,000 or more persons in a State where a primary election, as defined in 11 CFR 9032.7, is being held within 30 days; or

(B) Can be received by 50,000 or more persons anywhere in the United States within the period between 30 days before the first day of the national nominating convention and the conclusion of the convention.

(4) A special election or a runoff election is a primary election if held to nominate a candidate. A special election or a runoff election is a general election if held to elect a candidate.

(5) Targeted to the relevant electorate means the communication can be received by 50,000 or more persons—

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

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

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

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

(2) Appears in a news story, commentary, or editorial distributed through the facilities of any broadcast, cable, or satellite television or radio station, unless such facilities are owned or controlled by any political party, political committee, or candidate. A news story distributed through a broadcast, cable, or satellite television or radio station owned or controlled

by any political party, political committee, or candidate is nevertheless exempt if the news story meets the requirements described in 11 CFR 100.132(a) and (b);

(3) Constitutes an expenditure or independent expenditure provided that the expenditure or independent expenditure is required to be reported under the Act or Commission regulations; ~~or~~

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

(5) Is not described in 2 U.S.C. 431(20)(A)(iii) and is paid for by a candidate for State or local office in connection with an election to State or local office; or

(6) Is paid for by any religious, educational, or charitable organization operating under section 501(c)(3) of the Internal Revenue Code of 1986. Nothing in this section shall be deemed to supersede the requirements of the Internal Revenue Code for securing or maintaining 501(c)(3) status.

PART 114 — CORPORATE AND LABOR ORGANIZATION ACTIVITY

3. The authority citation for part 114 is ~~amended~~ revised to read as follows:

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

4. In section 114.2, paragraph (b) is revised to read as follows:

§ 114.2 Prohibitions on contributions and expenditures.

* * * * *

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

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

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

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

(iii) Making payments for an electioneering communication to those outside the restricted class. However, this paragraph (b)(2)(iii) shall not apply to State party committees and State candidate committees that incorporate under 26 U.S.C. 527(e)(1), provided that:

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

(B) The committee incorporated for liability purposes only;

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

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

* * * * *

5. In section 114.10, the section heading and paragraphs (a), (d), (e) and (g) are revised and paragraphs (h) and (i) are added to read as follows:

§ 114.10 Nonprofit corporations exempt from the prohibitions on making independent expenditures and electioneering communications.

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

* * * * *

(d) Permitted corporate independent expenditures and electioneering communications.

(1) A qualified nonprofit corporation may make independent expenditures, as defined in 11 CFR 100.16, without violating the prohibitions against corporate expenditures contained in 11 CFR part 114.

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

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

(e) Qualified nonprofit corporations; reporting requirements.

(1) Procedures for demonstrating qualified nonprofit corporation status.

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

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

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

the qualifying statement. The letter shall also certify that the corporation has the characteristics set forth in paragraphs (c)(1) through (c)(5) of this section. A corporation that does not have all of the characteristics set forth in paragraphs (c)(1) through (c)(5) of this section, but has been deemed entitled to qualified nonprofit corporation status by a court of competent jurisdiction in a case in which the same corporation was a party, may certify that application of the court's ruling to the corporation's activities in a subsequent year entitles the corporation to qualified nonprofit corporation status. Such certification shall be included in the letter submitted in lieu of the FEC form.

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

(A) This certification is due no later than the due date of the first electioneering communication statement required under paragraph (e)(2)(ii).

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

(2) Reporting independent expenditures and electioneering communications.

(i) Qualified nonprofit corporations that make independent expenditures aggregating in excess of $250 in a calendar year shall file reports as required by 11 CFR part 104.

(ii) Qualified nonprofit corporations that make electioneering communications aggregating in excess of $10,000 in a calendar year shall file statements as required by 11 CFR 104.14.

* * * * *

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

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

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

6. Section 114.14 is added to read as follows:

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

(a) (1) Corporations and labor organizations shall not give, disburse, donate or otherwise provide funds, the purpose of which is to pay for an electioneering communication, to any other person.

(2) A corporation or labor organization shall be deemed to have given, disbursed, donated, or otherwise provided funds under paragraph (a)(1) of this section if the corporation or labor organization knows, has reason to know, or ~~should know~~willfully blinds itself to the fact, that the person to whom the funds are given, disbursed, donated, or otherwise provided, intended to use them to pay for an electioneering communication.

(b) Persons who accept funds given, disbursed, donated or otherwise provided by a corporation or labor organization shall not:

(1) Use those funds to pay for any electioneering communication; or

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

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

(1) Salary, royalties, or other income earned from bona fide employment or other contractual arrangements, including pension or other retirement income;

(2) Interest earnings, stock or other dividends, or proceeds from the sale of the person's stocks or other investments; or

(3) Receipt of payments representing fair market value for goods provided or services rendered to a corporation or labor organization.

(d) (1) Persons who receive funds from a corporation or a labor organization that do not meet the exceptions of paragraph (c) of this section must be able to demonstrate through a reasonable accounting method that no such funds were used to pay any portion of an electioneering communication.

(2) Any person who wishes to pay for electioneering communications may, but is not required to, establish a segregated bank account into which it deposits only funds donated or otherwise provided by individuals, as described in 11 CFR part 104. Use of funds exclusively from such an account to pay for an electioneering communications shall satisfy paragraph (d)(1) of this section. Persons who use funds exclusively from such a segregated bank account to pay for an electioneering communication shall be required to only report the names and addresses of those individuals who donated or otherwise provided an amount aggregating $1,000 or more to the segregated bank account, aggregating since the first day of the preceding calendar year.

David M. Mason
Chairman
Federal Election Commission

DATED: _____

BILLING CODE: 6715-01-P