

**FEDERAL ELECTION COMMISSION**

[Notice 1979-23]

**11 CFR Parts 100, 110 and 114****Funding and Sponsorship of Federal Candidate Debates****AGENCY:** Federal Election Commission.**ACTION:** Transmittal of Regulations to Congress.

**SUMMARY:** The Commission has transmitted regulations to Congress to govern the funding and sponsorship of nonpartisan federal candidate debates. The regulations create an exemption from various provisions of the Federal Election Campaign Act to permit certain nonprofit organizations and news media organizations to stage nonpartisan federal candidate debates. Further information on the scope of the regulations appears below under Supplementary Information in the Explanation and Justification of the regulations.

2 U.S.C. 438(c) requires that any rule or regulations proposed by the Commission to implement Chapter 14 of Title 2, United States Code be transmitted to the Speaker of the House and the President of the Senate prior to final promulgation. If neither House of Congress disapproves the regulation within 30 legislative days after its transmittal, the Commission may finally prescribe the regulations in question. The following regulations were transmitted to Congress on December 20, 1979.

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

**FOR FURTHER INFORMATION CONTACT:** Ms. Patricia Ann Fiori, Assistant General Counsel, 1325 K Street, N.W., Washington, D.C. 20463 (202) 523-4143.

**SUPPLEMENTARY INFORMATION:** The following regulations were drafted pursuant to a Notice of Proposed Rulemaking published on October 12, 1979, at 44 FR 59162. Pursuant to that notice oral testimony was taken at hearings held on October 23 and 24, 1979, and numerous written comments were received. In response to these comments, the regulations now transmitted to Congress provide exemptions to permit not only certain nonprofit organizations, but also news media organizations, to stage nonpartisan federal candidate debates.

Previous regulations transmitted to Congress on this subject were published on July 5, 1979, at 44 FR 39348. Those regulations were disapproved by S. Res. 236 on September 18, 1979.

**Explanation and Justification of Regulations on Funding of Federal Candidate Debates**

The main purpose of these regulations is to create a narrow exemption from the provisions of the Federal Election Campaign Act to permit certain nonprofit organizations and news media organizations to stage nonpartisan federal candidate debates. In addition, certain of those organizations would be permitted to receive donations from other corporations and from labor organizations to stage debates. With this exemption, expenditures for staging such debates will be regarded as neither made for the purpose of influencing an election under 2 U.S.C. §§ 431(e) and 431(f), nor in connection with a federal election under 2 U.S.C. § 441b. The coverage of debates by news media organizations is already exempt from those provisions.

**11 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" are 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 nonpartisan candidate debate staged by a qualified nonpartisan organization or by a news media organization provides a forum for significant candidates to communicate their views to the public. Unlike single candidate appearances, nonpartisan 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 by certain nonprofit organizations to defray costs

incurred in staging nonpartisan debates are not considered contributions or expenditures under the Act. Similarly, expenditures by news media corporations to stage debates are not considered contributions or expenditures under the Act.

**11 CFR 110.13:**

This section sets forth the criteria for staging 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)(1) two types of nonprofit organizations qualify as staging organizations: those organizations which are exempt from federal taxation under 26 U.S.C. § 501(c)(3); and those organizations which are exempt from federal taxation under 26 U.S.C. § 501(c)(4) and which do not endorse, support or oppose political candidates or political parties. Organizations which are tax-exempt under 501(c)(3) are prohibited by statute from participating in or intervening in any political campaign on behalf of any candidate for public office. Organizations which are tax-exempt under 501(c)(4) may participate in political campaigns to a limited degree. However, a 501(c)(4) organization which participates in political campaigns even to a limited degree may not stage debates under this subsection because that organization would not qualify as one which does not endorse, support or oppose political candidates or political parties. By permitting 501(c)(3) corporations and 501(c)(4) corporations which are nonpartisan to stage debates, the integrity and fairness of the debate process is insured.

Under subsection (a)(2) those organizations which are specified in 2 U.S.C. § 431(f)(4)(A), the "news story" exemption under the Act, are also permitted to stage nonpartisan candidate debates. Section 431(f)(4)(A), read in conjunction with 2 U.S.C. § 441b, exempts expenditures related to particular functions of the news media from the prohibitions of Section 441b: news stories, commentaries and editorials. The news story exemption was not intended to permit the staging of candidate debates, but rather is a limited exemption designed to insure the right of the media to cover and comment on election campaigns. H.R. Rep. No. 93-943, 93d Cong., 2d Sess. at 4 (1974). However, due to the historical role of the news media in fostering public debate on issues (*Mills v. Alabama*, 384 U.S. 214 (1966), *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)), and in light of congressional acknowledgment of the media's role in election campaigns

as expressed in 2 U.S.C. § 431(f)(4)(A), *bona fide* news media corporations are permitted to stage nonpartisan candidate debates.

It is the Commission's belief that sufficient safeguards as to nonpartisanship of debates staged by broadcasters are set forth in the Communications Act, most particularly 47 U.S.C. § 315, and the present regulations and interpretations of the Federal Communications Commission under this section. Section 315 provides that if a broadcast licensee allows a legally qualified candidate for public office to use its broadcasting station, that licensee must afford all other candidates for the same office equal opportunities to use the station.

