

FEDERAL ELECTION COMMISSION

11 CFR Parts 100, 110, and 114

Funding and Sponsorship of Candidate Debates

AGENCY: Federal Election Commission.

ACTION: Transmittal of Regulations to Congress.

SUMMARY: The Commission has adopted regulations which govern the funding and sponsorship of candidate debates. These regulations have been transmitted to Congress pursuant to 2 U.S.C. 438(c). The regulations exempt from the definitions of contribution and expenditure funds provided and used to defray the costs of nonpartisan public candidate debates. They also specify which organizations may sponsor such debates and establish a structure for various types of nonpartisan debates between Federal candidates. Further information on the new regulations is contained in the statement of explanation and justification under Supplementary Information.

2 U.S.C. 438(c) requires that any rule or regulation prescribed by the Commission to implement Chapter 14 of Title II, United States Code, be transmitted to the Speaker of the House of Representatives and the President of the Senate prior to final promulgation. If neither House of Congress disapproves of the regulation within 30 legislative days of its transmittal, the Commission may finally prescribe the regulation in question. The following regulations were transmitted to Congress on June 28, 1979.

EFFECTIVE DATE: Further action, including the announcement of an effective date will be taken by the Commission after these regulations have been before the Congress 30 legislative days in accordance with 2 U.S.C. 438(c).

FOR FURTHER INFORMATION CONTACT: Ms. Patricia Ann Fiori, Assistant General Counsel for Regulations and Legislation, 1325 K Street, Northwest, Washington, D.C. 20463 (202) 523-4143.

SUPPLEMENTARY INFORMATION: These regulations were drafted pursuant to a Notice of Proposed Rulemaking published by the Commission on July 12, 1977, (42 FR 35856) and incorporate comments received subsequent to that notice and at public hearings held on September 12, 1977.

Explanation and Justification of Regulations on Funding and Sponsorship of Candidate Debates

CFR 100.4(b)(16) and 11 CFR 100.7(b)(18):

Under the Act, the terms "contribution" and "expenditure" include "a gift, subscription, loan, advance, or deposit of money or anything of value made for the purpose of influencing the nomination for election, or the election, of any person to Federal office . . ." (2 U.S.C. § 431(e)(1)(A)). Congress has, however, recognized that certain nonpartisan activity is not undertaken for the purpose of influencing the nomination or election of any candidate and has removed that activity from the coverage of the Act. Therefore, amounts spent for "nonpartisan activity designed to encourage individuals to register to vote or to vote" is exempt from the definition of the term "expenditure" (2 U.S.C. § 431(f)(4)(B)).

The educational purpose of nonpartisan public candidate debates is similar to the purpose underlying nonpartisan voter registration and get-out-the-vote campaigns. A properly held nonpartisan public candidate debate sponsored by a qualified nonpartisan organization provides a forum for significant candidates to communicate their views to the public. Unlike single candidate appearances, nonpartisan public debates are designed to educate and inform voters rather than to influence the nomination or election of a particular candidate. Hence, funds received and expended to defray costs incurred in sponsoring nonpartisan public debates are not considered contributions or expenditures under the Act.

11 CFR 110.13:

This section sets forth the criteria for sponsoring organizations and the structure of candidate debates which are exempt under 11 CFR 100.4(b)(16), 100.7(b)(18), and 114.4(e).

Under subsection (a), only an organization which has a history of nonpartisanship would qualify as a sponsor. In addition, the sponsor would have to be tax exempt under 26 U.S.C. § 501(c)(3). Organizations which are tax exempt under that section are prohibited by statute from participating in or intervening in any political campaign on behalf of any candidate for public office. By limiting sponsorship of debates to § 501(c)(3) organizations with a history of nonpartisanship, the integrity and fairness of the debate process is insured.

Subsection (b) outlines the structure for candidate debates at the presidential, House and Senate levels. This structure is designed to permit participation in a debate by significant serious candidates for the same public office.

In a general election debate at the presidential, House or Senate level, participation by candidates is based on affiliation with a political party. If a sponsoring organization invites a major party candidate to participate in a debate then the sponsor must also invite all other major party candidates seeking the same office to participate in that debate. Similarly, if a sponsor invites a minor party candidate to participate in a debate, then the sponsor is obligated to invite all other minor party candidates running for the same office to participate in the same debate.

