AGENDA DOCUMENT NO. 02-82

FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: The Commission

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SUBJECT: Draft Final Rules and Explanation and Justification on Disclaimers, Fraudulent Solicitations, Civil Penalties and Personal Use of Campaign Funds (BCRA "Other Provisions")

On August 29, 2002, the Commission published a notice of proposed rulemaking ("NPRM") entitled "Disclaimers, Fraudulent Solicitations, Civil Penalties and Personal Use of Campaign Funds." See 67 Fed. Register 55,348. Written comments were received on the proposed rules but no public hearing was held.

After reviewing the written comments received in response to the proposed rules and discussing the issues with the Regulations Committee, the Office of the General Counsel has prepared for the Commission's consideration the attached draft Final Rules and Explanation and Justification. These draft Final Rules implement BCRA's provisions on: 1) disclaimer requirements for campaign communications; 2) fraudulent misrepresentations for purposes of soliciting contributions and donations; 3) increased civil

penalties for violations involving contributions made in the name of another; and 4) permissible uses of campaign funds by candidates and Federal officeholders. All additions to and deletions and changes from the text of the current rules have been indicated by double underlining and strikethroughs.

OGC is also submitting the attached companion memorandum to the draft Final Rules. The memorandum addresses an alternative resolution of the issue of whether, under the personal use regulations, candidates may receive salaries.

Recommendation

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

Attachments
Draft Final Rules and Explanation and Justification
Memorandum on Salaries

FEDERAL ELECTION COMMISSION

11 CFR Parts 100, 110, 111, and 113

[Notice 2002 - >>]

Disclaimers, Fraudulent Solicitation, Civil Penalties, and Personal Use of Campaign Funds

AGENCY: Federal Election Commission.

ACTION: Final rules and transmittal of regulations to Congress.

SUMMARY: The Federal Election Commission is issuing final rules regarding disclaimers in political communications, fraudulent solicitations, civil penalties, personal use of campaign funds, and a technical amendment under the Federal Election Campaign Act of 1971, as amended ("FECA" or "the Act"). The final rules implement portions of the Bipartisan Campaign Reform Act of 2002 ("BCRA") that govern new requirements for disclaimers accompanying radio, television, print, and other campaign communications, expand the FECA's fraudulent misrepresentation prohibition, increase the FECA's civil penalties for violating the prohibition on contributions made in the name of another, and codify the "irrespective" test regarding the personal use of campaign funds by candidates and Federal office holders. The Commission had planned to address BCRA-related rules for inaugural committees in this rulemaking; however, inaugural committees will now instead be addressed in a future rulemaking. Further information is provided in the supplementary information that follows.

DATES: January 2, 2003

FOR FURTHER INFORMATION CONTACT: Mr. John C. Vergelli, Acting Assistant General Counsel, or Attorneys, Ms. Ruth Heilizer (personal use), Ms. Dawn Odrowski (fraudulent solicitations and civil penalties), or Mr. Richard Ewell (disclaimers), 999 E Street, N.W., Washington, D.C., 20463, (202) 694-1650 or (800) 424-9530.

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

Section 402(c)(1) of BCRA establishes a general deadline of 270 days for the Commission to promulgate regulations to carry out BCRA, which is December 22, 2002. The final rules do not apply with respect to runoff elections, recounts, or election contests resulting from the November 2002 general election. 2 U.S.C. 431 note.

Because of the brief period before the statutory 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 published in the Federal Register on August 29, 2002. 67 Fed. Register 55,348 (Aug. 29, 2002). Thirteen written comments were received. The names of the commenters and their comments are available at

http:www.fec.gov/register.htm under "Disclaimers, Fraudulent Solicitation, Civil Penalties, and Personal Use of Campaign Funds." A public hearing was not held.

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 disclaimers, fraudulent solicitation, civil penalties, and personal use of campaign funds were transmitted to Congress on November >>, 2002.

Explanation and Justification

Introduction

These final rules address changes to: disclaimer requirements for campaign communications (2 U.S.C. 441d); fraudulent misrepresentations for purposes of soliciting contributions or donations (2 U.S.C. 441h); civil penalties for a particular knowing and willful violation of FECA (2 U.S.C. 437g); permissible uses of campaign funds by candidates and officeholders (2 U.S.C. 439a); and a technical amendment to the definition of "Act" to include BCRA amendments to FECA.

11 CFR 100.18 Act (2 U.S.C. 431(19)).

Pre-BCRA, 11 CFR 100.18 defined "Act" to mean the Federal Election Campaign Act as amended by the 1974, 1976, and 1980 amendments. The final rules amend this definition to include the amendments to FECA within the Bipartisan Campaign Reform Act.

11 CFR 110.11 Communications; advertising; disclaimers (2 U.S.C. 441d).

Under section 441d of the Act, certain communications must include disclaimers identifying who paid for and, where applicable, who authorized the communication. In BCRA, Congress added new specificity to these requirements, expanded the disclaimer requirement to reach disbursements to finance "any communication" made by political committees, and required that "electioneering communications" include disclaimers. See 2 U.S.C. 441d. Congress also enacted "stand by your ad" requirements for certain radio and television communications. 2 U.S.C. 441d(d).

The Commission is implementing these statutory changes by deleting pre-BCRA 11 CFR 110.11 in its entirety, and adopting a new section 110.11 that is organized into a more easily understandable rule. As explained in detail below, revised section 110.11 incorporates many substantive provisions from the pre-BCRA version of the section.

11 CFR 110.11(a) Scope.

Paragraph (a) sets out the scope of the section by specifying which communications must carry disclaimers. Under 2 U.S.C. 441d(a), as amended by Congress through BCRA section 311, disclaimers are required whenever a person makes a disbursement for an electioneering communication, whenever a political committee makes a disbursement for the purpose of financing "any communication through any broadcasting station, newspaper, magazine, outdoor advertising facility, mailing, or any other type of general public political advertising," or whenever any person makes a disbursement for the purpose of financing "communications expressly advocating the election or defeat of a clearly identified candidate, or solicits any contribution through any broadcasting station, newspaper, magazine, outdoor advertising facility, mailing, or any other type of general public political advertising." The descriptive list of

"through any broadcasting station, newspaper, magazine, outdoor advertising facility, mailing, or any other type of general public political advertising" is similar to the language used by Congress in BCRA to describe a "public communication," as defined in 2 U.S.C. 431(22). See also 11 CFR 100.26 (67 Fed. Register 49, 111 (July 29, 2002)). The two descriptive lists differ in three respects. First, a "public communication" covers "any broadcast, cable, or satellite transmission," whereas section 441d(a) refers only to "any broadcasting station." Second, a "public communication" includes a "telephone bank to the general public," as defined in 2 U.S.C. 431(24), whereas telephone banks are not specifically mentioned in section 441d(a). Third, a "public communication" includes a "mass mailing," which is defined as more than 500 pieces of substantially similar mail. 2 U.S.C. 431(22), (23). Section 441d(a) refers to a "mailing," without any numerical minimum. Congress, through BCRA, removed the pre-BCRA reference to a "direct mailing" (emphasis added).

The Commission noted in the NPRM that the 2 U.S.C. 441d(a) references to "communication" share a fundamental similarity with the definition of "public communication" (2 U.S.C. 431(22)) in that both contain the virtually identical and broadly inclusive phrase, "or any other type [form] of general public political advertising," to describe what is encompassed by the respective definitions.[1] Because of the inclusion of this virtually identical phrase, the Commission interprets each term listed in the definition of "public communication" or in 2 U.S.C. 441d(a) as a specific example of one form of "general public political advertising." In other words, the universe of "general public political advertising," as it has been functionally defined by Congress through both the definition of "public communication" and in section

[1] Section 431(22) uses the word "form," while section 441d(a) uses the word "type;" the Commission discerns no substantive differences arising from the choice of synonyms.

441d(a), encompasses all the terms explicitly included by Congress, in addition to other potential forms of general public political advertising not specifically listed. As the Commission explained in the NPRM, this interpretation means that the communications described in section 441d(a) have the same meaning as "public communications," as defined in 2 U.S.C. 431(22). Thus, under 441d(a), the Commission concludes that disclaimers are required when any person or political committee makes a disbursement for a public communication, subject to the additional requirements, restrictions, and exceptions set forth below.

The Commission sought comment on whether the description of "communication," in 2 U.S.C. 441d(a) should be equated with the term "public communication," as defined in 2 U.S.C. 431(22). The Commission noted that one effect of using the consistent terminology of "public communication" to describe the 2 U.S.C. 441d(a) communications would be that "telephone banks to the general public" would be subject to the disclaimer requirements. Another effect of using the consistent terminology of "public communication" would be to harmonize the meaning of "mailing" with "mass mailing," and the coverage of "any broadcasting station" with "any broadcast, cable, or satellite transmission."

The Commission received two comments on this issue. Both commenters argued that the terms "public communication" and "communication," as used in the section 441d(a) context, should be treated as distinct terms with separate definitions. One commenter, advised against any interpretation that would have the effect of making the disclaimer requirements applicable to telephone banks. That commenter asserted that the existence of several state laws limiting or prohibiting taped phone messages are already sufficient to deter abuse in this area, and disclaimer requirements would only serve to chill speech.

The Commission does not agree with this commenter that state laws regarding taped calls

are sufficient to supplant the statutory disclaimer requirement, even in those few states that do have laws limiting taped calls. Requiring a caller to identify himself or herself serves important disclosure functions consistent with Congressional intent to broaden the reach of the previous laws regarding disclaimers and would likely complement state laws limiting the use of taped calls.

The other commenter stated that treating the term "communication" in 2 U.S.C. 441d(a) the same as "public communication" would "conflate and confuse two separate concepts that Congress established to meet two distinct purposes." That commenter also asserted that the inclusion of other forms of "general public political advertising" does not indicate that the two terms share the same meaning. The commenter supported this assertion by citing to the Commission's previous explanation that "general language following a listing of specific terms ... does not evidence Congressional intent to include a separate and distinct term that is not listed ...." See Final Rules and Explanation and Justification, "Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money," 67 Fed. Register at 49,072 (July 29, 2002).

The Commission notes that its prior statement cited by the commenter was made in the context of a decision not to include Internet communications within the definition of "public communication." Unlike the term "telephone bank to the general public" and the other terms listed in the BCRA definition of "public communication," communications over the Internet were not specifically listed as one of the forms of "general public political advertising." But while general language following a list of specific terms may not, by itself, provide sufficient evidence of Congressional intent, the Commission believes that such intent can be found where Congress has provided additional guidance as to the proper interpretation of that general language elsewhere in the same statute. In the Commission's judgment, the use of the phrase "or

any other type [form] of general public political advertising," which is used in BCRA only in the two locations specified above,[2] should be interpreted in an identical manner. Therefore, each form of communication specifically listed in the definition of "public communication," as well as each form of communication listed with reference to a "communication" in 2 U.S.C. 441d(a), must be a form of "general public political advertising." To include the term "telephone bank to the general public" within the meaning of "general public political advertising" in one part of the statute but not the other would be to provide two different meanings to the term "general public political advertising." Rather than conflating and confusing two separate concepts, the Commission is establishing a consistent meaning from the repeated use of a single statutory phrase in order to promote simplicity and symmetry between the various statutory provisions and within the regulations. Accordingly, Internet communications, already exempt from the definition of "public communication" (see 11 CFR 100.26), are likewise exempt from the definition of "communication" in 2 U.S.C. 441d(a).

Therefore, the Commission, in paragraph 11 CFR 110.11(a), provides that disclaimers are required for all public communications, as defined in 11 CFR 100.26, that are paid for by a political committee or any person. The Commission is interpreting the scope of the communications in 2 U.S.C. 441d(a) to be the same as the scope of the "public communications" in 2 U.S.C. 431(22) and is implementing section 441d(a) accordingly. This approach also incorporates Congressional intent, apparent in 2 U.S.C. 441d(d), to regulate communications by radio and television, and the Commission's judgment that it would be unsupportable to require a

[2] Definition of "public communication" in BCRA section 101 (2 U.S.C. 431(22)) and with reference to the scope of the disclaimer provisions in BCRA section 311 (2 U.S.C. 441d(a).)

disclaimer for a television communication that was broadcast, while not requiring a disclaimer for the same communication merely because it was carried on cable or satellite. It is also consistent with other uses (or proposed uses) of the term "public communication" in its regulations. The Commission has used the term "public communication" to clarify the definition of "generic campaign activity,"[3] see 11 CFR 100.25, and has proposed the use of "public communication" in a separate and ongoing rulemaking to describe communications that may be coordinated with a candidate, authorized committee, or political party committee. See proposed 11 CFR 109.21(c) and 109.37(a)(2), Notice of Proposed Rulemaking on Coordinated and Independent Expenditures, 67 Fed. Register 60,042, 60,065 and 60,068 (Sept. 24, 2002).