Further, fundamental principles of journalism, combined with the requirement that such debates be nonpartisan, provides sufficient safeguards as to nonpartisanship of debates staged by newspapers, magazines and other periodical publications.

For the purposes of this section, the term "broadcaster" is meant to include broadcasting facilities licensed by the Federal Communications Commission, as well as networks. The term "bona fide" newspaper is intended to mean a publication of general circulation produced on newsprint paper which appears at regular intervals (usually daily or weekly) and which is devoted primarily to the dissemination of news and editorial opinion to the general public. Only newspapers which ordinarily derive their revenues from subscriptions or advertising would be considered "bona fide". A "bona fide" magazine or other periodical publication is a publication in bound pamphlet form appearing at regular intervals (usually either weekly, bi-weekly, monthly or quarterly) and containing articles of news, information, opinion and entertainment, whether of general or specialized interest. Only magazines and periodicals which ordinarily derive their revenues from subscriptions and advertising would be considered "bona fide". In addition, a news gathering service that provides news coverage on a regular basis to newspapers and magazines may stage nonpartisan debates.

News media organizations which are owned or controlled by a political party, political committee or candidate may not stage debates. See 2 U.S.C. § 431(f)(4)(A). Moreover, not included within the newspaper exemption are periodical publications which are not of general distribution but serve as internal "house organs." See legislative history of Taft-Hartley Act (Labor Management

Relations Act of 1947, 61 Stat. 159), 93 Cong. Rec. 6439, 6440 (remarks of Sens. Magnuson and Taft interpreting the coverage of 18 U.S.C. § 610, the predecessor to 2 U.S.C. § 441b).

Nothing in this section limits the right of broadcasters, newspapers, magazines or other periodical publications to cover or broadcast debates staged by other entities. That activity is specifically exempted from the provisions of the Act by 2 U.S.C. § 431(f)(4)(A), and in the case of broadcasters is regulated by the Federal Communications Commission.

Under subsection (b) the precise structure of candidate debates is left to the discretion of the staging organization. Such debates must, however, be nonpartisan in nature and they must provide fair and impartial treatment of candidates. The primary question in determining nonpartisanship is the selection of candidates to participate in such debates.

Although the section does not prescribe specific requirements for selection of candidates to participate, a general election debate may not be structured so as to promote one candidate over another. An organization staging a debate may invite candidates to participate in a debate on the basis of party affiliation. Hence, such an organization could stage a general election debate to which only major party candidates are invited.

For debates at the primary, caucus or convention level, a staging organization may restrict participation to candidates seeking the nomination of one party. Moreover, if a staging organization restricts participation to candidates seeking the nomination of one party, there would be no requirement to stage a debate for candidates seeking the nomination of any other party. However, any debate held for primary, caucus or convention candidates may not promote one candidate over another.

A debate is nonpartisan if it is for the purpose of educating and informing the voters, provides fair and impartial treatment of candidates, and does not promote or advance one candidate over another.

#### 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 vote activity, under subsections (e)(1) and (e)(3), corporations and labor organizations are permitted to donate funds to nonprofit

organizations qualified to stage debates under 11 CFR 110.13(a)(1).

Although 2 U.S.C. § 441b broadly prohibits corporate and labor organization 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, labor organizations 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 organizations 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 labor organization 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., 2d Sess. 63-64 (1976).

The conferees' intent is embodied in Commission regulations at 11 CFR 114.4(d). That section permits corporations or labor organizations 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 labor organizations to donate funds to nonpartisan nonprofit organizations for the purpose of staging 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 labor organizations to donate funds to nonprofit nonpartisan organizations for their staging 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 labor organization 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 nonprofit nonpartisan corporations which are tax-exempt under 26 U.S.C. §§ 501 (c)(3) or (c)(4) may accept corporate or labor organization donations to stage debates. Such organizations 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 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.

Subsection (e)(2) permits broadcasters, newspapers, magazines and other periodical publications to use their own funds to stage nonpartisan debates. Consistent with ordinary practice and applicable regulations of the Federal Communications Commission, a broadcaster may accept both regular commercial advertising and underwriting by corporations and labor organizations to finance the broadcast of debates staged or covered by the broadcaster. Similarly, nothing in this section prohibits a newspaper, magazine or other periodical publication from accepting regular paid advertising in an issue which covers a debate, whether staged by the newspaper or by another entity. Broadcasters, newspapers, magazines and other periodical publications may not, however, accept direct corporate or labor organization payments (other than payments for regular commercial advertising and underwriting) to finance the staging of debates.

Only nonprofit corporations may accept such payments under 11 CFR 114.4(e)(1). The reason for this distinction is that federal tax law restrictions on the activities of nonpartisan corporations provide sufficient safeguards to insure nonpartisanship. There is no comparable safeguard for broadcasters, newspapers, magazines and other periodical publications. Indeed, media corporations are specifically permitted by the Act to endorse candidates, while a nonprofit organization which endorses candidates is not permitted to stage debates under the proposed regulations.

Authority: 2 U.S.C. §§ 431(e), 431(f) and 441b.