If, under this standard, only one major party candidate agrees to participate in a debate, then the sponsor must invite all minor party candidates nominated for the same office to participate in a debate with that major party candidate. Similarly, if only one minor party candidate accepts a sponsor's invitation to participate in a debate, then the sponsor must invite all new party candidates nominated for the same office to participate in a debate with that minor party candidate.

Although there would usually be no obligation to invite candidates who are not major party candidates to a debate with major party candidates, the sponsor would have the discretion to invite a minor party, new party, independent, or write-in candidate to appear in the same debate with major party candidates. Hence, the sponsor would have the discretion to include all candidates whom the sponsor viewed as significant in the debate to which major party candidates are invited, thereby enhancing the educational value of the debate.

Structuring debates on the basis of party affiliation is similar to the standard used in the Act for public funding entitlement. Under the Act, only those presidential primary candidates who are seeking nomination by a political party are entitled to receive matching funds (26 U.S.C. § 9033(b)(2)). Moreover, the amount of funding to which a general election candidate is entitled is based on whether the candidate is a major, minor or new party candidate. (26 U.S.C. § 9004).

The Supreme Court in *Buckley v. Valeo* upheld the constitutionality of the Act's public financing provisions. The Court stated:

... The Constitution does not require Congress to treat all declared candidates the same for public financing purposes. As we said in *Jenness v. Fortson*, "there are obvious differences in kind between the needs and potentials of a political party with historically established broad support, on the one hand, and a new or small political organization in

he other. . . . Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike, a truism well illustrated in *Williams v. Rhodes, supra*."

By basing participation in candidate debates on party affiliation, a standard which has been found constitutional by the Supreme Court is employed. Moreover, this standard will ensure a sponsor to present debates in which all significant candidates may appear to express their views.

At the caucus, convention and primary election levels, the standard is basically the same as for presidential and Congressional candidate debates. However, while congressional candidate debates are held on a State basis, presidential primary candidate debates may be held on a regional basis, with the sponsor designating the region.

Sponsors holding caucus, convention or primary election candidate debates have three different options for structuring those debates.

Option No. 1: The sponsor may hold a debate to which all candidates of all parties are invited. Thus, in States, which hold primary elections, all candidates qualified to appear on the ballot must be invited to participate in one debate; and in caucus or convention States, all recognized, active candidates must be invited to participate.

Option No. 2: The sponsor may hold a debate to which all candidates of one type (major, minor or new) of party are invited. For example, assume in a State that there are two major parties—Party X and Party Y—and one minor party—Party Z. The sponsor may hold a debate to which only candidates seeking the nomination of Party X and Party Y are invited. The sponsor would not be obligated to include the candidate seeking nomination by Party Z in any debate.

Option No. 3: The sponsor may hold separate debates restricted to candidates seeking the nomination of one party. If the sponsor chooses to hold such a debate for one party, then the candidates of all parties of the same type (major, minor or new) must be invited to participate in similar separate debates. This option is, however, not available if each party of the same type does not have at least two candidates seeking the nomination of that party.

As an example, assume that in a State, there are two major parties—Party X and Party Y—and one minor party—Party Z. Assume also that each party has two candidates. In this situation, if the sponsor chooses to hold a debate to which the candidates of Party X are invited, the sponsor must

also invite the candidates of Party Y to participate in a debate to which only they are invited. There would be no obligation to hold a debate for the candidates of Party Z—the minor party.

As a different example, assume the same parties in a State, but only one candidate rather than two, seeking the nomination of Party X. Because in such a situation there would be one major party with less than two candidates seeking the nomination of that party, the sponsor would not have the option of holding separate debates for each major party.

The standard at the House and Senate caucus, convention and primary election level is basically the same as for presidential caucus, convention and primary debates. This standard provides a fair opportunity for a wide number of candidates to participate in a debate and at the same time, allows the sponsor sufficient flexibility to hold separate debates for candidates of different parties when such debates would be more meaningful and of greater educational value.

11 CFR 114.4(e):

Certain nonpartisan voter registration and get-out-the-vote activity is exempt from the coverage of all provisions of the Act, including the prohibition against corporate and labor union contributions and expenditures. Because nonpartisan public candidate debates are similar in nature and purpose to registration and voter activity, corporations and labor unions are permitted to donate funds to support such debates.