In addition, by employing the term "public communication" in the section 110.11 disclaimer rules, the Commission avoids assigning different meanings to the term "mailing" in 2 U.S.C. 441d(a) and "mass mailing," the term used in the definition of "public communication" and defined by Congress in BCRA as more than 500 pieces of substantially similar mail. See 2 U.S.C. 431(23). In BCRA, Congress amended 2 U.S.C. 441d(a)(1) by removing the adjective "direct" from the pre-BCRA term "direct mailing," thereby removing a term that had been defined differently than the BCRA definition of "mass mailing." In the NPRM in this rulemaking, however, the Commission proposed a definition of the term "mailing" for purposes of the disclaimer requirements that would have treated "mailing" differently than the term "mass mailing." The Commission has reconsidered this separate definition of "mailing" in light of its efforts to promote simplicity and symmetry within its regulations. Both "mass mailing" and

[3] Congress defined "generic campaign activity" in BCRA as a "campaign activity that promotes a political party and does not promote a candidate or non-Federal candidate. Pub. L. 107-155, sec. 101 (March 27, 2002) (emphasis added).

"mailing" are examples of "general public political advertising," as set forth in the definition of "public communication" at 2 U.S.C. 431(22) and at 2 U.S.C. 441d(a). Congress did not provide a separate definition of "mailing." Therefore, in the Commission's judgment, the statutory term "mailing" used in 2 U.S.C. 441d(a) should not be given a separate meaning from "mass mailing" in the Commission's regulations. As a result, disclaimers would not be required for mailings unless the mailings are comprised of more than 500 pieces of substantially similar mail. See 2 U.S.C. 431(23).

Paragraphs (a)(1) through (4) of the final rules in 11 CFR 110.11 enumerate the particular types of such communications to which the disclaimer requirements apply. For the reasons described above and unless otherwise specified, the term "communications" is used in the preceding sentence and the remainder of the narrative below as a shorthand reference that encompasses both "public communications" and "electioneering communications." Throughout revised section 110.11, the word "type" is used, rather than "form," as in the pre-BCRA version of the regulation. This change has no substantive effect and only serves to conform the regulation to the language of the statute. See 2 U.S.C. 441d; see also 11 CFR 100.27. Disclaimers will also not be required for communications over the Internet, including electronic mail. See 11 CFR 100.26 and 100.27.

In BCRA, Congress provided that "any communication" for which a political committee makes a disbursement must include a disclaimer, expanding the scope of the disclaimer requirement for political committees beyond communications constituting express advocacy and communications soliciting contributions. Compare pre-and post-BCRA versions of 2 U.S.C. 441d(a). Revised paragraph (a)(1) of section 110.11 reads, "[a]ll such communications for which a political committee makes a disbursement," with the qualifier "such" clarifying that only

communications by a political committee through one or more of the media enumerated in the first sentence of paragraph (a)(1) must have a disclaimer.

In contrast, revised paragraph (a)(2) of section 110.11 requires that "[a]ll such communications by any person that expressly advocate the election or defeat of a clearly identified candidate" must include a disclaimer. 2 U.S.C. 441d(a). The revised rule does not substantively change the disclaimer requirement for express advocacy communications from the pre-BCRA version of the regulation because BCRA does not alter the reach of the disclaimer requirements for persons that are not political committees, except with regard to electioneering communications (see below).

Similarly, paragraph (a)(3) of section 110.11 requires "[a]ll such communications by any person" that solicit a contribution to include a disclaimer. 2 U.S.C. 441d(a). Here, too, the revised rule does not change the disclaimer requirement for solicitations from the pre-BCRA version of the rule because BCRA makes no changes in this regard..

Congress amended 2 U.S.C. 441d(a) to require that "electioneering communications" include disclaimers. In paragraph (a)(4) of section 110.11, the Commission requires that "[a]ll electioneering communications by any person" include a disclaimer. The term "electioneering communication" is defined in 11 CFR 100.29(a). See Electioneering Communications Final Rules and Explanation and Justification 67 Fed. Register 65190 (Oct. 23, 2002).

The Internal Revenue Service ("IRS") commented generally on the scope of the Commission's proposed rules and found no direct conflict with the Internal Revenue Code or the regulations thereunder. The IRS noted that the Commission proposed at 11 CFR 110.11(a)(1)(iii) to require a disclaimer statement for all types of "general public political advertising" by any person soliciting contributions. The IRS also requested that for the benefit

of tax-exempt organizations the Commission should restate certain requirements of section 6113 of the Internal Revenue Code (26 U.S.C. 6113). The IRS stated that section 6113 provides that certain tax-exempt organizations that are not eligible to receive tax deductible charitable contributions, and whose gross annual receipts normally exceed $100,000, must disclose in an "express statement (in a conspicuous and easily recognizable format)" that contributions to the organization are not deductible for Federal income tax purposes as charitable contributions. This provision applies to organizations that are not eligible to receive deductible charitable contributions and are described in either section 501(c), section 501(d), or section 527. The Internal Revenue Service issued Notice 88-120 to provide safe harbors for meeting the requirements of section 6113.

11 CFR 110.11(b) General content requirements

Paragraph (b) of section 110.11 sets out the general content requirements for disclaimers, depending on who paid for the communication and, where applicable, who authorized the communication. Pre-BCRA paragraphs (a)(1)(i) and (ii) of section 110.11, which applied to communications authorized and paid for by a candidate and communications authorized by a candidate but paid for by another person, respectively, are redesignated as paragraphs (b)(1) and (2) in the revised regulation, respectively, without substantive revision.

Paragraph (b)(3) of section 110.11 applies to a communication, including any solicitation, that is not paid for or authorized by a candidate. The provisions of pre-BCRA 11 CFR 110.11(a)(1)(iii) are replaced with paragraph (b)(3), with one substantive change. In BCRA, Congress provided that a covered communication not authorized by a candidate, his or her authorized committees or agents must have a disclaimer that includes the "permanent street address, telephone number, or World Wide Web address" of the person who paid for the

communication. 2 U.S.C. 441d(a)(3). Similar language is being added in paragraph (b)(3).

The Commission is not including pre-BCRA 11 CFR 110.11(a)(1)(iv) in revised section 110.11. This paragraph applied to "solicitations directed to the general public on behalf of a political committee which is not an authorized committee of a candidate" and required that these solicitations state the name of the person who paid for the communication. In the NPRM, the Commission explained that pre-BCRA paragraph (a)(1)(iv) appeared to be redundant with paragraph (b)(3), see above, which also requires communications not authorized by a candidate, including solicitations, to state the name of the person who paid for the communication. Consequently, the Commission proposed deleting pre-BCRA paragraph (a)(1)(iv). Given that Congress amended 2 U.S.C. 441d(a) to extend the disclaimer requirements to apply "whenever a political committee makes a disbursement for the purpose of financing any communication," and given that Congress did not create a specific exception for solicitations by unauthorized committees, the Commission is not retaining the exception for authorizations in solicitations even though an authorization statement was not required by pre-BCRA 11 CFR 110.11(a)(1)(iv).

11 CFR 110.11(c) Disclaimer specifications

A. Specifications for all disclaimers

In BCRA, Congress created a number of specific requirements for disclaimers to be included in communications covered by the statute. These statutory requirements vary, depending on whether the communication is printed or broadcast through radio or television, and on whether a candidate or another person pays for the communication. 2 U.S.C. 441d(c), (d). Paragraph (c) combines the disclaimer requirements in pre-BCRA 11 CFR 110.11(a)(5) with the new requirements Congress added in BCRA.

Paragraph (c)(1) sets forth a general, "clear and conspicuous" requirement applicable to all disclaimers, regardless of the medium in which the communication is transmitted. Paragraph (c)(1) is a slightly revised version of the "clear and conspicuous" requirement in pre-BCRA 11 CFR 110.11(a)(5). The final sentence of paragraph (c)(1) provides that a disclaimer is not clear and conspicuous if it is difficult to read or hear, or if its placement is easily overlooked. This modifies the corresponding pre-BCRA provision, which was focused on print communications only, by generalizing it to apply to communications made through other media as well. This generalization is justified by BCRA's revision to section 441d, which broadened the scope of the statute. No commenters addressed this paragraph.

B. Specific requirements for printed communications

Several of the specific disclaimer requirements added by BCRA apply only to printed communications. 2 U.S.C. 441d(c)(1). Paragraph (c)(2) of section 110.11 implements the new statutory specifications, and also incorporates three of the print-specific provisions of pre-BCRA 11 CFR 110.11.

One commenter suggested that the pre-BCRA disclaimer regulations work well and should not be changed except where required under BCRA. For the most part, the Commission agrees, but with the recognition that Congress has in fact required a number of changes in the disclaimer provisions through BCRA. For example, the pre-BCRA requirement that a disclaimer be "clear and conspicuous" was limited to printed communications. In BCRA, Congress added a new requirement that the disclaimer in a printed communication be of "sufficient type-size to be clearly readable by the recipient of the communication." 2 U.S.C. 441d(c)(1). Given the specificity of the statutory requirements added by BCRA, new paragraph (c)(2)(i) restates the "sufficient type size" requirement verbatim, while new paragraphs (c)(2)(ii) and (c)(2)(iii) also

precisely track 2 U.S.C. 441d(c)(2) and (3), respectively.

The Commission sought comment on whether the term "sufficient type size" requires additional clarification or a "safe harbor" provision. Three commenters responded and each stated that the Commission should provide some additional guidance or "safe harbor" in the form of an "objective" standard for type size. One commenter advocated a type-size requirement related to the smallest font size of a communication, but a different commenter warned that such a requirement could be easily circumvented by reducing the type-size of one sentence, or even one word, in the communication. Two commenters also expressed concerns that a type-size requirement based on the size of the largest font size in the communication would be "unworkable" or "overly complex." One commenter supported an approach that would set a fixed minimum type size.

The Commission shares the concerns expressed by the commenters regarding formulas fixed to the smallest or largest type size in a communication's core message text. However, the Commission is also reluctant to set one fixed minimum type size for all communications because a type size that can be easily read in a newspaper might be completely unreadable when included on a billboard or other large, printed communication. Therefore, in 11 CFR 110.11(c)(2)(i), the Commission is creating a "safe harbor" provision that establishes a fixed, twelve-point type size as a sufficient size for disclaimer text in newspapers, magazines, flyers, signs and other printed communications that are no larger than the common poster size of 24 inches by 36 inches. However, no specific safe harbor provision would apply to larger printed communications because the Commission concludes that the vast differences in the potential size and manner of display of larger printed communications would render fixed type-size examples ineffective and inappropriate. Whether a disclaimer on a larger printed communication is of sufficient type size

to be clearly readable is therefore to be determined on a case-by-case basis, taking into account the vantage point from which the communication is intended to be seen or read as well as the actual size of the disclaimer text.

Paragraph (c)(2)(ii) of section 110.11 specifies that the disclaimer included in printed communications must be contained within a printed box set apart from the other contents of the communication. 2 U.S.C. 441d(c)(2). Paragraph (c)(2)(iii) specifies that the text of the disclaimer must be printed with a reasonable degree of color contrast between the background and the printed statement. 2 U.S.C. 441d(c)(3). Both of these requirements apply regardless of the size of the printed material under paragraph (c)(2)(i).

In the NPRM, the Commission sought comment on whether the statutory phrase "reasonable degree of color contrast" should be further defined, and specifically whether the color contrast for the disclaimer notice should be related to the color contrast of the core message text. One commenter drew a distinction between the statutory requirement of color contrast between the "background and printed statement," 2 U.S.C. 441d(c)(3), and the Commission's suggestion in the narrative of the NPRM that a color contrast is required between the disclaimer text and the core message text. The Commission notes that color contrast between the disclaimer text and the core message text is not required by the statute, and is not required by the final rules. This should alleviate the commenter's concern that such an additional requirement might require three different colors (a background color, a core message text color, and a disclaimer text color), thereby effectively prohibiting simple black and white communications and possibly raising the cost for the communication. Therefore, paragraph (c)(2)(iii) addresses only the contrast between the text and background of a communication, and provides two "safe harbor" examples that, when followed, comply with the color-contrast requirement. First, paragraph (c)(2)(iii) specifies

that the color contrast requirement is met if the disclaimer is printed in black text on a white background. Second, paragraph (c)(2)(iii) specifies that the color contrast requirement is met if the degree of contrast between the background color and the disclaimer text color is at least as great as the degree of contrast between the background color and the color of the largest text in the communication. Please note that these two examples do not constitute the only ways to satisfy the color contrast requirements, and that they are safe harbors, not mandatory requirements. This approach is intended to provide a clear, flexible safe harbor that will ensure that the disclaimer does not blend in with the background of the communication any more than a headline or other key part of the core message text, and thereby providing certainty to persons making communications needing disclaimers.

Paragraphs (c)(2)(iv) and (v) incorporate pre-BCRA regulatory provisions specific to print communications. Paragraph (c)(2)(iv), to which the provisions of pre-BCRA paragraph (a)(5)(i) are redesignated without substantive revision, states that a disclaimer need not appear on the front or cover page of a communication, except for communications that only contain a front face, such as billboards. Paragraph (c)(2)(v), to which the provisions of pre-BCRA paragraph (a)(5)(ii) are redesignated without substantive change, states that a communication that would require a disclaimer if distributed separately, and that is included in a package of materials, must contain the required disclaimer.

C. Specific requirements for radio and television communications that are authorized by candidates

In BCRA, Congress added new requirements for disclaimers in radio and television communications paid for by candidates or persons authorized by candidates. 2 U.S.C. 441d(d)(1). Paragraph (c)(3) implements these specific statutory requirements as described

below.

Paragraph (c)(3)(i) tracks the new statutory language requiring that a communication that is paid for or authorized by a candidate or the candidate's authorized committee and transmitted through radio must include an audio statement spoken by the candidate himself or herself. 2 U.S.C. 441d(d)(1)(A). The statement must identify the candidate, and state that the candidate has approved the communication. Id.

Likewise, paragraphs (c)(3)(ii) tracks the new statutory language requiring that a communication that is paid for or authorized by a candidate or the candidate's authorized committee and transmitted through television have an oral disclaimer spoken by the candidate himself or herself. 2 U.S.C. 441d(d)(1)(B). The provision requires the candidate to identify himself or herself, and to state that he or she has approved the communication. In addition, Congress specified that the candidate must convey that message in one of two ways: through a full-screen view of the candidate making the statement or through a "clearly identifiable photographic or similar image of the candidate" that appears during the candidate's voice-over statement. Paragraph (c)(3)(ii)(A) sets forth the first option, while paragraph (c)(3)(ii)(B) sets forth the second option and provides additional guidance regarding the meaning of "clearly identifiable." The only commenter who specifically addressed this issue suggested that the picture of the candidate should only be considered "clearly identifiable" if it is displayed in a full-screen view. However, the Commission notes that although Congress specifically required a full-screen view when the candidate is shown making the statement, Congress did not require a full-screen view for the still picture. The Commission views this as an intentional distinction that contemplated an alternative to the full-screen view. Therefore, the Commission is establishing a safe harbor provision whereby a still picture of the candidate shall be considered

"clearly identifiable" if it occupies at least 80% of the vertical screen height. That size is, in the Commission's judgment, a meaningful alternative to the full-screen requirement, and complies with Congress's mandate that the picture be "clearly identifiable."

Congress also established a third disclaimer requirement for communications paid for or authorized by a candidate and transmitted through television. In addition to the oral statement described above, each television communication must contain a "clearly readable" written statement that appears at the end of the communication "for a period of at least four seconds" with a "reasonable degree of color contrast" between the background and the disclaimer statement. See 2 U.S.C. 441d(d)(2)(B)(ii). These statutory requirements are implemented in new 11 CFR 110.11(c)(3)(iii).

The pre-BCRA regulations provided that a written disclaimer appearing on the screen of a television communication "shall be considered clear and conspicuous if [it] appear[s] in letters equal to or greater than four (4) percent of the vertical picture height for not less than four (4) seconds." Pre-BCRA 11 CFR 110.11(a)(5)(iii). Two commenters urged the Commission to retain the four-percent height provision as a "safe harbor." However, the new Congressional color-contrast requirement in 2 U.S.C. 441d(d)(2)(B)(ii) renders the pre-BCRA "safe harbor" incomplete because the four-percent-for-four-seconds provision does not address color contrast.

The Commission is therefore setting forth the statutory "clearly readable" requirement in paragraph 11 CFR 110.11(c)(3)(iii) and is employing the same four percent height provision and the four-second duration provision as two of the three specific criteria that will determine whether a statement is "clearly readable." Rather than providing a "safe harbor," paragraphs 11 CFR 110.11(c)(3)(iii)(A), (B), and (C) provide, respectively, that the statement will not be considered "clearly readable" unless it appears in letters equal to or greater than four percent of

the vertical picture height, it appears for at least four seconds, and the statement contains a reasonable degree of color contrast with the background.

Paragraph (c)(3)(iii)(B) sets forth the four-second duration requirement in accordance with the BCRA language. 2 U.S.C. 441d(d)(1)(B).

Paragraph 11 CFR 110.11(c)(3)(iii)(C) addresses the new color contrast requirement in BCRA, which is the third criterion used to determine whether a statement is clearly readable. Because the statute did not define "reasonable degree of color contrast," the Commission requested comment on several different approaches. To continue the same "safe harbor" approach of pre-BCRA paragraph (a)(5)(iii), the regulations would have to describe "reasonable degree of color contrast" in an objective manner. The same commenter who addressed the color contrast issue in the context of printed communications also suggested that the Commission avoid overly complicated or cost-incurring definitions of "reasonable degree of color contrast" in the context of television communications. For the same reasons stated above with reference to the color contrast requirements for printed communications, the Commission is providing "safe harbors" for disclaimers that are printed in black text on a white background, as well as disclaimers that have at least the same degree of contrast with the background color as the degree of contrast between the background color and the color of the largest text used in the communication. 11 CFR 110.11(c)(3)(iii)(C). Either of these disclaimer formats would satisfy the color-contrast requirement, which is the third criterion used to determine whether the statement is "clearly readable."

The Commission received no comments on the two proposed examples of spoken disclaimers that, if used by a candidate, will satisfy the requirements of paragraphs (c)(3)(i), (ii) and (iii). These examples, located in paragraph (c)(3)(iv), are not mandatory and are not the only

acceptable disclaimers. Paragraph (c)(3)(iv) is intended to provide a clear "safe harbor" for candidates, authorized committees, and others required to include disclaimers in communications.

D. Specific requirements for radio and television communications paid for by other persons and not authorized by candidates

In BCRA, Congress set forth a scripted audio statement required for disclaimers in communications transmitted through radio or television and paid for by persons other than candidates or persons authorized by candidates. 2 U.S.C. 441d(d)(2). New paragraph (c)(4) tracks the statutory language by requiring the name of the political committee or other person responsible for the communication and any connected organization to be included in the communication. "Connected organization" is defined in 11 CFR 100.6. Paragraph (c)(4) also requires that communications transmitted through a telephone bank, as defined in 11 CFR 100.28, carry the same statement. See discussion regarding the inclusion of telephone banks within the term "public communication," above, and the discussion of specific requirements for radio, telephone bank, and television communications authorized by candidates, above. The scripted statement is: "XXX is responsible for the content of this advertising." 2 U.S.C. 441d(d)(2).

Furthermore, in the case of a television transmission, Congress required that the statement be conveyed by a "full-screen view of a representative of the political committee or other person making the statement," or in a "voice-over" by such representative. 2 U.S.C. 441d(d)(2). The Commission sought comment on whether the regulation should specify who may represent the payor for this purpose. One commenter urged the Commission to require an officer of the organization to make the statement, rather than a volunteer or paid celebrity. In

contrast, another commenter argued that any restriction on who could make the statement "would far exceed the scope of BCRA," which allows a "representative of the committee or other person" to make the statement. See 2 U.S.C. 441d(d)(2) (emphasis added). The Commission agrees with the latter commenter that the statute does not appear to contemplate any additional restrictions on the choice of the person making the disclaimer statement. Furthermore, the Commission sees no reason to remove additional flexibility where the plain emphasis of the relevant statutory provision is the content and conspicuousness of the disclaimer, not the individual speaking those words. The Commission also notes that where Congress clearly intended that a specific person convey the disclaimer message for an authorized radio or television communication, it did so explicitly by providing that the candidate must make the statement. Compare 2 U.S.C. 441d(d)(1) with 2 U.S.C. 441d(d)(2). Thus, 11 CFR 110.11(c)(4)(ii) does not include any specific limitation regarding who must speak the required message. In addition, unlike the requirements for television communications authorized by candidates, the audio statement required for television communications that are not authorized by candidates can be accomplished through voice-over without any requirement of a photograph or similar representation of the speaker.

Finally, as with authorized television communications, the disclaimer statement for a television communication that is not authorized by any candidate must also appear in writing at the end of the communication in a clearly readable manner with a reasonable degree of color contrast between the background and the printed statement for a period of at least four seconds. 2 U.S.C. 441d(d)(2). Paragraphs 11 CFR 110.11(c)(4)(iii)(A), (B), and (C) are therefore identical to 11 CFR 110.11(c)(3)(iii)(A), (B), and (C). See above explanation of 11 CFR 110.11(c)(3)(iii).

11 CFR 110.11(d) Coordinated and Independent Expenditures by Political Party Committees

Paragraph (d) of section 110.11 covers disclaimers for communications that constitute coordinated party expenditures and independent expenditures by national, state, district, and local political party committees. The relevant pre-BCRA provisions of 11 CFR 110.11(a)(2) are being redesignated as paragraph (d)(1), with one minor grammatical change and without substantive change.

Although the Commission did not propose any significant substantive changes for disclaimer requirements related to coordinated party expenditures, one commenter expressed concern that a communication paid for by a political party committee with funds subject to the 2 U.S.C. 441a(d) coordinated expenditure limits would, solely by virtue of being a 2 U.S.C. 441a(d) coordinated expenditure, be considered to be "authorized" communications subject to the requirements of 11 CFR 110.11(c)(3). The Commission does not intend such a result and believes that such an interpretation would be contrary to its longstanding policy of permitting political party committees to avail themselves of the 2 U.S.C. 441a(d) limits, both before and after a party's primary, without any showing of candidate authorization or actual "coordination" with a candidate. See "Party Expenditures vs. Contributions: Similarities," Campaign Guide for Political Party Committees at p.16 (1996) ("It is up to the party committee to decide.") Therefore, the Commission is adding new paragraph (d)(2) to 11 CFR 110.11 to make it clear that a communication paid for by a political party committee through a section 441a(d) expenditure will not be considered to be authorized by a candidate solely by virtue of using the funds subject to the section 441a(d) limits. 11 CFR 110.11(d)(3). Please note, however, that while this clarification recognizes a political party committee's freedom to characterize its

payment as a "coordinated expenditure" even when no actual coordination occurred, the communication could be considered authorized by a candidate (and would therefore require an authorization statement to that effect) as the result of some other factor, such as if the communication is actually coordinated with a candidate under 2 U.S.C. 441a(a)(7)(B)(i).

Paragraph (d)(3) covers communications that constitute independent expenditures by political party committees. It states that the disclaimer provisions apply to such communications, and that a "non-authorization notice" is required, as with any other independent expenditure communication. See pre-BCRA 11 CFR 109.3 and proposed 11 CFR 109.10(e) (as proposed in a separate Notice of Proposed Rulemaking on Consolidated Reporting, 67 Fed. Register 64,555 (October 21, 2002).)

11 CFR 110.11(e) Exempt activities

The Commission is redesignating the provisions of pre-BCRA 11 CFR 110.11(a)(4), pertaining to communications that qualify as "exempt activities," as paragraph (e) of section 110.11. In the NPRM, the Commission proposed to make only minor, non-substantive revisions. 67 Fed. Register 55,351. Although not so expressly stated in the NPRM, the Commission based this proposal on the tentative conclusion that Congress did not intend, in BCRA, to overturn the Commission's longstanding approach to disclaimers for exempt activities. The Commission received no comments on this proposal.