Although 2 U.S.C. § 441b broadly prohibits corporate and labor union political spending, Congress carved out an exemption from that prohibition for certain nonpartisan registration and get-out-the-vote activity. Corporations are thus specifically permitted under 2 U.S.C. § 441b(b)(2)(B) to use their treasury funds to conduct nonpartisan registration and get-out-the-vote campaigns aimed at their stockholders and their executive and administrative personnel. Similarly, under that section, unions are permitted to use treasury funds to conduct registration and get-out-the-vote campaigns aimed at union members and their families.

Moreover, in permitting corporations and labor unions to support registration and get-out-the-vote campaigns aimed at the public, Congress prescribed a role for nonpartisan nonprofit organizations. In addition to § 441b(b)(2)(B), 2 U.S.C. § 431(f)(4)(B) also specifically provides that the term "expenditure" does not include "nonpartisan activity designed to encourage individuals to register to

vote, or to vote." In discussing the interrelationship between 2 U.S.C. § 431(f)(4)(B) and 2 U.S.C. § 441b(b)(2)(B), the 1976 conferees expressly stated that corporate and union treasury funds could be used for nonpartisan registration and get-out-the-vote efforts aimed at the general public, if such efforts were jointly sponsored by a nonprofit nonpartisan organization.

... The conferees' intent with regard to the interrelationship between sections 301(f)(4)(B) and 321(b)(2)(B) which permit such activities as assisting eligible voters to register and to get to the polls, so long as these services are made available without regard to the voter's political preference, is the following: these provisions should be read together to permit corporations both to take part in nonpartisan registration and get-out-the-vote activities that are not restricted to stockholders and executive or administrative personnel, if such activities are jointly sponsored by the corporation and an organization that does not endorse candidates and are conducted by that organization; and to permit corporations, on their own, to engage in such activities restricted to executive or administrative personnel and stockholders and their families. The same rule, of course, applies to labor organizations. H.R. Rep. No. 1057, 94th Cong., 2nd Sess., p. 63-64 (1976).

The conferees' intent is embodied in Commission regulations at 11 CFR 114.4(d). That section permits corporations or labor unions to support and donate funds for nonpartisan registration and get-out-the-vote drives aimed at the public if the activities are jointly sponsored with and conducted by a nonprofit organization which does not support or endorse candidates or political parties.

In sections 431(f)(4)(B) and 441b(b)(2)(B) Congress expressly indicated an intent to permit corporations and labor organizations to participate in nonpartisan activity aimed at encouraging voter participation where that activity was undertaken in conjunction with a nonpartisan nonprofit organization. Permitting corporations and unions to donate funds to a nonpartisan nonprofit organization for the purpose of sponsoring nonpartisan candidate debates furthers that express congressional intent. Candidate debates stimulate voter interest and hence "encourage individuals to register to vote or to vote." Inasmuch as candidate debates are in the public interest and encourage educated voter involvement, permitting corporations and unions to donate funds for their sponsorship is consistent with congressional intent and policy underlying sections 431(f)(4)(B) and 441b(b)(2)(B).

It is also important to note that the prohibitions of 2 U.S.C. § 441b were not specifically aimed at the donation of corporate or union funds to a nonpartisan tax exempt organization. Under 2 U.S.C. § 441b(b)(2), the terms "contribution" and "expenditure" are defined to mean "any direct or indirect payment, distribution, loan, advance, deposit or gift of money . . . to any candidate, campaign committee or political party or organization." Under 11 CFR 114.4(e), only an organization which has a history of nonpartisanship is qualified to sponsor candidate debates, and that organization must in addition be tax exempt under 26 U.S.C. § 501(c)(3). Such tax exempt organizations are prohibited by statute from intervening in any political campaign on behalf of any candidate for public office. Hence, an organization qualified to sponsor candidate debates would be neither a campaign committee, a political party nor a political organization referred to in 2 U.S.C. § 441b.

Finally, courts have generally construed 2 U.S.C. § 441b to prohibit only active electioneering on behalf of a candidate or a political party or conduct designed to influence the public for or against a particular candidate. (See, *United States v. United Auto Workers*, 352 U.S. 567 (1957); *United States v. Pipefitters Local Union No. 562*, 434 F.2d 1116 (8th Cir. 1970), rev'd on other grounds, 407 U.S. 385 (1972); *Miller v. American Telephone & Telegraph*, 507 F.2d 759 (3d Cir. 1974). Unlike single candidate appearances which have the effect of promoting the nomination or election of one individual, a properly structured nonpartisan public debate involving two or more candidates would not be construed to be active electioneering to promote or influence the nomination or election of one particular candidate.