The Commission has concluded that no substantive revisions are necessary. The Commission has, however, rewritten the paragraph to make it clear that public communications that constitute exempt activities are covered by the requirements of paragraphs (a), (b), (c)(1), and (c)(2) of section 110.11, but are not subject to the new "stand by your ad" requirements in

paragraphs (c)(3) and (c)(4) of section 110.11. This revision is not intended to change the rule substantively; rather, it is only intended to clarify the rule in light of the new provisions added by BCRA.

11 CFR 110.11(f) Exceptions

Exceptions to the disclaimer requirements are set out in paragraph (f). The exceptions in pre-BCRA paragraphs (a)(6)(i), (ii), and (iii) are being redesignated as paragraphs (f)(1)(i), (ii), and (iii), respectively, with only grammatical, non-substantive revision.

The Commission is incorporating the provisions of pre-BCRA 11 CFR 110.11(a)(7), regarding certain communications by a separate segregated fund or its connected organization, in paragraph (f)(2), because this provision is essentially an exception. In addition, in paragraph (f)(2), the word "form" is being changed to "type." This change has no substantive effect, and is being done only to conform to the language of the statute. See 2 U.S.C. 441d(a). In addition, the reference "general public political advertising" in pre-BCRA 11 CFR 110.11(a)(7) is replaced with a reference to a "public communication." 11 CFR 110.11(f)(2). No commenters addressed this provision.

11 CFR 110.11(g) Comparable Rate for Campaign Purposes

Paragraph (g) of section 110.11 continues the pre-BCRA rule pertaining to comparable rates for print advertising. That is, the contents of pre-BCRA 11 CFR 110.11(b) are being redesignated as paragraph (g). Other than the addition of a heading for the paragraph, there are no revisions to the pre-BCRA rule. Paragraph (g) tracks 2 U.S.C. 441d(b), as did its pre-BCRA predecessor. No commenters addressed this provision.

11 CFR 110.16 Prohibitions on fraudulent misrepresentations

BCRA adds a subsection to the fraudulent misrepresentation statute at 2 U.S.C. 441h. The new provision, 2 U.S.C. 441h(b), prohibits a person from fraudulently misrepresenting that the person is speaking, writing or otherwise acting for, or on behalf of, a Federal candidate or political party, or an employee or agent of either, for the purpose of soliciting contributions or donations. It also prohibits persons from participating in, or conspiring to participate in, plans, schemes, or designs to make such fraudulent misrepresentations in soliciting contributions and donations. BCRA also non-substantively amends the existing fraudulent misrepresentation statute by redesignating it as subsection (a) of 2 U.S.C. 441h. The regulation implementing this provision, together with the pre-BCRA fraudulent misrepresentation regulation formerly found at 11 CFR 110.9(b),[4] is combined in new 11 CFR 110.16.

The pre-BCRA fraudulent misrepresentation provision, now codified at 2 U.S.C. 441h(a), is aimed at fraudulent misrepresentation of campaign authority. For additional background, see Legislative History of Federal Election Campaign Act Amendments of 1974 at 521. The statute prohibits a candidate, his or her employee or agent, or an organization under the candidate's

[4] Another BCRA rulemaking amended 11 CFR 110.9, formerly entitled "Miscellaneous Provisions," to address only violations of the contribution limits and was re-titled accordingly. See Final Rules and Explanation and Justification for Contribution Limitations and Prohibitions, 67 Fed. Register >>>>> (Nov. 19, 2002). Other provisions previously addressed in 11 CFR 110.9 include fraudulent misrepresentation, price index increase and voting age population. This rulemaking redesignates and amends the fraudulent misrepresentation provision. The "Contribution Limitations and Prohibitions" rulemaking redesignates and amends the price index increase provision. See id. A third BCRA rulemaking project entitled "Coordination and Independent Expenditures" proposes to redesignate and amend the voting age population provision. See NPRM at 67 Fed. Register 60,042, 60,060 (Sept. 24, 2002).

control, from purporting to speak, write, or act for another candidate or political party on a matter that is damaging to the other candidate or party. Section 441h(a) encompasses, for example, a candidate who distributes letters containing statements damaging to an opponent and who fraudulently attributes them to the opponent. The Commission has determined that "on a matter that is damaging" includes actions or spoken or written communications that are intended to suppress votes for the candidate or party who has been fraudulently misrepresented. A violation of section 441h(a) does not depend on whether the candidate or party who is fraudulently represented goes on to win an election. While the precise harm may be difficult to quantify, harm is presumed from the nature of the communication. Proof of financial damages is unnecessary.

Because the language and purpose of the pre-BCRA misrepresentation statute encompasses only misrepresentations by a candidate or the candidate's employee or agent, the Commission has historically been unable to take action in enforcement matters where persons unassociated with a candidate or candidate's authorized committee have solicited funds by purporting to act on behalf of a specific candidate or political party. Candidates have complained that contributions that contributors believed were going to benefit the candidate were diverted to other purposes, harming both the candidate and contributor. Consequently, the Commission has frequently included in its annual legislative recommendations to Congress a recommendation that 2 U.S.C. 441h be amended to specifically prohibit any person from fraudulently misrepresenting a candidate or political party in solicitations. See Federal Election Commission Annual Reports for 2000 at 39, for 1999 at 47-48, for 1998 at 52, and 1997 at 47. BCRA's prohibition on fraudulent solicitations of contributions and donations implements those

legislative recommendations. 2 U.S.C. 441h(b); see 148 Cong. Rec. S3122 (daily ed. March 29, 2001) (statement of Sen. Nelson).

The Commission received one comment on the proposed rules to implement BCRA's fraudulent solicitation provision and to redesignate the pre-BCRA fraudulent misrepresentation rule. The commenter expressed support for combining these two provisions in a new rule. The commenter agreed that an anti-fraud provision aimed at fraudulent fundraising and applicable to a broader range of persons was needed.

The final rule at 11 CFR 110.16(a) remains unchanged from the proposed rule in the NPRM. Paragraph (a) amends the pre-BCRA fraudulent misrepresentation regulation, formerly found at 11 CFR 110.9(b), by adding the title, "In general." This change follows BCRA, which added a similar heading to section (a) of 2 U.S.C. 441h. Technical amendments also make the wording of paragraph (a) gender-neutral. Finally, paragraph (a)(2) has been amended from the pre-BCRA rule to include the word "scheme" so that it tracks the statute.

The final rule at 11 CFR 110.16(b) tracks the statutory language in BCRA. No changes are being made from the proposed rule. Paragraph (b)(1) prohibits a person from fraudulently misrepresenting that the person speaks, writes, or otherwise acts for or on behalf of a candidate, political party, or an employee or agent of either, in soliciting contributions or donations. As used in section 110.16(b)(1), "donation" has the same meaning as in 11 CFR 300.2(e). See Final Rules for Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed. Register 49,064, 49,122 (July 29, 2002). Paragraph (b)(2) prohibits a person from willfully and knowingly participating in, or conspiring to participate in, any plan, scheme, or design to violate proposed paragraph (b)(1).

The Commission notes that the fraudulent misrepresentations prohibited in both 11 CFR 441h(a) and (b) and 11 CFR 110.16(a) and (b) differ from common law fraud. Unlike common law fraudulent misrepresentation, section 441h gives rise to no tort action. Section 441h is part of a Federal statute designed to address campaign finance abuses, not common law fraud. See generally Buckley v. Valeo, 424 U.S. 1, 26-27 (1976).

The Supreme Court has recognized that statutes that address schemes to defraud, such as sections 441h(a)(2) and (b)(2), do not require proof of the common law requirements of "justifiable reliance" and "damages." Neder v. United States, 527 U.S. 1, 24-25 (1999) ("The common law requirements of 'justifiable reliance' and 'damages,' for example, plainly have no place in federal fraud statutes . . ." "By prohibiting the 'scheme to defraud' rather than the completed fraud, the elements of reliance and damage would clearly be inconsistent with the statutes Congress enacted"), citing United States v. Stewart, 872 F.2d 957, 960 (10th Cir. 1989).

Another indication that the fraudulent misrepresentations prohibited by section 441h differ from common law fraud is that section 441h(a) states that the fraudulent misrepresentation must be "on a matter which is damaging to [the misrepresented] candidate or political party." If the statute were to require proof of damage in common law fraudulent misrepresentation, then the phrase "on a matter which is damaging" is superfluous. Courts construe statutes so "as to avoid rendering superfluous any parts thereof." Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104 (1991); see also Federal Election Commission v. Arlen Specter '96, 150 F. Supp.2d 797, 806 (2001), quoting Bennett v. Spear, 520 U.S. 154, 173 (1997).

11 CFR 111.24 Civil penalties (2 U.S.C. 437g(a)(5), (6), (12), 28 U.S.C. 2461 nt.).

The Act imposes civil penalties on anyone violating any portion of FECA or the Presidential Election Campaign Fund Act ("Fund Act") or the Presidential Primary Matching Payment Account Act ("Matching Payment Act"). The Act's civil penalties, found at 2 U.S.C. 437g(a)(5), (6), and (12), are organized into two tiers of monetary penalties; one tier of penalties for violations of the Act, and a second tier of penalties for "knowing and willful" violations of the Act.

BCRA amends sections 437g(a)(5)(B) and 437g(a)(6)(C) by separating out and increasing the penalties for a subset of knowing and willful violations, namely, contributions that are made in the name of another. See 2 U.S.C. 441f. Such contributions are often made through a conduit to circumvent the contribution limits. The amendment to 2 U.S.C. 437g(a)(5)(B) increases the civil penalties for such violations to "not less than 300 percent of the amount involved in the violation" and "not more than the greater of $50,000 or 1,000 percent of the amount involved in the violation."

Section 437g(a)(6)(C) of FECA, authorizing a court to impose civil penalties on a person who knowingly and willfully violates the Act, has been similarly amended by BCRA. Accordingly, the Commission amends 11 CFR 111.24 to implement these amendments to FECA.

Specifically, the Commission is dividing 11 CFR 111.24(a) into paragraphs (a)(1), and (a)(2)(i) and (ii). Paragraph (a)(1) contains the unchanged language of the pre-BCRA regulation for civil penalties for violations of the Act or the Fund Act or Matching Payment Act. Paragraph (a)(2) addresses "knowing and willful" violations and is further divided into paragraphs (a)(2)(i) and (ii). Paragraph (a)(2)(i) contains the unchanged language of the pre-BCRA regulation for civil penalties for knowing and willful violations of FECA or the Fund Act or the Matching

Payment Act. 11 CFR 111.24(a)(2)(ii) implements BCRA's amendments to FECA increasing civil penalties for knowing and willing violations involving contributions made in the name of another. In the case of a knowing and willful violation of the prohibition on contributions in the name of another, the civil penalty is not less than an amount that is equal to 300 percent of the amount of the violation, and the civil penalty is not more than $50,000 or an amount equal to 1,000 percent of the amount of the violation, whichever is greater. The Commission received no comments on these amended rules, which are identical to the proposed rules, previously published.

11 CFR Part 113 Excess Campaign Funds and Funds Donated to Support Federal Officeholder Activities (2 U.S.C. 439a)

Introduction

In BCRA, Congress deleted 2 U.S.C. 439a in its entirety, and replaced it with an entirely new section. Subsection (a) of the amended section sets forth the following four categories of "permitted uses" of campaign funds: (1) otherwise authorized expenditures in connection with a candidate's campaign for Federal office; (2) ordinary and necessary expenses incurred in connection with a Federal officeholder's duties; (3) contributions to certain tax-exempt organizations; and (4) transfers, without limitation, to national, state or local political party committees. 2 U.S.C. 439a(a)(1) through (4). Congress also included a list of non-exhaustive, per se prohibited personal uses of campaign funds, including home mortgage, rent or utility payments, clothing purchases, noncampaign-related automobile expenses, country club memberships, vacations or other noncampaign-related trips, household food items, tuition

payments, noncampaign-related admissions to entertainment events, such as sporting events, concerts, and theatres, and health club dues. 2 U.S.C. 439a(b)(2)(A) through (I).

Former 2 U.S.C. 439a was the statutory basis for the Commission's pre-BCRA "personal use" rules. It allowed candidates and Federal officeholders to use excess campaign funds to pay for ordinary and necessary expenses incurred in connection with their duties as Federal officeholders, certain contributions to tax-exempt organizations, and other lawful purposes, including transfers, without limitation, to national, state or local political party committees. The former section 439a also generally prohibited candidates and Federal officeholders from converting their excess campaign funds to personal uses.

Two pre-BCRA regulations implemented the statutory conversion-to-personal-use prohibition. 11 CFR 113.1(g)(1)(i) set out a non-exhaustive list of per se prohibited personal uses, and 11 CFR 113.1(g)(1)(ii) described uses that the Commission evaluated on a case-by-case basis. In addition, the latter regulation stated that uses that would exist "irrespective" of a candidate's campaign or a Federal officeholder's duties constitute personal use. Finally, another pre-BCRA regulation, which described the permissible uses of excess campaign funds, included the "any other lawful purpose" language from former section 439a. 11 CFR 113.2(d).

In the NPRM, the Commission proposed regulations that would implement amended section 439a. The Commission also requested comments on several issues. With regard to the personal use regulations, the Internal Revenue Service commented that it saw no direct conflict between the Commission's proposals and the Internal Revenue Code or the regulations thereunder. Other comments are addressed below.

Unchanged provisions of 11 CFR 113.1(e) and 11 CFR 113.2

1. Excess campaign funds

In BCRA, Congress omitted the phrase "in excess of any amount necessary to defray" campaign expenses from section 439a. 11 CFR 113.2 is framed in terms of the uses of "excess campaign funds," which 11 CFR 113.1(e) defines to mean "amounts received by a candidate as contributions which he or she determines are in excess of any amount necessary to defray his or her campaign expenditures." 11 CFR 113.2 sets forth permissible uses of excess campaign funds (e.g., "excess campaign funds and funds donated may be used to defray any ordinary and necessary expenses incurred in connection with the recipient's duties as a holder of Federal office"). In the NPRM, the Commission proposed not to change sections 113.1(e) or 113.2, but raised the issue of whether Congress intended to eliminate the discretion of candidates and Federal officeholders to use these excess campaign funds "for ordinary and necessary expenses incurred in connection with duties of the individual as a holder of Federal office." 2 U.S.C. 439a(a)(2). No commenters opposed the Commission's proposal to leave sections 113.1(e) and 113.2 unchanged, and one commenter supported leaving the "excess campaign funds" phrase intact.

The Commission is not changing the "excess campaign funds" language in 11 CFR 113.1(e) and 11 CFR 113.2 for two reasons. First, the phrase "excess campaign funds" is a well-defined, longstanding term of art familiar to those who are subject to section 439a and the Commission's personal use rules. See, e.g., Advisory Opinions ("AOs") 2001-8, 2001-9, and 2002-5; see also the Commission's contrasting descriptions of "excess campaign funds" versus "ordinary and necessary expenses" (Explanation and Justification for 11 CFR part 113, 60 Fed. Register 7872 (Feb. 9, 1995)). Thus, deleting the phrase "excess campaign funds" could be potentially confusing or misleading. Second, BCRA's legislative history indicates that BCRA is generally intended to codify the Commission's personal use regulations. 148 Cong. Rec. S1993-

4 (daily ed. March 18, 2002) (statement of Sen. Feingold). Given that the legislative history indicates Congressional approval of the existing personal use regulations, and to avoid very possible confusion from its deletion, the Commission will continue to use the term "excess campaign funds."

2. Any other lawful purpose

In the NPRM, the Commission noted that former 2 U.S.C. 439a included the phrase "for any other lawful purpose" in addition to enumerating permissible uses of excess campaign funds. Amended section 439a does not include "any other lawful purpose" in the statutory list of permitted uses. Nonetheless, in the NPRM, the Commission proposed retaining that language in pre-BCRA 11 CFR 113.2(d). The Commission recognized that Congress's general intent is to codify the Commission's previous personal use rules.

One commenter disagreed with the Commission's proposed rule and recommended that the "any other lawful purpose" language be deleted from the regulation. This commenter noted that pre-BCRA 11 CFR 113.2(d), which closely tracks the language of former section 439a, provides for four broad permissible uses of campaign funds: (1) ordinary and necessary expenses incurred in connection with the duties of a holder of Federal office; (2) contributions to an organization described in 26 U.S.C. 170(c); (3) transfers to a national, state or local party committee; and (4) any other lawful purpose, except that such funds may not be converted to personal use, other than to defray officeholder expenses or repay loans made by the candidate for campaign purposes. Pointing out that BCRA deletes "any other lawful purpose" as an expressly permissible use of campaign funds, the commenter argued that BCRA reduces the categories of permissible uses of campaign funds from four to three. Thus, the commenter concluded that the

"any other lawful purpose" language in 11 CFR 113.2(d) should be deleted and that the regulation should be revised accordingly.

The Commission is retaining the language in 11 CFR 113.2(d), as it has concluded that Congress intended to continue to allow certain lawful uses of campaign funds that are not explicitly enumerated in section 439(a) and that do not conflict with the "irrespective" test. (The "irrespective" test is described below.) Therefore, 11 CFR 113.2(d) remains a permissible interpretation of the statute. This is especially true because, as explained above, the legislative history clearly indicates that Congress intended to codify the Commission's pre-BCRA personal use rules. In addition, none of the members of Congress who commented on other portions of the Commission's NPRM addressed the "any other lawful purpose" language. Finally, the Commission notes that the effect of deleting the "any other lawful purpose" provision may be to apply disparate treatment of incumbents and challengers. Specifically, in the absence of the "any other lawful purpose" provision, many questions of personal use previously resolved under it would probably have to be resolved under the "ordinary and necessary" provision of 11 CFR 113.2(a).

The latter provision, however, applies to "expenses incurred in connection with the recipient's duties as a holder of Federal office." A non-incumbent challenger does not hold a Federal office, and may thus not use campaign funds under this provision. The result of an exhaustive interpretation of section 439a(a) would thus appear to be that challengers would be limited to three permissible types of spending, compared to four for incumbents. Therefore, the Commission is retaining the "any other lawful purpose" language in 11 CFR 113.2(d).

The Commission notes, however, that the "any other lawful purpose" language in 11 CFR 113.2(d) does not override the "irrespective" test in 11 CFR 113.1(g)(1)(ii). Thus, if a use

of campaign funds is lawful, but would exist irrespective of an individual's campaign or duties as a Federal officeholder, that use is prohibited.

3. Per se personal uses

The pre-BCRA version of 2 U.S.C. 439a contained a general prohibition against the personal use of campaign funds, but did not specify any particular impermissible uses. In contrast, the Commission's pre-BCRA personal use regulations specifically defined certain uses of campaign funds or donations as per se prohibited personal uses. 11 CFR 113.1(g)(1)(i).

When Congress enacted BCRA, it amended 2 U.S.C. 439a(b) to include a non-exhaustive list of prohibited personal uses of campaign funds. As one of BCRA's principal sponsors explained, amended section 439a "[c]odifies FEC regulations relating to the personal use of campaign funds by candidates" (emphasis added). 148 Cong. Rec. S1993-4 (daily ed. March 18, 2002) (statement of Sen. Feingold). However, the Commission noted in the NPRM that several of the personal use provisions in amended section 439a were not adopted verbatim, but were instead summaries of pre-BCRA personal use regulations. For example, the statute now prohibits the use of campaign contributions for "a clothing purchase" (2 U.S.C. 439a(b)(2)(B)); whereas the pre-BCRA corresponding regulation at 11 CFR 113.1(g)(1)(i)(C) prohibited the personal use of "[c]lothing, other than items of de minimis value that are used in the campaign, such as campaign 'T-shirts' or caps with campaign slogans." In addition, amended section 439a did not incorporate all of the pre-BCRA per se personal use rules in their entirety. Compare post-BCRA 2 U.S.C. 439a(b)(2)(A) through (I) with pre-BCRA 11 CFR 113.1(g)(1)(i). In the NPRM, the Commission stated that it interpreted new subsection (b) of 2 U.S.C. 439a to provide an even firmer statutory foundation for the per se rules at 11 CFR 113.1(g)(1)(i) than did the pre-BCRA version of section 439a. No commenters opposed this interpretation, and two

commenters supported it. Accordingly, aside from the exceptions noted below, the Commission is retaining its pre-BCRA per se personal use regulations.

4. Irrespective test

As the Commission noted in the NPRM, pre-BCRA section 113.1(g)(1)(ii) stated that a use that would exist "irrespective" of a candidate's campaign or a Federal officeholder's duties would constitute a prohibited personal use. In BCRA, Congress codified the "irrespective" test as part of new section 439a(b)(2) ("For the purposes of paragraph (1), a contribution or donation shall be considered to be converted to personal use if the contribution or amount is used to fulfill any commitment, obligation, or expense of a person that would exist irrespective of the candidate's election campaign or individual's duties as a holder of Federal office . . . .") As the Commission explained in the NPRM, BCRA's "irrespective" test is virtually identical to the language in section 113.1(g)(1)(ii). The Commission proposed to continue to apply the "irrespective" test as it had done prior to BCRA. No comments were received specifically on this issue, although one commenter cited BCRA's "irrespective" language in the context of the commenter's analysis of the "noncampaign-related trip" language in proposed 11 CFR 113.1(g)(i)(K). (Noncampaign-related trips are discussed below.) Therefore, in the final rule, the Commission is not revising the "irrespective" test.

Amended provisions of 11 CFR 113.1

1. 11 CFR 113.1(g)(1)(i)(I) - Using contributions to pay salaries to candidates

In the NPRM, the Commission proposed adding a new rule, 11 CFR 113.1(g)(1)(i)(I), which would prohibit candidates from using campaign funds to pay themselves salaries or otherwise compensate themselves for income lost as a result of campaigning for Federal office. In AO 1999-1, the Commission banned the use of campaign funds to pay candidate salaries, in

part because candidates would otherwise be able to spend campaign funds received as salaries for prohibited personal uses such as food, clothing, utilities, mortgages and other prohibited uses. Also, although the Commission noted that one of BCRA's principal sponsors stated that BCRA was intended to codify the Commission's current regulations but not its advisory opinions (148 Cong. Rec. S2143 (daily ed. March 20, 2002) (statement of Sen. Feingold)), the Commission preliminarily concluded that this proposed addition to its regulations would be consistent with the non-exhaustive list of prohibited personal uses in amended 2 U.S.C. 439a(b)(2).

No commenters supported the proposal and three commenters opposed it. All of them disagreed with the Commission's proposal to characterize the payment of salaries to candidates as a per se prohibited personal use. One commenter took the position that BCRA does not support the Commission's proposal. To the contrary, according to this commenter, amended 2 U.S.C. 439a(b)(2) precludes a campaign's use of a contribution to "fulfill any commitment, obligation or expense of a person that would exist irrespective of (emphasis added) the candidate's election campaign or individual's duties as a holder of Federal office," but does not encompass salary payments to candidates. The commenter asserted that candidates may have to leave their jobs and forego their salaries precisely because they are running for Federal office. Therefore, the commenter concluded that the "irrespective" test should operate to allow candidates to pay themselves salaries from campaign funds.

The commenter also noted that AO 1999-1, which cites AOs 1996-34, 1995-42, and 1995-20, stated that the Commission has permitted the use of campaign funds to enable candidates and immediate family members to attend campaign events. Finally, the commenter concluded that candidates without significant resources might not be able to forego salary payments in order to run for Federal office, and recommended that the Commission promulgate a

regulation permitting candidates to be paid salaries from campaign funds, with restrictions sufficient to prevent abuse.

A second commenter, citing the above-mentioned statement by one of BCRA's principal sponsors that the new law was not intended to codify the Commission's advisory opinions, asserted that the Commission lacked the authority to characterize salary payments to candidates from campaign funds as a per se prohibited personal use. This commenter also argued that, were it not for their campaign responsibilities, candidates would not have to leave their jobs and give up their salaries. Thus, the commenter concluded, this situation fulfills BCRA's "irrespective" test. The commenter also maintained that paying salaries to candidates so that they can buy personal items and services is akin to corporate employees making political contributions from their salaries. The commenter drew the analogy that, because corporate contributions are illegal but contributions from corporate employees are not, candidates should be able to draw salaries from campaign funds and should be allowed to purchase personal goods and services. Noting that would-be candidates of modest means might not be able to run for Federal office without salaries, the commenter urged the Commission not to change existing rules on this subject, but rather to either reconsider AO 1999-1 or let Congress decide the issue.

Finally, a third commenter, who joined in the comments of the previous two commenters, maintained that the Commission's proposal exceeds both Congress's mandate in BCRA and congressional intent. The commenter also stated that the proposal would exacerbate what the commenter characterized as "enhanced advantages conferred upon the wealthy, including incumbent federal office holders," by BCRA. The commenter concluded that, unlike officeholders, persons of average means need a salary in order to pay expenses while running for office.

Although the Commission is aware that the lack of a salary may make it more difficult for some individuals to run for Federal office, the dangers of allowing candidates to draw salaries from their campaign funds outweigh the benefits. First, the Commission reaffirms its reasoning in AO 1999-1, in which it denied a request by an individual, who wished to seek Federal office, to pay himself a salary from his campaign funds. The Commission stated that many of the expenses incurred by candidates, such as mortgages, utilities, groceries, and clothing, would exist "irrespective" of an individual's status as a candidate and would thus be prohibited. The Commission warned that, in effect, allowing candidates to draw salaries from their campaign funds indirectly permits them to use campaign funds for the most fundamental personal uses.

In addition, the Commission responded to the requester's arguments that "full-time services of a candidate are an absolute necessity to any campaign," and that using his campaign funds to offset his lost income was the only way for the requester to provide these services. The Commission stated that candidates are traditionally involved in their own campaign strategies and appearances, regardless of remuneration, because such activities are inherent in candidates' campaigns.

The Commission notes that it allows the family members of candidates or officeholders to be paid salaries from campaign funds. However, such payments are only allowed if the services rendered are for "bona fide, campaign related services," pursuant to 11 CFR 113.1(g)(1)(i)(H). If such salary payments exceed the fair market value of the services provided, salary payments above the fair market value are considered personal use, even if the services are for bona fide purposes. Id. See AO 2001-10 (principal campaign committee of officeholder, whose spouse had extensive government and campaign experience, was allowed to pay spouse

for her services as a consultant, provided that her salary did not exceed the fair market value of her services).

Further, the Commission notes that, in situations such as those described in AOs 1996-34, 1995-42, and 1995-20, where it has permitted candidates and immediate family members to use campaign funds to attend campaign events, the Commission's approval has been carefully tailored to specific factual situations. In contrast, the commenters on this rulemaking advocate a more open-ended rule where candidates would be free to spend their contributor-funded salaries on a variety of items in many different situations, thereby negating the per se list of prohibited personal uses. Therefore, the Commission is promulgating new 11 CFR 113.1(g)(1)(i)(I) as a new category of per se prohibited personal uses.

2. 11 CFR 113.1(g)(1)(i)(J) and 11 CFR 113.1(g)(1)(ii)(C) - Noncampaign-related trips

One issue on which the Commission requested comment is raised by 2 U.S.C. 439a(b)(2)(E), which specifically included a "vacation or other noncampaign-related trip" (emphasis added) as a per se statutorily prohibited personal use. The NPRM accordingly proposed to add "[a] vacation or other noncampaign-related trip" to the regulatory list of per se personal uses in proposed 11 CFR 113.1(g)1)(i)(K). The Commission also proposed to modify the pre-BCRA case-by-case rules at 11 CFR 113.1(g)(1)(ii)(C), which applies to "travel expenses" to reflect the changes made by BCRA. Seven sets of commenters, including the principal sponsors of BCRA, addressed the Commission's proposal.

The principal sponsors of BCRA stated that Congress had intentionally left intact the statutory provision that states that campaign funds may be used "for ordinary and necessary

expenses incurred in connection with duties of the individual as a holder of Federal office."[5] Compare pre-BCRA 2 U.S.C. 439a with new 2 U.S.C. 439a(a)(2); see also 11 CFR 113.1(g)(5). The principal sponsors explained that Congress did not intend to modify current law or practice governing the use of campaign funds for travel expenses in connection with officeholders' duties. Consequently, they requested that the Commission modify the following regulations: proposed 11 CFR 113.1(g)(1)(i)(J); proposed 113.1(g)(1)(i)(K); proposed 11 CFR 113.1(g)(ii)(C); and 11 CFR 113.1(g)(5).

Another group of commenters also observed that new section 439a(a)(2) states that campaign funds may be used "for ordinary and necessary expenses incurred in connection with duties of the individual as a holder of Federal office." This language, these commenters stated, expresses Congress's intent to allow Senators to use campaign funds for their official expenses, including fact-finding trips. These commenters also pointed out that fact-finding trips, which members would not take but for their official duties, would not occur "irrespective" of their official duties. Therefore, these trips constitute part of members' official duties and do not constitute a prohibited personal use of campaign funds.

Finally, two commenters acknowledged that 2 U.S.C. 439a(b)(2) includes a vacation or noncampaign-related trip in the list of prohibited uses. Nonetheless, they asserted that, if the Commission were to issue regulations to ban the use of campaign funds for noncampaign-related travel, it would be ignoring Congress's clear authorization in amended 2 U.S.C. 439a(a)(2) to allow the use of campaign funds for expenses incurred in connection with an individual's duties

[5] For a detailed explanation of how the Commission's personal use rules interact with the rules of the House of Representatives and the Senate, see the Commission's 1995 Explanation and Justification of its rules concerning personal use of campaign funds at 60 Fed. Register 7870-7871 (Feb. 9, 1995).

as a Federal officeholder, and the "irrespective" test, which, as stated above, is now part of amended 2 U.S.C. 439a(b)(2). They urged the Commission to construe the statute as a whole.

Other commenters also argued that the Commission should not prohibit the use of campaign funds to pay for all noncampaign-related travel, including fact-finding trips. As did the previous commenters, these commenters noted that BCRA permits the use of campaign funds "for ordinary and necessary expenses incurred in connection with duties of the individual as a holder of Federal office." Therefore, the commenters urged the Commission not to adopt regulations defining "noncampaign-related" travel as a per se prohibited personal use, but rather to evaluate travel on a case-by-case basis under 11 CFR 113.1(g)(1)(ii)(C), as has been the Commission's rule.

Another commenter asserted that the Commission has historically treated the use of campaign funds for campaign-related travel and for officeholder travel as permissible. This commenter argued that the language of amended 2 U.S.C. 439a(a) has explicitly made this practice permissible by listing both campaign expenditures and officeholder-related expenses as acceptable uses of campaign funds. If, according to the commenter, Congress intended to change its longstanding practice, it would have done so explicitly, in its list of per se prohibited personal uses. This commenter concluded that Congress's failure to specifically exclude officeholder-related travel from the per se list of prohibited personal uses in amended 2 U.S.C. 439a(b)(2) was inadvertent, and recommended that the Commission exclude both officeholder-related travel and campaign-related travel from proposed 11 CFR 113.1(g)(1)(i)(K).

A commenter stated that there is no need to change the Commission's current personal use regulations because Congress did not intend either to limit or ban an officeholder's ability to use campaign funds for officeholder travel, even if the travel is not campaign-related, such as

fact-finding trips. A different commenter maintained that campaign funds should not be used for fact-finding trips. Instead, the commenter recommended that campaign funds not be used for anything other than campaign costs, such as advertising and campaign literature, with the exception of charitable contributions.[6]

Based on Congressional guidance and the reasoning expressed in other comments concerning this matter, the Commission is not adding the "noncampaign-related trip" language to the list of per se personal uses in the final rules in 11 CFR 113.1(g)(1)(i)(J). Thus, this paragraph provides only that the use of campaign funds for a vacation is a per se personal use. (This proposed provision was designated as paragraph (g)(1)(i)(K) in the proposed rules.) The Commission is persuaded that amended section 439a(a), which provides that campaign funds may be used "for ordinary and necessary expenses incurred in connection with duties of the individual as a holder of Federal office," encompasses certain noncampaign-related travel, notwithstanding the language of 2 U.S.C. 439a(b)(2)(E). Accordingly, aside from vacations, which are enumerated as a per se personal use in the final rules in 11 CFR 113.1(g)(1)(i)(J), the Commission will continue to evaluate travel expenses on a case-by-case basis under existing 11 CFR 113.1(g)(1)(ii)(C).

3. 11 CFR 113.1(g)(1)(ii)(D) - Noncampaign-related automobile expenses

BCRA amended 2 U.S.C. 439a by including "a noncampaign-related automobile expense" in the list of per se prohibited uses of campaign funds. Given that statutory provision,

[6] According to the commenter, charitable contributions made with campaign funds should be allowed as long as the candidates themselves do not receive tax deductions for the charitable contributions. The Commission notes that contributions to certain charities are permitted by 2 U.S.C. 439a(a)(3) and 11 CFR 113.1(g)(2). Whether those contributions are tax-deductible falls within the jurisdiction of the Internal Revenue Service.

the Commission proposed to delete vehicle expenses from the case-by-case rules set out in 11 CFR 113.1(g)(1)(ii).

Two sets of commenters addressed this proposal. BCRA's principal sponsors stated that the Commission's proposed regulation could be read, incorrectly, to completely prohibit the use of campaign funds for any vehicle expenses (other than for de minimis amounts), including campaign-related expenses. The other commenters argued that the Commission should not interpret BCRA to prohibit the use of campaign funds for all noncampaign-related vehicle expenses. Instead, these commenters urged the Commission to continue to permit, on a case-by-case basis, vehicle expenses paid for with campaign funds that are used for Federal officeholder purposes.

The Commission agrees with these reasons to continue to assess vehicle expenses on a case-by-case basis under 11 CFR 113.1(g)(1)(ii)(D). The text of proposed 11 CFR 113.1(g)(1)(i)(J) was identical to that of pre-BCRA 11 CFR 113.1(g)(1)(ii)(D). The Commission further notes that one of BCRA's principal sponsors explained that the " . . . personal use . . . provision is intended to codify the FEC's current regulations on the use of campaign funds for personal expenses . . ." (emphasis added). 148 Cong. Rec. S2143 (daily ed. March 20, 2002) (statement of Sen. Feingold).

The Commission acknowledges the BCRA's sponsors' observation that the beginning of paragraph (g)(1)(ii)(D) could be read to prohibit campaign and officeholder-related uses of vehicles funded by campaign contributions. ("Vehicle expenses, unless they are a de minimis amount.") 11 CFR 113.1(g)(1)(ii)(D)). The Commission notes, however, that this provision must be read together with the next sentence ("If a committee uses campaign funds to pay expenses associated with a vehicle that is used for both personal activities beyond a de minimis

amount and campaign or officeholder related activities, the portion of the vehicle expenses associated with the personal activities is personal use, unless the person(s) using the vehicle for personal activities reimburse(s) the campaign account within thirty days for the expenses associated with the personal activities.").

4. 11 CFR 113.1(g)(5) and 11 CFR 113.1(g)(6) - Technical changes

The Commission is making non-substantive changes to two cross-references in 11 CFR 113.1(g)(5) to the definition of "expenditure," and to one cross-reference in 11 CFR 113.1(g)(6) to the definition of "contribution." These citation changes conform to the reorganized regulations on "contributions" and "expenditures." 67 Fed. Register 50,582 (Aug. 5, 2002).

5. 11 CFR 113.1(g)(8) - Recordkeeping requirement

In the NPRM, the Commission proposed new 11 CFR 113.1(g)(8), a recordkeeping requirement for campaign funds used for expenses that may be partly personal in nature. Such expenses may include vehicle, legal, meal, and travel expenses. See 11 CFR 113.1(g)(1)(ii)(A) through (D) and 11 CFR 113.2. As stated in the NPRM, the proposed regulation is based on the analysis in AO 2001-3, which advised that a member of Congress who proposed to pay for a vehicle with campaign funds and use it for a combination of campaign, official, and personal uses, should keep a log detailing each use of the car. Keeping such logs will help the Commission to determine to what extent "case-by-case" expenses are personal in nature. No commenters addressed this provision. The Commission adopts this provision as 11 CFR 113.1(g)(8), with one modification to clarify that the log will also serve to distinguish personal uses from uses related to a Federal office holder's duties.

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

[Regulatory Flexibility Act]

The Commission certifies that the attached final rules will not have a significant economic impact on a substantial number of small entities. The basis of this certification is that national, State, and local party committees of the two major political parties to which the fraudulent solicitation, disclaimers, and civil penalties rules apply are not small entities under 5 U.S.C. 601. In addition, the rules for personal use only affect individuals, not entities, and the rules for the prohibition on fraudulent solicitation do not carry an economic impact. Furthermore, the requirements of the disclaimer rules as applied to small entities are no more than what is necessary to comply with the new statute enacted by Congress, and in any event, such entities will not incur significant additional costs in complying with these requirements. The increase in civil penalties do not unduly burden small entities since a small entity would pay a civil penalty only if the entity engaged in a specific knowing and willful violation of the Act.

List of Subjects

11 CFR Part 100

Elections

11 CFR Part 110

Campaign funds, and political committees and parties.

11 CFR Part 111

Campaign funds, and political committee and parties.

11 CFR Part 113

Campaign funds, and political candidates.

For the reasons set out in the preamble, subchapter A of chapter 1 of title II 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 part 100 continues to read as follows:

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

2. Section 100.18 is revised to read as follows:

§ 100.18 Act (2 U.S.C. 431(19)).

Act means the Federal Election Campaign Act of 1971 (Pub. L. 92-225), as amended in 1974 (Pub. L. 93-443), 1976 (Pub. L. 94-283), 1980 (Pub. L. 96-187), and 2002 (Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155).

Part 110 – CONTRIBUTION AND EXPENDITURE LIMITATIONS AND PROHIBITIONS

3. The authority citation for part 110 continues to read as follows:

Authority: 2 U.S.C. 431(8), 431(9), 432(c)(2), 437d(a)(8), 438(a)(8), 441a, 441b, 441d, 441e, 441f, 441g, 441h, and 441k.

4. Section 110.11 is revised to read as follows:

§ 110.11 Communications; advertising; disclaimers (2 U.S.C 441d).

~~(a) (1) General Rules. Except as provided at paragraph (a)(6) of this section, whenever any person makes an expenditure for the purpose of financing a communication that expressly advocates the election or defeat of a clearly identified candidate, or that solicits any contribution, through any broadcasting station, newspaper,~~

~~magazine, outdoor advertising facility, poster, yard sign, direct mailing, or any other form of general public political advertising, a disclaimer meeting the requirements of paragraphs (a)(1)(i), (ii), (iii), (iv), or (a)(2) of this section shall appear and be presented in a clear and conspicuous manner to give the reader, observer, or listener adequate notice of the identity of persons who paid for and, where required, who authorized the communication.~~

~~(i) Such communication, including any solicitation, if paid for and authorized by a candidate, an authorized committee of a candidate, or its agent, shall clearly state that the communication has been paid for by the authorized political committee; or~~

~~(ii) Such communication, including any solicitation, if authorized by a candidate, an authorized committee of a candidate or an agent thereof, but paid for by any other person, shall clearly state that the communication is paid for by such other person and is authorized by such candidate, authorized committee or agent; or~~

~~(iii) Such communication, including any solicitation, if made on behalf of or in opposition to a candidate, but paid for by any other person and not authorized by a candidate, authorized committee of a candidate or its agent, shall clearly state that the communication has been paid for by such person and is not authorized by any candidate or candidate's committee.~~

~~(iv) For solicitations directed to the general public on behalf of a political committee which is not an authorized committee of a candidate, such~~

~~solicitation shall clearly state the full name of the person who paid for the communication.~~

~~(2) Coordinated Party Expenditures.~~

~~(i) For a communication paid for by a party committee pursuant to 2 U.S.C. 441a(d), the disclaimer required by paragraph (a)(1) of this section shall identify the committee that makes the expenditure as the person who paid for the communication, regardless of whether the committee was acting in its own capacity or as the designated agent of another committee.~~

~~(ii) A communication made by a party committee pursuant to 2 U.S.C. 441a(d) prior to the date the party's candidate is nominated shall satisfy the requirements of this section if it clearly states who paid for the communication.~~

~~(3) Definition of "direct mailing." For purposes of paragraph (a)(1) of this section only, direct mailing includes any number of substantially similar pieces of mail but does not include a mailing of one hundred pieces or less by any person.~~

~~(4) Exempt Activities. For purposes of paragraph (a)(1) of this section only, the term expenditure includes a communication by a candidate or party committee that qualifies as an exempt activity under 11 CFR 100.8(b)(10), (16), (17), or (18). Such communications, unless excepted under paragraph (a)(6) of this section, shall clearly state who paid for the communication but do not have to include an authorization statement.~~

~~(5) Placement of Disclaimer. The disclaimers specified in paragraph (a)(1) of this section shall be presented in a clear and conspicuous manner, to give the reader,~~

observer, or listener adequate notice of the identity of the person or committee that paid for, and, where required, that authorized the communication. A disclaimer is not clear and conspicuous if the placement is easily overlooked.

(i) The disclaimer need not appear on the front or cover page of the communication as long as it appears within the communication, except on communications, such as billboards, that contain only a front face.

(ii) Each communication that would require a disclaimer if distributed separately, that is included in a package of materials, must contain the required disclaimer.

(iii) Disclaimers in a televised communication shall be considered clear and conspicuous if they appear in letters equal to or greater than four (4) percent of the vertical picture height that air for not less than four (4) seconds.

(6) Exceptions. The requirements of paragraph (a)(1) of this section do not apply to:

(i) Bumper stickers, pins, buttons, pens, and similar small items upon which the disclaimer cannot be conveniently printed;

(ii) Skywriting, watertowers, wearing apparel, or other means of displaying an advertisement of such a nature that the inclusion of a disclaimer would be impracticable; or

(iii) Checks, receipts, and similar items of minimal value which do not contain a political message and which are used for purely administrative purposes.

(7) Activities by a separate segregated fund or its connected organization. For purposes of paragraph (a)(1) of this section, whenever a separate segregated fund

~~or its connected organization solicits contributions to the fund from those persons it may solicit under the applicable provisions of 11 CFR part 114, or makes a communication to those persons, such communication shall not be considered a form of general public political advertising and need not contain the disclaimer set forth in paragraph (a)(1) of this section.~~

~~(b) (1) No person who sells space in a newspaper or magazine to a candidate, an authorized committee of a candidate, or an agent of the candidate, for use in connection with the candidate's campaign for nomination or for election, shall charge an amount for the space which exceeds the comparable rate for the space for non-campaign purposes.~~

~~(2) For purposes of this section, comparable rate means the rate charged to a national or general rate advertiser and shall include discount privileges usually and normally available to a national or general rate advertiser.~~

(a) Scope.

This section applies only to public communications, as defined in 11 CFR 100.26, and electioneering communications, as defined in 11 CFR 100.29. The following types of such communications must include disclaimers, as specified in this section:

(1) All public communications for which a political committee makes a disbursement.

(2) All public communications by any person that expressly advocate the election or defeat of a clearly identified candidate.

(3) All public communications by any person that solicit any contribution.

(4) All electioneering communications by any person.

(b) General content requirements. A disclaimer required by paragraph (a) of this section must contain the following information:

(1) If the communication, including any solicitation, is paid for and authorized by a candidate, an authorized committee of a candidate, or an agent of either of the foregoing, the disclaimer must clearly state that the communication has been paid for by the authorized political committee;

(2) If the communication, including any solicitation, is authorized by a candidate, an authorized committee of a candidate, or an agent of either of the foregoing, but is paid for by any other person, the disclaimer must clearly state that the communication is paid for by such other person and is authorized by such candidate, authorized committee, or agent; or

(3) If the communication, including any solicitation, is not authorized by a candidate, authorized committee of a candidate, or an agent of either of the foregoing, the disclaimer must clearly state the full name and permanent street address, telephone number, or World Wide Web address of the person who paid for the communication, and that the communication is not authorized by any candidate or candidate's committee.

(c) Disclaimer specifications.

(1) Specifications for all disclaimers. A disclaimer required by paragraph (a) of this section must be presented in a clear and conspicuous manner, to give the reader, observer, or listener adequate notice of the identity of the person or political committee that paid for and, where required, that authorized the communication.

A disclaimer is not clear and conspicuous if it is difficult to read or hear, or if the placement is easily overlooked.

(2) Specific requirements for printed communications. In addition to the general requirement of paragraphs (b) and (c)(1) of this section, a disclaimer required by paragraph (a) of this section that appears on any printed public communication must comply with all of the following:

(i) The disclaimer must be of sufficient type size to be clearly readable by the recipient of the communication. A disclaimer in twelve (12)-point type size satisfies the size requirement of this paragraph (c)(2)(i) when it is used for signs, posters, flyers, newspapers, magazines, or other printed material that measure no more than twenty-four (24) inches by thirty-six (36) inches.

(ii) The disclaimer must be contained in a printed box set apart from the other contents of the communication.

(iii) The disclaimer must be printed with a reasonable degree of color contrast between the background and the printed statement. A disclaimer satisfies the color contrast requirement of this paragraph (c)(2)(iii) if it is printed in black text on a white background or if the degree of color contrast between the background and the text of the disclaimer is no less than the color contrast between the background and the largest text used in the communication.

(iv) The disclaimer need not appear on the front or cover page of the communication as long as it appears within the communication, except on communications, such as billboards, that contain only a front face.

(v) A communication that would require a disclaimer if distributed separately, that is included in a package of materials, must contain the required disclaimer.

(3) Specific requirements for radio and television communications authorized by candidates. In addition to the general requirements of paragraphs (b) and (c)(1) of this section, a communication that is authorized or paid for by a candidate or the authorized committee of a candidate (see paragraph (b)(1) or (b)(2) of this section) that is transmitted through radio or television, or through any broadcast, cable, or satellite transmission, must comply with the following:

(i) A communication transmitted through radio must include an audio statement by the candidate that identifies the candidate and states that he or she has approved the communication; or

(ii) A communication transmitted through television or through any broadcast, cable, or satellite transmission, must include a statement that identifies the candidate and states that he or she has approved the communication. The candidate shall convey the statement either:

(A) Through an unobscured, full-screen view of himself or herself making the statement, or

(B) Through a voice-over by himself or herself, accompanied by a clearly identifiable photographic or similar image of the candidate.

A photographic or similar image of the candidate shall be considered clearly identified if it is at least eighty (80) percent of the vertical screen height.

(iii) A communication transmitted through television or through any broadcast, cable, or satellite transmission, must also include a similar statement that must appear in clearly readable writing at the end of the television communication. To be clearly readable, this statement must meet all of the following three requirements:

(A) The statement must appear in letters equal to or greater than four (4) percent of the vertical picture height;

(B) The statement must be visible for a period of at least four (4) seconds; and

(C) The statement must appear with a reasonable degree of color contrast between the background and the text of the statement. A statement satisfies the color contrast requirement of this paragraph (c)(3)(iii)(C) if it is printed in black text on a white background or if the degree of color contrast between the background and the text of the statement is no less than the color contrast between the background and the largest type size used in the communication.

(iv) The following are examples of acceptable statements that satisfy the spoken statement requirements of paragraph (c)(3) of this section with respect to a radio, television, or other broadcast, cable, or satellite communication, but they are not the only allowable statements:

(A) "I am [insert name of candidate], a candidate for [insert Federal office sought], and I approved this advertisement."

(B) "My name is [insert name of candidate]. I am running for [insert Federal office sought], and I approved this message."

(4) Specific requirements for radio and television communications paid for by other persons and not authorized by a candidate. In addition to the general requirements of paragraphs (b) and (c)(1) of this section, a communication not authorized by a candidate or a candidate's authorized committee that is transmitted through radio or television or through any broadcast, cable, or satellite transmission, must comply with the following:

(i) A communication transmitted through radio or television or through any broadcast, cable, or satellite transmission, must include the following audio statement, "XXX is responsible for the content of this advertising," spoken clearly, with the blank to be filled in with the name of the political committee or other person paying for the communication, and the name of the connected organization, if any, of the payor unless the name of the connected organization is already provided in the "XXX is responsible" statement; and

(ii) A communication transmitted through television, or through any broadcast, cable, or satellite transmission, must include the audio statement required by paragraph (c)(4)(i) of this section. That statement must be conveyed by an unobscured full-screen view of a representative of

the political committee or other person making the statement, or by a representative of such political committee or other person in voice-over.

(iii) A communication transmitted through television or through any broadcast, cable, or satellite transmission, must also include a similar statement that must appear in clearly readable writing at the end of the communication. To be clearly readable, the statement must meet all of the following three requirements:

(A) The statement must appear in letters equal to or greater than four (4) percent of the vertical picture height;

(B) The statement must be visible for a period of at least four (4) seconds; and

(C) The statement must appear with a reasonable degree of color contrast between the background and the disclaimer statement. A disclaimer satisfies the color contrast requirement of this paragraph (c)(4)(iii)(C) if it is printed in black text on a white background or if the degree of color contrast between the background and the text of the disclaimer is no less than the color contrast between the background and the largest type size used in the communication.

(d) Coordinated party expenditures and independent expenditures by political party committees.

(1) (i) For a communication paid for by a political party committee pursuant to 2 U.S.C. 441a(d), the disclaimer required by paragraph (a) of this section must identify the political party committee that makes the expenditure as

the person who paid for the communication, regardless of whether the political party committee was acting in its own capacity or as the designated agent of another political party committee.

(ii) A communication made by a political party committee pursuant to 2 U.S.C. 441a(d) and distributed prior to the date the party's candidate is nominated shall satisfy the requirements of this section if it clearly states who paid for the communication.

(2) For purposes of this section, a communication paid for by a political party committee pursuant to 2 U.S.C. 441a(d) shall not be considered to be authorized by a candidate solely because it is a coordinated expenditure under 2 U.S.C. 441a(d).

(3) For a communication paid for by a political party committee that constitutes an independent expenditure under 11 CFR 100.16, the disclaimer required by this section must identify the political party committee that paid for the communication, and must state that the communication is not authorized by any candidate or candidate's committee.

(e) Exempt activities. A public communication authorized by a candidate, authorized committee, or political party committee, that qualifies as an exempt activity under 11 CFR 100.140, 100.147, 100.148, or 100.149, must comply with the disclaimer requirements of paragraphs (a), (b), (c)(1), and (c)(2) of this section, unless excepted under paragraph (f)(1) of this section, but the disclaimer does not need to state whether the communication is authorized by a candidate, or any authorized committee or agent of any candidate.

(f) Exceptions.

(1) The requirements of paragraphs (a) through (e) of this section do not apply to the following:

(i) Bumper stickers, pins, buttons, pens, and similar small items upon which the disclaimer cannot be conveniently printed;

(ii) Skywriting, water towers, wearing apparel, or other means of displaying an advertisement of such a nature that the inclusion of a disclaimer would be impracticable; or

(iii) Checks, receipts, and similar items of minimal value that are used for purely administrative purposes and do not contain a political message.

(2) For purposes of this section, whenever a separate segregated fund or its connected organization solicits contributions to the fund from those persons it may solicit under the applicable provisions of 11 CFR part 114, or makes a communication to those persons, such communication shall not be considered a type of public communication and need not contain the disclaimer required by paragraphs (a) through (c) of this section.

(g) Comparable rate for campaign purposes.

(1) No person who sells space in a newspaper or magazine to a candidate, an authorized committee of a candidate, or an agent of the candidate, for use in connection with the candidate's campaign for nomination or for election, shall charge an amount for the space which exceeds the comparable rate for the space for non-campaign purposes.

(2) For purposed of this section, comparable rate means the rate charged to a national or general rate advertiser, and shall include discount privileges usually and normally available to a national or general rate advertiser.

5. Section 110.16 is added to read as follows:

§ 110.16 Prohibitions on fraudulent misrepresentations.

(a) In general. No person who is a candidate for Federal office or an employee or agent of such a candidate shall—

(1) Fraudulently misrepresent ~~himself~~ the person or any committee or organization under ~~his~~ the person's control as speaking or writing or otherwise acting for or on behalf of any other candidate or political party or employee or agent thereof in a matter which is damaging to such other candidate or political party or employee or agent thereof; or

(2) Willfully and knowingly participate in or conspire to participate in any plan, scheme, or design to violate paragraph (a)(1) of this section.

(b) Fraudulent solicitation of funds. No person shall—

(1) Fraudulently misrepresent the person as speaking, writing, or otherwise acting for or on behalf of any candidate or political party or employee or agent thereof for the purpose of soliciting contributions or donations; or

(2) Willfully and knowingly participate in or conspire to participate in any plan, scheme, or design to violate paragraph (b)(1) of this section.

Part 111 – COMPLIANCE PROCEDURE (2 U.S.C. 437g, 437d(a))

6. The authority citation for part 111 continues to read as follows:

Authority: 2 U.S.C. 437g, 437d(a), 438(a)(8); 28 U.S.C. 2461 nt.

7. In section 111.24, paragraph (a) is revised as follows:

§ 111.24 Civil penalties (2 U.S.C. 437g(a)(5), (6), (12), 28 U.S.C. 2461 nt.).

(a) Except as provided in 11 CFR part 111, subpart B and in paragraph (b) of this section, a civil penalty negotiated by the Commission or imposed by a court for a violation of the Act or chapters 95 or 96 of title 26 (26 U.S.C.) shall be as follows:

(1) Except as provided in paragraph (a)(2) of this section, in the case of a violation of the Act or chapters 95 or 96 of title 26 (26 U.S.C.), the civil penalty shall not exceed the greater of $5,500 or an amount equal to any contribution or expenditure involved in the violation.

(2) Knowing and willful violations.

(i) In the case of a knowing and willful violation of the Act or chapters 95 or 96 of title 26 (26 U.S.C.), the civil penalty shall not exceed the greater of $11,000 or an amount equal to 200% of any contribution or expenditure involved in the violation.

(ii) Notwithstanding paragraph (a)(2)(i) of this section, in the case of a knowing and willful violation of 2 U.S.C. 441f, the civil penalty shall not be less than 300% of the amount of any contribution involved in the violation and shall not exceed the greater of $50,000 or 1,000% of the amount of any contribution involved in the violation.

* * * * *

PART 113 – EXCESS CAMPAIGN FUNDS AND FUNDS DONATED TO SUPPORT FEDERAL OFFICEHOLDER ACTIVITIES (2 U.S.C. 439a)

8. The authority citation for part 113 continues to read as follows:

Authority: 2 U.S.C. 432(h), 438(a)(8), 439a, and 441a.

9. In section 113.1, paragraph (g) is revised to read as follows:

§ 113.1 Definitions (2 U.S.C. 439a).

* * * * *

(g) Personal use. Personal use means any use of funds in a campaign account of a present or former candidate to fulfill a commitment, obligation or expense of any person that would exist irrespective of the candidate's campaign or duties as a Federal officeholder.

(1) (i) Personal use includes but is not limited to the use of funds in a campaign account for:

(A) Household food items or supplies;

(B) Funeral, cremation or burial expenses;

(C) Clothing, other than items of de minimis value that are used in the campaign, such as campaign "T-shirts" or caps with campaign slogans;

(D) Tuition payments, other than those associated with training campaign staff;

(E) Mortgage, rent or utility payments--

(1) For any part of any personal residence of the candidate or a member of the candidate's family; or

(2) For real or personal property that is owned by the candidate or a member of the candidate's family and used for campaign purposes, to the extent the payments exceed the fair market value of the property usage;

(F) Admission to a sporting event, concert, theater or other form of entertainment, unless part of a specific campaign or officeholder activity;

(G) Dues, fees or gratuities at a country club, health club, recreational facility or other nonpolitical organization, unless they are part of the costs of a specific fundraising event that takes place on the organization's premises; ~~and~~

(H) Salary payments to a member of the candidate's family, unless the family member is providing bona fide services to the campaign. If a family member provides bona fide services to the campaign, any salary payment in excess of the fair market value of the services provided is personal use; ~~.~~

(I) Salary payments to a candidate or any other compensation for income lost as a result of the campaign for federal office; and

(J) A vacation.

(ii) The Commission will determine, on a case-by-case basis, whether other uses of funds in a campaign account fulfill a commitment, obligation or expense that would exist irrespective of the candidate's campaign or duties

as a Federal officeholder, and therefore are personal use. Examples of such other uses include:

(A) Legal expenses;

(B) Meal expenses;

(C) Travel expenses, including subsistence expenses incurred during travel. If a committee uses campaign funds to pay expenses associated with travel that involves both personal activities and campaign or officeholder-related activities, the incremental expenses that result from the personal activities are personal use, unless the person(s) benefiting from this use reimburse(s) the campaign account within thirty days for the amount of the incremental expenses, and

(D) Vehicle expenses, unless they are a de minimis amount. If a committee uses campaign funds to pay expenses associated with a vehicle that is used for both personal activities beyond a de minimis amount and campaign or officeholder-related activities, the portion of the vehicle expenses associated with the personal activities is personal use, unless the person(s) using the vehicle for personal activities reimburse(s) the campaign account within thirty days for the expenses associated with the personal activities.

(2) Charitable donations. Donations of campaign funds or assets to an organization described in section 170(c) of Title 26 of the United States Code are not personal use, unless the candidate receives compensation from the organization before the

organization has expended the entire amount donated for purposes unrelated to his or her personal benefit.

(3) Transfers of campaign assets. The transfer of a campaign committee asset is not personal use so long as the transfer is for fair market value. Any depreciation that takes place before the transfer must be allocated between the committee and the purchaser based on the useful life of the asset.

(4) Gifts. Gifts of nominal value and donations of a nominal amount made on a special occasion such as a holiday, graduation, marriage, retirement, or death are not personal use, unless made to a member of the candidate's family.

(5) Political or officially connected expenses. The use of campaign funds for an expense that would be a political expense under the rules of the United States House of Representatives or an officially connected expense under the rules of the United States Senate is not personal use to the extent that the expense is an expenditure under ~~11 CFR 100.8~~ subpart D of part 100 or an ordinary and necessary expense incurred in connection with the duties of a holder of Federal office. Any use of funds that would be personal use under ~~11 CFR 113.1~~ paragraph (g)(1) of this section will not be considered an expenditure under ~~11 CFR 100.8~~ subpart D of part 100 or an ordinary and necessary expense incurred in connection with the duties of a holder of Federal office.

(6) Third party payments. Notwithstanding that the use of funds for a particular expense would be a personal use under this section, payment of that expense by any person other than the candidate or the campaign committee shall be a contribution under ~~11 CFR 100.7~~ subpart B of part 100 to the candidate unless the

payment would have been made irrespective of the candidacy. Examples of payments considered to be irrespective of the candidacy include, but are not limited to, situations where--

(i) The payment is a donation to a legal expense trust fund established in accordance with the rules of the United States Senate or the United States House of Representatives;

(ii) The payment is made from funds that are the candidate's personal funds as defined in 11 CFR 110.10(b), including an account jointly held by the candidate and a member of the candidate's family;

(iii) Payments for that expense were made by the person making the payment before the candidate became a candidate. Payments that are compensation shall be considered contributions unless--

(A) The compensation results from bona fide employment that is genuinely independent of the candidacy;

(B) The compensation is exclusively in consideration of services provided by the employee as part of this employment; and

(C) The compensation does not exceed the amount of compensation which would be paid to any other similarly qualified person for the same work over the same period of time.

(7) Members of the candidate's family. For the purposes of ~~section 113.1(g)~~ paragraph (g) of this section, the candidate's family includes:

(i) The spouse of the candidate;

(ii) Any child, step-child, parent, grandparent, sibling, half-sibling or step-sibling of the candidate or the candidate's spouse;

(iii) The spouse of any child, step-child, parent, grandparent, sibling, half-sibling or step-sibling of the candidate; and

(iv) A person who has a committed relationship with the candidate, such as sharing a household and having mutual responsibility for each other's personal welfare or living expenses.

(8) Recordkeeping. For those uses of campaign funds described in proposed paragraphs (g)(1)(i) and (g)(1)(ii) of this section that involve both personal use and either campaign or office-holder use, a contemporaneous log or other record must be kept to document the dates and expenses related to the personal use of the campaign funds. The log must be updated whenever campaign funds are used for personal expenses, as described in paragraph (g)(1) of this section, rather than for campaign or office-holder expenses. The log or other record must also be maintained and preserved for 3 years after the report disclosing the disbursement is filed, pursuant to 11 CFR 102.9 and 104.14(b).

David M. Mason
Chairman
Federal Election Commission

DATED: _____

BILLING CODE: 6715-01-P